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NEXT UPDATE: SUPPLEMENT APRIL 19, 1993

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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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NEW JERSEY REGISTER

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EXECUTIVE ORDER

(a)

OFFICE OF THE GOVERNOR
Governor Jim Florio
Executive Order No. 89(1993)
Development of Plan to Take Advantage of Democratic Reform in Cuba

Issued: April 15, 1993.
Effective: April 15, 1993.
Expiration: Indefinite.

WHEREAS, the Cuban people have demonstrated a great longing for freedom and democracy, and have expressed increasing opposition to the Castro regime; and

WHEREAS, the Cuban people have recently risked their lives by organizing democratic activities on the island and by undertaking dangerous and courageous flights for freedom to the United States and other countries; and

WHEREAS, in light of the recent upheavals in the former Soviet Union and in Eastern Europe, the Cuban-American community in New Jersey eagerly awaits the time when similar movements for democratic reform gather strength and momentum in Cuba; and

WHEREAS, the Cuban-American community in New Jersey ardently looks forward to the inevitable day when the Cuban people are forever liberated from communist dictatorship, and the Cuban people are free to form a government that is democratic, respects human rights, and honors the rule of law; and

WHEREAS, a liberated Cuba will enable the Cuban people to engage in social, cultural, and economic exchanges with the people of the United States, including the citizens of New Jersey; and

WHEREAS, a free and open exchange of ideas, people, and goods will greatly benefit the people of Cuba as well as the people of the United States; and

WHEREAS, New Jersey should prepare to take full advantage of these inevitable developments in Cuba; and

WHEREAS, it is appropriate and necessary to undertake a thorough review of the possible impact that these profound social and political changes will have on the State of New Jersey and its residents;

NOW, THEREFORE, I, JAMES J. FLORIO, Governor of the State of New Jersey, by virtue of the authority vested in me by the Constitution and by the Statutes of this State, do hereby ORDER and DIRECT:

1. In light of the enormous potential for democratic change in Cuba, the New Jersey Department of Commerce and Economic Development shall conduct a study to determine the likely social, economic, and cultural consequences that would result from the liberation of the people of Cuba. In particular, the Department of Commerce shall prepare a plan setting forth a strategy that will enable the State of New Jersey to take full advantage of the social, cultural, and economic opportunities that would result from democratic reform in Cuba.
2. The Department of Commerce shall whenever necessary coordinate this effort with any and all other State departments having relevant expertise or knowledge of such issues.
3. The Department of Commerce shall report its findings to me no later than one year following the date of this Order.
4. This Order shall take effect immediately.

RULE PROPOSALS

PERSONNEL

(a)

MERIT SYSTEM BOARD

Classification, Services and Compensation

Proposed Readoption with Amendments: N.J.A.C. 4A:3

Authorized By: Merit System Board, Anthony J. Cimino, Commissioner, Department of Personnel.

Authority: N.J.S.A. 11A:2-6(d), 11A:2-11(h), 11A:3-1 through 7, and 11A:6-24; 29 U.S.C. 201, et seq.; and Executive Order No. 70(1992).

Proposal Number: PRN 1993-280.

A **public hearing** concerning the proposed readoption with amendments will be held on:

Thursday, June 3, 1993, at 5:30 P.M.
Office of Administrative Law
9 Quakerbridge Plaza
Hamilton Township, New Jersey

Please call the Regulations Unit at (609) 984-0118 if you wish to be included on the list of speakers.

Submit written comments by June 16, 1993, to:

Janet Share Zatz
Director of Appellate Practices and Labor Relations
Department of Personnel
CN 312
Trenton, New Jersey 08625

The agency proposal follows:

Summary

Pursuant to Executive Order No. 66(1978), N.J.A.C. 4A:3 expires on September 6, 1993. The Merit System Board has reviewed the rules and, with the following exceptions, has found them to be necessary, reasonable and proper for the purposes for which they were originally promulgated, as required by the Executive Order.

Subchapter 1 concerns allocations between the career and unclassified services, as well as allocations between the competitive and non-competitive divisions of the career service. No changes are proposed to Subchapter 1.

Subchapter 2 contains rules governing the Senior Executive Service (SES). No changes are proposed to N.J.A.C. 4A:3-2.1 through 2.8. In N.J.A.C. 4A:3-2.9, Separation from the SES, a new subsection (d) is proposed to codify existing practice concerning SES members affected by layoff having lateral, demotional and special reemployment rights.

Subchapter 3, Classification, contains a number of proposed amendments related to Executive Order No. 70(1992) on consolidation of personnel functions. No changes are proposed to N.J.A.C. 4A:3-3.1, Classification of positions, and 4A:3-3.2, Establishment of classification plans. In N.J.A.C. 4A:3-3.3, Administration of classification plans, a proposed new subsection (e) would require each State department and autonomous agency to designate an agency representative, who will serve as the liaison with the Department of Personnel on all classification and compensation matters. Further, a proposed new subsection (f) will require all State departments and autonomous agencies to give notice to affected negotiations representatives of such matters as reorganizations, new title requests, job reevaluation requests, title and specification modification requests, employee relations group changes, and hours of work modifications.

No changes are proposed to N.J.A.C. 4A:3-3.4, Title appropriate to duties performed.

In N.J.A.C. 4A:3-3.5, proposed amendments to subsection (b) provide that a classification review may be initiated by an appointing authority or the Department of Personnel. When a classification review is requested by an employee or union representative, the classification appeal mechanism described in N.J.A.C. 4A:3-3.9 will be utilized. In subsection (c), the provision allowing delegation of reclassifications is being deleted, as inconsistent with the consolidation of personnel functions. In paragraph (c)1, the word "affected" has been changed to the more appropriate verb "effected." Finally, paragraph (c)2 would specify, consistent with the consolidation of personnel functions in State service, that employees and local appointment authorities may appeal reclassifications, but State appointing authorities may not.

The Board proposes to change the section heading of N.J.A.C. 4A:3-3.6 from "Request for new titles" to "New titles." A new subsection (a) would provide criteria for establishing a new job title or title series. Further changes in the rule would clarify that requests for title series as well as single titles are included in this process, and would specify that requests for new titles or title series in State service should be submitted by the agency representative. In former subsection (d), recodified as (e), the provision on appeals would be deleted, consistent with the consolidation of personnel functions. Finally, in former subsection (e), recodified as (f), a more flexible, workable standard is proposed for determining the effective date of the creation of a new title.

In N.J.A.C. 4A:3-3.7, Trainee titles, the phrase "unless otherwise provided by law" would be added to subsection (d), which provides for a 12-month training period. This change would accommodate certain apprenticeship programs which, by law, have a training period longer than 12 months. In paragraph (g)1, the Board proposes to add language codifying current practice that a trainee may only be advanced to one of the appropriate primary titles specified for that trainee title. Similarly, in paragraph (g)4, added language would clarify that trainees who fail to successfully complete their working test period in the primary title cannot return to the trainee title.

No changes are proposed to N.J.A.C. 4A:3-3.8, Intermittent titles in State service.

The Board proposes a number of substantial amendments to N.J.A.C. 4A:3-3.9, concerning classification appeals, in order to implement Executive Order No. 70(1992). State appointing authorities would no longer render first-level determinations on classification appeals. Rather, the agency representative would ensure that needed information has been submitted, and then forward the appeal to the Department of Personnel for determination. Moreover, State appointing authorities would no longer be able to appeal a first-level determination by the Department of Personnel. Employees in State and local service and local appointing authorities would retain such appeal rights.

In Subchapter 4, Compensation, no changes are proposed to N.J.A.C. 4A:3-4.1, General provisions, or N.J.A.C. 4A:3-4.2, Job evaluation in State service. However, the Board proposes substantial amendments to N.J.A.C. 4A:3-4.3, Job reevaluation requests and appeals in State service, reflecting Executive Order No. 70(1992). In a manner similar to classification appeals, State appointing authorities would no longer render first-level determinations on job reevaluation (salary) appeals, but rather would forward such appeals to the Department of Personnel for determination. State agencies would not be able to appeal first-level determinations on these issues, but employees would retain existing appeal rights.

In N.J.A.C. 4A:3-4.4, Salary rates for initial appointments in State service, the Board proposes to add the phrase "a State college" to subsection (b). This amendment reflects current practice, whereby an employee who has separated from a State college may, upon appointment, be placed up to and including the step in the salary range reflecting total service.

A technical amendment is proposed in N.J.A.C. 4A:3-4.5, Anniversary dates in State service, which would update the information contained in the example.

In N.J.A.C. 4A:3-4.6, an amendment to subsection (c) would address changes in anniversary dates when an alternate workweek program has been established. In addition, a new subsection (d) would provide that intermittent days without pay which total less than 10 are not carried forward to the next calendar year for purposes of adjusting the anniversary date.

No changes are proposed to N.J.A.C. 4A:3-4.7, determining types of pay adjustments in State service.

In N.J.A.C. 4A:3-4.8, Lateral pay adjustments, a technical amendment would eliminate outdated dollar amounts from the example. Further, a new subsection (c) would codify current practice with regard to employees whose salaries are between steps of the range.

The Board proposes significant changes to the language of N.J.A.C. 4A:3-4.9, advancement pay adjustments in State service. Generally, these

amendments do not change the system of adjusting salary and anniversary dates when an employee moves to a title with a higher class code, but are intended to clarify and simplify the explanation of these adjustments. With regard to substantive changes, the rule would provide that the Department of Personnel determines whether service in a lower title provided significant preparation and training for service in a higher title, and thus whether the employee is entitled to a more beneficial salary adjustment. Further, an amendment would clarify that an employee at the maximum step for at least 39 pay periods receives an additional increment upon advancement if the salary increase would otherwise be less than the value of two increments.

In N.J.A.C. 4A:3-4.10, proposed amendments to subsection (a) would codify current practice with regard to demotional pay adjustments in State service. The example, which is based upon outdated salary amounts, would be deleted. In subsection (b), an amendment would provide for placement on the salary scale when an employee is returned to his or her former title. In subsection (c), an amendment would provide that the Department of Personnel determines whether service in the higher title provided significant preparation and training for service in the lower title, and thus whether the employee is entitled to a more beneficial salary adjustment. In addition, the standard for length of previous service would be reduced from one year to four months, and demotions in lieu of layoffs would be entitled to a more beneficial salary adjustment, whether or not the service in higher title provided significant preparation and training for service in the lower title. In paragraph (c)4, an amendment would provide that employees whose salaries are reconstructed shall not receive a higher salary than that calculated by reducing the salary one increment in the higher range and equalizing into the lower range. Finally, a new subsection (e) would ensure that the rule is not used to gain a salary advantage, that is, attain a higher salary than the employee would have received by remaining in the higher title.

The Board proposes to add the term "red circled" to N.J.A.C. 4A:3-4.11, Downward title reevaluation pay adjustments, to clarify longstanding practice that this term applies to a situation where an employee remains at a base salary above the maximum step until such time as that step is increased to a level at or above the employee's base salary.

In N.J.A.C. 4A:3-4.12, proposed amendments to subsection (a) clarify the calculation of salary and anniversary date when an employee moves from a no-range or single rate title to a title having a salary range. Further, the Department of Personnel would determine whether service in the no-range title provided the employee with significant experience and trainining for service in the range title, and thus whether the employee is entitled to a more beneficial salary adjustment. Finally, a new subsection (c) would provide for "red circling" of employees whose salaries are above the maximum step of the range. A similar amendment concerning "red circling" would be made in N.J.A.C. 4A:3-4.13, Salaries of employees whose annual salaries are not on a step in their salary range.

No changes are proposed to N.J.A.C. 4A:3-4.14, Movement of employees to trainee titles from titles having higher pay rates; N.J.A.C. 4A:3-4.15, Salaries for employees appointed to tentative title positions; and N.J.A.C. 4A:3-4.16, Salaries of employees on military leave during a trainee period.

In N.J.A.C. 4A:3-4.17, an amendment to subsection (a) would provide that when making an appointment from a special reemployment list, the employee is entitled to the most beneficial formula for determining salary. Provision would also be made for a situation where an employee has been demoted but has attained a higher salary in that title than the current value of the step he or she would have received in the new title on the date of the layoff. In addition, there are various technical amendments, the deletion of one example based upon outdated salary amounts, and the updating of another example. Finally, a new subsection (e) would provide that the rule is also applicable to unclassified or provisional employees recalled after a reduction in force in accordance with a union contract.

No changes are proposed to N.J.A.C. 4A:3-4.18, Salaries and anniversary dates for employees appointed from a regular reemployment list; N.J.A.C. 4A:3-4.19, Other forms of compensaton; and N.J.A.C. 4A:3-4.21, Salary overpayments.

The Board proposes to amend N.J.A.C. 4A:3-4.20 to provide that retroactive salary actions will be available to the estates of employees who die during the period of retroactive application.

In Subchapter 5, Overtime Compensation, no changes are proposed to N.J.A.C. 4A:3-5.1, General provisions; 4A:3-5.3, 40 hours or less in a workweek; 4A:3-5.4, Criteria for exemption from Fair Labor Standards Act; 4A:3-5.5, Federal fair labor standards applicable to more than 40 hours in a workweek for 35, 40 and NE titles; and 4A:3-5.6, Federal fair labor standards applicable to more than 40 hours in a workweek for 3E, 4E, NL and N4 titles. In N.J.A.C. 4A:3-5.2, a punctuation correction is made in the "pay period" definition.

In N.J.A.C. 4A:3-5.7, Special circumstances, subsection (d) would be amended to provide that overtime compensation for exceptional emergencies is available only for non-limited employees with salaries below range 32, instead of range 35. Further, the more accurate term "emergency condition" rates would be used instead of "special project" rates. In N.J.A.C. 4A:3-5.8, Holiday pay, clarifying language would be added to paragraph (c)3.

No changes are proposed to N.J.A.C. 4A:3-5.9, Appointing authority responsibilities. A punctuation correction is made in paragraph (a)1 of 4A:3-5.10, Appeal procedures.

Social Impact

The proposed readoption of N.J.A.C. 4A:3 includes numerous technical as well as substantive changes to the current rules governing classification and compensation. These changes are intended either to clarify current practice or, in some cases, to revise practices to improve these vital functions of the State's central human resource agency.

The proposed change to N.J.A.C. 4A:3-2.9 would codify the existing practice concerning SES members displaced by layoff, and would thus ensure uniform treatment in future situations.

Several of the substantive changes in subchapter 3, Classification, and N.J.A.C. 4A:3-4.3, Job reevaluation requests and appeals, implement the consolidation of personnel functions mandated by Executive Order No. 70(1992). These rule changes are intended to eliminate duplication and overlap of responsibilities in the area of personnel management. State agencies would retain their responsibilities, as appointing authorities, to make job assignments and to exercise overall managerial control over their workforce. However, these amendments would ensure that the Department of Personnel exercises its statutory responsibility to classify positions and, in State service, assign appropriate compensation to job titles. The amendments would preclude an adversarial relationship between State agencies and the Department of Personnel in the areas of classification and compensation. However, employees and their union representatives would retain the right to appeal adverse determination in these matters. Local appointing authorities would also retain the right to appeal classification determinations.

The proposed amendment to N.J.A.C. 4A:3-3.3, concerning notice of certain actions to union representatives in State service, will increase awareness by collective negotiations representatives about substantial changes affecting their members.

In three sections of subchapter 4, Compensation, amendments provide that the Department of Personnel determines whether service in one title provided significant preparation and training for service in another title, and thus whether the employee is entitled to a more beneficial salary adjustment upon moving from one title to another. These changes will enhance uniform treatment of employees in State service.

The amendment to N.J.A.C. 4A:3-5.7, which restricts overtime compensation for exceptional emergencies to non-limited employees in salary range 32 or above, is consistent with changes made previously restricting comp time for such employees.

In addition to the amendments described above, the rules in N.J.A.C. 4A:3 proposed for readoption without change will continue to provide a clear regulatory framework for vital activities of the Department of Personnel concerning classification and compensation. These rules have a substantial impact upon 208,000 merit system employees and 378 State and local appointing authorities. In the absence of readoption of this chapter, these individuals and government agencies would have no guidance on matters involving classification and compensation of personnel, other than the provisions of Title 11A, New Jersey Statutes.

Economic Impact

Many of the proposed changes clarify current policy, and thus will have no substantial economic impact. However, the amendments implementing the consolidation of personnel functions, by reducing duplication and overlap of responsibilities, are expected to result in significant economy and efficiency in State government.

A number of the amendments to Subchapter 4, Compensation, will have a beneficial economic impact upon certain State employees. These include employees who are subject to non-disciplinary demotions, those

who move from no-range titles to titles with salary ranges, and those who are appointed from special reemployment lists.

The rules proposed for readoption without change continue to provide a fair and equitable system for classifying positions in State and local service, and for compensation employees in State service. Compensation of employees in local service remains relatively free of central regulatory control. As such, these rules are beneficial to the economic security of public employees, as well as the interest of the public in having appropriate levels of compensation for governmental employees. If this chapter is not readopted, there would be a substantial negative economic impact on public employers and employees, as well as the taxpaying public. Since the provisions of Title 11A, New Jersey Statutes, provide only broad, general guidance on matters of classification and compensation, costly litigation would be needed to resolve disputes concerning the application of these statutory provisions.

Regulatory Flexibility Statement

A regulatory flexibility analysis is not required since this proposed readoption with amendments will have no effect on small businesses as defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The rules proposed for readoption with amendments will regulate employment in the public sector.

Full text of this readoption may be found in the New Jersey Administrative Code at N.J.A.C. 4A:3.

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

4A:3-2.9 Separation from the SES: State service

(a)-(c) (No change.)

(d) If the position to which an SES member is appointed is vacated or abolished due to a reduction in force, and the SES member has career status, the SES member shall have lateral, demotional and special reemployment rights based upon the permanent title held immediately prior to SES appointment.

4A:3-3.3 Administration of classification plans

(a)-(d) (No change.)

(e) In State service, each department and autonomous agency shall designate an individual as the agency representative, to serve as its liaison with the Department of Personnel on all classification and compensation matters.

(f) In State service, the agency representative shall provide notice to affected and potentially affected negotiations representatives upon submission of the following to the Department of Personnel. The Department of Personnel shall verify that proper notice has been given of each of the following:

1. Reorganizations;

2. Job content reevaluation requests;

3. Requests for new titles or title series;

4. Job specification modification requests;

5. Employee relations group changes; and

6. Establishment, modification or termination of flexitime programs, alternate workweek programs and adjusted hours of operation.

4A:3-3.5 Reclassification of positions

(a) (No change.)

(b) [A] **An appointing authority may** request [for reclassification shall be submitted by the appointing authority to] **a classification review by** the Department of Personnel in a manner and form as determined by the Commissioner. **Such review may be initiated by the Department of Personnel. An employee or union representative may request a classification review in accordance with N.J.A.C. 4A:3-3.9.**

(c) No reclassification of any position shall become effective until notice is given affected permanent employees and approval is given by the Commissioner. [However, the Commissioner may provide for delegation of reclassifications as provided in N.J.A.C. 4A:1-4.1, subject to post-audit.]

1. Within 30 days of receipt of the reclassification determination, unless extended by the Commissioner in a particular case for good cause, the appointing authority shall either effect the required change in the classification of an employee's position; assign duties and responsibilities commensurate with the employee's current title; or reassign the employee to the duties and responsibilities to which the employee has permanent rights. Any change in the classification of a permanent employee's position, whether promotional, demotional or lateral, shall be [affected] **effected** in accordance with all applicable rules.

2. Should [an appointing authority or] an employee in the career or unclassified service **in State or local service, or an appointing authority in local service,** disagree with reclassification, an appeal may be filed in accordance with N.J.A.C. 4A:3-3.9.

4A:3-3.6 [Requests for new] **New** titles

(a) The Department of Personnel may determine that a new title or title series is necessary, when it is found that a new set of functions is assigned to the position(s) being reviewed and these new functions are not appropriately described by an existing title or title series.

[(a)]**(b)** Requests for new titles **or title series** must be submitted in writing by the appointing authority to the Department of Personnel on a designated form. **In State service, such requests shall be submitted by the agency representative.** The request must include:

1.-3. (No change.)

[(b)]**(c)** If the Department of Personnel [staff makes an initial determination] **determines** that there is a need for [the requested] **a** new title **or title series,** a new job specification will be prepared and in State service the title will be evaluated for compensation purposes. [Thereafter, the matter will be presented to the Commissioner for approval or disapproval.]

[(c)]**(d)** Pending approval by the Commissioner **of a new title or title series,** the designation "Tentative Title" may be used for affected positions. See N.J.A.C. 4A:3-4.15 for compensation procedures in State service.

[(d)]**(e)** [Appeals from the denial of a new title request will be processed in accordance with N.J.A.C. 4A:3-3.9] In State service, appeals from a salary evaluation **of a new title** will be processed in accordance with N.J.A.C. 4A:3-4.3.

[(e)]**(f)** The effective date of the creation of a new title by the Commissioner will be:

1. In State service[, the]**:**

i. The beginning of the pay period immediately after 14 days from the date the Department of Personnel receives the new title request and all requested information;

ii. The date of appointment to the Tentative Title; or

iii. An appropriate date as established by the Commissioner when a classification review has been initiated by the Department of Personnel; or

2. In local service, an appropriate date as established by the Commissioner.

4A:3-3.7 Trainee titles

(a)-(c) (No change.)

(d) Advancement to the lowest title in the related title series, referred to in this section as the primary title, shall take place only upon successful completion of the training period. The length of the training period shall be designated in the specification for the particular trainee title. The designated length shall not be longer than 12 months, **unless otherwise provided by law.** The training period must be continuous, except if interrupted by leave or layoff from the trainee title, and may include provisional service in the trainee or higher related title.

(e)-(f) (No change.)

(g) The advancement of the successful, permanent trainee to the appropriate primary title shall be accomplished without the usual promotional examination process, but rather by reclassifying the trainee position to an appropriate primary title and by concurrent regular appointment of the trainee to the position.

1. To effect advancement, the appointing authority must certify the trainee's successful completion of the training period, and, for those primary titles requiring extra training courses or the attainment of a proficiency standard over the trainee title requirements, that the trainee has successfully completed such requirements. **A trainee**

may only receive advancement to one of the appropriate primary titles specified for that trainee title.

2.-3. (No change.)

4. Trainees advanced to a primary title shall be required to complete a working test period in the primary title. **Trainees who fail to successfully complete their working test period in the primary title have no right to return to the trainee position.**

4A:3-3.9 Appeal procedure

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

(c) In State service, a classification appeal from an employee or union representative shall be submitted, in writing, to the [appointing authority personnel officer] **agency representative**. The appeal must identify the specific duties that do not conform to the specification for the title and, if the appellant proposes a different existing title for the position, an explanation of how that title more accurately describes the duties of the position than the current or proposed title. **The appeal should also include a completed position classification questionnaire.**

1. The [appointing authority] **agency representative** shall review the appeal [and notify the appellant of its decision within 30 days of receipt of the appeal. This decision letter must include a summary of the duties of the position, findings of fact, conclusions, notice of appeal rights, and a determination that:

i. The position is properly classified;

ii. The position is properly classified, but that out-of-title duties are being performed, in which case the appointing authority shall order, in writing, the immediate removal of inappropriate duties; or

iii. The position should be reclassified, in which case, normal reclassification procedures shall be initiated immediately.], **provide an organization chart and ensure that the information set forth in (c) above has been included. Within 10 days of receipt of the appeal, the agency representative shall either notify the appellant that specific additional information is required, or shall forward the appeal to the Department of Personnel and so notify the appellant, and may indicate a recommended approval or rejection of the appeal for specified reasons. If additional information is required, the agency representative shall forward the appeal to the Department of Personnel within 10 days of receipt of the appellant's response to the request for additional information.**

[2. An appeal may be filed with the Department of Personnel within 20 days of receipt of the appointing authority's determination or, if the appellant does not receive a timely decision letter from the appointing authority, within 20 days from the final day for the appointing authority's decision.

3. Appeals from an employee or union representative to the Department of Personnel are second level appeals. Appeals from an appointing authority are first level appeals.

i. An appeal from an appointing authority shall include the same information as an appeal from an employee or union representative as stated in (c) above.

ii. An employee or union representative submitting a second level appeal must submit a copy of all materials submitted at the first level and a copy of an appointing authority's decision letter, if issued. The appeal must state what specific portions of the decision are contested and the basis for appeal. Information and/or argument which was not presented at a prior level of appeal shall not be considered.]

[4.]**2.** A representative of the Department of Personnel shall review the appeal, **request additional information if needed,** order a desk audit where warranted, and issue a written decision. The decision letter shall be issued within 60 days of receipt of the appeal **and all requested information** and shall include a summary of the duties of the position, findings of fact, conclusions, [determination and] a notice **to an employee or authorized employee representative** of appeal rights to the Commissioner **and a determination that:**

i. The position is properly classified;

ii. The position is properly classified, but that out-of-title duties are being performed, in which case the representative shall order, in writing, the immediate removal of inappropriate duties within a specified period of time; or

iii. The position should be reclassified, in which case, normal reclassification procedures shall be initiated immediately.

(d) In local service an appeal from an employee, union representative, or appointing authority shall be submitted, in writing, to the appropriate regional office of the Department of Personnel. The appeal must identify the specific duties that do not conform to the specification for the title and, if the appellant proposes a different title for the position, an explanation of how that existing title more accurately describes the duties of the position than the current or proposed title. **The appeal should also include a completed position classification questionnaire and an organization chart.**

1. A representative of the Department of Personnel shall review the appeal, **request additional information if needed,** order a desk audit where warranted, and determine that:

i.-iii. (No change.)

2. (No change.)

(e) [All appeals] **Appeals** to the Commissioner **may be made by an employee, authorized employee representative or local appointing authority and** shall be submitted in writing, within 20 days of receipt of the decision letter and must include copies of all materials submitted and [determinations] **the determination** received from the lower [levels] **level**, state which [determinations] **portions of the determination** are being disputed and the basis for appeal. Information and/or argument which was not presented at [a] **the** prior level of appeal shall not be considered. When new information and/or argument is presented, the appeal may be remanded to the prior level.

1.-2. (No change.)

(f)-(h) (No change.)

4A:3-4.3 Job reevaluation requests and appeals: State service

(a) [Employees, authorized employee representatives, or appointing] **Appointing** authorities may request a reevaluation **by the Department of Personnel** of a job title to determine its proper class code. [A request by an employee or the employee's representative shall first be submitted to the appointing authority when the title exists only in that appointing authority. All other requests shall first be submitted to the Department of Personnel.] **The request, which shall be submitted through the agency representative, must include a brief rationale for the request, an organization chart, and the requested new salary level. The Department of Personnel may require additional information to be submitted in a manner and form as determined by the Commissioner.**

(b) [A request] **An appeal by an employee or authorized employee representative** for a reevaluation **shall be submitted, in writing, to the agency representative. The appeal** must identify and explain the areas of substantive change in job content or other change in job evaluation factors through written narrative and a revised job specification, which shall be marked to indicate changes, and include evidence that the change in job content affects all employees in the title. **The Department of Personnel may require additional information to be submitted in a manner and form as determined by the Commissioner.**

1. The agency representative shall review the appeal and ensure that the information set forth in (b) above has been included. Within 10 days of receipt of the appeal, the appointing authority representative shall either notify the appellant that specific additional information is required, or shall forward the appeal to the Department of Personnel and so notify the appellant, and may indicate a recommended approval or rejection of the appeal for specified reasons. If additional information is required, the agency representative shall forward the appeal to the Department of Personnel within 10 days of receipt of the appellant's response to the request for additional information.

[(c) An appointing authority that receives a request for reevaluation shall conduct a review based on the New Jersey Job Content Evaluation System and notify all parties of its decision, including appeal rights to the Department of Personnel, within 30 days of receipt of the request. The decision letter shall indicate either that there is no substantive change in job content or that the request will be submitted to the Department of Personnel, in which case

the appointing authority shall submit a request for reevaluation pursuant to (b) above.

1. An employee who disagrees with the appointing authority's decision may appeal the decision within 20 days of notification to the Department of Personnel. The appeal shall include a copy of the initial request, the appointing authority's decision letter, a statement identifying the specific portions of the decision being contested, and the basis for the appeal.

2. If the employee requesting reevaluation does not receive a decision letter from the appointing authority within the specified 30 days, he or she may, in the following 20 days, submit an appeal, with a copy of the original request, to the Department of Personnel.]

[(d)](c) [The] **A representative of the** Department of Personnel shall review **the request or appeal and render a written decision.** [and render a] **A** written decision on evaluation [requests under (a) above and] appeals [under (c) above] **shall be rendered** within 60 days **of receipt of all required information. The decision letter shall include a notice of appeal rights to the Commissioner in the case of an appeal by an employee or authorized employee representative.**

[(e)](d) Any affected [party] **employee or authorized employee representative** may appeal the [first level] determination [in (d) above] to the Commissioner within 20 days of its receipt. The appeal shall contain all information which was presented to the prior [levels] **level**, a statement identifying the specific portions of the prior level determination being contested, **and** the basis for appeal[, and copies shall be provided by the]. **The** appellant **shall provide copies** to all parties.

Recodify existing (f) and (g) as (e) **and (f)** (No change in text.)

[(h)](g) If a title is approved for reevaluation, the effective date of the reevaluation shall be the first full pay period following the receipt [of a filing with] **by** the Department of Personnel of a fully documented request for reevaluation under (a) above or a fully documented appeal under [(c)] (**b**) above.

4A:3-4.4 Salary rates for initial appointments: State service

(a) (No change.)

(b) When the employee has separated from another State appointing authority, **a State college,** Rutgers, the State University, the New Jersey Institute of Technology, or the University of Medicine and Dentistry of New Jersey, and has been hired without an interruption in service, the employee may be placed up to and including that step of the salary range that the employee would receive if the employee had been continuously employed in the new agency.

(c) (No change.)

4A:3-4.5 Anniversary dates: State service

(a) An anniversary date is the biweekly pay period in which an employee is eligible, if warranted by performance and place in the salary range, for a salary increase.

1. An employee's anniversary date shall be assigned upon initial appointment to the first pay period following the completion of 26 full pay periods after appointment. In years which contain 27 pay periods, anniversary dates shall be determined in accordance with a schedule issued by the Department of Personnel.

EXAMPLE: An employee is appointed to a position on Monday, August [10, 1987] **16, 1993**. The first full pay period following the date of appointment is pay period 18, which begins on August [15, 1987] **21, 1993**. The employee's anniversary date is pay period 18 in calendar year [1988] **1994**, expressed as [18/88] **18/94**.

2.-3. (No change.)

(b)-(c) (No change.)

4A:3-4.6 Anniversary date change when employee is in non-pay status: State service

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

(c) When an employee returns from one full pay period or more in non-pay status, or when an employee accumulates 10 or more working days in non-pay status on an intermittent basis, the appointing authority shall notify the Department of Personnel and the employee in writing that the anniversary date is to be changed. **If an alternate worksheet program has been established, consideration of the adjusted hours per day must be made when counting the number of work days in non-pay status.**

(d) Intermittent days without pay which total less than 10 shall not be carried forward to the next calendar year.

4A:3-4.8 Lateral pay adjustments: State service

(a) (No change.)

(b) Employees affected by a lateral pay adjustment shall have their pay adjusted to the same step in the salary range of the new title as that step at which they were paid in the salary range of the former title. The employee's anniversary date shall not be changed.

EXAMPLE: An employee currently on step four, salary range A10 [($15,800.94)], in a 35-hour workweek title (class code 11), is appointed to a 40-hour workweek title in class code 11. The new salary range will be A12, and the employee will be placed on step four [($17,415.44). NOTE: Salaries effective September 12, 1987].

(c) When a workweek change occurs for an employee whose salary is between steps of the range, the following calculation shall be made to accommodate the workweek adjustment. Divide the amount of extra salary by the amount of the increment of the employee's current salary range. This will provide a percentage of the current increment represented by the extra salary. Adjust the employee's salary to the new range at the same step. Calculate the amount of extra salary by applying the percentage arrived at above to the increment of the new range.

4A:3-4.9 Advancement pay adjustments: State service

[(a) Employees in the following situations shall have their pay advanced under (b) below, and anniversary date set under (e) below when there is no workweek change or under (f) below when their workweek changes:

1. Employees promoted from one title to a title with a higher class code following or subject to a promotional examination;

2. Employees serving in a title which is reevaluated to a higher class code; or

3. Employees appointed to a title with a higher class code, when that action will not be subject to promotional examination, provided the following criteria are met:

i. The employee has served continuously in the lower title for at least four months immediately preceding the effective date of the advancement;

ii. The higher title is in the same occupational group as the lower title; and

iii. The service in the lower title provided significant preparation and training for service in the higher title.]

(a) Employees who are appointed to a title with a higher class code shall receive a salary increase equal to at least one increment in the salary range of the former title plus the amount necessary to place them on the next higher step in the new range. If the workweek changes, workweek adjustments will be made prior to the determination of anniversary date. If the workweek increases, workweek adjustments will be made prior to salary determination. (See (f) below). This subsection shall apply when the following conditions are met:

1. Employees are appointed from their permanent title to a title with a higher class code following or subject to a promotional examination;

2. Employees are serving in a title which is reevaluated to a higher class code; or

3. Employees are appointed to a title with a higher class code, when the conditions in (a)1 or 2 above are not applicable, provided the Department of Personnel finds the following criteria are met:

i. The employee has served continuously in the lower title for at least four months immediately preceeding the effective date of the advancement; and

ii. The service in the lower title provided significant preparation and training for service in the higher title.

[(b) Employees under (a) above shall have their salaries calculated as follows:

1. When there is no change in workweek or workweek decreases, the employee shall have his or her salary in the lower range increased

by one increment in that range. Then, the employee's salary in the higher range will be set at the lowest step in that ranhe that equals or exceeds this increased salary.

EXAMPLE: An employee on step four on salary range A10 ($15,800.94) is promoted to a title with salary range A13. An increase of one increment in the lower salary range would bring the employee to step five in range A10, or $16,487.30. The step in the higher range which would provide at least this increase is step two of salary range A13, or $16,699.13. NOTE: Salaries effective September 12, 1987.

2. If workweek increases (for example, 35 to NL or NL to 40) the employee's salary is determined by the following three steps;

i. Performing the workweek adjustment (see (f) below):

ii. Increasing the employee's salary at the lowest step in the new range that equals or exceeds the increased salary in the workweek adjusted range; and

iii. Setting the employee's salary at the lowest step in the new range that equals or exceeds the increased salary in the workweek adjusted range.

EXAMPLE: An employee at step four, range A10, in a 35 hour workweek is promoted to a title in range A13 with a 40 hour workweek. The workweek adjustment, as seen in the example under (f)1 below, would bring the employee to the same step (four) two ranges higher (A12), or $17,415.44. One additional increment in range A12 would bring the employee to step five, or $18,171.15. The step in range A13 which would provide at least this increase is step four, or $18,289.35. NOTE: Salaries effective September 12, 1987.]

[3.]**(b)** When an employee is advanced to a title with a salary schedule which is different (dollar value of ranges and steps do not coincide) from the employee's previous salary schedule, the steps described in [(b)1 or 2] **(a)** above are first performed in the previous schedule, and then the employee's salary is set at the lowest step in the new schedule and range that equals or exceeds that salary.

[4.]**(c)** When an employee has been at the maximum of his or her previous salary range for at least 39 pay periods, **and the salary increases after workweek adjustment would be less than two increments in the employee's previous range,** the employee shall receive[, if warranted by performance,] an additional increment in the new range [beyond the advancement under (b)1 or 2 above], providing[:

i. The] **the** employee is not already at the maximum of the new range[; and

ii. The total salary increase, after workweek adjustment if applicable, is not greater than three increments of the employee's previous range].

(d) Employees who do not meet the criteria set forth in (a) above shall be placed on a step in the salary range of the title with the higher class code that is the same or next higher than the salary paid in the title with the lower class code.

1. The adjustments described in (b) and (c) above shall be applied as appropriate.

[(c) Employees in the following situations shall have their pay advanced under (d) below, and anniversary date set under (e) below when there is a no workweek change or under (f) below when their workweek changes:

1. Employees appointed to a title with a higher class code when that action will not be subject to a promotional examination and the conditions specified in (a)3 above are not met;

2. Employees appointed to an upwardly reevaluated title after the effective date of the reevaluation but prior to the implementation date.]

(e) The anniversary date will be retained if the total salary increase after workweek adjustment is less than two increments in the employee's previous range. If the total salary increase after workweek adjustment is two increments or more, or the advancement results in step eight or nine, the anniversary date will be determined by the effective date of the action (frozen if step eight or nine).

[(d) Employees under (c) above shall receive the lowest step of the new range that equals or exceeds the prior salary.

EXAMPLE: An employee on step four on salary range A10 ($15,800.94) is appointed to an unrelated, unclassified title with salary range A13. The lowest step in range A13 that equals or exceeds the prior salary is step one, or $15,904.02. NOTE: Salaries effective September 12, 1987.

1. When an employee has been at the maximum of his or her previous salary range for at least 39 pay periods, he or she shall also receive, if warranted by performance, an increment in the new range, provided:

i. The employee is not ready at the maximum of the new range; and

ii. The total salary increase, after workweek adjustment if applicable (see (f) below), is not greater than three increments of the employee's previous range.

(e) When there is no change in workweek, the anniversary date of an employee whose pay is advanced under (a) or (c) above shall be determined as follows:

1. If the pay increase due to advancement is less than two increments in his or her previous range, the employee shall retain his or her anniversary date.

2. If the pay increase due to advancement is equal to or greater than two increments in his or her previous range, the employee's anniversary date shall be advanced based on the effective date of the advancement.

3. If the employee has been at the eighth or ninth step of a range for less than 39 pay periods before advancement; and

i. If an advancement results in step seven or less, the employee's anniversary date will be the pay period which reflects the difference between the time previously served at step eight or nine and 39 pay periods, but in no case shall the anniversary date exceed one year from the effective date of the advancement;

ii. If an advancement results in step eight, the anniversary date is retained;

iii. If an advancement results in step nine, the anniversary date becomes the effective date of the advancement.

(f) When there is a change in workweek, the anniversary date of an employee whose pay is advanced under (a) or (c) above shall be determined by following two steps: first, computing the workweek adjustment as provided in (f)1 below; second, applying one of the formulas in (f)2 or (f)3 below, as appropriate. However, if an employee has been at the eighth or ninth step in the prior range for less than 39 pay periods before advancement which results in step seven or less, the workweek adjustment is skipped and the anniversary date is determined under (e)3 above.]

[1.]**(f)** The workweek adjustment is computed by finding the workweek adjusted range, according to the following chart, and then placing the employee on the same step in the workweek adjusted range as the employee's step [on] **in** the former range.

WORKWEEK OF EMPLOYEE'S NEW TITLE

Workweek of Employee's Former Title	35 OR 3E	NL OR NE	40, 4E OR N4
35 OR 3E	NO CHANGE	+1 SALARY RANGE	+2 SALARY RANGES
NL or NE	−1 SALARY RANGE	NO CHANGE	+1 SALARY RANGE
40, 4E OR N4	−2 SALARY RANGES	−1 SALARY RANGE	NO CHANGE

EXAMPLE: An employee on step four in salary range A10 in a 35-hour week title is appointed to a 40-hour week title. Adjusting salary range A10 (35 hours) to the 40-hour week (+2 salary ranges) will result in a range A12, step four.

[2. When an employee receives a pay increase after workweek adjustment which is less than two increments in his or her workweek adjusted range, the employee shall ratain his or her anniversary date.

EXAMPLE: An employee at step four, range A10, in a 35 hour workweek is promoted to a title in range A13 with a 40 hour workweek. The workweek adjustment, as seen in the example above, would bring the employee to the same step (four) two ranges higher (A12), or $17,415.44. The employee's new pay rate, as seen from the example in (b)2 above, is $18,289.35. Since the pay increase after workweek adjustment ($18,289.35 minus $17,415.44 = $873.91) is less than two increments in the workweek adjusted range $755.71 + $755.71 = $1,511.42), the anniversary date is retained. NOTE: Salaries effective September 12, 1987.

3. When an employee receives a pay increase after workweek adjustment which is equal to or greater than two increments in his or her workweek adjusted range, the employee's anniversary date shall be advanced based on the effective date of the advancement.

EXAMPLE: An employee at step four, range A10, in a 40 hour workweek, is promoted to a title in range A13 with a 35 hour week. The workweek adjustment would bring the employee to the same step (four) two ranges lower (A8), or $14,336.32. The employee's new pay rate is $16,699.13 (step two, range A13). Since the pay increase after workweek adjustment ($16,699.13 minus $14,336.32 = $2,362.81) is more than two increments in the workweek adjusted range ($624.46 + $624.46 = $1,248.92), the anniversary date is advanced. NOTE: Salaries effective September 12, 1987.]

(g) When an employee's work year changes, a work year adjustment shall first be performed before making any other adjustments under this section. The work year adjustment is computed by placing the employee in the same step three ranges up, when work year is increased from 10 to 12 months, or three ranges down, when work year is decreased from 12 to 10 months.

EXAMPLE: An employee on step four, range A10 in a 10 month title, is promoted to a 12 month title with salary range A15. There is no change in workweek. The work year adjustment would bring the employee to step four, range A13 [($18,289.35)]. Then, salary is calculated based on [(b)] **(a)** above [and anniversary date set under (e) above].

4A:3-4.10 Demotional pay adjustments: State service

(a) The salary of an employee who receives a disciplinary demotion shall be adjusted by reducing the employee's salary one increment in the higher range. Then, the employee's salary in the lower range will be set at the step that is equal to or next lower than such reduced salary. [The anniversary date is retained.]

1. The adjustment in (a) above shall be made after adjustment for workweek. See N.J.A.C. 4A:3-4.9(f).

i. When a workweek change occurs for an employee whose salary is between steps of the range, the following calculation shall be made to accommodate the workweek adjustment: Divide the amount of extra salary by the amount of the increment of the employee's current salary range. This will provide a percentage of the current increment represented by the extra salary. Adjust the employee's salary to the workweek adjusted range at the same step. Calculate the amount of extra salary by applying the percentage arrived at above to the increment of the workweek adjusted range.

2. The anniversary date is retained, unless the action results in step eight or nine, in which case the anniversary date is based on the effective date of the action.

[EXAMPLE: An employee on step four, range A18 ($23,341.28) is demoted to a job title in range A15. First, the employee's salary is reduced one increment in range A18 to step three ($22,326.77). Then, the step in range A15 that is equal to or next lower than this reduced salary is step six ($21,912.36). NOTE: Salaries effective September 12, 1987.]

(b) When an appointing authority demotes an employee in lieu of removal due to loss of qualifications for job title (for example, a Truck Driver whose license is suspended is demoted to a Building Maintenance Worker), salary and anniversary date shall be determined as provided in (a) above. **If the employee is subsequently returned to the former title, he or she may be appointed up to and including the step held prior to the demotion.**

(c) If the demotion is other than disciplinary or in lieu of removal under (b) above, the employee's salary shall be reduced one increment in the higher range. Then the employee's salary in the lower range will be set at the step that is equal to or next higher than such reduced salary. [The anniversary date is retained.]

1. The adjustment in (c) above is made after adjustment for workweek. See N.J.A.C. 4A:3-4.9(d).

2. The anniversary date is retained, unless the action results in step eight or nine, in which case the anniversary date is based on the effective date of the action.

[EXAMPLE: An employee on step four, range A18 ($23,341.28) is demoted in lieu of layoff to a job title in range A15. First, the employee's salary is reduced one increment in range A18 to step three ($22,326.77). Then, the step in range A15 that is equal to or next higher than this reduced salary is step seven ($22,788.11).]

[1.]**3.** This adjustment shall be applied only when the employee has served at least [one year] **four months** in the higher title and:

i. The employee has previously held the lower title;

ii. [The lower title is in the same occupational group as the higher title] **The employee is being demoted in lieu of layoff**; or

iii. The **Department of Personnel finds that** service in the higher title provided significant preparation and training for service in the lower title.

[2.]**4.** If the conditions in [(c)1] **(c)3** above are not met, then salary and anniversary date shall be determined by reconstructing the employee's salary as if the employee had remained in **or been appointed to** the lower title on the date he or she was appointed to the higher title. **N.J.A.C. 4A:3-4.4 may be applied, but in no case shall an employee receive a higher salary than that calculated through the application of (c) above.**

(d) For all non-disciplinary demotions except voluntary demotions and those provided in (b) above, an employee demoted to a title lower than the class code of his or her permanent title must be given 45 days' notice of demotion by the appointing authority.

(e) In no event shall this section be used to gain a salary advantage for an employee.

4A:3-4.11 Downward title reevaluation pay adjustments: State service

(a) When a title is reevaluated to a lower class code, or when a title is eliminated and incumbents are placed in a title having a lower class code, each employee in that title shall remain at his or her current base salary. The part of an employee's base salary that is above the nearest lower step in the lower range will be carried as extra salary until the employee's anniversary date, at which time the employee's salary shall be moved to the next higher step, if warranted by performance, in lieu of the normal performance increment. If the employee's base salary is [at] **above** the maximum step, the employee will **be red circled, that is,** remain at that salary until the maximum step of the lower range is increased to a level at or above the employee's base salary, at which time the employee's salary shall be moved to that maximum step of the lower range.

1.-3. (No change.)

4A:3-4.12 Movement of employees from no-range or single rate titles to titles having salary ranges: State service

(a) When a title is changed from a no-range or single rate category to a range in the Compensation Plan, or when an employee moves from a no-range title to a title having a salary range, the salary [and anniversary dates of employees serving in that title shall be adjusted in accordance with N.J.A.C. 4A:3-4.9(d)] **shall be adjusted up to the step in the range that is the same or next higher than the salary of the no range or single rate title and the anniversary date assigned based on the pay period the employee would have been eligible for an increase in the no range or single rate title,** providing the following two criteria are met:

1. The **Department of Personnel finds that** service in the no-range title provided the employee with significant experience and training for service in the range title; and

2. The employee has served in the former title for four months or more.

(b) (No change.)

(c) If the employee's base salary is above the maximum step, the employee will be red circled, that is, remain at that salary until the maximum step of the range is increased to a level at or above the employee's base salary, at which time the employee's salary shall be moved to that maximum step of the range.

[(c)](**d**) (No change in text.)

4A:3-4.13 Salaries of employees whose annual salaries are not on a step in their salary range: State service

Except as otherwise provided by the Commissioner, an employee whose base salary is not on a step in his or her salary range shall remain at his or her current base salary. That part of an employee's salary that is above the nearest lower step in the salary range will be carried as extra salary until the employee's anniversary date, at which time the employee's salary shall be moved to the next higher step, if warranted by performance, in lieu of the normal performance increment. **If the employee's base salary is above the maximum step, the employee will be red circled, that is, remain at that salary until the maximum step of the range is increased to a level at or above the employee's base salary, at which time the employee's salary shall be moved to that maximum step of the range.**

4A:3-4.17 Salaries and anniversary dates for employees appointed from a special reemployment list: State service

(a) The salary of an employee appointed from a special reemployment list shall be determined as follows:

1. When appointed to the same title held at the time of the reduction in force, the employee shall receive the same step of the salary range received on the date of the layoff **or the salary determined in accordance with (a)2 below, whichever is the most beneficial to the employee.**

2. When appointed to a different title from the one held at the time of the reduction in force, the employee shall receive the most beneficial to the employee of the following:

i. The same step and salary range that he or she would have received if appointed to the new title on the date of the reduction in force; or

ii. When the employee is currently serving in another title, the salary determined by adjustment to the new title:

(1) When appointed to a new title with the same class code, make a lateral pay adjustment, N.J.A.C. 4A:3-4.8;

(2) When appointed to a new title with a higher class code, make an advancement pay adjustment, N.J.A.C. 4A:3-4.9. **If the employee has attained a higher salary in a lower title than the current value of the step he or she would have received in the new title on the date of the layoff, the salary shall be set at the step that is next higher than the salary in the lower title. The anniversary date will be set based on the effective date of the action**; or

(3) When appointed to a new title with a lower class code, make a demotional pay adjustment, N.J.A.C. 4A:3-[4.1]**4.10**.

[EXAMPLE: An employee was demoted in lieu of layoff in October, 1988 from Secretarial Assistant II (Range A17, 35 hour workweek) to Principal Clerk Typist (Range R11, 35 hour workweek). At the time of the reduction in force, the employee was at step three of range A17 or $22,328. In accordance with N.J.A.C. 4A:3-4.10(c), which governs nondisciplinary demotions, the salary in the Principal Clerk title was set at step nine of range R11, or $21,229. Five months later and before the employee's anniversary date, the employee was appointed from a special reemployment list to the title of Principal Clerk Typist (Range R12, 35 hour workweek). Two calculations are made: (1) Using (a)2i above, if the employee had been demoted to Principal Clerk Typist at the time of layoff, the application of N.J.A.C. 4A:3-4.10(c) would have placed the employee at step eight of range R12, or $21,492. (2) Using (a)2ii above, advancement from Principal Clerk to Principal Clerk Typist would be governed by N.J.A.C. 4A:3-4.9(b) and would place the employee at a step nine of Range R12, or $22,286. Since the second option is more beneficial to the employee, (a)2ii above is followed.]

(b) The anniversary date of an employee appointed from a special reemployment list shall be determined as follows:

1. When using (a)1 or (a)2i above to determine salary, reconstruct the employee's anniversary date to the date of the reduction in force, then calculate the additional number of pay periods needed to meet the requirements for a performance increment **(except as provided in (a)2ii(2)).** Assign the anniversary date which will include the additional number of pay periods of service needed to satisfy anniversary date requirements.

2. (No change.)

3. If at the time of the reduction in force the employee was at the maximum salary step for the title from which displaced, assign the anniversary date that reflects the length of time that the employee had been at the maximum step on the date of the reduction in force.

EXAMPLE: An employee is reappointed from a special reemployment list on [March 26, 1988] **April 3, 1993** (pay period 8/[88]**93**) to the permanent title from which the employee was laid off on January [15, 1988] **23, 1993** (pay period 3/[88]**93**). At the time of the layoff the employee was receiving the ninth step of the salary range with an anniversary date of 1/[88]**93.** When reappointed, the employee will receive an anniversary date of 6/[88]**93** to show that the employee had been at the maximum step of the salary range for two pay periods.

(c)-(d) (No change.)

(e) This section shall be applied to unclassified or provisional employees recalled after a reduction in force in accordance with a collective negotiations agreement.

4A:3-4.20 Retroactive pay: State service

Personnel actions having retroactive effective dates shall apply only to employees who remain on a State payroll on the date of the retroactive payment and employees who retire **or die** during the period of retroactive application.

4A:3-5.2 Definitions: State service

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

. . .

"Pay period" means the period beginning 12:01 A.M. Saturday and ending midnight the second Friday following[.] (Note: A schedule of pay periods is published annually by the New Jersey Department of the Treasury.).

. . .

4A:3-5.7 Special circumstances: State service

(a)-(c) (No change.)

(d) Eligibility for overtime compensation for exceptional emergencies shall be as follows:

1. When an agency head declares an exceptional emergency involving a critical service disruption that poses a danger to health or safety, he or she may authorize:

i. Cash overtime compensation for non-limited employees in titles with established salary ranges below range [35] **32** performing emergency related work. For these circumstances employees in non-limited titles shall be deemed to have a 40 hour workweek.

ii. Overtime compensation for work not covered by the job specification. See N.J.A.C. 4A:3-5.3(c)3.

2. An agency head shall file with **the** Commissioner two reports concerning an exceptional emergency as follows:

i.-ii. (No change.)

3. These provisions shall not apply to work performed beyond the regular work hours on emergency maintenance, construction, snow removal or other related work in situations which constitute unreasonable safety hazards to the public, employees, other persons or property of the State. The Commissioner shall establish [special project] **emergency condition** rates for these circumstances.

(e) (No change.)

4A:3-5.8 Holiday pay: State service

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

(c) The following shall govern overtime compensation for full-time and part-time employees in fixed workweek titles who are employed in a seven day coverage operation:

1.-2. (No change.)

3. If a holiday occurs on a regular workday of an employee and the employee does not report for duty, he or she shall not be eligible for overtime compensation or an alternate day off **for that holiday**.

(d) A part-time or full-time employee in a fixed workweek title, in conjunction with his or her appointing authority, [mayacree] **may agree** to work on a holiday in exchange for a specified day of personal preference off. If the employee is required to work on the specified personal preference day, she or he shall be entitled to overtime compensation for all hours worked on the personal preference day as if that day were the holiday.

(e) (No change.)

4A:3-5.10 Appeal procedures: State service

(a) Appeals may be filed under this subchapter as follows:

1. Position designation appeals, in which the issue is the status of a particular position as exempt or covered under the Fair Labor Standards Act, 29 U.S.C. 201 et seq.; and/or

2. (No change.)

(b)-(d) (No change.)

EDUCATION

(a)

STATE BOARD OF EDUCATION

School Ethics Commission

Proposed New Rules: N.J.A.C. 6:3-9

Authorized By: State Board of Education, Mary Lee Fitzgerald, Secretary, State Board of Education and Commissioner, Department of Education.

Authority: N.J.S.A. 18A:12-21 et seq.

Proposal Number: PRN 1993-275.

Submit written comments by June 16, 1993 to:
Elease E. Greene-Smith, Rules Analyst
N.J. Department of Education
225 East State Street, CN 500
Trenton, New Jersey 08625-0500

The agency proposal follows:

Summary

The School Ethics Act P.L. 1991, c.393 (N.J.S.A. 18A:12-21 et seq.), created a School Ethics Commission and establishes specific standards to guide the conduct of school officials who are defined as all elected or appointed local board of education members and all administrators and supervisors, certificated and non-certificated, who make recommendations for hiring or the purchase or acquisition of property or services.

The Act requires that school officials annually file both a financial disclosure statement and a personal/relative disclosure statement which become public records open for inspection by interested individuals. The Act also creates a process whereby members of the public may file complaints with the Commission against school officials whom they believe are in violation of the standards of conduct established under the law. The Act further provides a means for determining whether a complaint is valid through an administrative hearing process and authorizes the Commission to prescribe a penalty which is reviewable by the Commissioner and appealable to the State Board of Education.

A review of the new rules follows:

N.J.A.C. 6:3-9.1 Purpose

This section defines the purpose of the law and the School Ethics Commission.

N.J.A.C. 6:3-9.2 Definitions

This section defines terms such as administrator, censure, reprimand, spouse, relative and other terms necessary for instructing persons who are required to file under the Act.

N.J.A.C. 6:3-9.3 Filing of disclosure statements and procedures in the event of incomplete filing or failure to file disclosure statements

This section defines the process for the annual filing of disclosure statements and establishes the responsibility of board secretaries to annually prepare lists of who must file, review forms for completeness and transmit two copies of the forms to the Commission through the county offices. This section also defines a failure to file as a violation that can result in the suspension or removal of a school official and the due process procedures that are available in the event of such action being taken. The section further describes the process that is being established in the event the Commission determines that a filing is incomplete.

N.J.A.C. 6:3-9.4 Board member training

This section provides that the board member training mandated by the Act include a segment on ethical standards. It also provides a mechanism for certifying that newly elected board members have completed the training.

N.J.A.C. 6:3-9.5 Functions and authority

This section defines the authority of the Commission.

N.J.A.C. 6:3-9.6 Membership

This section defines the number and method of appointment of Commission members.

N.J.A.C. 6:3-9.7 Officers

This section describes the process for electing a Commission chairperson and for replacing or substituting for the chairperson in the case of resignation or absence.

N.J.A.C. 6:3-9.8 Term

This section defines the term of the Commission chairperson as being one year commencing on July 1.

N.J.A.C. 6:3-9.10 through 12

These sections define the method for calling monthly meetings and special meetings of the Commission as well as defining a quorum.

N.J.A.C. 6:3-9.13 Committee structure

This section sets forth the authority of the Commission to establish committees.

N.J.A.C. 6:3-9.14 Advisory opinion

This section describes the process for requesting an advisory opinion from the Commission regarding whether a contemplated action of a school official may create a conflict of interest.

N.J.A.C. 6:3-9.15 Filing and service of a complaint

This section defines the manner in which a complainant files a complaint alleging a violation of the Act and reproduces the actual complaint form adopted by the Commission.

N.J.A.C. 6:3-9.17 Answer to complaint

This section describes the manner in which a person against whom a complaint is lodged responds to the complaint.

N.J.A.C. 6:3-9.18 Commission review

This section describes the process for Commission review, initially for purposes of making a probable cause determination and transmission to the Office of Administrative Law (OAL) if such a determination is made.

N.J.A.C. 6:3-9.19 Written decision

This section describes the function of the Commission relative to reviewing the recommendation of OAL and developing a written decision and recommendation as to penalty to the Commissioner, if a penalty is deemed warranted.

Social Impact

These proposed new rules directly affect approximately 12,000 local school board members and administrators by requiring them to fill out two disclosure statements. One statement requires the listing of sources of income and the other asks general personal information questions regarding whether family members or the school official may be engaged in activities which could conflict with the official's public duties. All citizens of the State of New Jersey are potentially affected by virtue of

the establishment of the right to register a complaint against a school official deemed in violation of the School Ethics Act.

Economic Impact

The Department of Education will incur some cost in the preparation of forms to be distributed to the districts in numbers sufficient to include all persons eligible to file. Districts will incur the cost of duplicating the forms sufficient to provide two additional copies. Board secretaries will also be required to spend some time in distributing, collecting and reviewing forms.

Regulatory Flexibility Statement

The adoption of these proposed new rules will impose no reporting, recordkeeping or other compliance requirements on small businesses, as that term is defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B et seq. All requirements of these new rules affect all school officials as defined in the Act.

Full text of the proposed new rules follows:

SUBCHAPTER 9. SCHOOL ETHICS COMMISSION

6:3-9.1 Scope and purpose

(a) The rules set forth in this subchapter have been adopted for the purpose of effectuating the legislative intent of N.J.S.A. 18A:12-21 et seq., the School Ethics Act (P.L. 1991, c.393), which seeks to "... ensure and preserve public confidence ..." in the integrity of elected and appointed school board members and school administrators.

(b) To achieve this goal the Legislature has adopted N.J.S.A. 18A:12-24 which prescribes a code of ethics by which school officials are to be guided in the conduct of their offices and positions and created a School Ethics Commission specifically for the purpose of enforcing those ethical standards through a procedure for reviewing complaints of ethical violations, investigating those complaints and ultimately rendering recommendations to the Commissioner as to the imposition of sanctions when violations are demonstrated.

6:3-9.2 Definitions

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

"Administrator" means any officer, other than a board member, or employee of a local school district who:

1. Holds a position which requires a certificate that authorizes the holder to serve as school administrator, principal, or school business administrator; or

2. Holds a position which does not require that the person hold any type of certificate but is responsible for making recommendations regarding hiring or the purchase or acquisition of any property or services by the local school district; or

3. Holds a position which requires a certificate that authorizes the holder to serve as supervisor and who is responsible for making recommendations regarding hiring or the purchase or acquisition of any property or services by the local school district.

"ALJ" means an administrative law judge from the Office of Administrative Law.

"Board member" means any person holding membership, whether by election or appointment, on any board of education other than the State Board of Education.

"Censure" means a formal public action read into the record of the School Ethics Commission to rebuke a school official who has been determined by the Commission to have been in violation of N.J.S.A. 18A:12-21 et seq.

"Commission" means the School Ethics Commission and its staff as created pursuant to N.J.S.A. 18A:12-21 et seq.

"Commissioner" means the Commissioner of Education or his or her designee.

"Complainant" means the person bringing a complaint of alleged violation of N.J.S.A. 18A:12-21 et seq.

"Financial Disclosure Statement" means the statement of personal finances which school officials are required to annually file pursuant to N.J.S.A. 18A:12-21 et seq.

"Income" for purposes of these rules shall be as defined by the Internal Revenue Service except as otherwise provided in N.J.S.A. 18A:12-26a(1).

"Local School District" for purposes of these rules means any local or regional school district established pursuant to Chapter 8 or Chapter 13 of Title 18A of the New Jersey Statutes and shall include jointure commissions, county vocational schools, county special services districts, educational service commissions, educational research and demonstration centers, environmental education centers, and educational information and resource centers.

"Member of the immediate family" means the spouse or dependent child of a school official residing in the same household. Dependent child shall be defined as any child claimed as a dependent on the school official's Federal and state tax returns.

"OAL" means the Office of Administrative Law.

"Personal/Relative Disclosure Statement" means the statement required by N.J.S.A. 18A:12-21 et seq. of a school official setting forth whether said official has a relative or any other person related to the school official by marriage, employed by the district in which he or she serves; whether said official or a relative is a party to a contract with the school district in which the school official holds office or position; or whether the school official or a relative is employed by, receives compensation from, or has an interest in, any business which is a party to a contract with the school district in which the school official holds office or position.

"Related to the school official by marriage" as used in the statute shall be limited to mother-in-law, father-in-law, brother-in-law and sister-in-law.

"Relative" means the spouse, natural or adopted child, parent or sibling of a school district.

"Reprimand" as a sanction imposed by the Commissioner upon recommendation of the School Ethics Commission shall consist of a letter from the Commission rebuking a school official for having been found to have breached the standards of conduct prescribed by N.J.S.A. 18A:12-21 et seq.

"Respondent" means the board member or administrator against whom a complaint is made pursuant to N.J.S.A. 18A:12-21 et seq.

"School official" means a board member or an administrator.

"Spouse" means the person to whom the school official is legally married under New Jersey law.

6:3-9.3 Filing of disclosure statements and procedures in the event of incomplete filing or failure to file disclosure statements

(a) Annually, on or before April 30th of each year or as otherwise provided in these rules all school officials shall file, on forms provided through the county superintendent both a Financial Disclosure Statement and a Personal/Relative Disclosure Statement with the Commission. Additional copies of the aforesaid statements shall be prepared by the school official and maintained on file at the local district and the office of the county superintendent in order to facilitate public access to the documents. All disclosure statements filed in accordance with N.J.S.A. 18A:12-21 et seq. and these rules shall be public records.

(b) In order to comply with the requirement in (a) above, each local district board secretary shall annually, on or before February 1, cause to be developed and transmitted to the county superintendent a list of names of those school officials, by office and position, whose responsibilities would require the filing of the Financial and Personal/Relative Disclosure Statements pursuant to the criteria contained in N.J.S.A. 18A:12-21 et seq. and these rules. Offices and positions vacant or to become vacant by virtue of expiration of terms or personnel leaving the district are to be listed.

(c) Board members in Type II school districts elected to their positions in the annual April school election shall file within 30 days of taking office. The board secretary shall, upon election of new board members, inform the county superintendent of the names of the newly elected members and the county superintendent shall provide the forms necessary for compliance.

(d) Board members in Type II districts who are appointed to fill vacancies will file the requisite disclosure forms within 30 days of taking office. The board secretary will upon such appointment inform the county superintendent of the appointment. The county

superintendent shall provide the member with the required disclosure statements.

(e) Board members in Type I school districts who are initially appointed to take office on May 16 or June 1 as the case may be, shall file the required disclosure statements within 30 days of taking office. Board members in Type I districts appointed to fill vacancies shall likewise file within 30 days of taking office. The board secretary shall inform the county superintendent of the appointment of new board members and the county superintendent shall provide the required forms.

(f) Administrators as defined in this subchapter, appointed to fill vacancies after the April 30 filing date shall file the required disclosure forms within 30 days of the appointment. The board secretary shall inform the county superintendent of the appointment of any new administrators or supervisors subject to the requirement to file disclosure statements under the School Ethics Act.

(g) On or before April 30, May 16 or June 1 as the case may be, the board secretary of each local school district shall, before transmitting the completed disclosure forms to the county superintendent, certify that he or she has reviewed each disclosure form to assure that both required forms have been filed; that all questions have been answered or indicated as not being applicable; and that each copy is signed by an original signature. Further, the board secretary shall provide to the county superintendent the names of all persons on the February 1 list of school officials compiled in accordance with (b) above and all newly elected or appointed persons who have failed to file as required by N.J.S.A. 18A:12-21 et seq.

(h) Failure to file as prescribed by N.J.S.A. 18A:12-21 et seq. shall constitute a violation of the School Ethics Act and shall result in the suspension and/or removal of a school official upon recommendation of the Commission and affirmance of the Commissioner.

(i) Prior to any action taken by the Commission for failure to file, the Commission shall direct that the school official show cause in writing under oath within 20 days why the penalty of suspension and/or removal should not be imposed. The Order to Show Cause shall be considered the equivalent of the complaint required by N.J.S.A. 18A:12-29.

(j) Upon receipt of the response to the Order to Show Cause or upon expiration of the time period for so filing the Commission shall proceed to a determination. The school official shall be advised of his or her right to appear before the Commission, be represented by counsel and present witnesses on his or her behalf prior to the Commission's making its probable cause determination.

(k) If the Commission determines that a filing is incomplete, it shall first return the filing to the school official for completion within 20 days of receipt of the returned filing. At the expiration of such time period or upon further receipt of a filing which fails to provide such information as required by statute, the Commission shall issue an order directing the school official in writing under oath to show cause within 20 days why the Commission should not impose such sanctions as permitted pursuant to N.J.S.A. 18A:12-29. If such order is not returned within the 20-day period, or if the response is returned with the school official's refusal to properly file, the Commission may assume that the school official's incomplete filing is in effect a failure to file and the Commission shall proceed to a determination. The school official shall be advised of his/her right to appear before the Commission, be represented by counsel and present witnesses on his/her behalf.

(l) If the school official responds to the Order to Show Cause by asserting either that the filing is complete or other appropriate factors, the matter shall be included as a contested case under N.J.S.A. 18A:12-29(b) and transmitted to the Office of Administrative Law for a hearing pursuant to N.J.A.C. 6:3-9.18 and 9.19.

6:3-9.4 Board member training

(a) Each newly elected or appointed board member shall during the first year of his or her first full term on any board complete a training program prepared and offered by the New Jersey School Boards Association which shall include in its content instruction relative to the board members responsibilities under the School Ethics Act.

(b) The New Jersey School Boards Association shall notify the board secretary in writing, when newly elected or appointed board members have attended a training program that satisfies the training mandate. The board secretary shall certify in writing to the county superintendent that the board member(s) have completed the requirement.

(c) By March 31 of each year the New Jersey School Boards Association shall present to the School Ethics Commission a list of those board members who have not fulfilled the training mandate for the previous filing period.

(d) Board members failing to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33. The Commission shall proceed thereafter in conformance with the procedures set forth in N.J.A.C. 6:3-9.3(i).

6:3-9.5 Functions and authority of School Ethics Commission

(a) Pursuant to the provisions of N.J.S.A. 18A:12-21 et seq. the School Ethics Commission shall:

1. Prescribe a Financial Disclosure Statement and a Personal/Relative Disclosure Statement in accordance with N.J.S.A. 18A:12-26 and 25 respectively, to be filed by all school officials as defined herein on or before April 30 of each year or at such other times as these rules may require;

2. Appoint such professional and clerical staff and incur such expenses as may be necessary to carry out the provisions of N.J.S.A. 18A:12-21 et seq. within the limits of funds appropriated or otherwise made available to it. All appointments shall be made in accordance with the provisions of Title 11A of the New Jersey Statutes;

3. Issue advisory opinions, receive and investigate complaints raised pursuant to section 9 of the School Ethics Act (N.J.S.A. 18A:12-29) and conduct such hearing as may be necessary to determine whether probable cause exists to credit the allegation raised in any complaint brought before it;

4. Receive and retain disclosure statements required by the Act. Requests for copies of disclosure statements will be subject to copying fees pursuant to N.J.S.A. 47:1A-1 et seq;

5. Have the authority to compel the attendance of such witnesses and the production of such documents as it may deem necessary and relevant to carrying out its duties under the Act;

6. Be empowered, along with the persons appointed by it, to administer oaths and examine witnesses under oath; and

7. Recommend to the Commissioner the reprimand, censure, suspension or removal of school officials found to have violated the School Ethics Act.

6:3-9.6 Membership of school ethics commission

The School Ethics Commission shall consist of nine members appointed for three year terms in the configuration and manner prescribed by N.J.S.A. 18A:12-21 et seq.

6:3-9.7 Officers of School Ethics Commission

(a) In accord with the provisions of N.J.S.A. 18A:12-21 et seq. the Commission, by majority vote, shall elect one member to serve as chairperson for a term not to exceed one year.

(b) Should the chairperson resign or otherwise be unable to serve out his or her term, the remaining Commission members shall, by majority vote, elect a chairperson from among their membership to fill out the remainder of the unexpired term.

(c) Should the chairperson be unable to attend any regular or special meeting of the Commission, the Commission, by majority vote of the quorum present, shall select a temporary chairperson to preside over the meeting.

6:3-9.8 Duties of chairperson

The chairperson shall preside over the meetings of the Commission and shall perform all duties incidental to that office.

6:3-9.9 Term of office of chairperson

The chairperson shall serve a one-year term which shall commence on July 1 of each year.

6:3-9.10 Regular meetings

Regular monthly meetings shall be held at such time, place and on such dates as established by the Commission and notice of such

regular meetings shall be made in accordance with N.J.S.A. 10:4-6 et seq., Open Public Meetings Act.

6:3-9.11 Special meetings

Special meetings may be called by the Commission chairperson at any time or at the request of any three members. Three days notice of any special meeting shall be given to each member. Public notice of such special meeting shall be made pursuant to N.J.S.A. 10:4-8.

6:3-9.12 Quorum

A quorom shall consist of a majority of the number of voting members of the Commission.

6:3-9.13 Committee structure

(a) The Commission shall act as a committee of the whole.

(b) The Commission chairperson shall select a nominating committee of three persons whose function it shall be to select a nominee for chairperson to present to the committee as a whole for approval at its May meeting.

(c) Special committees may be appointed by the chairperson to consider and make recommendations to the Commission on any matter.

6:3-9.14 Advisory options

(a) Any school official may request an advisory opinion from the Commission as to whether any proposed conduct or activity would constitute a violation of the provisions of the School Ethics Act.

(b) Request for advisory opinions must clearly set forth in detail the specific conduct or activity the school official seeks to undertake and the exact role he or she will play in that activity or conduct.

(c) Upon receipt of a request for an advisory opinion, the Commission shall assign a file number to the request.

1. During the course of any staff work and/or Commission deliberation with regard to the request for an advisory opinion, the request shall be identified for purposes of public access only by file number and not by the name(s) of school official(s) involved.

2. No information regarding any request for an advisory opinion shall be made public unless the information is incorporated into the advisory opinion and made public in accordance with (e) and (f) below.

(d) The Commission and/or its staff reserves the right to require additional information from the person seeking an advisory or to require the person's appearance before it or its staff.

(e) Advisory opinions issue by the Commission shall not be made public unless six members shall vote to direct the opinion be made public.

(f) Advisory opinions made public by the Commission shall delete the name and district of the school official requesting the advisory.

(g) The Commission shall render a response to the request for an advisory opinion at its next monthly meeting following its receipt of all relevant information and documentation needed to make a determination on the request.

(h) Notwithstanding the foregoing, the Commission may respond to a request for an advisory opinion by referring the issue raised to the Office of the Attorney General.

6:3-9.15 Filing and service of a complaint

(a) To file a complaint with the School Ethics Commission alleging a violation of the School Ethics Act, N.J.S.A. 18A:12-21 et seq., a complainant must file an original and two copies of such complaint using the form set forth in N.J.A.C. 6:3-9.16. Any member of the Commission may also file a complaint.

(b) No complaint shall be accepted by the Commission unless it is signed under oath by the complainant.

(c) Upon receipt of the complaint the Commission shall serve a copy of the complaint on the school official or officials named.

(d) Upon receipt of a complaint the Commission shall assign a file number to the complaint.

1. During the course of any staff work and/or Commission deliberation with regard to the complaint, the complaint shall be identified only by file number for purposes of public access and not by the name(s) of the school official(s) involved.

2. No information regarding any complaint shall be made public until the Commission takes action in accordance with N.J.A.C. 6:3-9.18(d).

3. Pursuant to N.J.S.A. 18A:12-29(e) the Commission may impose a fine not to exceed $500.00 for the filing of a frivolous complaint.

6:3-9.16 Complaint form

(a) The form used to file a complaint is as follows:

NAME OF COMPLAINANT(S), : BEFORE THE SCHOOL
v. : ETHICS COMMISSION
NAME OF RESPONDENT(S): OF NEW JERSEY
_____ : COMPLAINT FORM

I, (Name of Complainant), residing at (Address and Phone Number of Complainant), request the School Ethics Commission to consider a complaint against the above-named Respondent whose address is (address of respondent), in accordance with the authority of the School Ethics Commission to entertain such complaints under N.J.S.A. 18A:12-21 et seq.

The facts upon which this complaint is based are as follows: (Set down below in individually numbered paragraphs the specific facts which cause you to believe that a violation of the School Ethics Act has occurred. Cite, if known to you, the section(s) of the Act which you believe to have been violated.)

1. _____

_____

2. _____

_____

3. _____

_____

4. _____

_____

WHEREFORE, I, as Complainant, request that the School Ethics Commission find and determine that the above-named Respondent has violated the School Ethics Act and that he/she be subject to such penalty as the Commission and the Commissioner of Education deem appropriate.

Date _____ _____
Signature of Complainant
or his or her Attorney

CERTIFICATION UNDER OATH

(Name of Complainant), of full age, being duly sworn upon his/her oath according to law deposes and says:

1. I am the complainant in this matter.

2. I have read the complaint and aver that the facts contained therein are true to the best of my knowledge and belief and I am aware that the statute which created the School Ethics Commission authorizes the Commission to impose penalties for filing a frivolous complaint N.J.S.A. 18A:12-29e.

Date _____ _____
Signature of Complainant

Sworn and subscribed to before me this _____ day of _____, 19__.

_____
Signature

(b) No complaint will be processed by the Commission nor will the Commission issue a final ruling or advisory opinion on any matter pending in any court of law or administrative agency of this State.

6:3-9.17 Answer to complaint

(a) Upon receipt of the complaint from the Commission, the respondent shall have 20 days within which to file an original and two copies of a written statement under oath with the Commission.

Upon written application by the respondent, the Commission or its designee may extend the time for filing such statement.

(b) The respondent's statement shall respond directly to each allegation set forth in the complaint.

(c) The respondent shall not generally deny the allegations but shall set forth substantive reasons why the allegations are false or unfounded.

(d) Failure to respond to the complaint within the 20 day period from receipt of the complaint shall result in a notice to the respondent directing a response within 10 days of receipt.

(e) Further failure to respond shall result in a second notice which shall inform the respondent that unless an answer is received within 10 days of receipt of the second notice, each allegation in the complaint shall be deemed admitted and the Commission shall make a determination as to whether probable cause exists or the complaint should be dismissed.

6:3-9.18 Commission review

(a) Upon receipt of respondent's statement or the expiration of the time for filing such response, the Commission shall determine whether probable cause exists to credit the allegation in the complaint.

(b) In order to carry out the Commission's responsibilities under the Act to determine whether probable cause exists the Commission and/or its staff shall conduct investigations, hold hearings, compel the attendance of witnesses, and the production of documents and to examine such witnesses under oath.

(c) Prior to the Commission's determination of probable cause the respondent will be notified of his or her right to address the Commission, be represented by counsel and present witnesses on his/her behalf.

(d) Should the Commission find that probable cause does not exist, the Commission shall dismiss the complaint and so notify the complainant and the school official named in the complaint.

(e) Dismissal by the Commission shall constitute final agency action.

(f) Should the Commission determine that probable cause does exist, it shall refer the matter to the Office of Administrative Law for a hearing to be conducted in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. and shall so notify the complainant and the school official(s) named in the complaint.

6:3-9.19 Written decision

(a) Upon completion of the hearing before the OAL, the Commission shall determine by majority vote whether the conduct complained of constitutes a violation of the Act or whether the complaint should be dismissed. In rendering its decision the Commission shall be governed by the procedures and time constraints of the Administrative Procedure Act.

(b) The Commission's decision shall be in writing and it shall set forth its findings of fact and conclusions of law.

(c) If a violation is found, the Commission shall recommend to the Commissioner the reprimand, censure, suspension, or removal of the school official. The imposition of any of the foregoing sanctions shall require a vote of the majority of the full membership of the Commission.

1. The Commissioner's Resolution of Censure shall be adopted at the Commission's meeting next following the affirmance of the sanction by the Commissioner and shall be read at the next public meeting of the district board of education following its adoption by the Commission and posted in such places as the board posts its public notices.

(d) The Commissioner shall act upon the Commission's recommendation regarding the sanction.

(e) Any appeal of the Commission's determination regarding a violation of the Act or the Commissioner's decision regarding the sanction shall be to the State Board of Education in accordance with Title 18A of the New Jersey Statutes and the procedures set forth in N.J.A.C. 6:2.

ENVIRONMENTAL PROTECTION AND ENERGY

(a)

DIVISION OF FISH, GAME AND WILDLIFE FISH AND GAME COUNCIL

License, Permit and Stamp Fees

Proposed New Rule: N.J.A.C. 7:25-1.5

Authorized By: Fish and Game Council, Cole Gibbs, Chairman.

Authority: N.J.S.A. 13:1B-29 et seq., 23:3-1a, 23:3-1.1, 23:3-3, 23:3-4, 23:3-4.1, 23:3-4.11, 23:3-25, 23:3-27.1, 23:3-29, 23:3-56.1, 23:3-59, 23:3-61.3, 23:3-63 and 23:3-66.

DEPE Docket Number: 31-93-04.

Proposal Number: PRN 1993-288.

Submit written comments by June 16, 1993 to:

Robert Itchmoney, Assistant Director
Division of Fish, Game and Wildlife
Department of Environmental Protection and Energy
CN 400
Trenton, New Jersey 08625

The agency proposal follows:

Summary

In 1991, the Legislature amended the Fish and Game Code, N.J.S.A. 23:3-1a, and thereby authorized the Fish and Game Council ("Council") to promulgate regulations raising the base fee for hunting, fishing and trapping licenses, permits, certificates, tags and stamps by no more than 10 percent of the base fee on one occasion only, at such time as deemed appropriate by the Council. Having compared its budget for the fiscal year 1994 with the anticipated costs of administering its programs, the Council has determined that it must request a 10 percent increase in certain fees for the 1993-1994 hunting season in order to meet its future operating costs. The new base fees are to be published in a currently reserved section of the administrative code, N.J.A.C. 7:25-1.5. Fees for trapping licenses shall not be altered in light of the dramatic decrease in license sales over the last few years. Non-resident bow and arrow and firearm licenses will also not be increased in order to make the cost of these licenses approximately equal with those of neighboring states.

Social Impact

Numerous studies have shown that outdoor recreation, including both consumptive and nonconsumptive use of fish and wildlife resources, is very important to the quality of New Jersey residents' lives. Mandated by the Legislature to provide for the conservation, management and enhancement of the State's abundant fish and wildlife resources, the Division's programs described below ensure that the public continues to enjoy a variety of recreational activities which include not only hunting and fishing but birdwatching, wildlife photography and wildlife viewing. Additionally, the Division's Wildlife Management Area system provides over 200,000 acres of open land for activities such as hiking, horseback riding, boating and bicycling.

The proposed fee schedule will provide the monetary resources needed by the Division of Fish, Game and Wildlife to continue its programs at their current levels of effectiveness. Therefore, the adoption of the proposed amendments will result in a positive social impact by allowing for the continued optimal recreational use of New Jersey's fish and wildlife resources by the State's residents, the continued protection and maintenance of substantial open spaces and the continued law enforcement efforts resulting in cleaner New Jersey waters.

Past experience has shown that use of fish and wildlife resources cannot be allowed to occur haphazardly. Fish and wildlife populations must be closely monitored, scientifically managed and protected so that they are not irreparably damaged by human use. Fish and wildlife populations are monitored through research projects which collect harvest and condition information through species inventories, user surveys and mandatory check stations. Scientific management is achieved through promulgation of regulations, formulated after analysis of collected data and public input, which provide for a maximum of recreation without negatively impacting fish and wildlife populations. Protection occurs through vigorous enforcement of fish and wildlife regulations by Division law enforcement officers. These actions, taken together, ensure sustainable fish and wildlife populations.

Establishing and maintaining sustainable populations of fish and wildlife species requires a considerable, varied and well coordinated program of data collection and analysis, regulation development, information dispersal, education and law enforcement. Revenue from the requested fee increases will ensure that the Division continues the following programs:

Division fish hatcheries raise warm, cool and cold water fish. The fish are used for stocking in bodies of freshwater whose fish populations are depleted, for put and take fishing and for the introduction of new fish species to provide increased fishing recreation.

A freshwater fisheries research unit inventories freshwater fish populations in the State's freshwater, researches new species of fish for introduction into New Jersey's freshwater, determines equitable distribution of over 750,000 trout for New Jersey's put and take trout fishery, gathers broodstock for hatchery programs, recommends regulations that will conserve the State's freshwater fish, evaluates stocking efforts and monitors juvenile shad populations through seining studies.

A wildlife control unit provides assistance to farmers and the general public in controlling wildlife damage to crops and property by responding to over 4,000 complaints annually, removes nuisance animals such as raccoons, opossums, bear and beaver, issues permits to kill wild deer found damaging crops and provides fence and deer repellent to farmers who can document deer crop damage.

A wildlife research section collects and analyzes age, sex and condition data on animals harvested during New Jersey's hunting seasons, recommends hunting and trapping season lengths and bag limits which provide optimal use of wildlife while protecting wildlife populations. It also maintains a Statewide system of check stations for harvested deer, turkey, beaver and otter, surveys hunters annually to determine small game, furbearer and waterfowl hunting and trapping harvests, and estimates New Jersey's game animal populations. In addition it conducts waterfowl surveys through annual population counts and leg and neck banding studies, assists in Federal surveys of mourning doves and woodcock and raises approximately 50,000 pheasants and 15,000 quail for stocking on Wildlife Management Areas (WMA's) Statewide to enhance hunting opportunities.

A development and maintenance section maintains 75 WMA's, totaling over 200,000 acres of open land administered by the Division, by removing trash, grading roadways and parking lots, cutting timber to create openings important for wildlife and planting wildlife food patches. It also recommends new areas for acquisition to preserve open space, develops new water access sites for boaters, anglers and hunters and develops new visitor facilities. By way of maintenance it renovates Division offices and buildings and assists in the stocking of 750,000 trout, 50,000 pheasant and 15,000 quail each year.

A law enforcement element enforces New Jersey's fish and wildlife regulations through Statewide routine patrolling of New Jersey's land and water. This results in approximately 75,000 field inspections and 5,200 prosecutions annually. The element also conducts training in new enforcement methods and equipment for regular and volunteer deputy conservation officers and investigates all reported hunting accidents.

An information and education section disseminates information about fish and wildlife resources through the use of information booths at sportsmen's shows, distribution of over 1,000,000 pieces of literature annually, including the publication of the "Fish and Wildlife Digest." It also conducts seminars for outdoor writers and teachers, composes and distributes news releases, conducts an annual essay contest, hosts a Special Olympics fishing derby and operates the Pequest Natural Resource Education Center which receives over 30,000 visitors and 250 school groups annually.

A fish and wildlife health unit examines fish, birds and mammals to determine causes of death in fish and wildlife kills Statewide, diagnoses fish diseases at the Division fish hatcheries, provides the law enforcement element with expert witnesses for prosecutions and studies rabies control.

An environmental review unit provides Division advice concerning at least 1,000 development projects yearly to other permit issuing government agencies evaluating the projects' effect on fish and wildlife populations.

A permit section annually processes over 100,000 permit applications and issues over 90,000 permits which allow hunters to participate in the deer, turkey, beaver and otter hunting and trapping seasons.

An administrative unit plans future programs, coordinates the application for and allocation of Federal grants, coordinates the Division's extensive volunteer corps, operates the Division accounting and buying sections, prints over 500,000 licenses yearly and provides policy direction for the Division's programs.

All of the foregoing programs and services can only be maintained at their current levels as a result of the revenue derived from the increase in fees proposed herein.

It is also important to note that the Division monitors the commercial hunting and fishing businesses it licenses to ensure compliance with all fish and game rules, including those regarding use of captive-raised animals, bag limits, tag and permit requirements, in order to ensure that natural wild fish and/or wildlife populations are not adversely affected in any way as a result of activities by these licensed businesses.

Economic Impact

The proposed fee increases will have a positive economic impact on the programs managed by the Division by increasing funding to the Hunters and Anglers account which pays in whole or in part for the following programs administered by the Division: freshwater fisheries, fish hatcheries, wildlife control and research, maintenance and development of wildlife management areas, law enforcement, all of which are described more fully under the above Social Impact.

To maintain Division programs at their current levels of operation, a 10 percent increase in fees for hunting and fishing licenses, stamps and permits is necessary and justified. Without an increase in revenue from license, stamp and permit fees, the Division expects to incur a $277,701 budget deficit by the end of fiscal year 1994.

Approximately 70 percent of the Division's annual budget consists of salaries and benefits. These costs continue to increase due to merit and cost of living pay raises for personnel. These increases, which are not negotiated by the Division are, however, necessary to attract and hold the increasingly sophisticated work force needed to effectively conserve, manage and enhance fish and wildlife resource found in New Jersey's highly urbanized and fast developing environment. Additionally, it is more efficient to keep the Division's highly trained and effective personnel than to continually retrain new and inexperienced personnel.

Salaries of employees will increase by yearly merit increments as well as by a five percent cost of living increase which will go into effect October 1, 1993 as mandated by the current union contract. In addition, conservation officers will receive an additional two percent salary increase in January 1, 1994 and their clothing allowance will increase from $1135 to $1335 in fiscal year 1994. In fiscal year 1995, the clothing allowance will increase another $100.00 for conservation officers and from $500.00 to $550.00 for all eligible Division employees. Contracts also mandate another six percent cost of living increase for most Division employees and seven percent for conservation officers.

In addition to these increases, the Division has experienced increases in the costs of maintaining its fleet of vehicles, tractors and bulldozers needed for law enforcement patrols, fish and wildlife field studies and wildlife management area maintenance and improvements. Increased costs are also inevitable as old, inefficient equipment is replaced.

To meet these increased costs, the Fish and Game Council proposes to increase the base fee of most licenses, permits and stamps by 10 percent. Most hunting and fishing license, stamp and permit fees will be affected by these proposed changes. However, since the licensed population of trappers has decreased dramatically over the past several years and since the increased revenue from trapping licenses will not be significant, the Council does not propose to increase trapping license fees. Similarly, the Council will not increase license fees for nonresident bow and arrow and firearm licenses in order to bring the cost of these licenses into line with those of neighboring states.

License, permit and stamp fee increases will range from $.25 to $2.25 depending on a particular license, permit or stamp. For example, a deer permit currently costs $18.00 plus a $2.00 non-refundable application fee for a total of $20.00. The new fee will be $21.75 ($18.00 base fee plus $1.75 fee increase and $2.00 non-refundable application fee). The cost of the proposed fee increases will be insignificant to the individual hunter or angler yet, due to the volume of licenses, permits and stamps sold annually, will allow the Division to continue operation of existing programs and balance the Division's estimated fiscal year 1994 budget. Commercial businesses which permit hunting or fishing on private land for profit can easily absorb the 10 percent increase in license fees and have the option of passing the cost of the increase on to patrons, if the business chooses.

The Division's projected income to operate its programs for fiscal year 1994 is $14,389,252. This figure includes an estimated $11,660,000 from various license, permit and stamp sales, $1,400,000 from Federal grants and the $1,329,252 left in the Division's emergency contingency fund. The emergency contingency fund is reserved for the sole purpose of meeting unexpected budget increases such as State-mandated cost of

living raises, unexpected equipment repairs and clothing allowances which are not known when the annual budget is calculated and which are not negotiated by the Division itself. However, the Division's estimated budget for fiscal year 1994 is $14,666,953. These figures show that there will be a $277,701 deficit, under the existing fee schedule, by the end of fiscal year 1994. Additionally, without the proposed fee increases, the emergency contingency fund would be completely depleted by the end of fiscal year 1994.

It is estimated that the fee increases proposed here will generate $300,000 in income for the Division in fiscal year 1994. While this sum is $22,299 more than the expected $277,701 deficit, the expected additional income from these fee increases is an estimate only, and amounts to less than .2 percent of the Division's projected 1994 budget. If license sales decrease, as a result of these fee increases, at a greater rate than the Division expects, this overage would be entirely eliminated.

Environmental Impact

The proposed new rule will have a positive environmental impact by allowing Division programs, outlined above, to continue the effective conservation, management, protection and enhancement of New Jersey's fish and wildlife resources.

Through the continued full funding of various Division programs described above, deer populations will remain healthy and at levels compatible with their surrounding habitat; waterfowl, furbearer, turkey and small game populations will remain viable and self-sustaining; New Jersey waters will continue to support a variety of fish species; nuisance wildlife will be removed to the greatest extent possible thereby reducing human-animal conflicts and quality habitats and open space will be protected. Continued full funding of Division education efforts will help the public to appreciate the value of the natural resources in New Jersey. Additionally, revenue from increased fees will allow the Division to continue aggressive investigation of fish and wildlife kills and their causes, take necessary efforts to halt the spread of rabies and continue its review of development projects which may cause substantial harm to fish and wildlife populations.

Regulatory Flexibility Analysis

While the proposed new rule mainly affects individuals engaged in recreational hunting and fishing, this new rule also increases the cost of Commercial Hunting and Fishing Preserve licenses issued to businesses which allow hunting or fishing on privately owned land for profit. The proposed fee increase will impose no additional reporting, recordkeeping or other compliance requirements on these businesses as defined by the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., aside from the fee increases itself. As explained in the impact statements above, the fee increases are necessary in order to enable the Division of Fish, Game and Wildlife to continue its living resource management and research programs, and the Division considers it reasonable for those who benefit from such resources to share equally in cost of their maintenance as provided by these increased fees.

Full text of the proposed new rule follows:

7:25-1.5 License, permit and stamp fees

Pursuant to N.J.S.A. 23:3-1a, the fees for hunting and fishing licenses, permits and stamps issued by the Division of Fish, Game and Wildlife are as follows. The listed fees include, where applicable, a non-refundable $2.00 application fee as set by the Legislature in N.J.S.A. 23:3-1c and an issuance fee of $.50 as set by the Legislature in N.J.S.A. 23:3-1.1, 23:3-4 and 23:3-4.1.

Resident Fishing	$16.50
Jr/Sr Fishing	7.75
Family Fishing	27.50
Family Supplement	2.25
Non-Resident Fishing	25.25
Non-Resident 7-Day Fishing	16.50
Resident Trout Stamp	7.75
Non-Resident Trout Stamp	15.50
Resident Hunting	22.00
Jr/Sr Hunting	10.75
Juvenile Hunting	3.00
Non-Resident 2-Day Hunting	27.50
1 Day Hunting	7.75
Resident Bow and Arrow	26.25
Jr/Sr Bow and Arrow	12.00
Juvenile Bow and Arrow	3.00
All Around Sportsman	60.50
Pheasant/Quail Stamp	22.00
Woodcock Stamp	2.75
Rifle Permit	14.00
Deer Permit	21.75
Turkey Permit	16.25
Semi-Wild	57.00
Commercial Hunt	222.00
Propagation	7.50
Fish Preserve	167.00

(a)

DIVISION OF FISH, GAME AND WILDLIFE FISH AND GAME COUNCIL

1993-94 Game Code

Proposed Amendments: N.J.A.C. 7:25-5

Authorized By: Fish and Game Council, Cole Gibbs, Chairman.
Authority: N.J.S.A. 13:1B-29 et seq.
DEPE Docket Number: 32-93-04.
Proposal Number: PRN 1993-289.

A **public hearing** concerning these proposed amendments will be held on:

Tuesday, June 8, 1993 at 8:00 P.M.
Mercer County Community College
West Windsor Campus
1200 Old Trenton Road
Administration Building Conference Room A
West Windsor, New Jersey

Submit written comments by June 16, 1993 to:

Robert McDowell, Director
Division of Fish, Game and Wildlife
Department of Environmental Protection and Energy
CN 400
Trenton, New Jersey 08625

The agency proposal follows:

Summary

The proposed 1993-94 Game Code, N.J.A.C. 7:25-5, states when, under what circumstances, in what location, by what means, and in what amounts and numbers, birds, game animals and fur-bearing animals may be pursued, taken, killed or possessed.

Since the turn of the century, the Game Code has provided a system for the protection, propagation, increase, control and conservation of game birds, game animals, and fur-bearing animals in this State and for their use and development for public recreation and food supply. Yearly revisions based on scientific investigation and research ensure the greatest likelihood of success in reaching these goals.

The proposed amendments include the following revisions:

1. A "New Jersey Second Deer Permit and Transportation Tag" is defined in the rule as the paper deer permit and transportation tag issued by mandatory deer check stations after registration of deer taken on a regular license or special season permit. This definition is added for clarification purposes (N.J.A.C. 7:25-5.1).

2. A "New Jersey Bonus Deer Permit and Transportation Tag" is defined in the rule as the paper deer permit and transportation tag issued by mandatory deer check stations after registration of an antlerless deer taken pursuant to N.J.A.C. 7:25-5.25(b)1. This definition is added for clarification purposes (N.J.A.C. 7:25-5.1).

3. Most hunting season dates are adjusted to correspond with the 1993-94 calendar which takes into account both anticipated differences in hunting activities according to the day of the week, and the effects of the regulatory activities of neighboring states. Small game seasons have been adjusted to correspond to changes in the deer hunting seasons, generally with no change in the overall length of the small game season (N.J.A.C. 7:25-5.2, 5.3, 5.4, 5.5, 5.7, 5.15, 5.17 and 5.18).

4. Artificial decoys are allowed for use in hunting wild turkeys. Of the 43 states which presently permit the use of artificial decoys, none report any significant effects on hunter success or safety. This change will not adversely impact wild turkey populations (N.J.A.C. 7:25-5.7).

5. Turkey permit quotas for 10 areas are adjusted to provide for a total increase of 1,700 permits. Occupied turkey habitat and turkey

populations have expanded enough to allow for an increased harvest without detriment to the population (N.J.A.C. 7:25-5.7).

6. Turkey hunting Area 13 has been eliminated and incorporated into existing Areas 14 and 16. The assessment of wild turkeys released into Area 13 is complete and there is no longer any need to maintain separate areas. This change will facilitate administration of the program and provide hunters in the Pine Barrens more flexibility in locating birds and finding suitable places to hunt (N.J.A.C. 7:25-5.7).

7. The season limit for site specific beaver permits is increased from three to five beaver per permit in order to further address complaint colonies or sites (N.J.A.C. 7:25-5.9).

8. The beaver and otter trapping season is January 16 to February 12, 1994 inclusive. This change will provide a two week earlier season which will help eliminate loss of quality in beaver and otter pelts. Ensuring pelt primeness will maximize the value of the harvested resource (N.J.A.C. 7:25-5.9 and 5.10).

9. A special September Canada goose hunting permit is required to hunt Canada geese if the appropriate prescribed seasons is established by Federal regulations. The permit is valid only in the designated hunting area. This change will provide for an increased harvest of resident Canada geese in much of the State (N.J.A.C. 7:25-5.13).

10. The number of days permitted for hunting squirrels with muzzleloading rifles has been increased to include the first 35 days of the squirrel season (October 9 to November 12). This change will expand the opportunity for hunters to use muzzleloading rifles in pursuit of the gray squirrel which continues to be an underutilized game species in New Jersey (N.J.A.C. 7:25-5.23).

11. The firearms and missiles section regarding smoothbore muzzleloaders will be changed to clarify the rule. Single barrel smoothbore muzzleloaders which fire a single projectile will continue to be authorized for use during the permit muzzleloader season. Double barrel smoothbores and single barrel smoothbore muzzleloaders will be authorized for use during the six day firearm and permit shotgun seasons with either single projectiles or buckshot. It was not the intent of this regulation to prohibit hunters from using smoothbore, double barrel, muzzleloading shotguns during the six day firearm or permit shotgun seasons (N.J.A.C. 7:25-5.23).

12. Doctors of Optometry, licensed to practice in New Jersey, are included for the purpose of disability certification for Special Muzzleloader Rifle Scope Permits. State regulations prohibit limiting certification to Doctors of Ophthalmology (N.J.A.C. 7:25-5.23).

13. Non-magnifying scopes are added to the rifle scopes permitted under a special Muzzleloader Rifle Scope Permit for the purpose of clarifying the rule (N.J.A.C. 7:25-5.23).

14. The fall bow season, bag limit in deer management Zones 7, 8, 9, 10, 11, 12, 13, 39, 40, and 41 is changed to provide one additional deer to any properly licensed hunter who harvests an antlerless deer first in these zones, exclusively. A "New Jersey Bonus Deer Permit and Transportation Tag" will be issued in addition to a "New Jersey Second Deer Permit and Transportation Tag" by designated deer checking stations after registration of an antlerless deer. The "New Jersey Bonus Deer Permit and Transportation Tag" can only be used in Zones 7, 8, 9, 10, 11, 12, 13, 39, 40 and 41. A deer of either sex and any age may be taken pursuant to this rule except from October 2 through October 8 in Zones 7, 8, 10, 11, 12 and 41, when only antlerless deer may be taken. The requirement that only antlerless deer may be taken during the first six days of the fall bow season, October 2 through 8, 1993, in Zones 7, 8, 10, 11, 12 and 41 is retained. This change will provide for increased recreational opportunity and the increased harvest of antlerless deer in these management zones in order to maintain the deer population at a level compatible with the available habitat, land use and human population (N.J.A.C. 7:25-5.25).

15. The fall bow season, bag limit in Zone 55 is changed to antlered bucks only during the first three weeks of the season (October 2 through 22, 1993). This change will provide for a more equitable distribution of the antlerless harvest among all either-sex deer seasons (N.J.A.C. 7:25-5.25).

16. The six day firearm season bag limit rule will be changed to indicate that "No person shall take, attempt to take, hunt or attempt to hunt, kill or attempt to kill, shoot at or attempt to shoot at, **in any one day or** in any one year more than the number of deer permitted by the Code." **"In any one day or"** was added for clarification purposes (N.J.A.C. 7:25-5.27).

17. The permit muzzleloader season length in Zone 4 is increased from eight days to 14 days for the purpose of increasing recreational opportunity (N.J.A.C. 7:25-5.28).

18. Permit bow, permit muzzleloader and permit shotgun seasons quotas, bag limits and season lengths are adjusted according to harvest objectives to yield a Statewide net increase in the anticipated antlerless deer harvest for the purpose of maintaining the deer population at a level compatible with the available habitat, land use and the human population (N.J.A.C. 7:25-5.28, 5.29 and 5.30).

19. Deer management zone boundary descriptions are updated for clarification purposes to reflect current road numbers and names and other changes in boundary identifiers, however there are no changes in the actual or physical boundaries (N.J.A.C. 7:25-5.29).

20. A one day, permit shotgun season is authorized for deer management Zone 43 for the purpose of achieving the antlerless deer harvest objective (N.J.A.C. 7:25-5.29).

21. The duration of the permit shotgun season is increased as follows: from one day to three days in Zones 22, 26, 30, 34 and 46; from three days to seven days in Zones 28, 29 and 35; from six days to seven days in Zones 2, 5, 7, 8, 10, 11, 12, 14, 15, 17, 25, 27, 36, 41, 47, 48, 49, 50 and 63; and from eight to nine days in Zones 9 and 13 for the purpose of achieving antlerless deer harvest objectives designed to maintain the deer population at a level compatible with the available habitat, land use and the human population (N.J.A.C. 7:25-5.29).

22. The bag limit of the permit shotgun season is increased as follows: from one deer of either sex and any age to two deer of either sex and any age in Zones 22, 26, 30, 34 and 46; and, from two deer of either sex and any age to three deer of either sex and any age in Zones 9, 10, 11, 12, 13, 36, 41, 47, 49, 50 and 63 for the purpose of achieving antlerless deer harvest objectives designed to maintain deer populations at a level compatible with the available habitat, land use and the human population (N.J.A.C. 7:25-5.29).

The remaining changes have been made for clarification and correction of typographical errors.

Social Impact

Adjustments in the dates of small game seasons in order to account for 1993 calendar changes are minor with no social impact anticipated.

The increase in the number of days available for deer hunting in some areas and the additional permits available for turkey hunting should have significant positive impact on increasing hunting opportunity. Adjustments that have been made to deer hunting quotas, season lengths, and bag limits should benefit all segments of the public in providing for healthier deer populations, long-term enhanced recreational hunting opportunities, and deer population levels compatible with other land uses.

The positive social impact ancitipated includes the conservation, management, and the enhancement of the wildlife resource for continued recreational opportunities.

Economic Impact

There may be a small, short-term positive economic impact on local retailers serving the hunting population as a result of increases in hunting seasons, permit quotas, and special permit seasons. Also, these amendments to the Game Code should further the conservation and enhancement of the wildlife resource upon which a significant recreation and commercial industry is dependent and, therefore, occasion a long-term economic boon.

Environmental Impact

The proposed amendments should have a positive environmental impact in continuing the conservation, management and enhancement of the State's wildlife resources based on their current population, distribution and habitat status.

Regulatory Flexibility Analysis

The proposed 1993-94 Game Code imposes reporting and compliance requirements on sportsmen engaged in recreational hunting. These requirements are not, therefore, imposed upon small businesses, as the term is defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq.

However, the Game Code also regulates the activity of trappers, who may engage in such activity for their economic benefit. Such trappers may be considered small businesses. The proposed amendments to trapping rules N.J.A.C. 7:25-5.8 through 5.11 impose no additional reporting, recordkeeping or compliance requirements. The 1992-93 season dates are revised for the 1993-94 season, the beaver and otter trapping season will be two weeks earlier and the season limit for site specific beaver permits is increased from three to five beaver per permit. These revisions

should result in no increased capital cost to trappers, and cause no need for professional services to be engaged, in order to comply.

As there is no increased regulatory burden on trappers due to the proposed amendments, and given the Council's objective to both protect game resources and foster recreational opportunities related to game, no differentiation in requirements to exemption related to business size are provided.

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

SUBCHAPTER 5. [1992-93]**1993-94** GAME CODE

7:25-5.1 General provisions

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

(c) This Code, when adopted and when effective, shall supersede the provisions of [1991-92] **1992-93** Game Code.

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

1.-5. (No change.)

6. "New Jersey Second Deer Permit and Transportation Tag" means the paper deer permit and transportation tag issued by mandatory deer check stations after registration of a deer taken on a regular license or special season permit. The "New Jersey Second Deer Permit and Transportation Tag" will allow the hunter to continue hunting and take one additional deer subject to applicable sections of this Code. The transportation tag portion is completed and affixed to a deer immediately upon killing by the hunter.

7. "New Jersey Bonus Deer Permit and Transportation Tag" means the paper deer permit and transportation tag issued by mandatory deer check stations after registration of an antlerless deer taken pursuant to N.J.A.C. 7:25-5.25(b)1. The "New Jersey Bonus Deer Permit and Transportation Tag" will allow the hunter to continue hunting and take one additional deer subject to applicable provisions of N.J.A.C. 7:25-5.25(b)1. It is not valid on the day of issuance. The transportation tag portion is completed and affixed to a deer immediately upon killing by the hunter.

(e) (No change.)

7:25-5.2 Pheasant—Chinese ringneck (Phasianus colchicus torguatus), English or blackneck (P. c. colchicus), Mongolian (P. mongolicus), Japanese green (Phasianus versicolor); including mutants and crosses of above

(a) The duration for the male pheasant season is November [7] **13**, to December [5, 1992] **4, 1993** inclusive, and December [14, 1992] **13, 1993** through January [2, 1993] **8, 1994** excluding December [16, 17, and 18, 1992] **15, 16 and 17, 1993** in those deer management zones in which a shotgun permit deer season is authorized and also excluding any extra permit deer season day(s) if declared open.

(b) The duration for the male pheasant season for properly licensed persons engaged in falconry is September 1 to December [5, 1992] **4, 1993** and December [14, 1992] **13, 1993** through March 31, [1993] **1994**, excluding November [5, 1992] **12, 1993** and December [16, 17 and 18, 1992] **15, 16 and 17, 1993** and January [15, 16 and 23, 1993] **14, 15, 21 and 22, 1994** in those management zones in which a shotgun deer permit season is authorized and also excluding any extra permit deer season day(s) if declared open.

(c) (No change.)

(d) The duration of the season for pheasants of either sex in the area described as Warren County north of Route 80, Morris County north of Route 80, Ocean County south of Route 70 and the counties of Sussex, Passaic, Bergen, Hudson, Essex, Camden, Atlantic and Cape May and on all wildlife management areas is November [7] **13** to December [5, 1992] **4, 1993** inclusive, and December [14, 1992] **13, 1993** through February [15, 1993] **14, 1994**, excluding December [16, 17 and 18, 1992] **15, 16 and 17, 1993** and January [15, 16 and 23, 1993] **14, 15, 21 and 22, 1994** in those deer management zones in which a shotgun permit deer season is authorized and also excluding any extra permit deer season day(s) if declared open.

(e) The hours for hunting pheasants on November [7, 1992] **13, 1993** are 8:00 A.M. to ½ hour after sunset. All other days on which the hunting for pheasants is legal, the hours are sunrise to ½ hour after sunset.

(f) (No change.)

(g) The season for properly licensed semi-wild preserves is November [7, 1992] **13, 1993** to March 15, [1993] **1994** inclusive.

(h) (No change.)

7:25-5.3 Cottontail rabbit (Sylvilagus floridanus), black-tailed jack rabbit (Lepus californicus), white-tailed jack rabbit (Lepus townsendii), European hare (Lepus europeus), chukar partridge (Alectoris graeca), and quail (Colinus virginianus)

(a) The duration of the season for the hunting of cottontail rabbit, black-tailed jack rabbit, white-tailed jack rabbit, European hare, chukar partridge and quail is November [7] **13** through December [5, 1992] **4, 1993**, inclusive, and December [14, 1992] **13, 1993** to February [15, 1993] **14, 1994**, excluding December [16, 17 and 18, 1992] **15, 16 and 17, 1993** and January [15, 16 and 23, 1993] **14, 15, 21, and 22, 1994** in those deer management zones in which a shotgun permit deer season is authorized and also excluding any extra permit deer season day(s) if declared open.

(b) The duration of the season for the hunting of the animals enumerated by (a) above for properly licensed persons engaged in falconry is September 1 to December [5, 1992] **4, 1993**, inclusive, and December [14, 1992] **13, 1993** through March [31, 1993] **1994**, excluding November [6] **12** and December [16, 17 and 18, 1992] **15, 16 and 17, 1993** and January [15, 16 and 23, 1993] **14, 15, 21 and 22, 1994** in those deer management zones in which a shotgun permit deer season is authorized and also excluding any extra permit deer season day(s) if declared open.

(c) (No change.)

(d) The hunting hours for the animals enumerated in this section are as follows: November [7, 1992] **13, 1993**, 8:00 A.M. to ½ hour after sunset. On all other days for which hunting for these animals is legal, the hours are sunrise to ½ hour after sunset.

(e) The quail and chukar partridge season for properly licensed semi-wild preserves is November [7, 1992] **13, 1993** to March 15, [1993] **1994** inclusive.

(f) (No change.)

7:25-5.4 Ruffed grouse (Bonasa umbellus)

(a) The duration of the season for the hunting of grouse is October [10] **9** through December [5, 1992] **4, 1993**, inclusive, and December [14, 1992] **13, 1993** to February [15, 1993] **14, 1994**, excluding December [16, 17 and 18, 1992] **15, 16 and 17, 1993** and January [15, 16 and 23, 1993] **14, 15, 21 and 22, 1994** in those deer management zones in which a shotgun permit deer season is authorized and excluding any extra deer permit season day(s) that is declared open.

(b) (No change.)

(c) The hunting hours for ruffed grouse are sunrise to ½ hour after sunset, with the exception of November [7, 1992] **13, 1993** when legal hunting hours are 8:00 A.M. to ½ hour after sunset.

(d) (No change.)

7:25-5.5 Eastern gray squirrel (Sciuris carolinensis)

(a) The duration of the season for the hunting of squirrels is October [10] **9** through December [5, 1992] **4, 1993**, inclusive, and December [14, 1992] **13, 1993** to February [15, 1993] **14, 1994**, excluding December [16, 17 and 18, 1992] **15, 16 and 17, 1993** and January [15, 16 and 23, 1993] **14, 15, 21 and 22, 1994** in those deer management zones in which a shotgun permit deer season is authorized and also excluding any extra permit season day(s) if declared open.

(b) The duration of the season for the hunting of squirrels for properly licensed persons engaged in falconry is September 1 to December [5, 1992] **14, 1993**, inclusive, and December [14, 1992] **13, 1993** through March 31, [1993] **1994**, excluding December [16, 17 and 18, 1992] **15, 16 and 17, 1993** and January [15, 16 and 23, 1993] **14, 15, 21 and 22, 1994** in those deer management zones in which a shotgun permit deer season is authorized and also excluding any extra permit deer season day(s) if declared open.

(c) (No change.)

(d) Hunting hours for squirrels are sunrise to ½ hour after sunset, with the exception of November [7, 1992] **13, 1993** when legal hunting hours are 8:00 A.M. to ½ hour after sunset.

(e) (No change.)

7:25-5.7 Wild turkey (Meleagris gallapavo)

(a) The duration of the Spring Wild Turkey Gobbler hunting season includes five separate hunting periods of four, five or 10 days each. The hunting periods for all hunting areas shall be:

1. Monday, April [26, 1993] **25, 1994**—Friday, April [30, 1993] **29, 1994**

2. Monday, May [3, 1993] **2, 1994**—Friday, May [7, 1993] **6, 1994**

3. Monday, May [10, 1993] **9, 1994**—Friday, May [14, 1993] **13, 1994**

4. Monday, May [17, 1993] **16, 1994**—Friday, May [21, 1993] and **20, 1994**; Monday, May [24, 1993] **23, 1994**—Friday, May [28, 1993] **27, 1994**

5. Saturday, [May 1, 1993] **April 30, 1994**; Saturday, May [8, 1993] **7, 1994**; Saturday, May [15, 1993] **14, 1994** and Saturday, May [22, 1993] **21, 1994**

(b)-(d) (No change.)

(e) Hunting methods shall be restricted to calling or stand-hunting. No person shall stalk or attempt to approach a wild turkey for the purpose of taking or attempting to take the bird. All persons must have a turkey calling device in their possession while turkey hunting. No person shall use an electronic calling device at any time during the open season. Persons may not drive or chase wild turkeys for the purpose of putting them in range of hunters. The use of dogs is prohibited. No[,] **live** decoys[, live or artificial,] may be used. Fluorescent hunters orange is not required on outer clothing for turkey hunting. No shot size larger than number four fine shot or smaller than number seven and one-half fine shot may be used for turkey hunting. No shotgun larger than 10 gauge or smaller than 20 gauge may be used for turkey hunting. A person shall not have in possession or control, a firearm or other weapon within 300 feet of a baited area. A baited area is defined as the collection, deposit, concentration or unnatural gathering of feed including, but not limited to, corn, wheat, oats or other substance that may constitute a lure or enticement to turkeys.

(f)-(g) (No change.)

(h) Wild Turkey Hunting Permits shall be applied for as follows:

1.-2. (No change.)

3. The application form shall be filled in to include: Name, address, [1993] **1994** firearm or archery hunting license number, turkey hunting areas applied for, hunting periods applied for, and any other information requested. Only those applications will be accepted for participation in random selection which are received in the Trenton office during the period of February 1-15, [1993] **1994**, inclusive. Applications received after February 15 will not be considered for the initial drawing. Selection of permits will be by random drawing.

i. If a fall turkey hunting season is authorized for [1993] **1994**, application shall be made in conjunction with the spring season application procedures in a form as prescribed by the Division.

4.-6. (No change.)

(i) Special Farmer Spring Turkey Permits shall be applied for as follows:

1.-2. (No change.)

3. The application form shall be filled in to include: Name, age, address and any other information requested thereon. THIS APPLICATION MUST BE NOTARIZED. Properly completed application forms will be accepted in the Trenton office only during the period of February 1-15, [1993] **1994**. There is no fee required and all qualified applicants will receive a Special Farmer Spring Turkey Permit delivered by mail.

4. (No change.)

(j) (No change.)

(k) Turkey Hunting Area Map is on file at the Office of Administrative Law and is available from that agency or the Division. The [1993] **1994** Spring Turkey Hunting Season Permit Quotas are as follows:

[1993] **1994** SPRING TURKEY HUNTING SEASON PERMIT QUOTAS

Turkey Hunting Area Number	Weekly Permit Quota*	Season Total	Portions of Counties Involved
1	[100]**120**	[500]**600**	Sussex
2	[120]**140**	[600]**700**	Sussex, Warren
3	80	400	Sussex, Warren
4	120	600	Sussex, Warren Morris
5	[100]**120**	[500]**600**	Sussex
6	[150]**200**	[750]**1,000**	Sussex, Passaic, Bergen
7	[150]**200**	[750]**1,000**	Sussex, Morris, Passaic
8	[70]**120**	[350]**600**	Warren, Hunterdon
9	[75] **80**	[375]**400**	Warren, Hunterdon, Morris
10	[30] **60**	[150]**300**	Essex, Middlesex, Morris, Somerset, Union
11	[50] **80**	[250]**400**	Middlesex, Mercer, Hunterdon, Somerset
[13]	[15]	[75]	[Burlington, Ocean]
14	[60] **70**	[300]**350**	Burlington, Ocean, Mercer, Monmouth
15	55	275	Burlington, Camden, Atlantic
16	[60] **70**	[300]**350**	Burlington, Atlantic, Ocean, Cape May, Cumberland
20	[70]**130**	[350]**650**	Cumberland, Salem
21	50	250	Atlantic, Cumberland, Salem
22	0	0	Atlantic, Cape May, Cumberland
Total	[1,355]**1,695**	[6,775]**8,475**	

*Applied to each of the five hunting periods (A, B, C, D, E) in all areas:

A. Monday, April [26, 1993] **25, 1994**—Friday, April [30, 1993] **29, 1994**

B. Monday, May [3, 1993] **2, 1994**—Friday, May [7, 1993] **6, 1994**

C. Monday, May [10, 1993] **9, 1994**—Friday, May [14, 1993] **13, 1994**

D. Monday, May [17, 1993] **16, 1994**—Friday, May [21, 1993] and **20, 1994**
Monday, May [24, 1993] **23, 1994**—Friday, May [28, 1993] **27, 1994**

E. Saturday, May [1, 1993] **April 30, 1994**; Saturday, May [9, 1993] **7, 1994**; Saturday, May [15, 1993] **14, 1994** and Saturday, May [22, 1993] **21, 1994**

(l) (No change.)
(m) Turkey Hunting Areas are as follows:
1.-11. (No change.)
[12. Turkey Hunting Area No. 13: That portion of Burlington and Ocean Counties lying within a continuous line beginning at the intersection of the Garden State Parkway and Route 37; then east along Route 37 to the Atlantic Ocean at Seaside Heights; then south along the Atlantic Ocean to Little Egg Inlet; then west along the north shore of Great Bay and the Mullica River to the Garden State Parkway to the point of beginning.]
[13.]**12.** Turkey Hunting Area No. 14: That portion of Burlington, Mercer, Monmouth and Ocean Counties lying within a continuous line beginning at the intersection of Route 1 and the Delaware River; then east along Route 1 to its intersection with Route 206; then south along Route 206 to its intersection with Route 524; then east along Route 524 to its intersection with Route 195; then east along Route 195 to its intersection with [Route 34; then south along Route 34 to its intersection with the Garden State Parkway; then south along the Garden State Parkway to its intersection with Route 72] **Route 38; then east along Route 38 to Belmar and the Atlantic Ocean; then south along the Atlantic Ocean to Ship Bottom**; then north and west along Route 72 to its intersection with Route 70; then west along Route 70 to its intersection with Route 38 at Cherry Hill; then west along Route 38 to its intersection with Route 30; then west along Route 30 to the Delaware River; then north along the east bank of the Delaware River to the point of beginning.
[14.]**13.** (No change in text.)
[15.]**14.** Turkey Hunting Area No. 16: That portion of Burlington and Atlantic Counties lying within a continuous line beginning at the intersection of Routes 206 and 70 at Red Lion; then east along Route 70 to its intersection with Route 72; then southeast along Route 72 to [its intersection with the Garden State Parkway; then south along the Garden State Parkway to its intersection with the Mullica River; then east along the south bank of the Mullica River to Great Bay; then east along the south shore of Great Bay to the Atlantic Ocean] **Ship Bottom and the Atlantic Ocean**; then south along the Atlantic Ocean to Sea Isle Boulevard (Route 625) in Sea Isle City; then west along Sea Isle Boulevard to its intersection with Route 9; then north along Route 9 to its intersection with Route 50; then north along Route 50 to its intersection with Route 557; then north and west along Route 557 to its intersection with Route 40; then west along Route 40 to its intersection with Route 54; then north along Route 54 to its intersection with Route 206; then north along Route 206 to the point of beginning.
Recodify existing 16.-18. as **15.-17.** (No change in text.)

7:25-5.8 Mink (Mustela vison), muskrat (Ondatra zibethicus) and nutria (Myocaster coypus) trapping only
(a) (No change.)
(b) The duration of the mink, muskrat and nutria trapping season is as follows:
1. Northern Zone: 6:00 A.M. on November 15, [1992] **1993** through March 15, [1993] **1994**, inclusive, except on State Fish and Wildlife Management Areas.
2. Southern Zone: 6:00 A.M. on December 1, [1992] **1993** through March 15, [1993] **1994**, inclusive, except on State Fish and Wildlife Management Areas.
3. (No change.)
4. On State Fish and Wildlife Management Areas: 6:00 A.M. on January 1 through March 15, [1993] **1994**, inclusive.
(c)-(e) (No change.)

7:25-5.9 Beaver (Castor canadensis) trapping
(a) (No change.)
(b) The duration of the trapping season for beaver shall be [February 1] **January 16** through February [28, 1993] **12, 1994**, inclusive.
(c) Special Permit: A special permit obtained from the Division of Fish, Game and Wildlife shall be required to trap beaver. (If the number of applications received in the Trenton office exceeds the quotas listed, a random drawing will be held to determine permit holders.) Applications shall be received in the Trenton office during the period [December 1, 1992] **November 15, 1993**—December [26, 1992] **15, 1993**. Applicants may apply for only one beaver trapping permit and shall provide their [1992] **1993** trapping license number. Permits will be alloted on a zone basis as follows: Zone 1—8, Zone 2—7, Zone 3—2, Zone 4—4, Zone 5—3, Zone 6—16, Zone 7—3, Zone 8—1, Zone 9—3, Zone 10—5, Zone 11—3, Zone 12—3, Zone 13—0, Zone 14—1, Zone 15—0, Zone 16—3, Zone 17—3, Zone 18—2. Total 67. Successful applicants must trap with a valid, current trapping license.
(d) (No change.)
(e) The season limit for beaver trapping is three beaver per **special** permit **and five beaver per special site specific permit.**
(f) A "beaver transportation tag" provided by the Division shall be affixed to each beaver taken immediately upon removal from trap, and all beaver shall be taken to a designated beaver checking station at the times and dates specified on the beaver permit and, in any case, no later than [March 6, 1993] **February 19, 1994**.
(g)-(i) (No change.)

7:25-5.10 River otter (Lutra canandensis) trapping
(a) (No change.)
(b) The duration of the trapping season for otter shall be [February 1] **January 16** through February [28, 1993] **12, 1994**, inclusive.
(c) Special Permit: A special permit obtained from the Division of Fish, Game and Wildlife shall be required to trap otter. (If the number of applications received in the Trenton office exceeds the quotas listed, a random drawing will be held to determine permit holders). Beaver permit holders will be given first opportunity for otter permits in their respective zones. Applications shall be received in the Trenton office during the period [December 1, 1992] **November 15, 1993**—December [26, 1992] **15, 1993**. Only one application per person may be submitted for trapping otter and applicants shall provide their [1992] **1993** trapping license number. Permits will be allotted on a zone basis as follows: Zone 1—7, Zone 2—7, Zone 3—2, Zone 4—3, Zone 5—2, Zone 6—9, Zone 7—3, Zone 8—6, Zone 9—3, Zone 10—4, Zone 11—5, Zone 12—2, Zone 13—14, Zone 14—7, Zone 15—12, Zone 16—4, Zone 17—2, Zone 18—5. Total 97. Successful applicants must trap with a valid, current trapping license.
(d) (No change.)
(e) The "otter transportation tag" provided by the Division must be affixed to each otter taken immediately upon removal from the trap. All otter pelts and carcasses shall be taken to a beaver-otter check station at dates specified on the otter permit and, in any case, no later than [March 6, 1993] **February 19, 1994**, where a pelt tag will be affixed and the carcass surrendered.
(f)-(i) (No change.)

7:25-5.11 Raccoon (Procyon lotor), red fox (Vulpes vulpes), gray fox (Urocyon cinereoargenteus), Virginia opossum (Didelphis virginiana), striped skunk (Mephitis mephitis), long-tailed weasel (Mustela frenata), short-tailed weasel (Mustela erminea), and coyote (Canis latrans) trapping only.
(a) (No change.)
(b) The duration of the regular raccoon, red fox, gray fox, Virginia opossum, striped skunk, long-tailed weasel, short-tailed weasel and coyote trapping season is 6:00 A.M. on November 15, [1992] **1993** to March 15, [1993] **1994**, inclusive, except on State Fish and Wildlife Management Areas.
(c) The duration for trapping on State Fish and Wildlife Management Areas is 6:00 A.M. on January 1, [1993] **1994** to March 15, [1993] **1994**, inclusive.
(d)-(h) (No change.)

7:25-5.13 Migratory birds
(a) Should any open season on migratory game birds including waterfowl, be set by Federal regulation which would include the date of November [7, 1992] **13, 1993**, the starting time on such date will be 8:00 A.M. to coincide with the opening of the small game season on that date. However, this shall not preclude the hunting of migratory game birds, including waterfowl, on the tidal marshes of the

State as regularly prescribed throughout the season by Federal regulations.

(b) (No change.)

(c) A person shall not take, attempt to take, hunt for or have in possession, any migratory game birds including waterfowl, except at the time and in the manner prescribed in the Code of Federal Regulations by the U.S. Department of the Interior, U.S. Fish and Wildlife Service, for the [1992-93] **1993-94** hunting season. The species of migratory game birds, including waterfowl, that may be taken or possessed and unless otherwise provided the daily bag limits shall be the same as those prescribed by the U.S. Department of the Interior, U.S. Fish and Wildlife Service for the [1992-1993] **1993-94** hunting season.

(d)-(g) (No change.)

(h) Hunting hours for waterfowl shall be those hours that are prescribed by the Department of the Interior, United States Fish and Wildlife Service for the [1992-93] **1993-94** hunting season.

(i) A special canvasback permit shall be required to hunt canvasback ducks, and a special swan permit shall be required to hunt swans, if the appropriate prescribed special season is established by Federal regulations. If a special season for canvasback ducks is established by Federal regulations, the special canvasback hunting area shall be that portion of the State south of Routes 287 and 440 (Perth Amboy), east of the Garden State Parkway and north of Route 36 (Long Branch) and that portion of the State south of Route 88 (Bay Head), east of the Garden State Parkway and north of Route 72 (Ship Bottom). If a special season for swan is established by Federal regulations, the special swan hunting area shall be the counties of Burlington, Cumberland and Salem. **A special September Canada goose hunting season permit shall be required to hunt Canada geese, if the appropriate prescribed special season is established by Federal regulations. If a special September Canada goose hunting season is established by Federal regulations, the special September Canada goose hunting area shall be that portion of the State within a continuous line that runs east along the New York State boundary line to the Hudson River; then south along the New York State boundary to its intersection with Route 440 at Perth Amboy; then west on Route 440 to its intersection with the Garden State Parkway; then south on the Parkway to its intersection with Route 70; then west on Route 70 to its intersection with Route 206; then south on Route 206 to its intersection with Route 54; then south on Route 54 to its intersection with Route 40; then west on Route 40 to its intersection with the New Jersey Turnpike; then south on the Turnpike to the Delaware State boundary line; then north on the Delaware State boundary to its intersection with the Pennsylvania State boundary; then north on the Pennsylvania boundary in the Delaware River to its intersection with the New York State boundary.**

(j)-(l) (No change.)

(m) A person shall not take or attempt to take migratory game birds:

1.-10. (No change.)

11. Before 8:00 A.M. on November [9, 1992] **13, 1993**. However this shall not preclude the hunting of migratory game birds on tidal waters or tidal marshes of the State.

12.-13. (No change.)

14. Except at the time and manner prescribed by the State or Federal regulation, or by the [1992-93] **1993-94** Game Code.

15.-19. (No change.)

(n) Seasons and bag limits are as follows:

1. Mourning dove (Zenaida macroura) are protected. There will be no open season on these birds during [1992-93] **1993-94**.

2. Rail and gallinule season and bag limits are as follows:

i. The duration of the season for hunting clapper rail (Rallus longirostris), Virginia rail (Rallus limicola), sora rail (Porzana carolina) and common gallinule or moorhen (Gallinula chloropus) is September 1 through November 9, [1992] **1993** inclusive.

ii. (No change.)

(o) Woodcock zones and hunting hours are as follows:

1.-2. (No change.)

3. Hunting hours for Woodcock are sunrise to sunset except on November [7] **13**, when the hunting hours are 8:00 A.M. to sunset.

(p)-(s) (No change.)

7:25-5.15 Crow (Corvus spp.)

(a) Duration for the season for hunting the crow shall be Monday, Thursday, Friday and Saturday from August [10, 1992] **9, 1993** through March [20, 1993] **19, 1994**, inclusive, excluding December [7-12] **6-11** and December [16, 17 and 18, 1992] **15, 16 and 17, 1993** and January [15, 16 and 23, 1993] **14, 15, 21 and 22, 1994** in those deer management zones in which a shotgun permit deer season is authorized.

(b) (No change.)

(c) The hours for hunting crows shall be sunrise to ½ hour after sunset, except on November [7, 1992] **13, 1993** when the hours are 8:00 A.M. to ½ hour after sunset.

(d) (No change.)

7:25-5.17 Raccoon (Procyon lotor) and Virginia opossum (Didelphis virginiana) hunting

(a) The duration for the season of hunting raccoons and Virginia opossum is one hour after sunset on October 1, [1992] **1993** to one hour before sunrise on March 1, [1993] **1994**. The hours for hunting are one hour after sunset to one hour before sunrise.

(b) (No change.)

(c) A person shall not hunt for raccoon or opossum with dogs and firearms or weapons of any kind on December [7-12] **6-11** and on December [16, 17 and 18, 1992] **15, 16 and 17, 1993** and January [15, 16 and 23, 1993] **14, 15, 21, and 22, 1994** in those deer management zones for which a shotgun permit deer season is authorized and including any extra permit deer season day(s).

(d) A person shall not train a raccoon or opossum dog other than during the period of September 1 to October 1, [1992] **1993** and from March 1 to May 1, [1993] **1994**. The training hours are one hour after sunset to one hour before sunrise.

(e) (No change.)

7:25-5.18 Woodchuck (Marmota monax) hunting

(a) Duration for the hunting of woodchucks with a rifle in this State is March [13] **12** through September [18, 1993] **30, 1994**. Licensed hunters may also take woodchuck with shotgun or long bow and arrow or by means of falconry during the regular woodchuck rifle season and during the upland game season established in N.J.A.C. 7:25-5.3.

(b)-(f) (No change.)

7:25-5.19 Red fox (Vulpes vulpes) and gray fox (Urocyon cinereoargenteus) hunting

(a) The duration of the red fox and gray fox hunting season is as follows:

1. Bow and Arrow Only—[September 26] **October 2** through November [6, 1992] **12, 1993**.

2. Firearm or Bow and Arrow—November [7, 1992] **13, 1993** through February [20, 1993] **19, 1994,** excluding December [7-12, 16, 17 and 18, 1992] **6-11, 15, 16 and 17, 1993** and January [15, 16 and 23, 1993] **14, 15, 21 and 22, 1994** in those deer management zones in which a shotgun permit deer season is authorized and also excluding any extra permit deer season day(s) if declared open.

(b) The use of dogs shall not be allowed for fox hunting during the Statewide bow and arrow only season of [September 26-November 6, 1992] **October 2—November 12, 1993**. There shall be no fox hunting during the firearm deer season, except that a person hunting deer during deer season may kill fox if the fox is encountered before said person kills a deer. However, after a person has killed a deer he must cease all hunting immediately.

(c) The hours for hunting fox are 8:00 A.M. to ½ hour after sunset on November [7, 1992] **13, 1993** and on other days from sunrise to ½ hour after sunset.

(d)-(e) (No change.)

7:25-5.20 Dogs

(a) A person shall not exercise or train dogs on State Fish and Wildlife Management Areas May to August 31, inclusive, except on portions or various wildlife management areas designated as dog

training areas, and there shall be no exercising or training of dogs on any Wildlife Management Area on November [6, 1992] **12, 1993**.

(b)-(c) (No change.)

7:25-5.23 Firearms and missiles, etc.

(a) Except when legally engaged in deer hunting during the prescribed firearm deer seasons no person shall have in his **or her** possession in the woods, fields, marshlands or on the water any shell or cartridge with missiles of any kind larger than No. 4 fine shot. This shall not preclude a properly licensed person from hunting woodchuck with a rifle during the woodchuck season. Also excepted is the use of a muzzleloading rifle, .36 caliber or smaller, loaded with a single projectile during the [late] **prescribed portion of the** squirrel season in designated areas. Waterfowl hunters may possess and use shotgun shells loaded with T (.200 inch) steel fine shot or smaller and properly licensed persons hunting for raccoon or opossum with hounds or engaged in trapping for furbearing animals may possess and use a .22 caliber rifle and raccoon, or opossum or legally trapped furbearing animals other than muskrat.

(b)-(d) (No change.)

(e) Within the areas described as portions of Passaic, Mercer, Hunterdon, Warren and Sussex Counties lying within a continuous line beginning at the intersection of Rt. 513 and the New York State line; then south along Rt. 513 to its intersection with the Morris-Passaic County line; then west along the Morris-Passiac County line to the Sussex County line; then south along the Morris-Sussex County line to the Warren County line; then southwest along the Morris-Warren County line to the Hunterdon County line; then southeast along the Morris-Hunterdon County line to the Somerset County line; then south along the Somerset-Hunterdon County line to its intersection with the Mercer County line; then west and south along the Hunterdon Mercer County line to its intersection with Rt. 31; then south along Rt. 31 to its intersection with Rt. 546; then west along Rt. 546 to the Delaware River; then north along the east bank of the Delaware River to the New York State line; then east along the New York State line to the point of beginning at Lakeside; and in that portion of Salem, Gloucester, Camden, Burlington, Mercer, Monmouth, Ocean, Atlantic, Cape May and Cumberland counties lying within a continuous line beginning at the intersection of Rt. 295 and the Delaware River; then east along Rt. 295 to its intersection with the New Jersey Turnpike; then east along the New Jersey Turnpike to its intersection with Rt. 40; then east along Rt. 40 to its intersection with Rt. 47; then north along Rt. 47 to its intersection with Rt. 536; then east along 536 to its intersection with Rt. 206; then north along Rt. 206 to it intersection with the New Jersey Turnpike; then northeast along the New Jersey Turnpike to its intersection with Rt. 571; then southeast along Rt. 571 to its intersection with the Garden State Parkway; then south along the Garden State Parkway to its intersection with Rt. 9 at Somers Point; then south along Rt. 9 to its intersection with Rt. 83; then west along Rt. 83 to its intersection with Rt. 47; then north along Rt. 47 to its intersection with Dennis Creek; then south along the west bank of Dennis Creek to its intersection with Delaware Bay; then northwest along the east shore of Delaware Bay and the Delaware River to the point of beginning; persons holding a valid and proper rifle permit in addition to their [1993] **current** firearm hunting license may hunt for squirrels between [January 25 and February 15, 1993] **October 9-November 12, 1993 and January 24-February 14, 1994** using a .36 caliber or smaller muzzleloading rifle loaded with a single projectile.

(f) Except as specifically provided below for waterfowl hunters, semi-wild and commercial preserves, muzzleloader deer hunters and trappers, from December [7-12, 1992] **6-11, 1993** inclusive, it shall be illegal to use any firearm of any kind other than a shotgun. Nothing herein contained shall prohibit the use of a shotgun not smaller than 20 gauge nor larger than 10 gauge with a rifled bore for deer hunting only. Persons hunting deer shall use a shotgun not smaller than 20 gauge or larger than 10 gauge with the lead or lead alloy rifled slug or slug shotgun shell only or a shotgun not smaller than 12 gauge nor larger than 10 gauge with the buckshot shell. It shall be illegal to have in possession any firearm missile except the 20, 16, 12 or 10 gauge lead or lead alloy rifled slug or hollow base slug shotgun shell or the 12 or 10 gauge buckshot shell. (This does not preclude a person legally engaged in hunting on semi-wild or commercial preserves for the species under license or a person legally engaged in hunting woodcock from being possessed solely of shotgun(s) and nothing larger than No. 4 fine shot, nor a person engaged in hunting waterfowl only from being possessed solely of shotgun and nothing larger than T (.200 inch) steel shot during the shotgun deer seasons). A legally licensed trapper possessing a valid rifle permit may possess and use a .22 rifle and short rimfire cartridge only while tending his or her trap line.

1. Persons who are properly licensed may hunt for deer with a muzzleloader rifle during the [1992] **1993** six day firearm deer season and the permit muzzleloader rifle deer season.

2. Muzzleloader rifles used for hunting deer are restricted to single-shot single barreled weapons with flintlock or percussion actions, shall not be less than .44 caliber and shall fire a single missile or projectile. Except as provided in (p) below, only open iron sights and peep sights shall be attached or affixed to the muzzleloader rifle while engaged in hunting for deer. Only one muzzleloader rifle may be possessed while hunting. Double barrel and other types of muzzleloader rifles capable of firing more than one shot without reloading or holding more than one charge are prohibited. Persons who are properly licensed may hunt for deer with a [smoothbore muzzleloader during the permit muzzleloader rifle season. Smoothbore muzzleloaders are restricted to single-shot, single barreled weapons with flintlock or percussion actions, shall not be smaller than 20 gauge or larger than 10 gauge, and shall fire a single missile or projectile] **single-shot, single barreled, flintlock or precussion action, smoothbore muzzleloader during the permit muzzleloader rifle season. Single shot, smoothbore muzzleloaders used during the permit muzzleloader season shall fire a single missile or projectile and shall not be smaller than 20 gauge or larger than 10 gauge. Double barrel and other types of smoothbore muzzleloaders capable of firing more than one shot without reloading or holding more than one charge are prohibited during the permit muzzleloader season. Persons who are properly licensed may hunt deer with single or double barrel, smoothbore muzzleloader during the six day firearm and permit shotgun deer seasons. Smoothbore muzzleloaders used for deer hunting during the six day firearm and permit shotgun deer seasons shall not be smaller than 20 gauge or larger than 10 gauge, and shall fire a single missile or projectile, or buckshot no smaller than No. 4 (.24 inch) or larger than 000 (.36 inch).** Except as provided in (p) below, no telescopic sights shall be attached or affixed to the smoothbore muzzleloader while engaged in hunting for deer. Only one muzzleloader rifle or smoothbore muzzleloader may be possessed while deer hunting. [Double barrel and other types of smooth bore muzzleloaders capable of firing more than one shot without reloading or holding more than one charge are prohibited.]

3.-5. (No change.)

(g)-(o) (No change.)

(p) The Division may issue a Special Muzzleloader Rifle Scope permit to certain visually handicapped individuals which would allow these individuals as specified below in this subsection to hunt with a muzzleloader rifle during the prescribed seasons. Special Muzzleloader Rifle Scope Permit applications will require certification by a Doctor of Ophthalmology **or Optometry**, licensed to practice in New Jersey and be subject to Division review and ratification. For the purposes of this permit, a visually handicapped individual is defined as one who is incapable of achieving proper sight alignment/sight picture using a muzzleloader rifle equipped with open sights or peep sights due to a permanent vision disability which cannot be adequately addressed through the use of corrective lenses. The rifle scopes permitted under a Special Muzzlelaoder Rifle Scope Permit shall be **non-magnifying or** fixed power of not more than 1.5x.

(q) (No change.)

7:25-5.24 Bow and arrow, general provisions

(a) (No change.)

(b) No person shall use a bow and arrow for hunting, on December [16, 17 and 18, 1992] **15, 16 and 17, 1993** and January [15, 16 and 23, 1993] **14, 15, 21 and 22, 1994** in those deer management zones in which a permit shotgun deer season is authorized, on any additional Permit Deer Season Day(s) if declared open, during the six [6]-Day Firearm Deer Season, or between ½ hour after sunset and sunrise during other seasons. Deer shall not be hunted for or taken on Sunday except on wholly enclosed preserves that are properly licensed for the propagation thereof.

(c)-(f) (No change.)

7:25-5.25 White-tailed deer (Odocoileus virginianus) fall bow season (either sex)

(a) Deer of either sex and any age may be taken by bow and arrow exclusively from [Septebmer 26-November 6-1992] **October 2—November 12, 1993**, inclusive; except in Zones 4, 18 [and], 21 **and 55** only deer with antlers at least three inches long may be taken from [September 26 to October 16, 1992] **October 2 to 22, 1993**; and in Zones 7, 8, 10, 11, 12 and 41 where only deer without antlers and deer with antlers which are less than three inches long may be taken from [September 26 to October 2, 1992] **October 2 to 8, 1993**. Legal hunting hours shall be ½ hour before sunrise to ½ hour after sunset.

(b) Bag Limit: Two deer of either sex, except as noted in (a) above **and (b)1 below**. Only one deer may be taken in a given day. Deer shall be tagged immediately with completely filled in "transportation tag" and shall be transported to a deer checking station bfore 8:00 P.M. E.S.T. on the day killed. Upon completion of registration of first deer, one valid and proper "New Jersey Second Deer Permit and Transportation Tag" (second tag) will be issued which will allow this person to continue hunting and take one additional deer of either sex during the current fall bow deer season. The second tag shall not be valid on the day of issuance and all registration requirements apply.

1. In deer management Zones 7, 8, 9, 10, 11, 12, 13, 39, 40, and 41, one additional deer may be taken by any properly licensed hunter who harvests an antlerless deer first in these zones, exclusively. A "New Jersey Bonus Deer Permit and Transportation Tag" will only be issued for the purpose of this provision at deer check stations located in or within 15 miles of these zones. The New Jersey Bonus Deer Permit and Transportation Tag will be issued in addition to the New Jersey Second Deer Permit and Transportation Tag, and may only be used for taking a deer within Zones 7, 8, 9, 10, 11, 12, 13, 39, 40 and 41. The transportation portion of this tag is completed and affixed to the deer immediately upon killing by the hunter. All other deer registration requirements apply. A deer of either sex and any age may be taken with a bonus deer permit, except from October 2 through 8 in Zones 7, 8, 10, 11, 12 and 41, when only antlerless deer may be taken. This bonus deer tag shall not be valid on the day of issuance and is not transferable. Persons possessing both a bonus tag and second tag may not take more than one deer per day.

[1.]**2.** (No change in text.)

(c)-(d) (No change.)

7:25-5.26 White-tailed deer winter bow season (either-sex)

(a) Deer of either sex and any age may be taken by bow and arrow exclusively from [1/2 hour before sunrise on January 4 to 1/2 hour after sunset on January 27, 1993] **January 3-26, 1994** inclusive, excluding January [15, 16 and 23, 1993] **14, 15, 21 and 22, 1994** in those management zones in which a shotgun permit season is authorized. Legal hunting hours shall be ½ hour before sunrise to ½ hour after sunset.

(b)-(d) (No change.)

7:25-5.27 White-tailed deer six day firearm season

(a) Duration for this season will be December [7-12, 1992] **6-11, 1993** inclusive with shotgun or muzzleloader rifle, exclusively.

(b) Bag Limit: Two deer, with antler at least three inches long; except in those areas designated as "hunters choice" indicated in (d) below, where the bag limit is two deer of either sex. Only one deer may be taken in a given day per person on a regular firearm hunting license. Persons awarded Zone 9 or Zone 13 shotgun permits may also take one deer of either sex and any age, per permit, on December [7 and 12, 1992] **6 and 11, 1993** subject to the provisions of N.J.A.C. 7:25-5.29. Deer shall be tagged immediately with the "transportation tag" appropriate for the season, completely filled in and shall be transported to a checking station before 7:00 P.M. E.S.T. on the day killed. Upon completion of the registration of the first deer, one valid and proper "New Jersey Second Deer Permit and Transportation Tag" (second tag) will be issued which will allow that person to continue hunting and take one additional deer with antler at least three inches long or one additional deer of either sex in the "hunters choice" area, exclusively, during the current, six-day firearm season. The second tag shall not be valid on the day of issuance and all registration requirements apply. Any legally killed deer which is recovered too late to be brought to a check station by closing time shall be immediately reported by telephone to the nearest Division of Fish, Game and Wildlife law enforcement regional headquarters. This deer must be brought to a checking station on the next open day to receive a legal "possession tag." If the season has concluded, this deer must be taken to a regular deer checking station on the following weekday to receive a legal "possession tag."

(c)-(d) (No change.)

(e) Hunting Hours: December [7-12, 1992] **6-11, 1993,** inclusive, 7:00 A.M. E.S.T. to 5:00 P.M. E.S.T. with shotgun or muzzleloader rifle.

(f) No person shall take, attempt to take, hunt or attempt to hunt, kill or attempt to kill, shoot at or attempt to shoot at, **in any one day or** in any one year more than the number of deer permitted by this Code.

(g) (No change.)

7:25-5.28 White-tailed deer muzzleloader rifle permit season (either sex)

(a)-(c) (No change.)

(d) [Duration of the muzzleloader rifle permit season is December 14, 15, 19, 21, 22, 23, 24, 26, 28, 29, 30, 31, 1992 and January 2, 1993 in zones 1-3, 5-36, 41-51, 55, 57, 58, 61, 63 and 65; December 14, 15, 19, 21, 22, 23, 24, 26, 1992 in zone 4; November 7-14, 1992 (first segment) and December 14-25, 1992 (second segment) in zones 37 and 52; December 14, 1992 to January 2, 1993 in 39, 54, and 62; November 28-December 5, 1992 (first segment) and December 14-31, 1992 (second segment) in zone 53 or any other time as determined by the Director. Legal hunting hours shall be sunrise to 1/2 hour after sunset E.S.T.] **Duration of the muzzleloader rifle permit season is December 13, 14, 18, 20, 21-24, 27-31, 1993 and January 1, 1994 in Zones 1-36, 41-51, 55, 57, 58, 61, 63 and 65; November 13-20, 1993 (first segment) and December 13-17, 20-24, 27-31, 1993 (second segment) in Zones 37 and 52; December 13-18, 20-25, 27-31, 1993 and January 1, 1994 in Zone 39; November 27-December 4, 1993 (first segment) and December 13-18, 20-24, 27-31, 1993 and January 1, 1994 (second segment) in Zone 53; December 13-18, 20-24, 27-31, 1993 in Zone 54 or any other time as determined by the Director. Legal hunting hours shall be sunrise to ½ hour after sunset E.S.T.**

(e)-(g) (No change.)

(h) Muzzleloader Rifle Permit Season Permits shall be applied for as follows:

1. Only holders of valid and current firearm hunting licenses may apply by detaching from their hunting license the stub marked "Special Deer Season [1992] **1993**" signing as provided on the back, and sending the stub, together with the permit fee and an application form which has been properly completed in accordance with instructions. Application forms may be obtained from:

i.-iv. (No change.)

2.-3. (No change.)

4. The application form shall be filled in to include: Name, address, current firearm hunting license number, deer management zone applied for, and any other information requested. Only those applications will be accepted for participation in random selection which are received in the Trenton office during the period of August 15—September 10, [1992] **1993** inclusive. Applications postmarked after the September 10 will not be considered for the initial drawing. Selection of permittees will be made by random selection.

5.-7. (No change.)

(i) Farmer Muzzleloader Rifle Permit Season Permits shall be applied for as follows:

1.-2. (No change.)

3. The application form shall be filled in to include: Name, age, size of farm, address, and any other information requested thereon. THIS APPLICATION MUST BE NOTARIZED. Properly completed application forms will be accepted in the Trenton office [only] during the period of August 1 to 15[, 1992]. There is no fee required, and all qualified applicants will receive a farmer muzzleloader rifle permit season permit, delivered by mail.

4.-5. (No change.)

(j) (No change.)

(k) The Deer Management Zone Map is on file at the Office of Administrative Law and is available from that agency or the Division. The [1992] **1993** Muzzleloader Rifle Deer Season Permit Quotas (either sex) are as follows:

[1992] **1993** MUZZLELOADER RIFLE PERMIT SEASON PERMIT QUOTAS

Deer Mgt. Zone No.	Season Dates Code	Anticipated Deer Harvest [1992]**1993**	Permit Quota [1992]**1993**	Portions of Counties Involved
1	1	[123] **242**	[500] **535**	Sussex
2	1	[145] **198**	[600] **650**	Sussex
3	1	[156] **171**	[800] **840**	Sussex, Passaic, Bergen
4	[2]**1**	[134] **164**	[370] **410**	Sussex, Warren
5	1	[293] **411**	[1225] **1515**	Sussex, Warren
6	1	[143] **196**	[750] **850**	Sussex, Morris, Passaic, Essex
7	1	[143] **177**	[650] **725**	Warren, Hunterdon
8	1	[319] **398**	[1735] **1950**	Warren, Hunterdon, Morris, Somerset
9	1	[131] **104**	450	Morris, Somerset
10	1	[176] **259**	[850] **1035**	Warren, Hunterdon
11	1	[74] **122**	[400] **500**	Hunterdon
12	1	[201] **275**	[1050] **1100**	Mercer, Hunterdon, Somerset
13	1	[44] **37**	[270] **245**	Morris, Somerset
14	1	[125] **156**	[700] **792**	Mercer, Somerset, Middlesex, Burlington
15	1	[125] **124**	[450] **461**	Mercer, Monmouth, Middlesex
16	1	[97] **140**	[425] **489**	Ocean, Monmouth
17	1	[67] **74**	[275] **286**	Ocean, Monmouth, Burlington
18	1	**50**	275	Ocean
19	1	[73] **84**	[400] **438**	Camden, Burlington
20	1	[53] **72**	[300] **400**	Burlington
21	1	[126] **153**	550	Burlington, Ocean
22	1	[36] **32**	[110] **180**	Burlington, Ocean
23	1	[154] **175**	[825] **950**	Burlington, Camden, Atlantic
24	1	[154] **152**	[600] **480**	Burlington, Ocean
25	1	[101] **139**	600	Gloucester, Camden, Atlantic, Salem
26	1	[182] **255**	[800] **950**	Atlantic
27	1	[178] **161**	650	Salem, Cumberland
28	1	[113] **139**	[475] **550**	Salem, Cumberland, Gloucester
29	1	[77] **116**	[385] **450**	Salem, Cumberland
30	1	[35] **41**	[160] **182**	Cumberland
31	1	[14] **13**	[67] **80**	Cumberland
32	1	[5] **10**	[50] **68**	Cumberland
33	1	[45] **65**	[210] **198**	Cape May, Atlantic
34	1	[100] **132**	[525] **595**	Cape May, Cumberland
35	1	[126] **175**	[570] **716**	Gloucester, Salem
36	1	[13] **6**	**60**	Bergen, Hudson, Essex, Morris, Union, Somerset, Middlesex
37	[3]**2**	[70] **121**	[260] **335**	Burlington (Fort Dix Military Reservation)
38		**0**	**0**	Morris (Great Swamp National Wildlife Refuge)
39	[4]**3**	[20] **17**	[35] **25**	Monmouth (Earle Naval Weapons Station)
40		**0**	**0**	Monmouth (Earle Naval Weapons Station—Waterfront)
41	1	[45] **87**	[250] **380**	Mercer, Hunterdon
42	1	[8] **9**	65	Atlantic
43	1	[44] **54**	[220] **245**	Cumberland
44	1	[26] **14**	75	Cumberland
45	1	[55] **83**	[340] **305**	Cumberland, Atlantic, Cape May
46	1	[63] **71**	250	Atlantic
47	1	[21] **50**	[90] **150**	Atlantic, Cumberland, Gloucester
48	1	[35] **41**	[250] **288**	Burlington
49	1	[8] **3**	[40] **23**	Burlington, Camden, Gloucester
50	1	**36**	[250] **214**	Middlesex, Monmouth
51	1	[34] **40**	[150] **224**	Monmouth, Ocean
52	**2**	[29] **56**	[100] **140**	Ocean (Fort Dix Military Reservation)

53	[5]**4**	[7]	**13**	[32]	**40**	Ocean (Lakehurst Naval Engineering Center)
54	[4]**5**	[2]	**4**	6		Morris (Picatinny Arsenal-ARRAD Com)
55	1	[12]	**18**	75		Gloucester
56			**0**		**0**	Atlantic (Forsythe National Wildlife Refuge)
57	1	[4]	**2**	40		Atlantic (Forsythe National Wildlife Refuge)
58	1	[9]	**8**	50		Burlington, Ocean (Forsythe National Wildlife Refuge)
59			**0**		**0**	Salem (Supawna National Wildlife Refuge)
60			**0**		**0**	Hunterdon (Round Valley Recreation Area)
61	1	[11]	**23**	105		Atlantic (Atlantic County Parks)
62	[4]	[1]	**0**	[6]	**0**	Monmouth (Fort Monmouth)
63	1	[53]	**50**	[200]	**225**	Salem
64			**0**		**0**	Monmouth (Monmouth Battleground State Park)
65	1	[13]	**19**	[100]	**120**	Gloucester
Total		[4,733]**6,037**		[22,101]**24,585**		

(l) The Season Dates Code referred in the table in (k) above is as follows:

1. Indicates the season dates will be December [14, 15, 19, 21, 22, 23, 24, 26, 28, 29, 30, 31, 1992 and January 2, 1993] **13, 14, 18, 20, 21, 22, 23, 24, 27, 28, 29, 30, 31, 1993 and January 1, 1994.**

[2. Indicates the season dates will be December 14, 15, 19, 21, 22, 23, 24, 26, 1992.]

[3.]**2.** Indicates the season dates will be November [7-14, 1992] **13-20, 1993** (first segment); and, December [14-25, 28-31, 1992] **13-17, 20-24, 27-31, 1993** (second segment).

[4.]**3.** Indicates the season dates will be December [14, 1992-January 2, 1993] **13-18, 20-25, 27-31, 1993 and January 1, 1994.**

[5.]**4.** Indicates the season dates will be November [28] **27**—December [5, 1992] **4, 1993** (first segment) and December [14-31, 1992] **13-18, 20-24, 27-31, 1993 and January 1, 1994** (second segment).

5. Indicates the season dates will be December 13-18, 20-24, 27-31, 1993.

(m) (No change.)

(n) Muzzleloader rifle permit season permits not applied for by September 10, [1992] **1993** will be reallocated to shotgun and bow permit season applicants.

7:25-5.29 White-tailed deer shotgun permit season (either sex)

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

(c) The season bag limit per permit shall be one deer of either sex and any age with a shotgun permit season permit in Zones 1, 3, 4, 18, 20, 21, [22,] 23, 24, [26, 30,] 31, 32, [34,] 37, 43, 45, [46,] 52, 53, **54,** 55, 64 and 65; two deer of either sex and any age with a shotgun permit season permit in Zones 2, [5-17] **5-8, 14-17,** 19, **22,** 25, [27-29] **30,** 33, **34,** 35, [36, 41,] 42, 44, **46,** [47-51, 54 and 63] **48 and 51**; three deer of either-sex and any age with a shotgun permit season permit in Zones **9-13, 36,** 39, **41, 47, 49, 50,** 56, 59, 60, [and] 61, **and 63**; six deer of either sex and any age in Zone 57 and 58; and 10 deer of either sex and any age in Zone 38. Only one deer may be taken in a given day per permit except in Zone 38 where the limit is two deer in a given day per permit. Persons awarded Zone 9 and 13 shotgun permits may also take a deer with antler at least three inches long on December [7 or 12, 1992] **6-11, 1993** with a regular firearm license, subject to the provisions of N.J.A.C. 7:25-5.27. It is unlawful to attempt to take or hunt for more than the number of deer permitted.

(d) Duration of the permit shotgun deer season is from sunrise to ½ hour after sunset E.S.T. on the following dates:

1. December [16, 1992] **15, 1993** in Zones 1, 3, 4, 18, 20, 21, [22,] 23, 24, [26, 30,] 31, 32, [34,] 43, 45, [46,] 55 and 65.

2. December [16, 17, and 18, 1992] **15, 16 and 17, 1993** and, January [15, 16, and 23, 1993] **14, 15, 21 and 22, 1994** in Zones 2, 5, 7, 8, 10, 11, 12, 14, 15, 17, 25, 27, **28, 29, 35,** 36, 41, 47, 48, 49, 50 and 63.

3. December [16, 17 and 18, 1992] **15, 16 and 17, 1993** in Zones 6, 16, 19, **22, 26, 30,** [28, 29,] 33, **34,** [35,] 42, 44, **46,** 51, 56, 60 and 61.

4. December [7, 12, 16, 17 and 18, 1992] **6, 11, 15, 16 and 17, 1993**, and January [15, 16 and 23, 1993] **14, 15, 21 and 22, 1994** in Zones 9 and 13.

5. December [26, 1992] **18, 1993** in Zones 37 and [52] **54.**

6. December [3, 4, 5, 10, and 11, 1992] **2, 3, 4, 9 and 10, 1993** in Zone 38.

7. December [19, 1992] **18, 1993**, and January [23 and 30, 1993] **15 and 29, 1994** in Zone[s] 39 [and 62].

8. [January 2, 1993 in Zone 53] **December 18, 1993 and January 15, 1994 in Zone 52.**

9. [December 19, 1992 and January 16, 1993 in Zone 54] **January 8, 1994 in Zone 53.**

10. December [7, 8, 9, 16, 17 and 18, 1992] **6, 7, 8, 15, 16 and 17, 1993** in Zones 57 and 58.

11. December [7, 8 and 9, 1992] **6, 7 and 8, 1993** (first segment), December [16, 17 and 18, 1992] **15, 16 and 17, 1993** (second segment), and January [15, 16 and 23, 1993] **14, 15 and 22, 1994** (third segment) in Zone 59.

12. January [15, 1993] **14, 1994** (first segment), January [16, 1993] **15, 1994** (second segment), and January [23, 1993] **22, 1994** (third segment in Zone 64.

13. (No change.)

(e)-(g) (No change.)

(h) Shotgun Permit Season Permits shall be applied for as follows:

1. Only holders of valid and current firearm hunting licenses including juvenile firearm license holders may apply by detaching from their hunting license the stub marked "Special Deer Season [1992] **1993**," signing as provided on the back, and sending the stub, together with the permit applied for and an application form properly completed in accordance with instructions. Application forms may be obtained from:

i.-iv. (No change.)

2. (No change.)

3. The application form shall be filled in to include: Name, address, current firearm hunting license number, deer management zone applied for, and any other information requested. Only those applications will be accepted for participation in random selection which are received in the Trenton office during the period of August 15—September 10[, 1992]. Applications postmarked after September 10 will not be considered for the initial drawing. Selection of permittees will be made by random selection.

4.-6. (No change.)

(i) Farmer Shotgun Permit Season Permits shall be applied for as follows:

1.-2. (No change.)

3. The application form shall be filled in to include: Name, age, size of farm, address, and any other information requested thereon. THIS APPLICATION MUST BE NOTARIZED. Properly completed application forms will be accepted in the Trenton office [only] during the period of August 1 to 15[, 1992]. There is no fee required, and all qualified applicants will receive a farmer shotgun permit season permit, delivered by mail.

4. (No change.)

(j) (No change.)

(k) The Deer Management Zone Map on file at the Office of Administrative Law and is available from that agency or the Division.

The [1992] **1993** Shotgun Permit Season Permit Quotas (Either Sex) are as follows:

[1992] **1993** SHOTGUN PERMIT SEASON PERMIT QUOTAS (EITHER SEX)

Deer Mgt. Zone No.	Season Dates Code	Anticipated Deer Harvest [1992]**1993**	Permit Quota [1992]**1993**	Portions of Counties Involved
1	1	[166] **178**	[807] **746**	Sussex
2	2	[599] **789**	[1447] **1682**	Sussex
3	1	[51] **68**	[556] **582**	Sussex, Passaic, Bergen
4	1	[47] **66**	[366] **405**	Sussex, Warren
5	2	[1823] **2498**	[3797] **4842**	Sussex, Warren
6	3	[317] **335**	[1321] **1310**	Sussex, Morris, Passaic, Essex
7	2	[722] **988**	[1580] **1964**	Warren, Hunterdon
8	2	[2034] **2315**	[4571] **4843**	Warren, Hunterdon, Morris, Somerset
9	4	[532] **866**	[1516] **1496**	Morris, Somerset
10	2	[1018] **1436**	[2357] **2377**	Warren, Hunterdon
11	2	[586] **714**	[1218] **1376**	Hunterdon
12	2	[1029] **1547**	[2394] **2373**	Mercer, Hunterdon, Somerset
13	4	[323] **439**	[795] **983**	Morris, Somerset
14	2	[624] **744**	[1919] **1979**	Mercer, Somerset, Middlesex, Burlington
15	2	[435] **428**	[845] **1014**	Mercer, Monmouth, Middlesex
16	3	[124] **120**	[460] **497**	Ocean, Monmouth
17	2	[300] **375**	[628] **719**	Ocean, Monmouth, Burlington
18	1	13	[123] **138**	Ocean
19	3	[148] **180**	[496] **604**	Camden, Burlington
20	1	[33] **26**	[195] **200**	Burlington
21	1	[29] **22**	[218] **225**	Burlington, Ocean
22	[1]**3**	[35] **52**	[180] **210**	Burlington, Ocean
23	1	[32] **37**	[238] **367**	Burlington, Camden, Atlantic
24	1	[24] **19**	[139] **131**	Burlington, Ocean
25	2	[225] **374**	[652] **1031**	Gloucester, Camden, Atlantic, Salem
25	[1]**3**	[27] **79**	[170] **255**	Atlantic
27	2	[322] **375**	[831] **935**	Salem, Cumberland
28	[3]**2**	[43] **148**	[234] **370**	Salem, Cumberland, Gloucester
29	[3]**2**	[176] **349**	[665] **723**	Salem, Cumberland
30	[1]**3**	[29] **46**	[125] **149**	Cumberland
31		0	0	Cumberland
32	1	[4] **2**	[28] **38**	Cumberland
33	3	[76] **87**	[187] **281**	Cape May, Atlantic
34	[1]**3**	[24] **68**	[134] **184**	Cape May, Cumberland
35	[3]**2**	[223] **454**	[883] **1085**	Gloucester, Salem
36	2	[45] **82**	[117] **120**	Bergen, Hudson, Essex, Morris, Union, Somerset, Middlesex
37	5	[24] **16**	[120] **100**	Burlington (Fort Dix Military Reservation)
38	6	[208] **242**	600	Morris (Great Swamp National Wildlife Refuge)
39	7	[104] **76**	[74] **93**	Monmouth (Earle Naval Weapons Station)
40		**0**	**0**	Monmouth (Earle Naval Weapons Stations—Waterfront)
41	2	[426] **504**	[867] **818**	Mercer, Hunterdon
42	3	[15] **13**	[56] **61**	Atlantic
43	1	[0] **22**	[0] **140**	Cumberland
44	3	[23] **14**	[75] **37**	Cumberland
45		0	0	Cumberland, Atlantic, Cape May
46	[1]**3**	[17] **32**	[83] **102**	Atlantic
47	2	[44] **59**	[105] **179**	Atlantic, Cumberland, Gloucester
48	2	[291] **290**	[613] **690**	Burlington
49	2	[37] **31**	[45] **51**	Burlington, Camden, Gloucester
50	2	[121] **315**	[412] **512**	Middlesex, Monmouth
51	3	[82] **53**	[325] **315**	Monmouth, Ocean
52	[5]**8**	[12] **26**	[65] **49**	Ocean (Fort Dix Military Reservation)
53	[8]**9**	[7] **13**	[38] **42**	Ocean (Lakehurst Naval Engineering Center)
54	[9]**5**	[18] **5**	[28] **30**	Morris (Picatinny Arsenal—ARRAD Com)
55	1	[3] **4**	[30] **36**	Gloucester
56	3	28	20	Atlantic (Forsythe National Wildlife Refuge)
57	10	[22] **18**	40	Atlantic (Forsythe National Wildlife Refuge)
58	10	[15] **23**	50	Burlington, Ocean (Forsythe National Wildlife Refuge)

59	11	[42]	**49**	75		Salem (Supawna National Wildlife Refuge)
60	3	[40]	**27**	120		Hunterdon (Round Valley Recreation Area)
61	3	[27]	**42**	108		Atlantic (Atlantic County Parks)
62	[7]	[12]	**0**	[24]	**0**	Monmouth (Fort Monmouth)
63	2	[157]	**210**	[336]	**349**	Salem
64	**12**	[65]	**78**	135		Monmouth (Monmouth Battleground State Park)
65	1	[15]	**10**	[53]	**60**	Gloucester, Camden
Total		[14,093]	**18,519**	[36,689]	**41,046**	

(l) Shotgun permit season permits not applied for by September 10, [1992] **1993** may be reallocated to muzzleloader rifle, permit season applicants.

(m) The Season Dates Code referred to in the table in (k) above is as follows:

1. Indicates one day shotgun permit season—December [16, 1992] **15, 1993.**

2. Indicates [six-day shotgun permit season—December 16, 17 and 18, 1992 and January 15, 16 and 23, 1993] **seven-day shotgun permit season—December 15, 16 and 17, 1993 and January 14, 15, 21 and 22, 1994.**

3. Indicates three-day shotgun permit season December [16, 17 and 18, 1992] **15, 16 and 17, 1993.**

4. Indicates [an eight-day shotgun permit season December 7, 12, 16, 17 and 18, 1992, and January 15, 16 and 23, 1993] **a nine-day shotgun permit season December 6, 11, 15, 16 and 17, 1993 and January 14, 15, 21 and 22, 1994.**

5. Indicates a one-day shotgun permit season December [26, 1992] **18, 1993.**

6. Indicates a five-day shotgun permit season December [3, 4, 5, 10 and 11, 1992] **2, 3, 4, 9 and 10, 1993.**

7. Indicates a three-day shotgun permit season December [19, 1992 and January 23 and 30, 1993] **18, 1993 and January 15 and 29, 1994.**

8. Indicates a [one-day shotgun permit season January 2, 1993] **two-day shotgun permit season December 18, 1993 and January 15, 1994.**

9. Indicates a [two-day shotgun permit season December 19, 1992 and January 16, 1993] **one-day shotgun permit season January 8, 1994.**

10. Indicates a six-day shotgun permit season December [7, 8, 9, 16, 17 and 18, 1992] **6, 7, 8, 15, 16 and 17, 1993.**

11. Indicates three, three-day shotgun permit season segments—December [7, 8 and 9, 1992 (first segment); December 16, 17 and 18, 1992 (second segment); and, January 15, 16 and 23, 1993 (third segment)] **6, 7 and 8, 1993 (first segment); December 15, 16 and 17, 1993 (second segment); and, January 14, 15 and 22, 1994 (third segment).**

12. Indicates three one-day shotgun permit season segments—January [15, 1993 (first segment), January 16, 1993 (second segment), and January 23, 1993 (third segment)] **14, 1994 (first segment); January 15, 1994 (second segment); and, January 22, 1994 (third segment).**

(n)-(o) (No change.)

(p) Deer Management zones are located as follows:

1. Zone No. 1: That portion of Sussex County lying within a continuous line beginning at the intersection of Rts. 206 and 519 at Branchville; then northwest along Route 206 to its intersection with Rt. 560; then west along Rt. 560 to its intersection with the Delaware River at Dingman's Ferry; then north along the east [branch] **bank** of the Delaware River to the New York State line; then east along the New York State line to Rt. 519, then south along Rt. 519 to the point of beginning at Branchville. The islands of Namanock, Minisink and Mashipacong lying in the Delaware River are included in this zone.

2.-3. (No change.)

4. Zone No. 4: That portion of Sussex and Warren Counties lying within a continuous line beginning at the intersection of Route 560 (Tuttles Corner-Dingman's Road) and the Delaware River at Dingman's Ferry; then southeast along Route 560 to its intersection with Route 206; then southeast along Route 206 to its intersection with the base of the Kittatinny Ridge at Culvers Inlet; then southwest along the base of the Kittatinny Ridge to the Delaware River at the Delaware Water Gap north and west of Quarry Road; then north along the east bank of the Delaware **River** to the point of beginning at Dingman's Ferry. Depew, Tocks, Poxono and Labar Islands in the Delaware River are included in this zone.

5. Zone No. 5: That portion of Warren and Sussex Counties lying within a continuous line beginning at the intersection of the base of the Kittatinny Ridge and Rt. 206 at Culvers Inlet; then southeast along Rt. 206 to its intersection with Rt. 519 at Branchville; then south along Rt. 519 to its intersection with Rt. 206 at Newton; then south along Rt. 206 to its intersection with Rt. 517 at Andover; then south along Rt. 517 to its intersection with Rt. 46 at Hackettstown; then west along Rt. 46 to its intersection with **the Delaware River at Manuakachunk; then north along the east bank of the Delaware River to its intersection with** the Zone 4 boundary at the Delaware Water Gap north and west of Quarry Road; then northeast along the base of the Kittatinny Ridge to its intersection with Rt. 206, the point of beginning.

6.-10. (No change.)

11. Zone No. 11: That portion of Hunterdon County lying within a continuous line beginning at the intersection of Rts. 12 and 31 and 202 at Flemington; [then south along Rt. 31-202 to the intersection where Rts. 202 and 31 separate at Ringoes;] then southwest along Rt. 202 to the Delware River; then northwest along the east bank of the Delaware River to its intersection with Rt. 12 at Frenchtown; then east along Rt. 12 to the point of beginning at Flemington. Shyhawks, Treasure, Rush, Bull and Eagle Islands lying in the Delaware River are in this zone.

12. (No change.)

13. Zone No. 13: That portion of Morris, Somerset and Union Counties lying within a continuous line beginning at the intersection of Rts. 22 and [287] **206** at Somerville; then north on Rt. [287 to] **206 to its intersection with Rt. 202 at** Bedminster, then northeast along Rt. 202 to its intersection with Rt. 24 at Morristown; then southeast along Rt. 24 to its intersection with Rt. 82; then southwest along Rt. 82 to its intersection with Rt. 22; then southwest along Rt. 22 to the point of beginning at Somerville.

14.-16. (No change.)

17. Zone No. 17: That portion of Mercer, Monmouth, Burlington and Ocean Counties lying within a continuous line beginning at the intersection of the New Jersey Turnpike and the Mercer County line near Yardville; then north along the Turnpike to its intersection with Interstate 195; then east along Interstate 195 to its intersection with Rt. 537 near Holmeson; then southwest along Rt. 537 to its intersection with Rt. 539; then southeast along Rt. 539 to the border of Fort Dix Military Reservation; then westward along the Fort Dix Military Reservation boundary to Rt. 545 near Wrightstown; then northwest along Rt. 545 to its intersection with the New Jersey Turnpike**; then north along the New Jersey Turnpike to its intersection with the Mercer County line near Yardville, the point of beginning.**

18. Zone No. 18: That portion of Ocean County lying within a continous line beginning at the intersection of Rt. 530 and the Garden State Parkway at South Toms River; then west along Rt. 530 to its intersection with [Rt. 539 near Whiting; then northwest along Rt. 539 to its intersection with] Rt. 70; then west along Rt. 70 to the border of Fort Dix Military Reservation; then northward along the Fort Dix Military Reservation boundary to the northern most intersection of the Fort Dix Military Reservation border and Rt. 539; then northwest along Rt. 539 to its intersection with **Rt.**

537 near Hornerstown; then northeast along Rt. 537 to its intersection with Rt. 571 near Holmeson; then southeast along Rt. 571 to the Garden State Parkway; then south along the Garden State Parkway to the point of beginning near South Toms River.

19.-20. (No change.)

21. Zone No. 21: That portion of Ocean and Burlington Counties lying within a continuous line beginning at the intersection of Rt. 530 and the Garden State Parkway at South Toms River; then south along the Parkway to its intersection with Rt. 72; then northwest along Rt. 72 to its intersection with Rt. 70; then northeast along Rt. 70 to its intersection with Rt. 539 **and Rt. 530** near Whiting; [then south along Rt. 539 to Rt. 530;] then east along Rt. 530 to its intersection with the Garden State Parkway at South Toms River, the point of beginning.

22. Zone No. 22: That portion of Ocean and Burlington Counties lying within a continuous line beginning at the intersection of the Garden State Parkway and Rt. 37 near Toms River [in Ocean County]; then south along the Garden State Parkway to its intersection with the Mullica River and Atlantic County line; then east to the Atlantic Ocean; then north along the Atlantic Ocean to Rt. 37 in Seaside Heights Boro; then **west** along Rt. 37 to its intersection with the Garden State Parkway near Toms River, the point of beginning. **The Edwin B. Forsythe National Wildlife Refuge (Zone 58) is excluded from Zone 22.**

23.-24. (No change.)

25. Zone No. 25: That portion of **Salem,** Gloucester, Atlantic and Camden Counties lying within a continuous line beginning at the intersection of Rts. [Rt.] 54 and [Rt.] 40 near Buena; then west on Rt. 40 to its intersection with Rt. 553; then north on Rt. 553 to its intersection with Rt. 610 (Aura Road); then southeast on Rt. 610 to its intersection with Rt. 655 (Fries Mill Road then north on Rt. 655 to its intersection with Rt. 322; then west on Rt. 322 to its intersection with Rt. 47 at Glassboro; then north on Rt. 47 to its intersection with County Road 635 (Hurfville-Grenloch Road); then eastward on County Road 635 to its intersection with County Road Rt. 707 (Woodbury-Turnersville Road); then southeast along Gloucester County road Rt. 707 (which becomes Camden County Road Rt. 705) to its intersection with County Road 688 (Turnerville-Hickstown Road); then eastward along County Road 688 to its intersection with County Road 689 (Berlin-Crosskeys Road); then northeast along County Road 689 to its intersection with Rt. 73 at Berlin; then south on Rt. 73 to its intersection with Rt. 30; then southeast along Rt. 30 to its intersection with Blue Anchor Brook, just past Cedar Avenue, south of Ancora; then eastward along Blue Anchor Brook until it becomes Albertson Brook at Fleming Pike; then eastward along Albertson Brook to its intersection with Rt. 206 (about four miles north of Hammonton); then south on Rt. 206 to its intersection with Great Swamp Branch (just past the intersection of Rt. 206 and Middle Road); then eastward along Great Swamp Branch to its intersection with Nescochague Creek; then eastward along Nescochague Creek to Nescochague Lake, at Pleasant [Plains] **Mills;** then westward along the north and western shore of Nescochague Lake to its intersection with Hammonton Creek; then westward along Hammonton Creek to its intersection with Rt. 30 (White Horse Pike), near Hammonton; then southeast on Rt. 30 to its intersection with Rt. 559 (Weymouth Road); then southward on Rt. 559 to its intersection with the Atlantic City Expressway; then west along the Atlantic City Expressway to its intersection with Eighth Street; then south along Eighth Street to its intersection with Rt. 322; then westward on Rt. 322 to its intersection with Rt. 54; then southward on Rt. 54 to its intersection with Rt. 40 near Buena, the point of beginning. Zone 65 is excluded from Zone 25.

26. Zone No. 26: That portion of Atlantic and Burlington Counties lying within a continuous line beginning at the intersection of Rts. 40 and 54 near Buena; then southeast on Rt. 40 (40-322) to its intersection with the Garden State Parkway; then northeast on the Garden State Parkway to its intersection with the Mullica River; then northwest along the south bank on the Mullica River to its intersection with Rt. 563 at Green Bank; then north on Rt. 563 to its intersection with Rt. 542, then west on Rt. 542; to its intersection with Nescochague Creek at Pleasant Mills; then south along the west bank of Nescochague Creek to Nescochague Lake; then southwest along the western bank of Nescochague Lake to its intersection with Hammonton Creek; then westward along Hammonton Creek to its intersection with Rt. 30 (White Horse Pike), near Hammonton; then south on Rt. 30 to its intersection with Rt. 559 (Weymouth Rd.); then south on Rt. 559 to its intersection with the Atlantic City Expressway; then northwest along the Atlantic City Expressway to its intersection with Eighth Street; then southwest along Eighth Street to its intersection with Rt. 322 (Black Horse Pike); then northwest along Rt. 322 to its intersection with Rt. 54; then southwest along Rt. 54 to its intersection with Rt. 40 at Buena, the point of beginning. **The Atlantic County Park System (Zone 61) is excluded from Zone 26.**

27.-30. (No change.)

31. Zone No. 31: That portion of Cumberland County lying within a continuous line beginning at the intersections of Rts. 77 and 49 at Bridgeton; then east on Rt. 49 to the Maurice River near Millville; then south along the west bank of the Maurice River near Millville; then south along the west bank of the Maurice River to Buckshutem Creek; then west on the north bank of Buckshutem Creek to its intersection with Buckshutem Road (County Road **6**70); then northwest on Buckshutem Road to its intersection with Cedarville Road (County Road **6**10); then southwest on Cedarville Road to its intersection with Newport Centre Grove Road (County Road **6**29); then southwest on Newport Centre Grove Road to its intersection with Rt. 553; then northwest along Rt. 553 to the Cohansey River at Fairton; then north on the east bank of the Cohansey River to Bridgeton, the point of beginning.

32. Zone No. 32: That portion of Cumberland County lying within the continuous line beginning at the intersection of Rt. 49 and the Maurice River at Millville; then south along the east bank of the Maurice River to [Port Elizabeth] **its intersection with Manumaskin Creek; then east along the north bank of Manumaskin Creek to its intersection with Rt. 47 in Port Elizabeth; then south on Rt. 47 to its intersection with Rt. 548;** then east on Rt. 548 to its intersection with Cumberland-Port Elizabeth Road (County Road **6**46); then north on Cumberland-Port Elizabeth Road to its intersection with Rt. 49; then northwest on Rt. 49 to its intersection with Union Road (County Rt. [76] **671**); then north on Union Road to its intersection with Rt. 552 [(County Road 48)]; then southwest on Rt. 552 (and Rt. 552 spur) to Millville, Rt. 49 and the Maurice River, the point of beginning.

33. Zone No. 33: That portion of Atlantic and Cape May Counties lying within a continuous line beginning at the intersection of Rts. 40 and 50 at Mays Landing; then south on Rt. 50 to its intersection with Rt. 631, Tuckahoe Road; then east along Rt. 631 to its intersection with Rt. 9 at Marmora; then north along Rt. 9 to its intersection with Rt. 623; then east along Rt. 623 to the Atlantic Ocean at Ocean City; then northeast along the Atlantic Ocean to Atlantic City; then northwest along Rt. 322 (40) to McKee City; then west on Rt. 40 to its intersection with Rt. 50 at Mays Landing, the point of beginning. **The Atlantic County Park System (Zone 61) is excluded from Zone 33.**

34. Zone No. 34: That portion of Cumberland and Cape May Counties lying within a continuous line beginning at [Port Elizabeth] **the confluence of the Maurice River and Manumaskin Creek at Port Elizabeth; then east along the south bank of Manumaskin Creek to its intersection with Rt. 47; then south on Rt. 47 to its intersection with Rt. 548;** then east on Rt. 548 to its intersection with Rt. 49; then continuing east on Rt. 49 to its intersection with Rt. 50 at Tuckahoe; then south on Rt. 50 to its intersection with Rt. 631, Tuckahoe Road; then east along Rt. 631 to its intersection with Rt. 9 at Marmora; then north along Rt. 9 to its intersection with Rt. 623; then east along Rt. 623 to the Atlantic Ocean at Ocean City; then southeast along the Atlantic Ocean to Delaware Bay; then north and west along the east bank of Delaware Bay to the Maurice River; then north along the east bank of the Maurice River to Port Elizabeth and Rt. 548, the point of beginning.

35. (No change.)

36. Zone No. 36: Hunter's Choice Area: That portion of Bergen, Hudson, Essex, Morris, Union, Somerset and Middlesex Counties

lying within a continuous line beginning at the intersection of Rt. 202 and the New York State line near Suffern; then south on Rt. 202 to its intersection with Rt. 23 near Wayne; then south on Rt. 23 to its intersection with Rt. 80; then southwest on Rt. 80 to its intersection with Rt. 511; then south on Rt. 511 to its intersection with Rt. 510; then west on Rt. 510 to its intersection with Rt. 124 at Morristown; then southeast on Rt. 124 to its intersection with Rt. 82; then southeast along Rt. 82 to its intersection with Rt. 22; then southwest on Rt. 22 to its intersection with Rt. 287 near Somerville; then southeast on Rt. 287 to its intersection with Rt. 18 near South Bound Brook; then southeast on Rt. 18 to its intersection with the New Jersey Turnpike; then north on the Turnpike to its intersection with the Raritan River; then east along the north bank of the Raritan River to Raritan Bay and the New York State line; then north along the New York State line to Arthur Kill and west bank of the Hudson River; then west along the New Jersey-New York border to the point of beginning near Suffern.

37.-41. (No change.)

42. Zone No. 42: That portion of Atlantic County lying with a continuous line beginning at the intersection of the Garden State Parkway and Mullica River at Chestnut Neck; then southwest along the Garden State Parkway to its intersection with Rt. 322 (40); then southeast along Rt. 322 to Atlantic City; then northeast along the Atlantic Ocean to Great Bay; then west along the Atlantic County line to the intersection of the Garden State Parkway and the Mullica River, the point of beginning. **The Edwin B. Forsythe National Wildlife Refuge (Zones 56 and 57) are excluded from Zone 42.**

43. Zone No. 43: That portion of Cumberland County lying within a continuous line beginning at the intersection of Buckshutem Road (County Road 670) and Cedarville Road (County Road 610); then southwest on Cedarville Road to its intersection with Newport Centre Grove Road (County Road 629); then southwest on Newport Centre Grove Road to its intersection with the Central Railroad of New Jersey (C.R.R.N.J.); then east on the C.R.R.N.J. line to its intersection with Haleyville Road (County Road [15] **676**) at Mauricetown Station; then east on Haleyville Road to its intersection with [Rt. 548; then east on Rt. 548 to its intersection with] the Maurice River at Mauricetown; then north along the west bank of the Maurice River to the [south] **north** bank of Buckshutem Creek at Laurel Lake; then west along the [south] **north** bank of Buckshutem Creek to Buckshutem Road; then northwest on Buckshutem Road to its intersection with Cedarville Road, the point of beginning.

44. Zone No. 44: That portion of Cumberland County lying within a continuous line beginning at the intersection of [Rt. 548 and the Maurice River; then west on Rt. 548 to its intersection with Haleyville Road (County Road 15); then west on Haleyville Road] **Haleyville-Mauricetown Road (County Road 676) and the Maurice Road at Mauricetown; then west on Haleyville-Mauricetown Road** to its intersection with the Central Railroad of New Jersey (C.R.R.N.J.) at Mauricetown Station; then west on the C.R.R.N.J. line to its intersection with Newport Centre Grove Road (County Road 29); and southwest on Newport Centre Grove Road to its intersection with Rt. 553; then south and east on Rt. 553 to [Cumberland County Rt. 32] **Hands Landing Road in Port Norris;** then south to the west bank of the Maurice River at Shell Pile; then north along the west bank of the Maurice River to [Rt. 548] **Haleyville-Mauricetown Road** at Mauricetown, the point of beginning.

45. Zone No. 45: That portion of Cumberland, Atlantic and Cape May Counties lying within a continuous line beginning at the intersection of Union Road (County Rt. [76] **671**) and Rt. 552; then east on Rt. 552 to its intersection with the Tuckahoe River at Milmay; then south along the west bank, of the Tuckahoe River to its intersection with Rt. 49 at Hunter's Mill; then southeast on Rt. 49 to its intersection with Rt. 548; then west on Rt. 548 to its intersection with Cumberland-Port Elizabeth Road (County Rt. 646) at Port Elizabeth; then north on Cumberland-Port Elizabeth Road to its intersection with Rt. 49; then northwest on Rt. 49 to its intersection with Union Road; then north on Union Road to Rt. 552, the point of beginnning.

46.-49. (No change.)

50. Zone No. 50: That portion of Monmouth and Middlesex Counties lying in a continuous line beginning at the intersection of the New Jersey Turnpike and Rt. 522 near Jamesburg, then southeast on Rt. 522 to its intersection with Rt. 537 at Freehold, then southwest on Rt. 537 to its intersection with Rt. 33; then east on Rt. 33 to its intersection with the western edge of the fenced boundary of the Earle Naval Weapons Depot, then north and east along the fenced boundary of the Earle Naval Depot to its intersection with county route 38 (Wayside Road); then south on County Route 38 to its intersection with Rt. 547; then north on Rt. 547 and to its intersection with the Garden State Parkway; then north on the Garden State Parkway to its intersection with Rt. 36 near Eatontown; then east on Rt. 36 to the Atlantic Ocean; then north along the Atlantic coastline to the Raritan Bay; then south and west along the shore of Raritan Bay to the Raritan River; then continuing west along the [southbank] **south bank** of the Raritan River to its intersection with the New Jersey Turnpike; then southwest along the New Jersey Turnpike to its intersection with Rt. 522, the point of beginning. Monmouth Battlefield State Park, Zone 64, and Earle Naval Weapons Station, [Zone 40] **Zones 39 and 40, and Fort Monmouth, Zone 62,** are excluded from this zone.

51.-65. (No change.)

7:25-5.30 White-tailed deer bow permit season (either sex)

(a)-(c) (No change.)

(d) Duration of the bow permit season is from November [7] **13**—December [5, 1992] **4, 1993** in Zones 1-3, 5-37, [39,] 41-55, 58, 59, 61,[-] 63 and 65; and November [7] **13, 1993**—January [2, 1993] **1, 1994** in Zone 40 or any other time as determined by the Director. Legal hunting hours shall be ½ hour before sunrise to ½ hour after sunset.

(e)-(g) (No change.)

(h) Bow Permit Season Permits shall be applied for as follows:

1. Only holders of valid bow and arrow licenses including juvenile bow license holders may apply by detaching from their bow hunting license the stub marked special deer season [1992] **1993,** signing as provided on the back, and sending the stub together with the permit fee and an application form which has been properly completed in accordance with instructions. Application forms may be obtained from:

i.-iv. (No change.)

2.-8. (No change.)

(i) Farmer Bow Permit Season Permits shall be applied for as follows:

1.-2. (No change.)

3. The application form shall be filled in to include: Name, age, size of farm, address, and any other information requested thereon. THIS APPLICATION MUST BE NOTARIZED. Properly completed application forms will be accepted in the Trenton office [only] during the period of August 1 to 15. There is no fee required, and all qualified applications will receive a farmer permit bow season permit, delivered by mail.

4. (No change.)

(j) (No change.)

(k) The Deer Management Zone Map is on file at the Office of Administrative Law and is available from that agency or the Division. The [1992] **1993** Bow Permit Season Quotas (Either Sex) are as follows:

[1992] **1993** BOW PERMIT SEASON PERMIT QUOTAS (EITHER SEX)

Deer Mgt. Zone No.	Season Dates Code	Anticipated Deer Harvest [1992]**1993**	Permit Quota [1992]**1993**	Portions of Counties Involved
1	1	[93] **82**	[840] **750**	Sussex
2	1	[107] **138**	[1150] **1265**	Sussex
3	1	[70] **113**	1040	Sussex, Passaic, Bergen
4	[1]	0	0	Sussex, Warren
5	1	[288] **317**	[2500] **2880**	Sussex, Warren
6	1	[120] **131**	1200	Sussex, Morris, Passaic, Essex
7	1	[146] **158**	[1300] **1450**	Warren, Hunterdon
8	1	[351] **360**	[3025] **3300**	Warren, Hunterdon, Morris, Somerset
9	1	[132] **120**	[1150] **1100**	Morris, Somerset
10	1	[186] **196**	[1680] **1800**	Warren, Hunterdon
11	1	[90] **113**	[900] **1035**	Hunterdon
12	1	[179] **218**	[1900] **2000**	Mercer, Hunterdon, Somerset
13	1	[101] **87**	[775] **800**	Morris, Somerset
14	1	[120] **164**	[1300] **1502**	Mercer, Somerset, Middlesex, Burlington
15	1	[129] **115**	[920] **1059**	Mercer, Monmouth, Middlesex
16	1	[72] **76**	700	Ocean, Monmouth
17	1	[66] **62**	[500] **569**	Ocean, Monmouth, Burlington
18	1	[42] **43**	[340] **390**	Ocean
19	1	[60] **63**	[500] **575**	Camden, Burlington
20	1	[25] **44**	[300] **400**	Burlington
21	1	[54] **53**	490	Burlington, Ocean
22	1	[22] **24**	[160] **220**	Burlington, Ocean
23	1	[65] **82**	[650] **750**	Burlington, Camden, Atlantic
24	1	[44] **37**	340	Burlington, Ocean
25	1	[84] **98**	[700] **900**	Gloucester, Camden, Atlantic, Salem
26	1	[67] **65**	[400] **600**	Atlantic
27	1	[99] **87**	[750] **800**	Salem, Cumberland
28	1	[52] **65**	[400] **600**	Salem, Cumberland, Gloucester
29	1	[71] **63**	[500] **576**	Salem, Cumberland
30	1	[17] **18**	[150] **161**	Cumberland
31	1	[7] **8**	[64] **70**	Cumberland
32	1	[4] **5**	[40] **45**	Cumberland
33	1	[22] **25**	[200] **232**	Cape May, Atlantic
34	1	[62] **53**	[425] **489**	Cape May, Cumberland
35	1	[109] **106**	[840] **969**	Gloucester, Salem
36	1	[26] **25**	230	Bergen, Hudson, Essex, Morris, Union, Somerset, Middlesex
37	1	[7] **13**	[100] **120**	Burlington (Fort Dix Military Reservation)
38		0	0	Morris (Great Swamp National Wildlife Refuge)
39	1	[20] **7**	[50] **60**	Monmouth (Earle Naval Weapons Station)
40	2	[10] **4**	[20] **30**	Monmouth (Earle Naval Weapons Station—Waterfront)
41	1	[43] **63**	[500] **577**	Mercer, Hunterdon
42	1	[6] **9**	[75] **80**	Atlantic
43	1	[28] **16**	[150] **147**	Cumberland
44	1	[14] **5**	50	Cumberland
45	1	[33] **22**	[250] **200**	Cumberland, Atlantic, Cape May
46	1	[16] **22**	200	Atlantic
47	1	[10] **16**	[90] **150**	Atlantic, Cumberland, Gloucester
48	1	[61] **63**	[500] **582**	Burlington
49	1	[4] **5**	[40] **47**	Burlington, Camden, Gloucester
50	1	[36] **57**	[450] **519**	Middlesex, Monmouth
51	1	[47] **50**	[400] **459**	Monmouth, Ocean
52	1	[5] **8**	70	Ocean (Fort Dix Military Reservation)
53	1	[5] **4**	[38] **40**	Ocean (Lakehurst Naval Engineering Center)
54	1	[14] **7**	[36] **35**	Morris (Picatinny Arsenal—ARRAD Com)
55	1	9	80	Gloucester
56		0	0	Atlantic (Forsythe National Wildlife Refuge)
57		0	0	Atlantic (Forsythe National Wildlife Refuge)
58	1	[6] **5**	50	Burlington, Ocean (Forsythe National Wildlife Refuge)
59	1	[12] **16**	35	Salem (Supawna National Wildlife Refuge)
60		0	0	Hunterdon (Round Valley Recreation Area)
61	1	[13] **15**	135	Atlantic (Atlantic County Parks)

62	[1]	[3]	**0**	[30]	**0**	Monmouth (Fort Monmouth)
63	1	[52]	**33**	300		Salem
64			**0**		**0**	Monmouth (Monmouth Battleground State Park)
65	1	[13]	**16**	[115]	**150**	Gloucester, Camden
Total		[3,649]	**3,879**	[32,123]	**35,403**	

(l) The Season Dates Code referred in the table in (k) above is as follows:

1. Indicates the season dates will be November [7—December 5, 1992] **13—December 4, 1993.**

2. Indicates the season dates will be November [7, 1992 to January 2, 1993] **13, 1993 to January 1, 1994.**

(m)-(n) (No change.)

7:25-5.31 White-tailed deer permit shotgun season permit (either sex), Great Swamp National Wildlife Refuge (Zone 38).

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

(c) Duration of the Great Swamp Permit Shotgun Season permit shall be from sunrise to ½ hour after sunset on the following dates: December [3, 4, 5, 10 and 11, 1992,] **2, 3, 4, 9 and 10, 1993** or as may otherwise be designated by the U.S. Fish and Wildlife Service.

(d)-(i) (No change.)

7:25-5.34 Controlled hunting—hunting restrictions on widlife management areas

(a) No wildlife management areas have been selected for limited hunter density for the [1993-93] **1993-94** season. However, hunting with firearms shall be prohibited on November [6, 1992] **12, 1993** on those wildlife management areas designated as pheasant and quail stamp areas in N.J.A.C. 7:25-5.33.

(b) (No change.)

HIGHER EDUCATION

(a)

STUDENT ASSISTANCE BOARD

General Provisions for Tuition Aid Grant and Garden State Scholarship Programs Dependent/Independent Student Defined

Proposed Amendment: N.J.A.C. 9:7-2.6

Authorized By: Student Assistance Board, M. Wilma Harris, Chairperson.

Authority: N.J.S.A. 18A:71-26.8 and 18A:71-48.

Proposal Number: PRN 1993-283.

Submit written comments by June 16, 1993, to:

Valerie Van Baaren, Esq.
Administrative Practice Officer
Department of Higher Education
20 West State Street
CN 542
Trenton, New Jersey 08625

The agency proposal follows:

Summary

The proposed amendment incorporates the recent changes in Federal regulations authorized by the Higher Education Amendments of 1992 as they relate to the definition, and thus eligibility, of applicants to claim independent student status when applying for New Jersey State student assistance programs. The proposed amendment also maintains consistency in the definition of independent student status for both Federal and State student assistance programs especially in light of the fact that all applicants for New Jersey State aid beginning in 1993-94 must complete the "Free Application for Federal Student Aid" which requests information in the determination of independent status based on the new Federal definition. The proposed amendment excludes a provision for single students under age 24 that previously allowed for self-support by demonstrating an income of at least $4,000 for the prior two years. This particular determination of independence was controversial and was thought to be abused by many applicants. However, the new definition continues to authorize financial aid administrators to use their own judgment in special circumstances.

Social Impact

It has been a long-standing policy to provide a single, integrated application form by which students could apply for both Federal and State financial aid and, therefore, to maintain as much consistency as possible between the Federal definitions for student eligibility and those used in the Tuition Aid Grant (TAG) Program. In addition to streamlining the application process, the proposed amendment, in keeping with the Federal definition, specifically aims at tightening the eligibility criteria for independent student status. By applying the old definition, it was becoming increasingly easier over the years for students to claim their financial independence from parents thus effectively reducing the dollars available to low-income, dependent students. To ascertain student status using previous definitions, past forms required applicants to respond to a complicated set of questions designed to probe total financial resources exclusive of parental support. These questions were confusing to students. By realigning the State's definition with Federal regulations, the student will now respond to a more simplified set of questions and in special circumstances, financial aid administrators are authorized to use their own judgment thus allowing for the fair treatment of those applicants who are legitimately financially independent.

Economic Impact

Although it is difficult to gauge the impact of this one proposed amendment in isolation, it is estimated that approximately 3,000 TAG recipients who were treated as independent students last year under the old definition may revert to dependent status in 1993-94 in the absence of any intervention by a financial aid administrator. While little information is presently available on the parental resources of these students, all indications are that many of these students come from higher income families and it is believed that many of them will have reduced awards in 1993-94 or may no longer qualify for TAG. There is no impact on the total TAG appropriation since these funds will be redistributed to other qualified students who meet all eligibility and financial need criteria to receive an award.

Regulatory Flexibility Statement

A regulatory flexibility analysis is not required because the proposed amendment does not impose reporting, recordkeeping or other compliance requirements on small businesses as defined by the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The proposed amendment merely incorporates recent changes in Federal regulations concerning the definition of an independent student for purposes of determining eligibility for student financial aid.

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

9:7-2.6 Dependent/independent student defined

(a) (No change.)

(b) [Except as provided in (c) below an] **An** individual meets the requirements of this section if such individual:

1.-2. (No change.)

3. Is a graduate or professional student [who declares that he or she will not be claimed as a dependent for income tax purposes by his or her parents (or guardian) for the first calendar year of the award year]; or

4. Is a married individual [who declares that he or she will not be claimed as a dependent for income tax purposes by his or her parents (or guardian) for the first calendar year of the award year]; or

5. Has legal dependents other than a spouse; or

[6. Is a single undergraduate student with no dependents who was not claimed as a dependent by his or her parents (or guardian) for income tax purposes for the two calendar years preceding the award year and demonstrates to the student financial aid administrator total

self-sufficiency during the two calendar years preceding the award year in which the initial award will be granted by demonstrating annual total resources (including all sources of resources other than parents) of at least $4,000; or]

[7.]**6.** Is a student for whom a financial aid administrator makes a documented determination of independence by reason of other unusual circumstances. For purposes of receiving State financial assistance as an independent student due to unusual circumstances, at least one of the following criteria must be met:

i. The student has been separated from his or her parents due to an unsafe home environment [or has been institutionalized in a correctional facility]. Documentation of such status must be received from a court, social service agency, or other similar source acceptable to the director of the applicable student assistance program within the Department of Higher Education.

[ii. The student is a recipient of either Aid to Families with Dependent Children (AFDC) or general assistance in his or her own name and complies with the provisions of (b)6 above except for the resource requirement set forth therein.]

[iii.]**ii.** The student has been separated from his or her parents and comes from a documented background of historical poverty as set forth in N.J.A.C. 9:11-1.5 (or as attested to by a social service agency or respected member of the student's community and acceptable to the director of the applicable student assistance program within the Department of Higher Education), **and** is living with a relative who is providing support to the student[, and complies with the provisions of (b)6 above except for the resource requirement set forth therein.]

[iv.]**iii.** The student's economic and personal circumstances are of such a unique or unusual nature that denial of independent student status would create an unjust hardship upon the student. [Eligibility] **Documentation of eligibility** under this subparagraph [is subject to the approval of] **must be acceptable to** the director of the applicable student assistance program within the Department of Higher Education.

[(c) An individual may not be treated as an independent student described in (b)3, 4, and 6 above if the financial aid administrator determines that such individual was treated as an independent student during the preceding award year, but was claimed as a dependent by any other individual (other than a spouse) for income tax purposes for the first calendar year of such award year.

(d) The financial aid administrator may certify an individual described in (b)3, 4, and 6 above on the basis of a demonstration made by the individual but no disbursal of an award may be made without documentation.]

[(e)](c) (No change in text.)

(a)

BOARD OF DIRECTORS OF THE EDUCATIONAL OPPORTUNITY FUND

Financial Eligibility for Undergraduate Grants

Proposed Amendment: N.J.A.C. 9:11-1.5

Authorized by: Board of Directors of the Educational Opportunity Fund, Delbert Payne, Chairperson.
Authority: N.J.S.A. 18A:71-33.
Proposal Number: PRN 1993-282.

Submit comments by June 16, 1993 to:
Valerie Van Baaren, Esq.
Administrative Practice Officer
Department of Higher Education
20 West State Street
CN 542
Trenton, New Jersey 08625

The agency proposal follows:

Summary

The Educational Opportunity Fund Program is open to students from educationally and economically disadvantaged backgrounds. Participants in the program are eligible to receive financial aid and other support services for attending institutions of higher education in New Jersey. The Board of Directors of the Educational Opportunity Fund determines the income levels for which eligibility to participate in the program is based. This proposed amendment increases those income levels, in accordance with annual family income adjustments for student assistance eligibility methodology.

Social Impact

The proposed amendment, by increasing the maximum income levels for participation in the Educational Opportunity Fund Program, recognizes the change in family income levels in the State. The amendment will enable the Educational Opportunity Fund Program to continue to offer higher educational opportunities to disadvantaged citizens of New Jersey consistent with the spirit and intent of the original legislation. The best available data suggests between 500-700 additional students would meet this financial eligibility criteria for the program. However, within the limits of the current appropriation, approximately 50 percent of the students who meet the income eligibility criteria are enrolled in EOF.

Economic Impact

The proposal changes eligibility requirements for the Educational Opportunity Fund Program but does not change the amount of aid which each program participant receives. The increase in the income levels will serve to expand the potential pool of applicants to the program and increase the number of current program participants who will have continued eligibility. They do not have a direct economic impact on the total number of awards, or total costs, associated with the program because the maximum enrollment is limited by the level of appropriations for the number of students funded by the program. The proposed amendment expands the number of potential program participants but does not necessarily increase the number of actual program participants.

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 as defined by the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The proposed amendments apply only to public and independent colleges and universities in New Jersey.

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

9:11-1.5 Financial Eligibility for Undergraduate Grants

(a) A dependent student is financially eligible for an initial EOF grant if the gross income of his or her parent(s) or guardian(s) does not exceed the applicable amount set forth below in the EOF Income Elgibility Scale. Where the dependent student's parent(s) or guardian(s) are receiving welfare as the primary means of family support, the student is presumed to be eligible without regard to the amount of primary welfare support.

1. EOF Dependent Student Eligibility Scale:

Applicants With a Household of:	Gross Income (Not to Exceed):
2 persons	[$15,480] **$15,510**
3	[17,970] **18,030**
4	[20,460] **20,550**
5	[22,950] **23,070**
6	[25,440] **25,590**
7	[27,930] **28,110**

2. For each additional member of the household, an allowance of [$2,490] **$2,520** shall be added to this amount in order to determine eligibility for EOF for the [1991-92] **1993-94** Academic Year. This allowance shall be adjusted annually to reflect changes in the [Standard Maintenance] **Income Protection** Allowance as published by the College Scholarship Service. In addition, the gross income level for each household size also shall be adjusted to reflect the change in the annual [Standard Maintenance] **Income Protection** Allowance.

3. The EOF Executive Director shall annually inform institutions of adjustments to the Income Eligibility Scale, in accordance with the [Standard Maintenance] **Income Protection** Allowance published by the College Scholarship Service.

(b)-(c) (No change.)

(d) An independent student is financially eligible for an EOF grant providing his or her gross annual income (including spouse) for the calendar year prior to the academic year for which aid is requested and the calendar year during which aid is received does not exceed the following schedule:

1. [$9,610] **$10,520** family size (including student) 1;
2. [$12,100] **$13,100** family size (including spouse) 2;
3. [$14,590] **$16,180** family size (including spouse) 3;
4. [$17,080] **$19,090** family size (including spouse) 4;
5. **$22,320 family size (including spouse) 5;**

[5.]**6.** Add [$2,490] **$2,520** for each additional dependent. This amount should be adjusted annually to reflect changes in the Independent Student **Income Protection** Allowance as published by the College Scholarship Service.

[6.]**7.** (No change in text.)

HUMAN SERVICES

(a)

DIVISION OF YOUTH AND FAMILY SERVICES

Case Goals

Proposed New Rules: N.J.A.C. 10:133C-4

Authorized By: William Waldman, Commissioner, Department of Human Services.

Authority: N.J.S.A. 30:4C-4(h).

Proposal Number: PRN 1993-294.

Submit comments by June 16, 1993 to:

Barbara Kraeger
Manual Unit
Division of Youth and Family Services
CN 717
Trenton, New Jersey 08625-0717

The agency proposal follows:

Summary

The Division of Youth and Family Services has undertaken a project to review and incorporate existing Division policy contained in the Division's Field Operations Casework Policy and Procedures Manuals into the New Jersey Administrative Code as rules. This project, known as the "Operations Policy to Rules" project, or OPTR, was initiated by the Division to subject those policies which have widespread coverage, continuing effect or a substantial impact on the rights or legitimate interests of the regulated public to the rulemaking process required by the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.

The OPTR project involves an advisory body of 90 members, which includes family and child advocates, foster parent associations, Legal Services, the Public Advocate, the Association for Children of New Jersey, DYFS field staff and other agency representatives. Through the OPTR Group, the OPTR project is a community-based process involving the affected public, private non-profit representative groups and governmental agencies. The end product of the process is a thorough and full-scale study, reevaluation and revision of existing Division policies, procedures and practices.

These proposed new rules, addressing the Division's case goals for each child and each family member receiving services, is a product of the OPTR project. Rather than merely codifying the existing section of the Division Field Operations Manual on General Policy and Procedures, entitled "Case Goals," the OPTR Group approached the issue by determining the way they thought the Division should provide such services. This manual was never part of the Administrative Code, but for information purposes, the changes from the manual to the proposed new rules are here summarized:

- Responsibilities of the Division are clarified throughout the proposed rules.
- It is stated that the purpose of a case goal is to define and guide Division activities in its provision of services to each family member and in the achievement of a child's permanent living arrangement. N.J.A.C. 10:133C-4.3.
- It is clarified that the Division representative, in consultation with the supervisor and each family member, is to select a case goal that maintains the child safely in his or her own home; or a goal that is the least restrictive and most appropriate one for the child's needs, leading to the most permanent living arrangement. N.J.A.C. 10:133C-4.5(a). In addition, it is stated that the child and parent shall be advised of the case goal and shall be provided with information about what the case goal means and its effect on the relationship between the parent and the child. N.J.A.C. 10:133C-4.5(b).
- It is clarified that a case goal shall be selected at the time of initial service delivery for each child, and one for each member receiving services. Previously the case goals to select from were: family and individual stabilization; family reunification; adoption; long-term foster care custody; and other permanent living arrangement. Now, the case goals to select from are: maintenance in own home; return home; permanency with a relative or family friend; adoption; long-term foster care custody; independent living; and other long-term, specialized care. N.J.A.C. 10:133C-4.5(c).
- The case goal shall be reviewed at the request of a family member. N.J.A.C. 10:133C-4.6.

The Field Operations Manual on General Policy and Procedures' section entitled "Case Goals" contains other material not regulatory in nature (hypothetical situations, case situations, etc.). The Field Operations Manual on General Policy and Procedures' section entitled "Case Goals" will remain in existence, but will be revised to reflect these proposed new rules upon adoption.

Based on the premise that every child deserves a safe, stable and permanent home in which to grow and develop, the Division is responsible for selecting a case goal, in consultation with the child and each family member receiving services, that will ensure that case activities are structured in such a way as to achieve the desired permanent plan in as short a time as possible. A thorough review of each child's case goal once every six months further ensures that each child is receiving the appropriate services that will culminate in the timely achievement of the case goal.

The child and each family member benefit from having a case goal that directs case activities. By being advised of, and having input into, the selection of the case goal, each family member is able to express his or her desires regarding the future, permanent plan for his or her child.

A summary of the proposed rules follows:

Proposed N.J.A.C. 10:133C-4.1 gives the source of the Division's authority to establish a case goal.

Proposed N.J.A.C. 10:133C-4.2 states the scope of these rules.

Proposed N.J.A.C. 10:133C-4.3 states the purpose of these rules.

Proposed N.J.A.C. 10:133C-4.4 references the definitions used in these rules.

Proposed N.J.A.C. 10:133C-4.5 states who selects the case goal; when the case goal is established; and the seven case goal categories used by the Division.

Proposed N.J.A.C. 10:133C-4.6 states when to review a case goal and the purpose of the review.

Social Impact

The proposed new rules represent a thorough review and evaluation of existing DYFS case goal policy as outlined in the General Policy and Procedures' section "Case Goals." These rules extract from existing policy the basic elements the Division must follow in establishing and selecting a case goal for each child and family member receiving services. These rules also serve to change the existing nomenclature by which the Division identifies case goals. In addition, the rules clarify who shall have a case goal, who selects the case goal, when the case goal is selected, and when the case goal is reviewed. The public may have confidence that each child and family member receiving services from the Division will have an appropriate case goal that is reviewed regularly to ensure that progress is continually being made to achieve permanency. The number of people receiving services varies daily, and cannot, therefore, be estimated precisely. Each child, however, is assigned the most appropriate of the seven goals, determined by DYFS staff. Goals change, based on client needs, and the distribution of the seven goals over the client population is a fluid one.

Child advocates, regional and district office staff, and other agency representatives participated in developing these rules through the OPTR process. The Division expects that these rules will have a positive effect on the regulated public, the families who receive services from the Division, who will now have the opportunity to be cognizant of the Division's case goals and their meaning as it relates to permanency for children.

Economic Impact

The Division does not anticipate any change in economic impact from these proposed rules. These rules state current Division policy but add no new requirements on Divisional operations that would require any additional capital improvements, expenditures for staff or equipment on the part of the Division or any individual. Any training required to familiarize Division staff with these rules will be part of ongoing staff development. As selecting a case goal for each child and family member receiving services is, though an integral part, only a part of many functions performed by DYFS direct service staff, the costs of such tasks cannot be estimated with any degree of accuracy.

Regulatory Flexibility Statement

Neither the Division nor the public requesting Division services is considered a small business under the terms of N.J.S.A. 52:14B-16 et seq., the Regulatory Flexibility Act. The proposed new rules do not impose reporting, recordkeeping, or compliance requirements on small businesses. Therefore, a regulatory flexibility analysis is not necessary. These new rules state the DYFS case goal policies.

Full text of the proposal follows:

SUBCHAPTER 4. CASE GOALS

10:133C-4.1 Authority

Pursuant to N.J.S.A. 30:4C-4(h), the Division of Youth and Family Services, Department of Human Services, shall establish reasonable rules for the purpose of carrying into effect the meaning of the statute.

10:133C-4.2 Scope

The provisions of this subchapter shall apply to each child receiving services, each family member receiving services, and to the Division.

10:133C-4.3 Purpose of a case goal

The purpose of a case goal is to define and guide Division activities in its provision of services to each child and each family member. The case goal guides the Division's activities in the achievement of the child's permanent living arrangement. Maintenance in his or her own home, or placement in the least restrictive setting that affords access to family members, is usually the most appropriate goal that meets the needs of the child and is the most permanent.

10:133C-4.4 Definitions

The definitions in N.J.A.C. 10:133-1.3 are incorporated herein by reference.

10:133C-4.5 Selecting a case goal

(a) The Division representative shall, in consultation with his or her supervisor and each family member receiving services, select a case goal. The guiding principles in selecting the case goal are:

1. Maintaining the child safely in his or her own home; or
2. Selecting the least restrictive, most appropriate goal that shall meet the needs of the child and shall lead to the most permanent living arrangement.

(b) The parent and the child shall be advised of the case goal and shall be provided with appropriate information about the case goal and how it may affect the relationship between the child and the parent.

(c) At the time of initial service delivery and in keeping with (a) above, one of the following case goals shall be selected for each child, and one for each family member receiving services:

1. Maintenance in own home;
2. Return home;
3. Permanency with a relative or family friend;
4. Adoption;
5. Long-term foster care custody;
6. Independent living; or
7. Other long-term, specialized care.

10:133C-4.6 Review of the case goal

(a) The Division shall review the case goal of each child and each family member receiving services at regularly scheduled intervals, but no less frequently than once every six months, and at the request of a family member, and when major changes in family circumstances occur which might affect the case goal. The purpose of the review is to determine:

1. Whether the case goal remains appropriate and, if not, to identify a more appropriate one;
2. The progress made toward achieving the case goal;
3. What, if any, barriers exist that impede achieving the case goal; and
4. Whether the case plan for achieving the case goal is appropriate.

INSURANCE

(a)

DIVISION OF THE NEW JERSEY REAL ESTATE COMMISSION

Agency Information Statement

Proposed New Rule: N.J.A.C. 11:5-1.43

Authorized by: New Jersey Real Estate Commission, Micki Greco Shillito, Executive Director.

Authority: N.J.S.A. 45:15-6.

Proposal Number: PRN 1993-277.

A **public hearing** will be held on this proposal on:

Tuesday, June 8, 1993 at 10:00 A.M.
Mary G. Roebling Building
Room 219-220 (2nd Floor)
20 West State Street
Trenton, New Jersey 08625

Submit written comments by June 16, 1993, to:

Robert J. Melillo
Special Assistant to the Director
New Jersey Real Estate Commission
CN-328
Trenton, New Jersey 08625-0328

The agency proposal follows:

Summary

This proposed new rule would require real estate licensees to give to their prospective clients or customers, at or before the first meeting to discuss specific real estate needs, a copy of the Agency Information Statement prescribed in subsection (d) of the proposed rule. The statement describes the types of agency relationships a licensee may engage in when working as a real estate professional. Licensees will also be required to indicate on the form containing the statement their name, the name of the firm they are licensed with, the date on which it was given to the recipient, and in what capacity that licensee's firm intends to work with the person to whom the form is being given. In addition, the rule requires licensees to maintain records of when and to whom the form/statement was delivered. The rule provides several options which licensees may utilize to fulfill this recordkeeping requirement.

Finally, short-term or seasonal lease transactions, which are defined in the rule as those pertaining to leases with a specified term of less than 60 consecutive days, are exempted from the requirements of this rule. This 60 consecutive day standard is identical to that used in New Jersey's Rent Security Deposit Act, N.J.S.A. 46:8-19, which similarly exempts such short-term leases from the requirements it imposes with respect to the maintenance of security deposits.

Social Impact

The adoption of this proposed new rule will have a favorable social impact upon the real estate buying, selling and leasing public. In recent years several studies have demonstrated that many buyers and sellers of real estate do not understand who a real estate salesperson is representing as an agent in a typical residential transaction. Sellers have often believed that a licensee working with a buyer actually represented that buyer as their agent, when in fact the licensee was working as a sub-agent of the seller, in cooperation with the seller's listing broker. Similarly, many buyers have mistakenly assumed that the licensee who showed them available properties and assisted them in the submission of an offer was representing them as an agent, when in fact he or she was operating as an agent of the seller. The intended effect of this rule is to educate the public about the various agency relationships in which

real estate licensees may engage. This will be done by requiring licensees to supply the prescribed Agency Information Statement to prospective or actual buyers, sellers, lessors and lessees early on in their dealing with such persons. By providing this information to members of the public at that stage in their dealings with real estate licensees, the incidence of the problems which ensue from persons acting on the basis of erroneous assumptions about the capacity in which a licensee is acting in a given transaction will be reduced.

Economic Impact

The adoption of this proposed new rule will have a substantial and beneficial economic impact upon members of the public who buy, sell and lease real estate through New Jersey real estate licensees. As a result of acting upon mistaken beliefs regarding the role of real estate licensees in sale and lease transactions, buyers and lessees may pay more than a seller or lessor would have accepted, believing that information they confided to the licensee assisting them would not be passed along to the seller or lessor. However, when acting as an agent of an owner, such a licensee has an absolute legal duty and fiduciary obligation to convey such information to their principal. Clarifying the types of agency relationships which a licensee may enter into with the parties to transactions will result in fewer actions being taken and statements being made based upon erroneous assumptions, which will have a positive economic impact on all persons involved in real estate transactions. This is true because fewer licensees will be susceptible to law suits based upon allegations that the party who acted upon a mistaken belief did so as a result of having been mislead by the licensee(s) involved.

This proposed new rule will also have a favorable economic impact upon licensees by virtue of what it does not do. Because the rule makes it optional, rather than mandatory, for licensees to obtain a signed acknowledgment of the receipt of the notice form at the time it is delivered, the rule leaves it to the licensees to determine which mode of memorializing the delivery of the form will best serve their business interests. Some brokers, believing that it provides the best protection from future liability for their firms, may opt to establish a policy requiring all licensees in their employ to secure the signed acknowledgment at the time the form is supplied to a member of the public. Others, believing that to seek to do so may adversely affect their effort to build a rapport with a prospective customer or client, may do so in another manner permitted under the rule. At this stage in the promulgation process it is the judgment of the Commission that broker licensees themselves are in the best position to determine which procedure they are most comfortable with.

Regulatory Flexibility Analysis

This proposed new rule does impose recordkeeping and compliance requirements upon the approximately 6,000 real estate brokerage firms licensed by the Commission, most of which are small businesses as defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The requirements are that licensees provide the Agency Information Statement as set forth in the rule and maintain a record of when and to whom they provided the Statement. It is unlikely that any professional services will be needed to comply with these requirements. This is true because licensees can fulfill their obligation by keeping copies of their listing, buyer-broker and dual agency agreements and of contracts of sale or leases which contain the acknowledging language required by the rule, or copies of the statement form itself signed by the person to whom it was given if a licensee chooses to obtain such signatures, or by keeping a ledger reflecting who the statement was supplied to and when. Because licensees are currently required by rule to maintain copies of their listing and brokerage agreements and of contracts or leases they prepare (see N.J.A.C. 11:5-1.12), it is estimated that the initial and annual compliance costs to licensees will be minimal. Whatever cost there is will be determined by the volume of business a firm does, which may not directly correspond to the size of a firm. By offering licensees a choice on how to fulfill the recordkeeping requirement the rule is designed to minimize any adverse economic impact it may have on small businesses.

Because the rule is intended to serve as a means to educate the public, the public welfare would be endangered if an exemption were created for firms of a certain size, or smaller. Clearly, members of the public who deal with smaller firms may be just as confused and just as much in need of information about the roles of real estate licensees as agents in real estate transactions as are persons who deal with larger firms.

Full text of the proposed new rule follows:

11:5-1.43 Agency Information Statement

(a) Licensees shall supply information with regard to their agency representation of parties to real estate transactions as provided in this section.

(b) Nothing in this section shall apply to licensees dealing with actual or prospective lessors or lessees of rental interests with a specified term of not more than 60 consecutive days.

(c) Upon or before the first meeting to discuss specific real estate needs, licensees shall deliver the Agency Information Statement prepared and furnished by the New Jersey Real Estate Commission, the text of which is reproduced in (e) below, to all persons with whom they have contact concerning the actual or possible sale, purchase or leasing of real estate by such persons. The statement is to be delivered in the same form in which it is supplied to licensees by the Commission, with no deletions or revisions and no reduction in type size.

(d) At the time of delivering the Agency Information Statement required by this rule, the licensee must indicate in the spaces provided on the Statement form the date of their delivery of the form, the regular business name of the firm they are licensed with and in what capacity they intend to deal with the person to whom the form is given.

(e) The text of the Agency Information Statement to be delivered by licensees as provided above is as follows:

AGENCY INFORMATION STATEMENT

In New Jersey, real estate licensees are required to disclose how they intend to work with buyers and sellers in a real estate transaction.

There are several types of relationships that are possible and you should understand these at the time a licensee provides specific assistance to you in buying or selling real estate. These are (1) seller's agent; (2) buyer's agent; and (3) dual agent. Each of these agency relationships impose certain legal duties and responsibilities on the licensee as well as on the seller or buyer represented.

SELLER'S AGENT

A seller's agent **works only for the seller** and has legal obligations, called fiduciary duties, to the seller. These include reasonable care, undivided loyalty, confidentiality and full disclosure. Seller's agents often work **with** buyers, but do not represent the buyers. However, in dealings with buyers a seller's agent must act honestly and fairly. A seller's agent must also disclose to buyers any defects of a material nature affecting the physical condition of the property which a reasonable inspection by the licensee would disclose.

Seller's agents include all persons licensed with the brokerage firm which has the listing on the seller's property. In addition, licensees with other firms may accept an offer to work with the listing broker's firm as the seller's agents. Those who do so are called sub-agents.

BUYER'S AGENT

A buyer's agent acts solely on behalf of the buyer. A buyer's agent has fiduciary duties to the buyer which include reasonable care, undivided loyalty, confidentiality and full disclosure. However, in dealing with sellers a buyer's agent must act honestly and fairly and may not knowingly give a seller false information concerning the financial condition of the buyer.

A buyer wishing to be represented by a buyer's agent is advised to enter into a separate written buyer agency contract with the brokerage firm which is to act as their agent.

DUAL AGENT

Dual agency occurs when the same real estate brokerage firm represents both the buyer and seller at the same time. To act as a dual agent, a firm must first obtain the written consent of the buyer and seller. Dual agency is more likely to occur when a real estate firm working as a buyer's agent shows the buyer properties owned by sellers for which that firm is also working as a seller's agent.

A real estate agent acting as a dual agent must carefully explain to each party that, in addition to acting as their agent, they will also

act as the agent for the other party. They must also explain what effect their acting as a dual agent will have on the fiduciary duties they owe to the buyer and to the seller. When acting as a dual agent, a licensee must have the express permission of a party to disclose the highest price a buyer can afford to pay and the lowest price a seller will accept and their motivation to buy or sell.

If you decide to enter into an agency relationship with a firm which is to act as a dual agent, you are advised to do so by signing a written agreement with that firm which clearly states what that firm will and will not do to protect your interests.

NON-AGENT

A real estate licensee can work in a real estate transaction without representing anyone as an agent. Such a licensee would be required to treat all parties fairly and honestly and to act in a competent manner, but they would not be required to keep confidential any information, or to fulfill any other fiduciary obligations to either party.

Date: _____

We, _____
Name of Licensee

and _____
Name of Brokerage Firm

intend, as of this time, to work with you as:
(licensee check as appropriate)

☐ Seller's Agent Only

☐ Buyer's Agent Only

☐ Seller's Agent and Dual Agent if the opportunity arises

☐ Buyer's Agent and Dual Agent if the opportunity arises

NOTE: It is possible for real estate licensees to begin working with a buyer or seller as one type of agent, and to thereafter enter into a different type of agency relationship with one or both of the parties.

(f) Written confirmation of the delivery of the Agency Information Statement set forth in (e) above must be secured by licensees in one of the following ways:

1. By having the person to whom the Agency Information Statement is given sign an acknowledgment included on the form itself confirming their receipt of it at or prior to their first meeting with the named licensee to discuss their specific real estate needs;

2. Where an acknowledgment as provided in (f)1 above has not been previously obtained, the following statement shall be included in all written sale or rental listing agreements, all written buyer-broker or lessee-broker agreements, and all dual agency agreements:

By signing this agreement the owner/buyer/lessee (as applicable) acknowledges that they received from _____ _____ an Agency Information Statement
Name of Brokerage Firm
at or before their first meeting to discuss their specific real estate needs with a representative of _____.
Name of Brokerage Firm

3. Where an acknowledgment as provided in (f)1 and 2 above has not been previously obtained from a buyer or lessee, the following statement shall be included in all contracts of sale or leases for residential properties prepared by licensees as permitted by N.J.A.C. 11:5-1.16(g):

By signing this agreement the buyer/lessee (as applicable) acknowledges that they received from _____ _____ an Agency Information
Name of Brokerage Firm
Statement at or before their first meeting to discuss their specific real estate needs with a representative of _____.
Name of Brokerage Firm

4. In all cases where signed acknowledgments as provided above are not obtained, licensees are required to make a record of having supplied the Agency Information Statement to buyers, sellers, lessors and lessees as required by this rule. They may do so by keeping a written ledger of the names of all persons to whom the notice was given and of the date upon which it was supplied to those persons, or by some other means which accurately records to whom and when the notice was delivered.

(g) Copies of the Agency Information Statement on which receipt was acknowledged as referenced in (f)1 above, of other records as referenced in (f)4 above, and of listing agreements, buyer (lessee) brokerage agreements, dual agency agreements, and contracts or leases as referenced in (f)2 and 3 above shall be maintained as business records in accordance with N.J.A.C. 11:5-1.12(c) and (d), as applicable.

LAW AND PUBLIC SAFETY

(a)

DIVISION OF CONSUMER AFFAIRS
BOARD OF NURSING

Certification of Homemaker-Home Health Aides
Proposed Amendment: N.J.A.C. 13:37-12.1
Proposed New Rules: N.J.A.C. 13:37-14

Authorized By: Board of Nursing, Sister Teresa Harris, Executive Director.

Authority: N.J.S.A. 45:11-24.

Proposal Number: PRN 1993-285.

Submit written comments by June 15, 1993 to:
Sister Teresa Harris, Executive Director
Board of Nursing
P.O. Box 45010
Newark, New Jersey 07101

The agency proposal follows:

Summary

N.J.S.A. 45:11-24, the Nursing Practice Act of New Jersey, was amended effective December 16, 1989 to require the Board of Nursing to prescribe standards and requirements for a competency evaluation program resulting in the certification of homemaker-home health aides. Previously, the provision of homemaker-home health aide services was within the jurisdiction of the Department of Health. This proposal establishes a new subchapter, N.J.A.C. 13:37-14, in order to implement the statutory mandate.

During the course of developing the proposed new rules, the Board received the advice and recommendations of a Home-Health Aide Advisory Committee consisting of representatives of the Board, governmental agencies and Home-health care service agencies. In addition, an open public forum was held on June 10, 1992 in order to solicit comments from interested parties (see 24 N.J.R. 1861(a)). Thirty-two individuals spoke at the public forum, and the proposed rules address some of the concerns raised by these commenters. The following is a brief summary of each section of this new subchapter.

N.J.A.C. 13:37-14.1 describes the purpose and scope of the proposed new rules, which is to protect the health and safety of the public through certification of homemaker-home health aides and to prescribe standards and curricula for the training program which a homemaker-home health aide is required to complete in order to work in this State.

N.J.A.C. 13:37-14.2 sets forth the definitions of terms used in the subchapter.

N.J.A.C. 13:37-14.3 sets forth the duties of a homemaker-home health aide and the registered professional nurse supervisor.

N.J.A.C. 13:37-14.4 details training program standards and curricula. A training program must be approved by the Board prior to its commencement. Consistent with applicable Federal requirements, it must consist of at least 76 hours, to include 60 hours of classroom instruction and 16 hours of supervised clinical experience in a skills laboratory or a patient care setting.

N.J.A.C. 13:37-14.5, 14.6, and 14.7 describe the responsibilities of the program sponsor, the program coordinator and the program instructors. These subsections also set forth the following educational requirements for the positions of program coordinator and program instructor.

The program coordinator must be a registered professional nurse licensed in New Jersey with a minimum of a bachelor's of science degree

in nursing (BSN). The Board believes the BSN curriculum is the only nursing curriculum which allows the nurse to see the various levels of care needed for a patient at home. In addition to a BSN degree, the program coordinator must have two years of nursing experience, one of which shall have been in community health, public health or home care, within the five-year period immediately preceding application.

The classroom instructor must be a registered professional nurse with the same experience as that required of the program coordinator.

The supervisor of the 16-hour clinical portion of the program must be a registered nurse with two years of experience, one of which shall have been in community health, public health or home care, and with at least six months' experience in the supervision of aides.

Program coordinators and program instructors who began their employment on or before the effective date of these rules may qualify for exemption from these educational and experiential requirements if they meet specified minimum criteria.

N.J.A.C. 13:37-14.8 sets forth the requirement that every applicant for certification complete a Board-approved training program. The applicant must complete the program within four months of starting it.

N.J.A.C. 13:37-14.9 lists the documents required upon application for certification.

N.J.A.C. 13:37-14.10 sets forth information concerning the written competency examination.

N.J.A.C. 13:37-14.11 provides for a waiver of the training program requirement for current nursing students who have successfully completed a course in fundamentals/basic nursing.

N.J.A.C. 13:37-14.12 concerns initial certification and renewal.

N.J.A.C. 13:37-14.13 provides for certification by endorsement.

N.J.A.C. 13:37-14.14 sets forth the duties and powers of the Board.

The Board is also proposing to amend its fee schedule, N.J.A.C. 13:37-12.1(c), to increase the amount of the annual program approval fee for additional locations. The current annual program approval fee is $100.00 plus $25.00 for each additional location. However, since the review process is no less for the additional locations in terms of the amount of administrative staff time expended, the Board is proposing to charge a $100.00 approval fee for each location at which the program is offered.

Social Impact

The proposed new rules, which implement legislation requiring the Board of Nursing to prescribe standards and curricula for a homemaker-home health aide competency evaluation program, are of significant benefit to the consumer. The homemaker-home health aide's completion of the training program requirements will assure the consumer of receiving capable services. Furthermore, the certification process will establish a data base of relevant disciplinary information on homemaker-home health aides in New Jersey. This information is particularly important here because services are rendered in the home, where the patient is especially vulnerable. Also, the inclusion of home addresses in the data base will assist the Board in locating individuals in the event an appearance before the Board is required.

Individuals employed as homemaker-home health aides will have to be certified and, for the protection of the public, will be expected to conform to certain standards of practice.

Finally, the proposed new rules will enable the Board to meet the responsibilities imposed upon it by the legislature.

Economic Impact

Since completion of a training program is required in order to be certified by the Board, all applicants for certification as homemaker-home health aides will incur the costs necessary to complete such a program. The Board currently certifies approximately 16,000 individuals and estimates that it will certify approximately 7,000 aides each year. These individuals will, in addition to training program costs, be responsible for a $5.00 biennial certification renewal fee and an as yet undetermined fee for competency evaluation. The certification renewal fee has been calculated to provide the Board of Nursing with adequate funding to meet the responsibilities imposed upon it by the legislature without being prohibitive to applicants for certification.

Program sponsors will be subject to an annual program approval fee of $100.00 for each location at which the training program will be offered. Compliance with these rules should require little, if any, additional expense for program sponsors since, for the most part, the proposed rules mirror Federal requirements. The rules differ from Federal regulations with regard to educational requirements for the program coordinator. Specifically, all program coordinators not approved by the Board as of the effective date of these rules will be required to have a bachelors of science degree in nursing. Any additional expense incurred in hiring appropriately qualified program coordinators may be mitigated, however, by the fact that several staff positions which were required by Department of Health guidelines, that is occupational therapist, social worker, home economist, dietitian, are not required under these proposed rules.

No adverse economic impact upon the consumer of homemaker-home health aide services is anticipated.

Regulatory Flexibility Analysis

The proposed new rules, which implement the provisions of N.J.S.A. 45:11-24, as amended, will affect all applicants for certification as homemaker-home health aides as well as all program sponsors. The following analysis applies to an estimated 100 program sponsors, some of which would be small businesses as defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq.

Compliance requirements include obtaining written approval of the Board of Nursing prior to commencement of the program; paying the appropriate program approval fee and annual renewals thereof; ensuring that absent students receive required classroom and/or clinical instruction missed; and establishing and implementing policies and procedures for coordination of instruction. In addition, program sponsors must ensure that the program is staffed by appropriately qualified individuals; that the program consists of the required number of classroom and clinical instruction hours; and that the required student-to-instructor ratio is not exceeded.

Reporting requirements include submission to the Board of resumes of nursing instructors and Board notification, at least two weeks prior to each program session, of the location and beginning and ending dates of the session. Board notification of any program session cancellation or change is also required at least one week prior to the change. Recordkeeping requirements include maintenance of copies of lesson plans, the evaluation plan and student records.

Initial and annual costs of compliance include the program approval fee of $100.00 for each training program location. As stated, the Board believes that additional compliance costs will be insignificant since, with one exception, the proposed rules are similar to Federal requirements. Sponsors not employing program coordinators who have a bachelors of science degree in nursing as of the effective date of these rules will have to hire personnel who meet this requirement. The Board believes, however, that many program coordinators meet this educational requirement and that salary differentials, if any, based upon academic degrees are minimal. In any event, as stated in the Economic Impact statement above, any additional expenditure in this regard may be mitigated by the fact that these rules require fewer staff positions than were required under Department of Health guidelines. Professional services may be utilized in connection with hiring qualified teaching staff members and equipping a skills laboratory. Because these rules seek to promote and protect the public health and welfare through regulation of the provision of homemaker-home health services, no differentiation in compliance based upon business size is provided.

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

13:37-12.1 Fee Schedule

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

(c) The following additional fees shall be charged by the Board in connection with certification of homemaker-home health aides.

[1. Program approval fee (annual) $100.00

2. Fee for each additional location at which course is offered (annual) ..... 25.00]

1. Program approval fee for each location at which course is offered (annual) $100.00

Recodify existing 3. to 8. as **2. to 7.** (No change in text.)

SUBCHAPTER 14. HOMEMAKER-HOME HEALTH AIDES

13:37-14.1 Purpose and scope

(a) The rules in this subchapter are designed to protect the health and safety of the public through certification of homemaker-home health aides, pursuant to N.J.S.A. 45:11-24(d)(20).

(b) This subchapter prescribes standards and curricula for homemaker-home health aide education and training programs which a homemaker-home health aide, as defined in this subchapter, is required to complete in order to work in this State. This

subchapter also establishes standards and requirements for homemaker-home health aide certification and for the renewal, suspension or revocation of that certification.

13:37-14.2 Definitions

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

"Activities of daily living" mean the functions or tasks for self-care which are performed either independently or with supervision or assistance. Activities of daily living include at least mobility, transferring, walking, grooming, bathing, dressing and undressing, eating, and toileting.

"Homemaker-home health aide" means a person who is employed by a home care services agency and who, under supervision of a registered professional nurse, follows a delegated nursing regimen or performs tasks which are delegated consistent with the provisions of N.J.A.C. 13:37-6.2.

"Program coordinator" means the nurse responsible for the training program curriculum.

"Program sponsor" means the agency, hospital or educational institution or entity granted approval by the Board of Nursing to conduct a homemaker-home health aide training program.

13:37-14.3 Duties of a homemaker-home health aide; supervision

(a) The duties of a homemaker-home health aide may include, but not be limited to, providing personal care and homemaking services essential to the patient's health care and comfort at home, including shopping, errands, laundry, meal planning and preparation (including therapeutic diets), serving of meals, child care and assisting the patient with activities of daily living.

(b) A homemaker-home health aide shall not administer medications.

(c) The registered professional nurse who is supervising a homemaker-home health aide shall ensure that the patient care provided by the homemaker-home health aide does not exceed the tasks and procedures which the homemaker-home health aide has satisfactorily demonstrated, as documented by the registered professional nurse.

13:37-14.4 Homemaker-home health aide training program

(a) A homemaker-home health aide training program may be conducted by a home care agency licensed by the Division of Consumer Affairs; a home health agency or hospital licensed by the Department of Health; an educational institution approved by the New Jersey State Department of Education or the Department of Higher Education; or a home care agency accredited by an independent national or state accrediting body which is without direct or indirect financial interest in the agency. Said accrediting body shall have prior approval of the Board of Nursing.

(b) A homemaker-home health aide training program shall consist of at least 76 hours, to include 60 hours of classroom instruction and 16 hours of clinical instruction in a skills laboratory or patient care setting. The student-to-instructor ratio for classroom instruction shall not exceed 30 students to one classroom instructor.

(c) The 16 hours of clinical instruction in a skills laboratory or patient care setting shall be supervised by a registered professional nurse. The supervision ratio shall not exceed 10 homemaker-home health aides to one registered professional nurse.

(d) The curriculum for a homemaker-home health aide training program shall include the activities described in N.J.A.C. 13:37-14.3 and shall be consistent with the laws governing the practice of nursing and the delegation of selected tasks by the registered professional nurse.

(e) Written approval of the Board of Nursing is required prior to commencement of the training program, which approval shall be granted for a 12-month period.

(f) At the discretion of the Board, program approval may be contingent upon a visit to the program site by a representative of the Board.

(g) The Board may deny or revoke program approval if the program sponsor does not meet the standards set forth in this subchapter.

13:37-14.5 Program sponsor; responsibilities

(a) The program sponsor shall provide an appropriately equipped classroom and skills laboratory with sufficient equipment and resources to provide for efficient and effective theoretical and clinical learning experiences.

(b) The program sponsor shall submit the following to the Board of Nursing at least two months prior to the commencement of the training program:

1. A Board of Nursing application for program approval. The application form requests the name and address of the agency or school, course offering dates and location, tentative number of trainees and name and address of program coordinator. Two supplemental forms which must accompany the application are a faculty approval application which requests the name of the instructor assigned to each session and an instructor personnel record which requests brief biographical and educational information for each instructor;

2. The annual program approval fee for each location at which the program will be offered, as set forth in N.J.A.C. 13:37-12.1(c)1; and

3. Resume(s) of nursing instructor(s). The resume shall include the instructor's name, address, education (institution, type of degree or diploma, month and year of graduation), work experience (employer's name and address, dates of employment, including month and year, job title, whether full-time or part-time, and New Jersey license or certification number, as appropriate.

(c) The program sponsor shall not, without prior notice to and approval by the Board, make additions to or deletions from a training program which has been approved by the Board of Nursing.

(d) The program sponsor shall notify the Board of Nursing, at least two weeks prior to each program session, of the location and the beginning and ending dates of the program session.

(e) Except in an emergency situation, the program sponsor shall notify the Board of Nursing in writing of any program session cancellation or change, such as a change in location, nursing instructor or dates, at least one week prior to any such cancellation or change. No cancellation or change shall be implemented without the written approval of the Board.

(f) The program sponsor's responsibilities shall include, but not be limited to, the following:

1. Establishing and implementing policies and procedures for the coordination of instruction, including designating a responsible program manager;

2. Maintaining on file a copy of the lesson plan for the curriculum;

3. Establishing methods or provisions to ensure that an absent student receives the required classroom and/or clinical instruction missed;

4. Establishing and maintaining records for each student. The student record shall include, at a minimum, the following:

i. The beginning and ending dates of the program session;

ii. An attendance record, including the dates of any makeup sessions; and

iii. Evaluation of the student's performance by the classroom instructor and by the registered professional nurse who supervised the student's clinical instruction; and

5. Developing, implementing and maintaining on file a plan for evaluating the effectiveness of the program. The evaluation plan shall include, at a minimum, the following:

i. The name of the person responsible for implementing the evaluation plan;

ii. An annual written training program evaluation report, including findings, conclusions and recommendations;

iii. A written evaluation of instructor(s) performance;

iv. Program, faculty and student data, which shall include, at a minimum, the following:

(1) The beginning and ending dates of each program session;

(2) The number of students enrolled;

(3) The number and percentage of students who satisfactorily completed the program;

(4) The number and percentage of students who failed the program;

(5) The number and percentage of students in each program who passed the New Jersey Homemaker-Home Health Aide Certification Examination; and

(6) The number and percentage of students in each program who failed the New Jersey Homemaker-Home Health Aide Certification Examination.

(g) The program sponsor shall not use the homemaker-home health aide training program as a substitute for staff orientation or staff continuing education programs.

13:37-14.6 Program coordinator; responsibilities

(a) The homemaker-home health aide training program shall be coordinated by a registered professional nurse licensed in New Jersey with:

1. A minimum of a bachelor's degree in nursing; and

2. At least two years of full-time or full-time equivalent experience as a registered professional nurse within the five-year period immediately preceding application, one year of which shall have been in community health, public health or home care.

(b) The program coordinator's responsibilities shall include, but not be limited to, the following:

1. Ensuring that the curriculum is coordinated and implemented in accordance with this subchapter.

2. Establishing job descriptions indicating the responsibilities of each instructor;

3. Ensuring that each instructor meets the qualifications specified in N.J.A.C. 13:37-14.7;

4. Ensuring that the program sponsor has available the resume of each instructor;

5. Ensuring that each student is supervised by a registered professional nurse during the student's clinical experience;

6. Ensuring that the registered professional nurse supervising the student evaluates the student's clinical performance and transmits the results of the evaluation to the classroom nursing instructor; and

7. Ensuring that patient care provided during the training period by the student is provided in a safe and competent manner and that the tasks and procedures delegated to the student in accordance with N.J.A.C. 13:37-6.2 do not exceed the tasks and procedures which the student has satisfactorily demonstrated as documented by the registered professional nurse.

(c) Program coordinators who do not have a bachelor's degree in nursing but who are otherwise bachelor's or master's prepared and who began their employment on or before (the effective date of these rules) may qualify for an exemption from the requirements of subsection (a) subject to Board approval.

13:37-14.7 Program instructor; responsibilities

(a) Except as set forth in (c) below, classroom instruction shall be provided by:

1. A registered professional nurse licensed in New Jersey with at least two years of full-time or full-time equivalent experience as a registered professional nurse within the five-year period immediately preceding application, one year of which shall have been in community health, public health or home care; or

2. A registered professional nurse who meets the qualifications set forth in (a)1 above and a multidisciplinary team of individuals which may include, but not be limited to, a registered dietician, licensed social worker, licensed psychologist, licensed physical therapist, mental health consultant, licensed speech-language pathologist, public health nurse, home economist, occupational therapist, and/or member of the clergy.

(b) Except as set forth in (c) below, supervised clinical experience shall be provided to the student by a registered professional nurse with:

1. At least two years of full-time or full-time equivalent experience as a registered professional nurse within the five-year period immediately preceding application, one year of which shall have been in community health, public health or home care; and

2. At least six months of full-time or full-time equivalent experience in the supervision of homemaker-home health aides.

(c) Program instructors who began their employment on or before (the effective date of these rules) and who have been previously approved by the Board may qualify for an exemption from the requirements of (a) and (b) above.

(d) The program instructor's responsibilities shall include, but not be limited to, the following:

1. Developing a lesson plan for each content area prior to the starting date of the program. The lesson plan shall include:

i. The behavioral objective(s) of the lesson;

ii. The content of the lesson;

iii. A description of clinical activities for each lesson;

iv. The hours of instruction; and

v. Method(s) of presentation and teacher strategies;

2. Developing and implementing criteria for evaluating the classroom and clinical performance of students; and

3. Developing and implementing criteria to determine whether a student has satisfactorily completed the training program.

13:37-14.8 Homemaker-home health aides; training program requirement

Every applicant for certification as a homemaker-home health aide in this State shall be required to complete a training program approved by the Board of Nursing, except as provided in N.J.A.C. 13:37-14.11 and 14.13. The applicant shall have completed the training program no later than four months after commencing the program.

13:37-14.9 Application for certification; documents required

(a) An applicant for certification as a homemaker-home health aide shall submit the following to the Board:

1. Evidence of satisfactory completion of a homemaker-home health aide training program approved by the Board;

2. Evidence in such form as the Board may prescribe that the applicant is of good moral character, is not a habitual user of controlled substances and has never been convicted of or pleaded nolo contendere, non vult contendere or non vult to an indictment, information or complaint alleging violation of a Federal or state law; and

3. The application fee as set forth in N.J.A.C. 13:37-12.1(b).

13:37-14.10 Competency examination

(a) Upon successful completion of an approved training program, the applicant shall register for the next scheduled administration of the competency examination administered by the Board or a Board-approved testing service.

(b) The applicant may be employed by a home health care agency under the supervision of a registered professional nurse while waiting to take the next scheduled administration of the competency examination.

(c) The competency examination shall be an examination administered by the Board of Nursing or a Board-approved testing service at least four times a year.

(d) The passing score on the examination shall be established and reviewed annually by the Board.

(e) An individual who fails the competency examination may retake the examination provided that he or she registers for the next scheduled administration of the examination.

(f) An individual awaiting the next scheduled administration of the examination in accordance with (e) above may continue to be employed by a home health care agency under the supervision of a registered professional nurse.

(g) If the individual fails in the second attempt to pass the examination, he or she shall successfully complete another homemaker-home health aide training program approved by the Board before taking the examination again. This individual shall not be employed as a homemaker-home health aide until he or she passes the examination.

(h) Upon application to the Board, an individual may satisfy the examination requirement for certification as a homemaker-home health aide by passing an oral competency evaluation in English or Spanish.

13:37-14.11 Waiver of training program requirement

Current nursing students who have successfully completed a course in fundamentals/basic nursing may take the competency examination without first completing an approved training program.

13:37-14.12 Initial certification and renewal

(a) An individual who passes the competency examination may be eligible for certification by the Board as a homemaker-home health aide.

(b) Certification shall be renewed on a biennial basis unless disciplinary action against the certified person has been instituted by the Board.

13:37-14.13 Certification by endorsement

An individual certified as a homemaker-home health aide in another state who can verify successful completion of an equivalent homemaker-home health aide program and competency examination may be eligible for certification by endorsement.

13:37-14.14 Duties and powers of the Board

(a) The Board may deny or revoke training program approval if the program sponsor has failed to comply with N.J.S.A. 45:11-24(d)(20) to (24) or this subchapter.

(b) The Board may investigate complaints made against a program sponsor or certified homemaker-home health aide and may conduct hearings in connection with such complaints.

(c) The Board may suspend or revoke the certification of a homemaker-home health aide who has violated any provisions of N.J.S.A. 45:11-24(d)(20) to (24) or this subchapter.

(d) Any Board action for certification suspension or revocation or training program revocation shall take place only upon notice to the licensee and the opportunity for 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.

(e) Decisions on violations shall be a public record maintained by the Board pursuant to N.J.S.A. 45:11-24(d)(20) and (24).

TRANSPORTATION

(a)

DIVISION OF PROCUREMENT
BUREAU OF CONSTRUCTION SERVICES, PROCUREMENT

Construction Services

Proposed Readoption: N.J.A.C. 16:44

Authorized By: William D. Ankner, Director, Division of Policy and Capital Programming, Department of Transportation.

Authority: N.J.S.A. 27:1A-5, 27:1A-6, 27:7-2.1, 27:7-35.2 et seq., 14A:1-1 and 14:15-2.

Proposal Number: PRN 1993-286.

Submit comments by June 16, 1993 to:

Charles L. Meyers
Administrative Practice Officer
Department of Transportation
1035 Parkway Avenue
CN 600
Trenton, New Jersey 08625

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 N.J.A.C. 16:44, Construction Services, including the requirements for contractors. These rules are scheduled to expire on May 25, 1993.

The rules provide criteria to be complied with by contractors/corporations in the contractual agreements with the Department regarding the bidding process in accordance with funding from state, local and Federal governments. Additionally, these rules provide necessary guidelines to be complied with pursuant to statutory requirements. These rules have provided an efficient and effective mechanism for the processing of contracts, the collection of fees and the preclusion of corporate reorganizations by contractors/corporations without following proper procedures.

N.J.A.C. 16:44 is summarized as follows:

Subchapter 1, Classification of Contractors, outlines the standards and prerequisites for the classification of contractors and prospective bidders and compliance with N.J.S.A. 18:25-1 pertaining to standards designed to advance equal employment opportunity.

Subchapter 2, Distribution of Standard Specifications, provides the method for the distribution and accounting for standard specifications.

Subchapter 3, Distribution and Sale of Construction Plans and Supplementary Specifications, entails the distribution of and established fees to be charged for the sale of plans and supplementary specifications.

Subchapter 4, Advertising for Bids, outlines the specific method used in the advertising of Department bids.

Subchapter 5, Receipt of Bids, prescribes the process to be followed when bids are received after being advertised.

Subchapter 6, Contracts, establishes the award of the contracts, preparation, execution and distribution to the contractor who has been selected to perform the project.

Subchapter 7, Deferred Payments to Contractors for Materials Supplied and Work Performed in the Construction of State Highways and Related Projects, outlines the method of payment to contractors as the work progresses until completion; bond requirements for contractors; action required in cases of default; and payment of service charges.

Subchapter 8, Debarment, Suspension and Disqualification of a Person(s), establishes causes for debarment, conditions affecting the debarment of a person(s); procedures, period of debarment and scope of debarment affecting the debarment of a person(s); causes, conditions and procedures suspending a person(s) and the effect of contracting with the State.

Subchapter 9, Corporate Reorganization of Contractors, establishes procedures and guidelines to be followed by contractors/corporations who effect any change in corporate structure vehicle contractors/corporations who effect any change in corporate structure vehicle under contract with the Department.

These rules were reviewed by the Department's Bureau of Construction Services, Procurement in compliance with Executive Order No. 66(1978) and were found adequate, reasonable, understandable and necessary for the purpose for which they were originally promulgated.

This chapter is not being amended on readoption; however, amendments may be proposed in the near future. The chapter has been amended several times since the last readoption, which was effective May 25, 1988 at 20 N.J.R. 1467(a).

Over the past five years the rule has been amended as follows:

N.J.A.C. 16:44-1.2 was amended at 20 N.J.R. 380(b) to effect a procedural change in the manner in which prospective bidders were classified and was adopted at 20 N.J.R. 913(c); additionally amended at 20 N.J.R. 3004(a) to increase the current "unlimited range" from over $500,000,000 to over $99,999,999; added additional clarification dollar ratings to the present rating system; and deleted the Class "A" through Class "W" ratings and established ramps; and was adopted at 20 N.J.R. 309(a), and further amended at 21 N.J.R. 1023(a) to extend the time frame required for prequalified firms to renew their prequalification before expiration, and adopted at 21 N.J.R. 1833(a).

N.J.A.C. 16:44-1.4 was amended at 21 N.J.R. 1023(a) to extend the time frame required for prequalified firms to renew their prequalification before expiration; and adopted at 21 N.J.R. 1833(a).

N.J.A.C. 16:44-1.1 was amended at 21 N.J.R. 2240(a) to establish the composition of the pre-qualification committee and effected title changes within the committee to conform with organizational changes, and adopted at 21 N.J.R. 3314(a).

N.J.A.C. 16:44-5.5 was amended at 21 N.J.R. 2239(a) to transfer the verification of bid proposals from the Division of Accounting and Auditing for mathematical accuracy to the Bureau of Construction Services, Procurement Division and adopted at 21 N.J.R. 3314(a).

N.J.A.C. 16:44-5.1 was amended at 21 N.J.R. 3437(b) to effect administration and procedural changes in the receipt of bids as outlined in N.J.A.C. 16:44-5.1, and provided the time frame required for the Deputy Attorney General to make a determination that the proposal meets specific requirements for the Department, and deleted internal procedural references no longer appropriate, and adopted at 22 N.J.R. 245(b).

N.J.A.C. 16:44-8.1 through 8.3 were amended to effectuate the mandate of Executive Order No. 189(1988) and establish additional ethical standards in conformity with which vendors must conduct themselves in doing business with the State.

N.J.A.C. 16:44-3.1 was amended at 22 N.J.R. 2247(a) to change the name of Department to the Department of Transportation.

N.J.A.C. 16:44-3.2 was amended at 22 N.J.R. 2247(a) to raise fees to accommodate current expenses and in conjunction with the requirements of N.J.A.C. 16:1-2.2(g).

N.J.A.C. 16:44-7.2 was amended at 22 N.J.R. 2247(a) to change the partial payment limit from 80 percnet of the value of the material to 85 percent of the bid price for the pay item.

N.J.A.C. 16:44-7.3 was amended at 22 N.J.R. 2247(a) to delete and insert new text which lowers the deduction to be retained by the Department pending completion of the project from 10 percent to five percent.

N.J.A.C. 16:44-1.1 was amended at 23 N.J.R. 3270(a) to supply definition for "Aggregate Rating", "Current Bid Capacity", "Maximum Rating" and "Project Rating" and deleted the definition of "Pre-Qualification Committee."

N.J.A.C. 16:44-1.2 through 1.10 were added as new rules (see 23 N.J.R. 3270(a)) which delineated the manner in which the Department (D.O.T.) would evaluate a contractor/prospective bidder's financial capacity and engineering ability.

N.J.A.C. 16:44-1.8 was amended at 24 N.J.R. 703(a) to change the text at N.J.A.C. 16:41-1.8(c) to include all contractors, whatever performance rating they may have received. Previous text did not cover contractors with performance ratings between the average of all contractors who had received performance ratings from the Department within the last four years and five points below the average for all such contractors.

The Department is currently reviewing the rules and amendments will be proposed in the future.

Social Impact

Readoption of these rules will ensure the continued public confidence in State government's ability to ensure that the public's interest in awarding public contracts is adequately protected. These rules impact on all contractors/corporations performing contractual agreements with the Department, in that they stipulate procedures and guidelines to be adhered to in the efficient operation of the administration of contracts.

As these procedures have been in place for many years, the readoption will cause little or no impact on those being regulated or the general public. The contractors/corporations have worked with these rules, have contributed to effect changes in the past and understand their purposes. Little if any comment, either positive or negative is anticipated, as there is little change in impact on the parties concerned.

Economic Impact

The Department will incur direct and indirect costs for personnel and equipment required for the collection of fees and for the production of plans and specifications required for the bidding process. The fees range from $1.00 to hundreds of dollars, based upon the Department's cost of producing the particular copies for a particular bidder. Except for the copying charges, which are paid by the bidders, the public ultimately pays the costs for the bidding process, through the budgeting of general revenues for the Department's expenses in the bidding process.

Bidders seeking contracts must be prequalified by the Department annually, in accordance with the rules in this chapter. The prequalification involves an expenditure on the bidder's part for an audited financial statement, the cost of which varies according to the size and complexity of the bidder's business. While the statement is a part of the Department's requirements, the bidder needs such a statement for other entities as well, such as banks and issuers of construction or performance bonds. Therefore, the Department cannot be said to be the exclusive source of this requirement. Bidders, upon purchasing the plans and specifications from the Department of the particular project for which they wish to bid, prepare the bid based upon their knowledge of current prices and cost, through their contacts with subcontractors and suppliers. The bid preparation requires no specialized training, although a knowledge of the construction field is advantageous, and bids can be produced at minimal cost. Many contractors routinely maintain a price index of necessary supplies and services, and can update this information readily via telephone calls to potential suppliers. Bidders generally consider the cost of copies of plans and specifications a part of general administrative overhead, and account for it accordingly.

Regulatory Flexibility Analysis

The rules proposed for readoption primarily affect contractors/corporations, some of which are small businesses, as that term is defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The bookkeeping, recordkeeping and compliance requirements of these rules are directed towards maintaining the accountability of contractors/corporations in contract with the Department. The promulgation of less demanding contract administration standards for small businesses would erode the level of accountability necessary for the Department to protect the public interest in the awarding of public contracts. For this reason, no differing compliance standards based upon business size are provided for in these rules.

The rules proposed for readoption use performance rather than design standards in the regulation of contractors/corporations. Professional services, such as accounting, needed by any contractor/corporation are already a part of the regulatee's organization, for other purposes, as indicated in the Economic Impact. There are no changes being implemented in this readoption which require any additional professional services.

Full text of the proposed readoption appears in the New Jersey Administrative Code at N.J.A.C. 16:44.

TREASURY-GENERAL

(a)

DIVISION OF PENSIONS AND BENEFITS

Administration

Proposed New Rules: N.J.A.C. 17:1

Authorized by: Margaret M. McMahon, Director, Division of Pensions and Benefits.

Authority: N.J.S.A. 52:18-96 et seq.

Proposal Number: PRN 1993-273.

Submit comments by June 16, 1993, to:

Peter J. Gorman, Esq.
Administrative Practice Officer
Division of Pensions and Benefits
CN 295
Trenton, New Jersey 08625

The agency proposal follows:

Summary

The Division of Pensions and Benefits is constantly reviewing the administrative rules within N.J.A.C. 17:1 concerning the administrative procedures of the Division and processes involving all of the State-administered retirement systems. When the Division becomes aware of a change in the laws or a court decision that possibly could affect the operations of the retirement systems, the administrative rules are reviewed and, if changes therein are mandated, steps are taken to propose changes to those rules to conform to the new statute or court decision. Additionally, the rules are periodically reviewed by the Division's staff to ascertain if the current rules are necessary and/or cost efficient. After careful scrutiny of the current rules in N.J.A.C. 17:1, the Division is satisfied that they are necessary and needed for the efficient operation of the Division. Accordingly, the Division of Pensions and Benefits proposes N.J.A.C. 17:1, which expired May 6, 1993, as new rules in accordance with N.J.A.C. 1:30-4.4, to extend the expiration date for such rules under Executive Order No. 66(1978) to May 1, 1998. The current rules deal with accounting procedures, Alternate Benefit Programs, the Central Pension Fund, claims and credit, hearings, pension adjustments, Social Security, unemployment insurance, the Prescription Drug Program, the Dental Expense Program and administrative practices involved in the administration of all of the State-administered retirement systems and health benefits programs, as more specifically described below:

In the rules governing the general administration of the Division of Pensions there are those which are common to all employee benefit programs administered by the Division as well as those which are unique to specific systems, such as the Alternate Benefit Programs of State and county colleges, the Central Pension Fund, Judicial Retirement System, Pension Adjustment Program and the State Agency for Social Security.

In the years 1965-68, legislation was enacted successively to permit the establishment of Alternate Benefit Programs for full-time faculty members of public institutions of higher education, including the New Jersey College (now University) of Medicine and Dentistry, Rutgers—The State University, the New Jersey Institute of Technology, and the State and county colleges. These programs provide full-time faculty members with annuities comparable to that provided by the State retirement systems. These benefits can be vested immediately and thereby provide the mobility of pension credit which is necessary for this group of public employees. The benefits are coordinated with Social Security.

The Central Pension Fund consists of the administration of a series of noncontributory pension acts. No reserves are established for the payment of these pensions. These benefits are administered by the Division of Pensions in accordance with the governing statute and the rules of the State House Commission, where applicable. The scope of the fund extends to: Health Act Pensioners, in accordance with N.J.S.A. 43:5-1 to 5-4, consisting of persons employed by the State as of January, 1921; Veterans Act pensioners, in accordance with N.J.S.A. 43:4-1 to 4-6; Annuity for widows of Governors, in accordance with N.J.S.A. 43:8-2; Special Pensioners, in accordance with various laws of the State authorizing payments to designated individuals.

All controversies which may arise from decisions of any board or commission are subject to appeal action upon the request of the member or his or her attorney as filed with the respective board or commission. If the request is filed on a timely basis and the member or his or her attorney raises a question of fact or of law, the board may authorize a hearing. If so, the matter is referred to the Office of Administrative Law where such hearing will be conducted.

The Pension Adjustment Program was established pursuant to N.J.S.A. 43:3B-1 through 6, P.L. 1958, c.143, and it covers all eligible pensioners of the State-administered retirement programs.

The State Agency for Social Security was initially established by N.J.S.A. 43:22-1 et seq., P.L. 1951, c.253, and became effective with the execution of a Federal-compact on Social Security coverage in December, 1952. Pursuant to N.J.S.A. 43:15A-1 et seq., Article I of P.L. 1954, c.84, all eligible public employees in New Jersey were required to be covered by Social Security pursuant to the terms of the Federal-State agreement effective January 1, 1955. Under the terms of the State statute, the work of the State agency is delegated to the Director of the Division of Pensions.

Unemployment Compensation for certain public employees was made possible for the first time under the provisions of P.L. 1971, c.346, effective January 1, 1972, coverage was extended to employees of the State or any of its instrumentalities employed in a hospital or institution of higher education. The Division of Pensions was requested by the Treasury Department to coordinate the administration of the program and specifically the receipt and transmittal of payroll deductions for State employees to the Division of Unemployment Compensation. With the extension of Unemployment Compensation to all eligible employees in 1978, the State designated a contractor to monitor and audit the claims paid by Unemployment Compensation in order to verify the State's experience under the program. The contractor reports to the Division of Pensions, which is responsible for this activity as well as the accounting function.

The State Prescription Drug Program was initially made available to certain State employees pursuant to a contract of insurance which became effective on December 1, 1974. On November 1, 1976, the administration of the program was transferred to the Division of Pensions. The Prescription Drug Program covers all eligible State employees and dependents who are also eligible to participate in the State Health Benefits Program.

The State Dental Expense Program was initially made available to certain State employees pursuant to a contract which became effective on February 1, 1978. The administration is performed by the Division of Pensions. The Dental Expense Program is available to most eligible State employees and dependents who are also eligible to participate in the State Health Benefits Program.

The administrative practices rules address Division obligation priorities, loans; cash discount value requests, bankruptcy; subsequent loans, transfers; court attendants/sheriff's officers, interfund transfers; accumulated interest, purchase of service credit; continuation of death benefits coverage; maternity leaves of absence, delinquent enrollment; employer liability, and the deadline for county and municipal early retirement incentive resolutions.

Social Impact

The rules involving the Division of Pensions and Benefits affect and work to the benefit of the past, present and future public employees of the State, counties, municipalities and other public agencies. The taxpaying public is affected by these rules in the sense that public funds are used to fund the benefits.

Economic Impact

While the readoption of the rules themselves will not present any adverse economic impact to the public, the payment of the benefits and claims mandated in the statutes are funded by public employer contributions and thus indirectly by taxpayers. If the administrative rules are not readopted, the benefits and claims mandated by the statutes must still be paid. Without the administrative rules to provide for the efficient operation of the systems, financial chaos would occur.

Regulatory Flexibility Statement

The rules of the Division of Pensions and Benefits only affect public employers and employees. Thus, the proposed new rules do not impose any reporting, recordkeeping or other compliance requirements upon small businesses, as defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-1 et seq. Therefore, a regulatory flexibility analysis is not required.

Full text of the expired rules proposed herein as new can be found in the New Jersey Administrative Code at N.J.A.C. 17:1.

(a)

DIVISION OF PENSIONS AND BENEFITS
Judicial Retirement System
Proposed New Rules: N.J.A.C. 17:10

Authorized By: Margaret M. McMahon, Secretary, Judicial Retirement System.

Authority: N.J.S.A. 43:6A-29d.

Proposal Number: PRN 1993-274.

Submit comments by June 16, 1993, to:

Peter J. Gorman, Esq.
Administrative Practice Officer
Division of Pensions and Benefits
CN 295
Trenton, New Jersey 08625

The agency proposal follows:

Summary

The Division of Pensions and Benefits is constantly reviewing the administrative rules within N.J.A.C. 17:10 concerning the Judicial Retirement System. When the Division becomes aware of a change in the laws or a court decision that possibly could affect the Judicial Retirement System, the administrative rules are reviewed and, if changes therein are mandated, steps are taken to propose changes to those rules to conform to the new statute or court decision. Additionally, the rules are periodically reviewed by the Division's staff to ascertain if the current rules are necessary and/or cost efficient. After careful scrutiny of the current rules in N.J.A.C. 17:10 et seq., the Division is satisfied that they are necessary and needed for the efficient operation of the System. Accordingly, the Division of Pensions and Benefits proposes N.J.A.C. 17:10, which expired May 6, 1993, as new rules in accordance with N.J.A.C. 1:30-4.4, to extend the expiration date for such rules under Executive Order No. 66(1978) to May 1, 1998. The current rules deal with the administration, enrollment, membership, retirement and transfer aspects associated with the Judicial Retirement System.

Social Impact

The rules involving the Judicial Retirement System affect and work to the benefit of the past, present and future persons appointed as judges within the New Jersey judicial system. The taxpaying public is affected by these rules in the sense that public monies are used to fund the benefits.

Economic Impact

While the readoption of the rules themselves will not present any adverse economic impact to the public, the payment of the benefits and claims mandated in the statutes are funded by public employer contribu-

tions and thus indirectly by taxpayers. If the administrative rules are not readopted, the benefits and claims mandated by the statutes must still be paid. Without the administrative rules to provide for the efficient operation of the systems, financial chaos would occur.

Regulatory Flexibility Statement

The rules of the Judicial Retirement System only affect public employers and employees. Thus, this proposed readoption does not impose any reporting, recordkeeping or other compliance requirements upon small businesses, as defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-1 et seq. Therefore, a regulatory flexibility analysis is not required.

Full text of the expired rules proposed herein as new can be found in the New Jersey Administrative Code at N.J.A.C. 17:10.

TREASURY-TAXATION

(a)

DIVISION OF TAXATION

Gross Income Tax
Credit for Excess Contributions
Proposed Amendment: N.J.A.C. 18:35-1.17

Authorized By: Leslie A. Thompson, Director, Division of Taxation.
Authority: N.J.S.A. 54A:9-17(a).
Proposal Number: PRN 1993-281.

Submit comments by June 16, 1993 to:
Nicholas Catalano
Chief, Tax Services
Division of Taxation
50 Barrack Street
CN 269
Trenton, New Jersey 08646

The agency proposal follows:

Summary

N.J.A.C. 18:35-1.17 is proposed for amendment to include guidance for employers and employees regarding the Health Care Subsidy Fund established by recent legislation. As a result of P.L. 1992, c.160, employers will now be required to separately state on the W-2 the amounts withheld for the Health Care Subsidy Fund, along with the amounts withheld for New Jersey unemployment insurance, disability insurance (public or private), and the Workforce Development Partnership Fund.

Employees who find that they have overpaid their contributions to the Health Care Subsidy Fund will be entitled to claim a credit against gross income. Overpayments of contributions to the Health Care Subsidy Fund, unemployment insurance, disability benefits fund, or the Workforce Development Partnership Fund, can be claimed as a credit by filing the NJ-2450 when filing the New Jersey gross income tax return.

Social Impact

The proposed amendment will identify for the general working public the amount withheld from their salary which is being contributed to the Health Care Subsidy Fund.

Economic Impact

The proposed amendment should have no specific economic impact, since it only requires an employer to separately state on the W-2 the amount of the employee's contribution to the Health Care Subsidy Fund. The amendment does not impose a new reporting requirement on the employer but simply amends a requirement that already exists.

Regulatory Flexibility Analysis

The proposed amendment imposes requirements regarding the separate statement on W-2s issued by employers of amounts withheld for the Health Care Subsidy Fund. The proposed amendment applies to small businesses as the term is defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., as well as to large businesses. Any action to exempt employers who may be small businesses would not be in compliance with the New Jersey Gross Income Tax Act. Therefore, the Division of Taxation has applied these provisions to employers uniformly.

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

18:35-1.17 Credit for excess contributions

(a) Credit for excess amounts deducted and withheld as worker contributions for unemployment and disability insurance shall be treated as follows:

1. Employers issuing a W-2 form to employees shall include on it:

i.-iii. (No change.)

iv. The amount withheld for Health Care Subsidy Fund contributions;

Recodify existing iv. and v. as **v. and vi.** (No change in text.)

(b) The latter two numbers referred to in [(a)1iv and v] **(a)1v and vi** above are assigned by the New Jersey Division of Unemployment and Disability Insurance in the Department of Labor.

(c) An individual claiming a credit against gross income tax for overpayment of unemployment, disability insurance [or], Workforce Development Partnership Fund **or Health Care Subsidy Fund** contributions shall claim such credit by including with his New Jersey 1040 or New Jersey 1040-NR a completed New Jersey Form 2450[, in duplicate]. A claim not received within two years after the end of the calendar year in which the contributions were deducted is void. Such claims are not applicable to withholdings made during calendar years prior to 1983.

Examples 1.-2. (No change.)

(d) (No change.)

OTHER AGENCIES

(b)

ELECTION LAW ENFORCEMENT COMMISSION

Public Financing: General Elections for the Office of Governor
Proposed Amendments: N.J.A.C. 19:25-15.17 and 15.48

Authorized by: Election Law Enforcement Commission, Frederick M. Herrmann, Ph.D., Executive Director.
Authority: N.J.S.A. 19:44A-16 and 19:44A-38.
Proposal Number: PRN 1993-284.

A **public hearing** concerning this proposal will be conducted on Friday, June 18, 1993 at 10:00 A.M. at:
Election Law Enforcement Commission
28 West State Street
Trenton, New Jersey

To reserve time to speak, telephone the Commission offices at (609) 292-8700 by June 16, 1993.

Submit written comments by June 16, 1993 to:
Nedda Gold Massar, Esq.
Election Law Enforcement Commission
CN-185
Trenton, New Jersey 08625-0185

The agency proposal follows:

Summary

The New Jersey Election Law Enforcement Commission (hereafter, the Commission) proposes amendments to its rules concerning the public financing of general election candidates for Governor (N.J.A.C. 19:25-15). These amendments have been necessitated by enactment on March 8, 1993 of statutory changes to N.J.S.A. 19:44A-16 which require candidates to include in campaign reports the occupation and name and mailing address of the employer of each individual whose aggregate contributions to the candidate exceed $200.00 (see P.L. 1993, c.65, section 9). The Commission believes that requiring disclosure of the additional contributor occupation and employer information by gubernatorial candidates in the documentation necessary to receive public matching funds therefore fulfills the public policy of the recent amendments to the New Jersey Campaign Contributions and Expenditures Reporting Act (hereafter, the Act).

1. A new subsection (1) has been added to N.J.A.C. 19:25-15.17, Matching of funds, to require that the certified statement filed by a candidate applying to receive public matching funds disclose the occupation and employer's name and mailing address for each contributor who is an individual and whose aggregate contributions to a candidate for the general election exceed $200.00. Disclosure on campaign reports of occupation and employer information concerning individual contributors whose aggregate contributions to a candidate are in excess of $200.00 is required by amendments to N.J.S.A. 19:44A-16 enacted on March 8, 1993 (P.L. 1993, c.65, section 9). Because this information is required by statute to be disclosed to the public on a gubernatorial candidate's campaign reports, the Commission believes that it is reasonable to require that the same information be provided in matching fund submission documents for each contributor of over $200.00 as a condition of receipt of public matching funds for that contribution.

2. N.J.A.C. 19:25-15.48, Candidate statement of qualification before participation in public financing, requires a candidate who intends to apply for public matching funds on a date later than the September 1st deadline for proving qualification to participate in gubernatorial public financing to file a statement with the Commission by September 1st which includes evidence that $177,000 in contributions has been deposited and expended for gubernatorial general election expenses. This section has been amended to include a new paragraph (a)4 which requires disclosure of the occupation and name and mailing address of the employer of each individual contributor reported in the statement of qualification whose aggregate contributions exceed $200.00. It is the opinion of the Commission that a campaign which intends at some date in the future to apply to receive public matching funds must demonstrate as part of the evidence of its qualification to receive public funds that it is prepared to comply with the contributor disclosure requirements of the Act.

Social Impact

The Commission's proposed amendments will affect primarily publicly-financed gubernatorial candidates and their campaign treasurers in the general election, and require additional recordkeeping and reporting requirements for information concerning contributions received from individuals. These records are required to be made and maintained by all candidates for inclusion on campaign reports which are filed pursuant to the Act. Imposing the additional requirement to report on public matching fund submissions the occupation and name and mailing address of an employer for an individual whose contributions exceed $200.00 serves the important social purpose of ensuring that public money is provided only to gubernatorial candidates who are able to fully comply with the requirements of the Act.

Economic Impact

The Commission believes that the proposed amendments which require reporting of additional contributor information on submissions for public funds by publicly-financed gubernatorial candidates will have a minimal economic impact. All candidates are currently required to make and maintain detailed records of all campaign receipts. The recently-enacted statutory changes to N.J.S.A. 19:44A-16 require that all candidates, including publicly-financed gubernatorial candidates, obtain and report the additional information concerning the occupation and employer of individual contributors of over $200.00.

Therefore, the only economic impact of the proposed amendments is to require that the occupation and employer information be disclosed by a publicly-financed gubernatorial campaign on an additional report not required of other candidates.

The costs associated with acquiring this information will have to be borne by all candidates. The Commission believes the cost to a publicly-financed campaign of including the information on submissions for public matching funds, as well as on campaign reports, will be marginal.

Regulatory Flexibility Statement

The Commission's proposed amendments do not impose any recordkeeping, reporting, or other compliance requirements on small businesses, as that term is defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. While it is conceivable that small businesses may be employed to provide goods or services to 1993 gubernatorial general election candidates, the reporting and recordkeeping requirements generated by the proposed amendments are solely on the gubernatorial and prospective candidates purchasing such goods and services.

Full text of the proposal follows (additions inidicated in boldface **thus**).

19:25-15.17 Matching of Funds

(a)-(k) (No change.)

(l) The lists of contributors submitted pursuant to this section shall also include for each contributor who is an individual and whose aggregate contributions to the candidate in the general election exceed $200.00 the occupation of the individual and the name and mailing address of the individual's employer.

19:25-15.48 Candidate statement of qualification before participation in public financing

(a) A candidate who intends to apply to the Commission for public matching funds on a date later than September 1 preceding a general election for the office of Governor must on or before September 1 preceding the general election for Governor file:

1.-3. (No change.)

4. For each contribution from an individual whose aggregate contributions to the candidate in the general election exceed $200.00 which is submitted in the report required by (a) above, the certified statement of qualification shall include the occupation of the individual and the name and mailing address of the individual's employer.

(b)-(c) (No change.)

(a)

CASINO CONTROL COMMISSION

Rules of the Games

Minimum and Maximum Wagers

Proposed Amendments: N.J.A.C. 19:45-1.12A; 19:47-1.3, 2.3, 2.6, 3.2, 5.1, 5.6, 7.2 and 9.3

Proposed Repeals: N.J.A.C. 19:47-4.2, 6.6, 10.10, 11.12 and 12.10

Proposed Repeal and New Rule: N.J.A.C. 19:47-8.2

Authorized By: Casino Control Commission, Joseph A. Papp, Executive Secretary.

Authority: N.J.S.A. 5:12-63(c), 69(a), 70(f), 99(a)16, and 100(e).

Proposal Number: PRN 1993-271.

Submit written comments by June 16, 1993 to:

Seth Briliant, Assistant Counsel
Casino Control Commission
Arcade Building
Tennessee Avenue and the Boardwalk
Atlantic City, N.J. 08401

The agency proposal follows:

Summary

These proposed amendments, repeals and new rule would implement a legislative change which eliminates a statutory requirement that the Commission must set and approve minimum wagers. Accordingly, the amendments, repeals and new rule would change the manner in which the Commission regulates minimum and maximum wagers, as well as the "spread" between those wagers.

Section 100(e) of the Casino Control Act, N.J.S.A. 5:12-100(e) (the Act), originally required the Commission to establish minimum wagers for all authorized table games, in order to "assure the vitality of casino operations" and "maximum participation by casino patrons." See, for example, N.J.A.C. 19:47-2.3(e) and 8.2.

In 1992, section 100(e) was amended to delete the reference to minimum wagers. In accordance with this statutory change, these amendments would delete N.J.A.C. 19:47-8.2(a), which requires a casino licensee to obtain Commission approval of its minimum wagers.

N.J.A.C. 19:47-8.2(b) presently specifies certain maximum permissible wagers at each authorized game, and certain minimum required "spreads" between minimum and maximum wagers. These regulations provide for the minimum spread to be as small as 10 times the minimum wager, see N.J.A.C. 19:47-8.2(b)4iv, and as large as 400 times the minimum wager, see N.J.A.C. 19:47-8.2(b)3ii1. Many of the games

(Blackjack, Pai Gow, Sic Bo, Red Dog, Pai Gow Poker) simply require a minimum spread of one to 20 on a minimum wager of $5.00 or less; others, such as Roulette and Big Six, allow different minimum spreads for different types of wagers.

The Commission believes that the present system, in addition to being overly cumbersome, is neither effective nor equitable for casino licensees or their patrons. Accordingly, except for certain wagers with specific minimum or maximum limitations or requirements, such as the "Over/Under 13" bet in N.J.A.C. 19:47-2.17(g), these proposed amendments, repeals and new rule would permit the casinos to set their own maximum wager limits, subject only to the general requirement that for all minimum wagers of $100.00 or less, where the odds are 10 to one or less, the corresponding maximum wager must be at least 10 times the minimum wager. See proposed N.J.A.C. 19:47-8.2(a).

Pursuant to N.J.A.C. 19:47-8.2(b), different maximum wagers could be offered at one gaming table for each permissible wager in an authorized game, and different maximums could be offered at different gaming tables for the same wager in an authorized game.

These amendments would also delete the cross-references to N.J.A.C. 19:47-8.3 now found in N.J.A.C. 19:47-1.3, 2.3, 3.2, 4.2, 5.1, 5.6, 6.6, 7.2, 8.2, 9.3, 10.10, 11.12, and 12.10. Instead, N.J.A.C. 19:47-8.2(c) would provide, as a general rule, that a casino licensee must provide notice of its minimum and maximum wagers, and any changes thereto, at each gaming table, in the manner specified in N.J.A.C. 19:47-8.3. However, no notice to the Commission would be required for any increase or decrease in the minimum wager, see N.J.A.C. 19:47-8.3(b) and (c), or any change in the maximum wager, see N.J.A.C. 19:47-8.3(c).

A new subsection, N.J.A.C. 19:47-8.2(d), would provide, in accordance with section 100(g) of the Act, that a wager which exceeds the maximum limit when placed, but is accepted by the dealer, would be paid or lost in its entirety, as the case may be, despite the fact that it exceeded the table limit. This would codify the existing practice of permitting casino licensees to "waiver" the maximum wager limit for one or more patrons at a table; it would also apply to the mistaken or inadvertent acceptance of a wager in excess of the table limit.

Social Impact

These proposed amendments, repeals and new rules would simplify and streamline the way casino licensees may set their minimum and maximum wagers, while striking what the Commission considers to be an appropriate balance between the goals of casino vitality and maximum player participation. These amendments, repeals and new rule would ensure that casino patrons will have sufficient flexibility to increase their wagers in meaningful amounts on routine and lower-odds wagers when they believe it is prudent to do so, thus affording them the maximum participation mandate by section 100(e) of the Act. However, casino licensees would still be free to impose whatever maximum bet requirements they believe are necessary on larger and higher-odds wagers, in order to limit their risk and to protect the vitality of their casino operations.

Economic Impact

Because of the complex interaction between wager limits and other factors involving a patron's casino play or a casino licensee's operation, the economic impact of the proposed amendments, repeals and new rule is unknown. However, because of the considerable flexibility which casino licensees already enjoy with regard to setting minimum and maximum wagers, no major economic impact to the public or casino licensees is anticipated.

Regulatory Flexibility Statement

The proposed amendments, repeals and new rule would affect casino licensees and their patrons, none of which is a "small business" as that term is defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. Accordingly, no regulatory flexibility analysis is required.

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

19:45-1.12A Personnel assigned to the operation and conduct of low limit table games

(a) Notwithstanding the provisions of N.J.A.C. 19:45-1.12 or any other Commission rule to the contrary, a casino licensee may offer table games which do not meet the minimum staffing requirements of N.J.A.C. 19:45-1.12 provided that:

1. The maximum wager [permitted] on such table games shall be $25.00;

2. [Any] **The** minimum wager [required] on such table games shall be no higher than $5.00; and

3. (No change.)

(b)-(c) (No change.)

19:47-1.3 Making and removal of wagers[; approval of minimum wagers]

(a)-(e) (No change.)

[(f) Each casino licensee shall submit to the Commission for its review and approval in accordance with N.J.A.C. 19:47-8.2 the proposed minimum wagers to be permitted at each craps table in the casino and the casino simulcasting facility. Each casino licensee shall provide notice in accordance with N.J.A.C. 19:47-8.3 of the minimum and maximum wagers in effect at each craps table.]

19:47-2.3 Wagers

(a)-(d) (No change.)

[(e) Each casino licensee shall submit to the Commission for review and approval in accordance with N.J.A.C. 19:47-8.2 the minimum wagers permitted at each blackjack table in the casino and the casino simulcasting facility. Each casino licensee shall provide notice in accordance with N.J.A.C. 19:47-8.3 of the minimum and maximum wagers in effect at each blackjack table.]

Recodify existing (f)-(h) as **(e)-(g)** (No change in text.)

[(i)](**h**) No dealer or other casino employee or casino key employee shall permit any player to engage in conduct violative of [subsections (g) or (h)] **(f) or (g) above** [of this section].

Recodify existing (j)-(k) as **(i)-(j)** (No change in text.)

[(l)](**k**) If a double shoe is utilized, the term "first card" as used in (a), (c) and [(g)] **(f)** above shall mean "determinant card."[.]

19:47-2.6 Procedure for dealing of cards

(a)-(j) (No change.)

(k) In lieu of the procedure set forth in (h) above, a casino licensee may permit a blackjack dealer to deal his or her hole card face upward after a second card and before additional cards are dealt to the players, provided that the casino licensee complies with the notice requirements set forth in N.J.A.C. 19:47-8.3. Notwithstanding any other provision of this subchapter, the following rules shall apply whenever cards used to game at blackjack are dealt in accordance with this subsection:

1. (No change.)

2. Winning wagers shall be paid in accordance with N.J.A.C. 19:47-2.3[(f)] **(e)**, except that standard blackjack shall be paid at odds of 1 to 1;

3.-5. (No change.)

(l)-(o) (No change.)

19:47-3.2 Wagers

(a)-(d) (No change.)

[(e) Each casino licensee shall submit to the Commission for review and approval in accordance with N.J.A.C. 19:47-8.2 the minimum wagers permitted at each Baccarat-Punto Banco table. Each casino licensee shall provide notice in accordance with N.J.A.C. 19:47-8.3 of the minimum and maximum wagers in effect at each Baccarat-Punto Banco table.]

19:47-4.2 [Minimum and maximum wagers] **(Reserved)**

[Each casino licensee shall submit to the Commisssion for review and approval in accordance wtih N.J.A.C. 19:47-8.2 the minimum wagers permitted at each Baccarat-Chemin de Fer table. Each casino licensee shall provide notice in accordance with N.J.A.C. 19:47-8.3 of the minimum and maximum wagers at each Baccarat-Chemin de Fer table.]

19:47-5.1 Wagers

(a)-(d) (No change.)

[(e) Each casino licensee shall submit to the Commission for review and approval in accordance with N.J.A.C. 19:47-8.2 the minimum wagers permitted at each roulette table in the casino and the casino simulcasting facility. Each casino licensee shall provide notice in accordance with N.J.A.C. 19:47-8.3 of the minimum and maximum wagers in effect at each roulette table.]

19:47-5.6 Big Six Wheel; wagers and rotation of the wheel

[(a) Each casino licensee shall submit to the Commission for review and approval in accordance with N.J.A.C. 19:47-8.2 the minimum wagers permitted at each Big Six Wheel in the casino and the casino simulcasting facility. Each casino licensee shall provide notice in accordance with N.J.A.C. 19:47-8.3 of the minimum and maximum wagers in effect at each Big Six table.]

Recodify existing (b)-(f) as **(a)-(e)** (No change in text.)

19:47-6.6 [Minimum wagers] **(Reserved)**

[(a) Each casino licensee shall submit to the Commission for review and approval, in accordance with N.J.A.C. 19:47-8.2, the minimum wagers permitted at each red dog table.

(b) Each casino licensee shall provide notice in accordance with N.J.A.C. 19:47-8.3 of the minimum and maximum wagers in effect at each red dog table.]

19:47-7.2 Wagers

(a)-(d) (No change.)

[(e) Each casino licensee shall submit to the Commission for review and approval in accordance with N.J.A.C. 19:47-8.2 the minimum wagers permitted at each minibaccarat table. Each casino licensee shall provide notice in accordance with N.J.A.C. 19:47-8.3 of the minimum and maximum wagers in effect at each minibaccarat table.]

Recodify existing [(f)](e) (No change in text.)

19:47-8.2 Minimum and maximum wagers

[(a) Each casino licensee or applicant shall submit to the Commission a proposal specifying the minimum wagers and any other limitations at all authorized table games in its casino or casino simulcasting facility. Such submission shall be made at least 30 days before gaming operations are to commence or before changes in a previously submitted proposal are to become effective, unless otherwise permitted by the Commission. Each such submission shall contain, but not be limited to the following information:

1. A floor plan of the casino and the casino simulcasting facility showing the location and configuration of all table games authorized by the Commission or proposed by the licensee or applicant for authorization;

2. The number of such table games, by game, authorized by the Commission or proposed by the licensee or applicant for such authorization in the licensee's or applicant's casino or casino simulcasting facility;

3. The minimum and maximum amount that the applicant or licensee will permit patrons to place on the possible wagers at each gaming table (forms will be provided by the Commission).

4. For the purposes of this regulation:

i. "Table games authorized by the Commission" means the total number of table games which the casino licensee is permitted to operate under the terms of its operation certificate;

ii. "Table games proposed by the licensee or applicant for authorization" means the total number of table games which the casino licensee or casino license applicant requests permission to operate under the terms of an operating certificate;

iii. "Table game open for play" means a table game staffed by the required number of dealers and supervisory personnel and in all respects available for gaming.

(b) The spread between the minimum wager and the maximum wager at table games shall be as follows:

1. Blackjack: If the minimum wager at a table is $5.00 or less, the maximum wager shall be at least $100.00;

2. Craps: If the minimum wager at a table is $5.00 or less, the maximum wager shall be at least $500.00; provided, however, that the maximum wager on the pass, don't pass, come, or don't come shall not preclude a casino patron from taking the odds or laying the odds in accordance with the regulations of the Commission relating to craps;

3. Roulette: If the minimum wager at a table is:

i. Less than $5.00, the maximum wager shall be at least:

(1) $1,000 on an even-money wager;

(2) $500.00 on wager where the odds are two to one;

(3) $50.00 on an inside wager, any way the patron can get to the number;

ii. $5.00, the maximum wager shall be at least:

(1) $2,000 on an even-money wager;

(2) $1,000 on a wager where the odds are two to one;

(3) $100.00 on an inside wager, any way the patron can get to the number;

4. Big Six Wheel: The minimum wager shall be $5.00 or less and the maximum wagers shall be at least:

i. $400.00 on a wager where the odds are even money;

ii. $200.00 where the odds are two to one;

iii. $80.00 where the odds are five to one;

iv. $50.00 where the odds are ten to one;

v. $50.00 where the odds are twenty to one;

vi. $50.00 where the odds are forty-five to one.

5. Baccarat:

i. If the minimum wager at a table is $50.00 or less the maximum wager shall be at least $2,000.

6. Minibaccarat:

i. If the minimum wager at the table is $5.00 or less, the maximum wager shall be at least $100.00.

7. Red Dog:

i. If the minimum wager at a table is $5.00 or less, the maximum wager shall be at least $100.00.

8. Sic bo:

i. If the minimum wager at the table is $5.00 or less, the maximum wager shall be at least $100.00. Nothing in this chapter shall preclude a casino licensee from establishing different maximum wagers for each wager at the game of sic bo, provided, however, that such limitations are posted at the table.

9. Pai gow:

i. If the minimum wager at the table is $5.00 or less, the maximum wager shall be at least $100.00.

10. Pai gow poker:

i. If the minimum wager at the table is $5.00 or less, the maximum wager shall be at least $100.00.

11. Pokette:

i. If the minimum wager at a table is $5.00 or less, the maximum wager shall be at least $40.00. Nothing in this chapter shall preclude a casino licensee from establishing different maximum wagers for each permissible wager at the game of pokette; provided, however, that such limitations are posted at the table.

(c) A casino licensee shall provide notice of changes in the permissible minimum and maximum wagers at table games in accordance with N.J.A.C. 19:47-8.3.]

(a) Except as otherwise specifically provided in this chapter, the minimum and maximum wagers permitted at any authorized table game in a casino or casino simulcasting facility shall be established by the casino licensee; provided, however, that any required minimum wager of $100.00 or less which has corresponding payout odds of 10 to one or less shall be required to have a maximum wager which is at least 10 times the amount of the minimum wager.

(b) A casino licensee may offer:

1. Different maximum wagers at one gaming table for each permissible wager in an authorized game; and

2. Different maximum wagers at different gaming tables for each permissible wager in an authorized game.

(c) A casino licensee shall provide notice of the minimum and maximum wagers in effect at each gaming table, and any changes thereto, in accordance with N.J.A.C. 19:47-8.3.

(d) Any wager accepted by a dealer which is in excess of the established maximum permitted wager at that gaming table shall be paid or lost in its entirety in accordance with the rules of the game, notwithstanding that the wager exceeded the current table maximum.

19:47-8.3 Rules of the games; notice

(a) (No change.)

(b) Except as provided in (c) below, no casino licensee shall change the rules pursuant to which a particular table game is being

operated unless, at least one-half hour in advance of such change, the casino licensee:

1.-2. (No change.)

3. Notifies the Commission of the rule change, the gaming table where it will be implemented and the time that it will become effective, **provided, however, that the Commission need not be notified of increases in minimum wagers.**

(c)-(d) (No change.)

19:47-9.3 Wagers

(a)-(c) (No change.)

[(d) Each casino licensee shall submit to the Commission for review and approval, in accordance with N.J.A.C. 19:47-8.2, the minimum wagers permitted at each sic bo table.

(e) Each casino licensee shall provide notice in accordance with N.J.A.C. 19:47-8.3 of the minimum and maximum wagers in effect at each sic bo table.]

[19:47-10.10 Minimum and maximum wagers

(a) Each casino licensee shall submit to the Commission for review and approval, in accordance with N.J.A.C. 19:47-8.2, the minimum wagers permitted at each pai gow table.

(b) Each casino licensee shall provide notice in accordance with N.J.A.C. 19:47-8.3 of the minimum and maximum wagers in effect at each pai gow table.]

Recodify existing N.J.A.C. 19:47-10.11 as **10.10** (No change in text.)

[19:47-11.12 Minimum and maximum wagers

(a) Each casino licensee shall submit to the Commission for review and approval, in accordance with N.J.A.C. 19:47-8.2, the minimum wagers permitted at each pai gow poker table.

(b) Each casino licensee shall provide notice in accordance with N.J.A.C. 19:47-8.3 of the minimum and maximum wagers in effect at each pai gow poker table.]

Recodify existing N.J.A.C. 19:47-11.13 as **11.12** (No change in text.)

[19:47-12.10 Minimum and maximum wagers

(a) Each casino licensee shall submit to the Commission for review and approval, in accordance with N.J.A.C. 19:47-8.2, the minimum wagers permitted at each pokette table.

(b) Each casino licensee shall provide notice in accordance with N.J.A.C. 19:47-8.3 of the minimum and maximum wagers in effect at each pokette table.]

(a)

CASINO CONTROL COMMISSION

Gaming Equipment

Issuance and Use of Slot Tokens for Gaming; Slot Token Specifications

Proposed Amendments: N.J.A.C. 19:46-1.33

Authorized By: Casino Control Commission, Joseph A. Papp, Executive Secretary.

Authority: N.J.S.A. 5:12-63(c), 69(a), 70(i) and 100(d).

Proposal Number: PRN 1993-272.

Submit written comments by June 16, 1993 to:

Seth H. Briliant, Counsel
Casino Control Commission
Arcade Building
Tennessee Avenue and the Boardwalk
Atlantic City, NJ 08401

The agency proposal follows:

Summary

This proposal would update and clarify the Commission's requirements and specifications for slot machine tokens. It would also codify previous rulings and interpretations made by the Commission and its staff concerning slot tokens specifications. For example, proposed N.J.A.C. 19:46-1.33(b) now lists the specifications of all slot tokens which have previously been approved by the Commission. The amendments to N.J.A.C. 19:46-1.33(a), also make it clear that slot tokens may be used in casino simulcasting facilities for simulcast wagering; N.J.A.C. 19:46-1.33(d) lists the situations in which slot tokens may or may not be used for such wagers. The deletion, rewrite and recodification of N.J.A.C. 19:46-1.33(c) results in no substantive change and is solely to clarify language.

Social Impact

This clarification and codification of slot token specifications should make it easier for casino licensees, as well as manufacturers of slot machines and slot machine tokens, to design, manufacture and utilize slot tokens that comply with Commission regulations because the information regarding specifications is now clearly listed. These proposed amendments should similarly enable the Commission and the Division of Gaming Enforcement (Division) to administer and enforce slot token specifications more easily, effectively and efficiently. There should not be any social impact upon casino patrons or the general public.

Economic Impact

Because they merely codify or clarify existing slot token requirements, these proposed amendments should not have any economic impact upon casino licensees or the makers of slot machines or slot machine tokens. There should also be no economic impact upon the Commission, the Division or the public.

Regulatory Flexibility Statement

These proposed amendments will affect New Jersey casino licensees, none of which is a "small business" as that term is defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. They will also affect manufacturers of slot machines or slot machine tokens, some of which may be "small businesses" under the Act.

By their very nature as a medium of exchange in casinos, slot tokens must be uniform and thus uniformly regulated. Such uniform regulation can only be achieved by imposing uniform compliance upon all manufacturers, distributors and users of slot tokens. Thus, no exemption for small businesses involved with slot tokens has been provided in this instance.

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

19:46-1.33 Issuance and use of tokens for gaming [in slot machines]; **slot token specifications**

(a) A casino licensee may, with [the] **Commission** approval [of the Casino Control Commission], issue metal tokens designed for gaming use in its slot machines **and in simulcast wagering,** provided that **each** such **slot** token[s]:

1. Clearly [identify] **identifies** the name or trade name and location of the **issuing** casino [issuing them];

2. Clearly states [the] **its** face value [of the token];

3. Contains a statement [to the effect] that [such] **the** token[s are] **is** acceptable only at the casino issuing [them] **it;**

4. Contains the statement "Not Legal Tender";

5. [Are] **Is** not deceptively similar to any current or past coin of the United States or a foreign country;

6. [Are] **Is** of a size or shape or [have] **has** other characteristics which [will] physically prevents [their] **its** use [to activate] **in** lawful vending machines or other machines designed to be operated by coins of the United States, except slot machines;

7. [Are] **is** not manufactured from:

i. [a] **A** three-layered material consisting of a **pure copper core clad on both sides with a** copper-nickel alloy [clad on both sides of a pure copper core]; [nor from]

ii. [a] **A** copper based alloy, [except if] **unless** the total zinc, nickel, aluminum, magnesium and other alloying metal exceeds 25 percent of the [tokens'] **token's** weight; **or**

iii. [nor from a] **A** ferromagnetic material;

[8. Comply with the following specifications:

i. Measure outside the following ranges in diameter (inches):]

8. Shall not have a diameter which is between:

0.680 **inch and** 0.860 **inch**
0.890 **inch and** 0.980 **inch**
1.018 **inches and** 1.068 **inches**
1.180 **inches and** 1.230 **inches**
1.475 **inches and** 1.525 **inches**

[ii.] **9. Shall not weigh** [Weigh no] less than two grams[; iii. Be no] **and shall not be** less than 0.060 inch thick; [and]

10. Is manufactured from a metal or combination of metals approved by the Commission;

11. Incorporates such anti-counterfeiting features and other security measures as the Commission may require; and

[9.] **12. Contains a statement that it is not redeemable for cash, if the slot** [For] token[s] **is** issued pursuant to section (c)2 below[, contain a statement which indicates that the slot tokens are not redeemable for cash].

(b) In addition to the above requirements, the following denominations of slot tokens must also meet the following specifications, with manufacturing tolerances approved by the Commission:

Denomination	Diameter
$ 1.00	**1.469 inches**
$ 2.00	**1.340 inches**
$ 5.00	**1.750 inches**
$ 10.00	**1.700 inches**
$ 25.00	**1.875 inches or 1.950 inches**
$100.00	**1.600 inches**
$500.00	**1.550 inches**

[(b)](**c**) No casino licensee shall issue or cause to be utilized in its casino any tokens for gaming use in slot machines unless and until such tokens are approved by the Casino Control Commission. In requesting approval of [such] **any slot** tokens, a casino licensee shall first submit to the Commission a detailed schematic of its proposed token which shall show the front, back and edge of [such] **the** token[s], its diameter, [and] thickness and any logo, design and wording [to be contained] thereon, all of which shall be depicted on [such schematics] **the schematic** as they will appear, both as to size and location, on the actual **slot** token. Once the design [schematics are] **schematic is** approved by the Casino Control Commission or its designee, no **slot** token shall be issued or utilized until and unless a sample of [such] **the** token is also submitted **to** and approved by the Commission.

[(c) Slot tokens approved for issuance by a casino licensee pursuant to this section shall either be:

1. Issued to a patron upon request or in accordance with a complimentary distribution program authorized pursuant to N.J.A.C. 19:45-1.46 and:

i. Capable of insertion into designated slot machines operated by the casino licensee for the purpose of activating play;

ii. Available as a payout from the payout reserve container (hopper) of such slot machines;

iii. Available for use in simulcast wagering; and

iv. Redeemable by the patron in accordance with N.J.A.C. 19:46-1.5(f)1; or

2. Issued in accordance with a complimentary distribution program authorized pursuant to N.J.A.C. 19:45-1.46 and:

i. Capable of insertion into designated slot machines operated by the casino licensee for the purpose of activating play;

ii. Retained in a separate drop bucket contained in such slot machines in accordance with N.J.A.C. 19:45-1.36(i) and 19:46-1.25(f);

iii. Not available as a payout from the payout reserve container (hopper) of such slot machines; and

iv. Exchangeable only for a coupon in accordance with N.J.A.C. 19:46-1.5(f)2.]

(d) A slot token shall be capable of insertion into and activating the play of a designated slot machine operated by the casino licensee which issued the slot token.

1. A slot token that is redeemable by the patron pursuant to N.J.A.C. 19:46-1.5(f)(1) shall:

i. Be issued upon a patron's request, or be issued in accordance with a complimentary distribution program authorized pursuant to N.J.A.C. 19:45-1.46;

ii. Be available as a payout from the slot machine payout reserve container (hopper); and

iii. Be available for use in simulcast wagering.

2. A slot token that is exchangeable only for a coupon pursuant to N.J.A.C. 19:46-1.5(f)2 shall:

i. Be issued only in accordance with a complimentary distribution program authorized pursuant to N.J.A.C. 19:45-1.46;

ii. Not be available as a payout from the slot machine hopper; and

iii. Be retained in a separate slot drop bucket or slot drop box, pursuant to N.J.A.C. 19:46-1.25(h); and

iv. Not be available for use in simulcast wagering.

(a)

CASINO CONTROL COMMISSION

Rules of the Games
Pokette
Payout Odds
Proposed Amendment: N.J.A.C. 19:47-12.6

Authorized by: Casino Control Commission, Joseph A. Papp, Executive Secretary.

Authority: N.J.S.A. 5:12-63(c), 70(f), 99(a) and 100(e).

Proposal Number: PRN 1993-270.

Submit written comments by June 16, 1993, to:

Barbara A. Mattie, Chief Analyst
Casino Control Commission
Arcade Building
Tennessee Avenue and Boardwalk
Atlantic City, NJ 08401

The agency proposal follows:

Summary

The proposed amendment to N.J.A.C. 19:47-12.6 would amend the payout odds in the game of pokette for the "single card" and "two card" wagers to 50 to 1 and 24 to 1, respectively. Currently, N.J.A.C. 19:47-12.6(b) requires that the wagers be paid off at odds no less than 51 to 1 for the "single card" wager and 25 to 1 for the "two card" wager.

Social Impact

The proposed amendment is not anticipated to have any significant social impact.

Economic Impact

If the game of pokette were currently being offered in casinos, the proposed amendment could be viewed as having a negative impact on those patrons which bet on the "single card" and "two card" wagers. However, no casinos are currently offering the game due to its house advantage. The proposed amendment may result in casinos electing to offer the game of pokette due to the increased theoretical hold percentage, which would generate increased casino revenues. Any increase in casino revenue which materializes will benefit senior and disabled citizens of New Jersey from the additional tax revenues realized. However, since there are no pokette tables presently available for patron use in Atlantic City casinos, there will be no immediate negative or positive economic impact from the proposed amendment.

Regulatory Flexibility Statement

No regulatory flexibility analysis is required because the proposed amendment 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]).

19:47-12.6 Payout odds

(a) (No change.)

(b) Each casino licensee shall pay off winning wagers at the game of pokette at no less than the odds listed below:

Wager	Payout Odds
Single card straight up	[51] **50** to 1
Two cards or split bet	[25] **24** to 1

...

RULE ADOPTIONS

AGRICULTURE

(a)

STATE AGRICULTURE DEVELOPMENT COMMITTEE

Agricultural Management Practices

Adopted Repeal: N.J.A.C. 2:76-2.1
Adopted Repeal and New Rule: N.J.A.C. 2:76-2.3
Adopted New Rules: N.J.A.C. 2:76-2.2 and 2.4
Adopted Amendment: N.J.A.C. 2:76-2.2

Proposed: February 16, 1993 at 25 N.J.R. 622(a).
Adopted: April 22, 1993 by the State Agriculture Development Committee, Arthur R. Brown, Jr., Chairperson.
Filed: April 23, 1993, as R.1993 d.223 **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. 4:1C-5f.

Effective Date: May 17, 1993.
Expiration Date: July 31, 1994.

Summary of Public Comments and Agency Responses:

COMMENT: The Sussex County Agriculture Development Board felt that the power of mediation dispute should be left at the county level rather than be placed with the State Agriculture Development Committee (SADC). Furthermore, the Board felt it was more familiar with the land, landowner, and situation than the SADC. The Board also stated that the determination of best agriculture management practices can be established through studies conducted by the State and Rutgers Extension.

RESPONSE: The mediation process described in the proposed new rule at N.J.A.C. 2:76-2.4, which involves the SADC is mandated under the Right to Farm Act, N.J.S.A. 4:1C-1 et seq., specifically N.J.S.A. 4:1C-6d. There is a distinct difference between the mediation process mandated by statute and the dispute procedures described in the current rule at N.J.A.C. 2:76-2.3. The dispute procedures between the municipality, farmer and the general public with respect to resolving disputes concerning agricultural management practices involving the operation of a commercial farm could only be instituted if an agricultural management practice was recommended by the SADC and does not address conflicts with State instrumentalities. Under the statute and proposed rule the SADC has the authority to mediate disputes between its recommended agricultural management practices and the practices of State instrumentalities, including State departments and agencies. The proposed rule broadens the current rule to mandate mediation between State departments and agencies. The proposed new rule and amendments were initiated to clarify the SADC's statutory responsibility for studying, developing and recommending agricultural management practices. The proposed amendments do not affect a county agriculture development board's ability to develop an educational and informational program concerning farmland preservation techniques and recommended agricultural management practices to advise and assist municipalities, farmers and the general public with respect to the implementation of these techniques pursuant to N.J.S.A. 4:1C-16a.

The Board's comment that the determination of best agriculture management practices can be established through studies conducted by the State and Rutgers Extension is consistent with the proposed new rules and amendment. As stated at proposed N.J.A.C. 2:76-2.2, the SADC may consult the New Jersey Department of Agriculture and the New Jersey Agricultural Experiment Station and other organizations or persons when recommending agricultural management practices. "Best" management practices established by other agencies may be considered by the SADC when recommending agricultural management practices.

COMMENT: The New Jersey Farm Bureau stated that it does not understand the need to significantly amend the process established by the Right to Farm Act and rules adopted by the SADC for developing agricultural management practices. It was further stated that agricultural management practices approved for use by all in the farm community MUST be prepared by those with the most expertise charged by both Federal and State statute with such responsibility. It is their understanding that the Right to Farm Act intended that agricultural management practices be developed like Best Management Practices by those agencies mandated to provide technical assistance to them. Farm Bureau suggested that if the definition and development of an agricultural management pracice should include a broader number of those with technical expertise about farming practices, then they should be added to the proposed rule. It is their opinion that consulting the New Jersey Agricultural Experiment Station and the State Soil Conservation Committee should be mandatory, not discretionary as proposed in the new rule and amendments.

The New Jersey Farm Bureau noted a second concern that the amended definition for agricultural management practices (AMPs) added the words "on farmland." They expressed the opinion that AMPs must cover the entire farm operation, not just the practices concerning the land.

The New Jersey Farm Bureau further noted that they disagree that any person or agency should be able to initiate the costly and time-consuming process of developing or commenting upon an AMP, especially without any contact with those expert in the practices and needs of New Jersey agriculture. They stated that if the nonfarm public feels that certain practices should be encouraged, they should present their request to those responsible for technically assisting farm operations before the SADC gets involved. They also raised the question if the SADC could use bond funds for the purpose of reviewing and developing AMPs.

In conclusion, Farm Bureau stated that the SADC's adoption of the proposed new rule and amendments is ill-advised and should be reconsidered in consultation with the New Jersey Department of Agriculture, State Soil Conservation Committee and the New Jersey Agricultural Experiment Station. They further view the amendments as a serious departure from the legislative intent of the Right to Farm statute.

RESPONSE: The New Jersey Farm Bureau's first concern that the proposed new rules and amendment significantly amends the process established by the Right to Farm Act and rules adopted by the SADC for developing agricultural management practices is inaccurate. To the contrary, the proposed new rules and amendment was introduced for the purpose of maintaining consistency with the Right to Farm Act and the Agriculture Retention and Development Act. The Right to Farm Act grants sole authority to the SADC to "study, develop and recommend to the appropriate State department and agencies thereof a program of agricultural management practices which shall include, but not necessarily be limited to, air and water quality control, noise control, pesticide control, fertilizer application, integrated pest management, and labor practices." The statute further mandates that the SADC "upon a finding of conflict between the regulatory practices of any state instrumentality and the agricultural management practices recommened by the SADC, commence a period of negotiation not to exceed 120 days with the State instrumentality in an effort to reach a resolution of the conflict, during which period the State instrumentality shall inform the SADC of the reasons for accepting, conditionally accepting or rejecting the SADC's recommendations and submit a schedule for implementing all or a portion of the SADC's recommendations." Therefore it is the statute which grants the SADC the sole authority to recommend agricultural management practices. The proposed rule is clearly within the statutory guidelines.

Proposed N.J.A.C. 2:76-2.2 outlines a process whereby the SADC may consult with specific agencies or organizations in addition to any other organizations or persons which may provide expertise concerning a particular practice. The New Jersey Farm Bureau's comment mandating that the New Jersey Agricultural Experiment Station and the State Soil Conservation Committee be consulted when developing an agricultural management practice may not be appropriate in some instances. For this reason, the proposed rules and amendment allow the SADC to use its discretion to contact those agencies, organizations or individuals which have expertise in the subject agricultural management practice.

In response to the second concern, the proposed amended definition of agricultural management practices at N.J.A.C. 2:76-2.1 which references "for use on farmland" was not intended to be limited in scope. The SADC agrees that the definition of "agricultural management practices" should not include the statement concerning where agricultural management practices can apply but rather identify the general types

of practices that the SADC should recommend. Therefore, the proposed definition of "agricultural management practices" contained at N.J.A.C. 2:76-2.1 will be changed upon adoption to delete the words "for use on farmland."

The New Jersey Farm Bureau's concern of any person, agency or nonfarm public having the ability to initiate a costly and time-consuming process of developing or commenting upon an agricultural management practice without any contact with those expert in the practices and needs of New Jersey Agriculture does not impose an immediate burden on the SADC. Proposed N.J.A.C. 2:76-2.2 does not discriminate against who may request the SADC to recommend an agricultural management practice. Furthermore, N.J.A.C. 2:76-2.2 does not mandate that the SADC develop an agricultural management practice on the sole basis of a request. The SADC has the discretion to determine the significance, need, and priority for recommending an agricultural management practice before initiating extensive studies and research. The question concerning the ability of the SADC to expend bond funds to develop, review and recommend agricultural management practices has been reviewed by the Office of the Attorney General. The Attorney General has advised that the proceeds of bond funds may not be used to establish a program for implementing recommended agricultural management practices pursuant to the Right to Farm Act.

Although the New Jersey Farm Bureau felt that it was ill-advised to proceed with the adoption of the proposed new rules and amendment, the SADC felt that its responses to the above questions appropriately address the concerns raised. The SADC further disagrees that the proposed amendments are a serious departure from the legislative intent of the Right to Farm Act for the reasons already discussed.

COMMENT: The Ocean County Agriculture Development Board felt that the existing method of recommending agricultural management practices through the New Jersey Agricultural Experiment Station and the State Soil Conservation Committee is sufficient and that additional regulations are not necessary. One of the major concerns was that by changing the way recommendations are made, the management practices may appear to become more like requirements than recommendations. Furthermore, agricultural management practices recommended by the SADC will at some point be required in order for farmers to receive benefits under the farmland preservation program.

RESPONSE: The proposed new rules and amendment are not a major departure from the existing rule. Under the existing rule, N.J.A.C. 2:76-2.1, the SADC is required to approve agricultural management practices. The proposed new rules and amendment merely clarify the procedure by which farmers, organizations, or the general public may request the SADC to recommend agricultural management practices. The remaining portions of the proposed new rules and amendment restate statutory mandates involving the protection afforded by the Right to Farm Act and negotiations of conflicts beween the regulatory practices of a State instrumentality and the SADC recommended agricultural management practices. The current rule limits the SADC to consider only the expertise of the New Jersey Agricultural Experiment Station and the State Soil Conservation Committee prior to SADC approval of the agricultural management practices.

In response to the Board's second concern, pursuant to N.J.A.C. 2:76-3.12 and 4.11, deed restrictions which are placed on lands enrolled in a Farmland Preservation Program or a Municipally Approved Farmland Preservation Program already require the grantor to comply with agricultural management practices recommended by the SADC, insofar as those practices are applicable to the land and the type of farming conducted on the premises. Landowners that enroll in a Farmland Preservation Program or a Municipally Approved Program in exchange for certain benefits do so voluntarily.

COMMENT: The Cape May County Agriculture Development Board objects to the proposed amendments that broaden the SADC's power from mediation, to recommendation of agricultural management practices. The Board feels that established and qualified agencies, such as the Farm Bureau, Rutgers Extension Services and the Department of Agriculture, have handled that responsibility to all farmer's satisfaction. The Board does not feel that broadening the authority of the SADC would be to the benefit of the farmer who does not have constant contact with the SADC.

RESPONSE: Statutorily, the SADC has the sole responsibility for recommending agricultural management practices. Likewise the existing rule only applies to agricultural management practices approved by the SADC, N.J.A.C. 2:76-2.1. The proposed new rules and amendment provide that the SADC may contact the New Jersey Agricultural Experiment Station, the State Soil Conservation Committee, the New Jersey Department of Agriculture, county agriculture development boards and any other organization or person which may provide expertise concerning a particular practice. The proposed new rules and amendment do not broaden the SADC's authority for recommending agricultural management practices.

Summary of Agency-Initiated Changes:

The following technical change has been made to correct a printing error:

In proposed N.J.A.C. 2:76-2.2(c)5, the word "organizaation" was corrected to "organization."

In proposed N.J.A.C. 2:76-2.2(d), the word "department" was corrected to "departments" to conform with the Right to Farm Act.

In proposed N.J.A.C. 2:76-2.3, the text "The agricultural management practices recommended by the Committee may be utilized by owners and operators of commercial farms to receive protection" is being deleted upon adoption and a simple reference to the enabling statute is added to the adopted new rule. The Committee determined that the change at N.J.A.C. 2:76-2.3 more clearly provides the reader with a nexus between the rules which identify the process for developing and recommending an agricultural management practice and the benefits and protections afforded by the Right to Farm Act and Agriculture Retention and Development Act. The change upon adoption is not so subtantive a change as to require additional public notice and comment because the amended text simply directs the reader to the controlling statute which identifies the benefits and protections afforded to owners and operators of commercial farms.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*).

2:76-2.1 Definitions

As used in this subchapter, the following words and terms shall have the following meanings:

"Agricultural management practices" means practices which have been recommended by the State Agriculture Development Committee *[for use on farmland]* which shall include, but not necessarily be limited to, air and water quality control, noise control, pesticide control, fertilizer application, integrated pest management and labor practices.

...

"State Soil Conservation Committee" means an agency of the State established pursuant to N.J.S.A. 4:24-1 et seq.

2:76-2.2 Recommendations of agricultural management practices

(a) The Committee at its initiative may recommend agricultural management practices.

(b) Any person or organization may request the Committee to recommend agricultural management practices.

(c) In considering agricultural management practices, the Committee may consult with the following agencies, organizations, or persons:

1. The New Jersey Department of Agriculture;
2. The New Jersey Agricultural Experiment Station;
3. County Agriculture Development Boards;
4. The State Soil Conservation Committee; or
5. Any other *[organizaation]* ***organization*** or person which may provide expertise concerning the particular practice.

(d) Upon the Committee's recommendation, the agricultural management practice shall be forwarded to the appropriate State *[department]* ***departments*** and agencies.

2:76-2.3 Utilization of agricultural management practices

[The agricultural management practices recommended by the Committee may be utilized by owners and operators of commercial farms to receive protection afforded] ***Owners and operators of commercial farms are afforded benefits and protections*** pursuant to the Right to Farm Act, N.J.S.A. 4:1C-1 et seq., P.L. 1983, c.31 and Agriculture Retention and Development Act, N.J.S.A. 4:1C-11 et seq., P.L. 1983, c.32, as amended.

2:76-2.4 Negotiation of conflicts between State regulatory practices and SADC recommended agricultural management practices

The Committee shall upon a finding of conflict between the regulatory practices of any State instrumentality and the agricultural management practices recommended by the Committee, commence a period of negotiation not to exceed 120 days with the State instrumentality in an effort to reach a resolution of the conflict, during which period the State instrumentality shall inform the Committee of the reasons for accepting, conditionally accepting or rejecting the Committee's recommendations and submit a schedule for implementing all or a portion of the Committee's recommendations.

BANKING

(a)

DIVISION OF REGULATORY AFFAIRS

Secondary Mortgage Loan Act Rules
Revolving Credit Equity Loan Act Rules
Adopted Amendments: N.J.A.C. 3:1-14.5; N.J.A.C. 3:18-3.2, 5.1, 5.3 and 8.1

Proposed: March 15, 1993 at 25 N.J.R. 1033(b).
Adopted: April 22, 1993 by Jeff Connor, Commissioner, Department of Banking.
Filed: April 23, 1993 as R.1993 d.218, **without change.**

Authority: N.J.S.A. 17:9A-24, 25.2, 17:11A-54 and 17:12B-48(21), 155.

Effective Date: May 17, 1993.
Expiration Date: N.J.A.C. 3:1—January 4, 1996.
N.J.A.C. 3:18—December 24, 1997.

Summary of Public Comments and Agency Responses:

The Department received a comment from Daniel J. Matyola, Esq., Corporate Counsel for New Jersey Savings Bank. The commentor disagreed with the Department's position that banks may not at present charge origination fees calculated as a percentage of the maximum credit line on home equity line transactions. The commentor, however, strongly supported the proposed regulatory amendment, which would definitively resolve the issue by specifically authorizing these fees. The Department takes note of the comments and agrees with the commentor that the amendment satisfactorily resolves the issue.

Full text of the adoption follows.

3:1-14.5 Interest

No interest shall be paid, deducted or received in advance, except that a bank, savings bank or savings and loan association may charge at closing up to three discount points computed as a percentage of the credit extended. Interest shall not be compounded and shall be computed only on unpaid principal balances, except that interest due but unpaid may be considered part of the unpaid principal balance. For purposes of computing interest all installment payments shall be applied no later than the next business day after the date of receipt at the designated office or offices of the bank, savings bank or savings and loan association as set forth in the agreement, and interest shall be charged for the actual number of days elapsed at a daily rate of 1/365th of the yearly rate.

3:18-3.2 Permitted charges

(a) A licensee may charge a borrower only the following fees incident to a secondary mortgage loan, in addition to interest:

1. Third party charges actually incurred by a licensee on behalf of a borrower incident to the processing of a secondary mortgage loan application or the closing of the loan. The licensee may collect third party charges only after they have been incurred by the licensee, and the licensee may not charge the borrower more than the amount the borrower is charged by the third party for the service. The licensee may not collect any third party charges except the following:

i. Fees for title examination, abstract of title, survey, recording or title insurance;

ii.-iii. (No change.)

iv. Reasonable attorney fees paid to an attorney authorized to practice law in New Jersey.

2. (No change.)

3. Check collection charges in the amount charged to the licensee;

4. No more than three discount points; and

5. The fee charged by the county recording officer to cancel the mortgage, plus an additional service fee not to exceed $25.00, providing that the borrower has received prior notice of the fees required by the licensee, and providing further that if the licensee collects the service fee at the time of the mortgage transaction and transfers the servicing rights prior to cancellation, the licensee must refund the service fee to the borrower.

(b)-(c) (No change.)

3:18-5.1 Affiliation between a licensee and its attorney prohibited

(a) A licensee shall not charge a borrower attorney fees if the attorney to whom the fee is to be paid is an employee, partner, officer, director or stockholder of the licensee.

(b) (No change.)

3:18-5.3 Attorney's statement must be detailed

To obtain reimbursement from the borrower at closing for attorney fees charged to the licensee in connection with a secondary mortgage loan, a licensee shall issue to the borrower at or before the closing of a secondary mortgage loan an itemized listing prepared by the attorney of the specific legal services performed by the attorney for and on behalf of the licensee and the charge to the licensee for each such service.

3:18-8.1 Branch offices

(a)-(f) (No change.)

(g) A licensee does not need to obtain a branch office license for an attorney's office merely because loans are closed there and fees are received there incident to the loan closing.

HEALTH

(b)

EPIDEMIOLOGY, ENVIRONMENTAL AND OCCUPATIONAL HEALTH SERVICES

Retail Food Establishments and Food and Beverage Vending Machines
Readoption with Amendments: N.J.A.C. 8:24

Proposed: February 16, 1993 at 25 N.J.R. 662(a).
Adopted: April 12, 1993 by the Public Health Council, William Frascella, O.D., Chairman.
Filed: April 14, 1993 as R.1993 d.201, **with the proposed repeal and new rules at N.J.A.C. 8:24-8 and new rules at N.J.A.C. 8:24-9 not adopted but still pending.**

Authority: N.J.S.A. 26:1A-7.

Effective Date: April 14, 1993.
Expiration Date: April 14, 1998.

Summary of Public Comments and Agency Responses:

The Department conducted a public hearing on the readoption, and on other proposals, on March 8, 1993. No one appeared for the purpose of commenting on the proposed readoption with amendments. James A. Blumenstock, hearing officer for the Department, recommended that the Department review, and respond appropriately to, any comments which may be received in writing. The hearing record may be reviewed by contacting Susan Eates, Department of Health, Health-Agriculture Bldg., CN 360, Trenton, NJ 08625.

The Department of Health, with the concurrence of the Public Health Council, is postponing the adoption of the new rules at N.J.A.C. 8:24-8, rules governing temporary retail food establishments and agricultural markets, and N.J.A.C. 8:24-9, rules governing mobile food establishments, to allow the Department additional time in order to address a number of technical comments submitted during the comment period. The comment period on the proposal expired on March 18, 1993 and the Department did not have sufficient time to properly address a number of highly technical comments received from several local health departments concerning these new rules before the expiration of the chapter on May 3, 1993. Until these technical points are thoroughly evaluated, the Department believes that, in the interim, the rules as proposed without the new rules will provide adequate public health protection. Therefore, the Department is adopting, with the changes proposed to N.J.A.C. 8:24-1 through 7, the rules governing sanitation in retail food establishments and food and beverage vending machines, until such time as the comments concerning the proposed amendments to subchapters 8 and 9 are evaluated and recommendations can be presented to the Public Health Council for its approval.

The Department of Health received several comments from Mr. Timothy J. Hilferty, Director of the Long Beach Health Department, in response to the proposed readoption of rules not related to the proposed amendments. These were the only written or oral comments that the Department received concerning sections of rules that do not relate to the amendments proposed on February 16, 1993.

COMMENT: Mr. Timothy Hilferty, Director of the Long Beach Health Department, believes that the rules do not clearly reference requirements related to the electrical code such as inadequate sized wiring, frayed wires, broken switches, and open electrical receptacles. The commenter suggested that specific language should be included that would address these areas as follows: "Electrical; size, installation, and maintenance:

a. All electrical wiring should be installed, sized, and maintained in accordance with the Uniform Construction Code.

b. All junctions boxes, receptacles, and switches shall have approved cover plates.

c. All electrical equipment shall have plugs and cords in good repair as not to be a safety hazard to employees.

d. Electrical lines and related systems shall not be mounted on floors, walls, or ceilings as to make cleaning difficult."

Also, the commenter suggested that more specific rules concerning the maintenance and repair of food equipment be added. The commenter recommended that the following language be added in order to address these concerns.

"a. Equipment and maintenance of all equipment shall be maintained in good repair, with all original or similar parts, such as side panels, covers, knobs, switches, etc. as not to provide a safety hazard to employees and as not to make cleaning difficult."

RESPONSE: The suggestions concerning the sizing, installation, and maintenance of electrical wiring and related areas fall under the jurisdiction of the Department of Community Affairs and these types of electrical code deficiencies are addressed under the New Jersey Uniform Construction Code, N.J.A.C. 5:23. Since this is an area not specifically related to food sanitation or food safety, the Department does not believe that these requirements need to be cross-referenced in these rules. A local sanitarian observing electrical code deficiencies during the conduct of a sanitary inspection of a retail food establishment should notify the appropriate sub-code official who enforces the Uniform Construction Code in the municipality. The Department believes that the commenter's suggestions regarding the installation of electrical lines and related equipment on walls and floors is adequately addressed in the rules under N.J.A.C. 8:24-7.1(k). The rules require that utility service lines which would include electrical lines be installed in a way that does not obstruct or prevent the cleaning of walls and ceilings.

Regarding the suggestion that a new section be added requiring that all equipment be maintained in good repair, this matter is currently addressed under N.J.A.C. 8:24-5.1, Food equipment and utensils, design, construction and materials. Furthermore, the Department believes the suggestion that the rules should be amended to require that equipment be repaired with all original or similar parts to meet specific design standards is quite restrictive. The rules require that repairs must be made with safe materials that meet a performance standard for durability and ease of cleaning. The Department believes that the rules under N.J.A.C. 8:24-5.1 setting a performance standard for ease of cleaning and durability adequately address the repair of equipment and this suggested change is, therefore, not warranted.

Full text of the proposed readoption may be found in the New Jersey Administrative Code at N.J.A.C. 8:24.

8:24-1.3 Definitions

For the purpose of this chapter, the following words, phrases, names and terms shall have the following meanings, unless the context clearly indicates otherwise:

...

"Temporary retail food establishment" means any retail food establishment which operates at a fixed location for a temporary period of time in connection with a fair, carnival, circus, public exhibition, or similar transitory gathering, including church suppers, picnics, or similar organizational meetings, as well as agricultural markets.

...

8:24-2.3 Shellfish source

(a) (No change.)

(b) Shellfish tagging and labeling shall be as follows:

1.-3. (No change.)

4. Immediately upon receipt of a container of shellstock or a lot of shucked stock, the purchaser shall mark the date of receipt on the stub or tag and when the package is empty, keep such stubs or tags on file for a period of not less than 90 days in an orderly fashion.

8:24-3.3 Food preparation

(a)-(f) (No change.)

(g) Custards, cream fillings, and similar products which are prepared by hot or cold processes, and which are used as puddings or pastry fillings, shall be kept at safe temperatures at or above 140 degrees Fahrenheit or at or below 45 degrees Fahrenheit except during necessary periods of preparation and service, and shall meet the following requirements as applicable:

1. (No change.)

2. Such fillings and puddings shall be cooled to 45 degrees Fahrenheit or below as required by N.J.A.C. 8:24-3.2(c) immediately after cooking or preparation, and held there until combined into pastries, or served.

3. All completed custard filled and cream filled or similar type pastries shall, unless served immediately following filling, be cooled to 45 degrees Fahrenheit or below as required by N.J.A.C. 8:24-3.2(c) promptly after preparation, and held at that temperature until served. Synthetic filled products may be excluded from this requirement if:

i.-ii. (No change.)

iii. Other scientific evidence is on file with the health authority demonstrating that the specific product will not support the growth of pathogenic microorganisms.

4. (No change in text.)

8:24-3.4 Food storage

(a) Containers of food shall be stored a minimum of six inches above the floor in such a manner as to be protected from splash and other contamination except that:

1. (No change.)

2. The containers are stored on dollies, racks, pallets or skids that are easily movable.

(b)-(e) (No change.)

8:24-4.1 Health and disease controls

(a) Persons, while affected with any disease in a communicable form, or while a carrier of such disease, or while affected with boils, infected wounds, sores, acute respiratory infection, nausea, vomiting, or diarrhea which could cause food borne diseases such as staphylococcal intoxication, salmonellosis, shigellosis or hepatitis, shall not work in any area of a food establishment in any capacity in which there is a likelihood of such person contaminating food or food contact surfaces with pathogenic organisms, or transmitting disease to other individuals and no person known or suspected of being affected with any such disease or condition shall be employed in any such area or capacity.

(b)-(c) (No change.)

8:24-4.2 Hygiene practices

(a) (No change.)

(b) Employees shall not use tobacco in any form while engaged in food preparation or service, nor while in equipment and utensil washing or food preparation areas, provided that locations in such areas may be designated by management for smoking, where no contamination of food, equipment, utensils, or other items needing protection will result.

(c) Employees shall consume food only in designated dining areas. An employee dining area shall not be so designated if consuming food there may result in contamination of other food, equipment, utensils or other items needing protection.

8:24-5.1 Design, construction and materials

(a)-(i) (No change.)

(j) Surfaces of equipment including shelves, not intended for contact with food, but which are exposed to splash, food debris, or otherwise require frequent cleaning, shall be reasonably smooth, washable, free of unnecessary ledges, projections, or crevices, readily accessible for cleaning, and of such materials and in such repair as to be readily maintained in a clean and sanitary condition. Fixed equipment designed and fabricated to be cleaned and sanitized by pressure spray methods shall have sealed electrical wiring, switches, and connections.

(k)-(n) (No change.)

8:24-5.4 Equipment and utensil sanitization

(a) (No change.)

(b) All kitchenware and food contact surfaces of equipment used in the preparation, service, display, or storage of potentially hazardous food shall be sanitized prior to such use, and following any interruption of operations during which contamination of the food contact surfaces is likely to have occurred. Where equipment and utensils are used for the preparation of potentially hazardous food on a continuous or production line basis, the food contact surfaces of such equipment, and utensils shall be cleaned and sanitized at intervals throughout the day on a schedule satisfactory to the Department or health authority.

8:24-5.5 Methods and facilities for washing and sanitizing

(a)-(c) (No change.)

(d) Mechanical washing and sanitizing:

1. (No change.)

2. The flow pressure shall not be less than 15 or more than 25 pounds per square inch on the water line at the machine, and not less than 10 pounds per square inch at the rinse nozzles. A suitable gauge cock shall be provided immediately upstream from the final rinse valves to permit checking the flow pressure of the final rinse water on all machines.

3.-7. (No change.)

8. Any other type of machine, device, or facilities and procedures may be approved by the Department or local health authority for cleaning or sanitizing equipment and utensils, if it can be readily established that such machine, device, or facilities and procedures will routinely render equipment and utensils clean to sight and touch, and provide effective bactericidal treatment.

9. (No change.)

(e) (No change.)

8:24-5.6 Storage and handling of cleaned equipment and utensils

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

(c) The storage of food equipment, utensils or single service articles in toilet rooms, toilet vestibules or garbage or mechanical rooms is prohibited.

8:24-5.7 Single service articles

(a) Single service articles shall be made from clean, sanitary, nontoxic, safe materials. Equipment, utensils, and articles shall not impart odors, color, or taste, nor contribute to the contamination of food.

(b) Single service articles shall be stored at least six inches above the floor on pallets, dollies or racks, in closed cartons or containers which protect them from contamination and shall not be placed under exposed sewer lines or water lines that are leaking or on which condensate water may accumulate.

(c) When offered for self service, single service knives, forks and spoons packaged in bulk shall be inserted into holders or be wrapped by an employee who has washed his hands immediately prior to sorting or wrapping the utensils. Unless single service knives, forks and spoons are prewrapped or prepackaged, holders shall be provided to protect these items from contamination and present the handle of the utensil to the consumer.

(d) Single service articles shall be used only once.

(e) All retail food establishments which do not have adequate and effective facilities for cleaning and sanitizing utensils shall use single service articles.

8:24-6.1 Adequacy, safety and quality of water

(a) The water supply shall be adequate as to quantity, of a safe, sanitary quality, and from a public or private water supply system which is constructed, protected, operated, and maintained in conformance with the New Jersey Safe Drinking Water Act (N.J.S.A. 58:12A-1 et seq.) and regulations (N.J.A.C. 7:10) and local laws, ordinances, and regulations; provided, that if approved by the Department of Environmental Protection, a nonpotable water supply system may be permitted within the establishment for purposes such as air conditioning and fire protection, only if such system complies fully with N.J.A.C. 8:24-6.6 (Size, installation and maintenance of plumbing), and the nonpotable water supply is not used in such a manner as to bring it into contact, either directly or indirectly, with food, food equipment or utensils.

(b) (No change.)

8:24-6.5 Sewage

(a) All sewage shall be disposed of by means of:

1. (No change.)

2. A disposal system which is constructed and operated in conformance with N.J.A.C. 7:9A Standards for Individual Subsurface Sewage Disposal Systems, the New Jersey Water Pollution Control Act Regulations, N.J.A.C. 7:14, and local laws, ordinances, and regulations.

8:24-6.7 Drains

(a) (No change.)

(b) Each waste pipe from such equipment shall discharge into an open, accessible, individual waste sink, floor drain, or other suitable fixture which is properly trapped and vented; provided, that indirect connections of drain lines from other equipment used in the preparation of food or washing of equipment and utensils may be required by the Department or health authority when, in its opinion, the installation is such that backflow of sewage is likely to occur.

(c)-(d) (No change.)

8:24-6.10 Garbage and rubbish disposal facilities

(a) (No change.)

(b) All containers, while being stored, shall be provided with tight-fitting lids or covers and shall, unless kept in a special vermin proofed room or enclosure or in a waste refrigerator, be kept covered. Containers used in food preparation and utensil washing areas need not be covered; provided, that they are removed to the garbage storage area upon being filled or otherwise emptied at least daily.

(c)-(g) (No change.)

(h) Garbage or refuse storage rooms, if used, shall be constructed of easily cleanable, nonabsorbent, washable materials, shall be kept clean, shall be vermin-proof and shall be large enough to store the garbage and refuse containers that accumulate.

(i) (No change.)

(j) All garbage and rubbish shall be disposed of daily, or at such other frequencies and in such a manner as to prevent a public health nuisance, including the development of excessive odors and the attraction of vermin.

(k) (No change.)

8:24-7.1 Floor, walls and ceilings

(a) (No change.)

(b) The floor surfaces in kitchens, in all other rooms and areas in which food is stored or prepared and in which utensils are washed, and in walk-in refrigerators, dressing or locker rooms, and toilet rooms, shall be of smooth, nonabsorbent materials, and so constructed as to be easily cleanable; provided, that in areas subject to spilling or dripping of grease or fatty substances, such floor coverings shall be of grease resistant materials; and provided further, that floors of nonrefrigerated dry food storage areas need not be nonabsorbent.

(c)-(g) (No change.)

(h) Mats or duckboards, if utilized, shall be so constructed as to facilitate easy cleaning, and shall be kept clean. They shall be of such design and size as to permit easy daily removal for cleaning. Duckboards shall not be used as storage racks.

(i)-(n) (No change.)

8:24-7.2 Lighting

(a) (No change.)

(b) Permanently fixed artificial light sources shall be installed to provide, at a distance of 30 inches from the floor:

1. (No change.)

2. At least 10 foot candles of light in dry food storage areas, in walk-in refrigerators, and in all other areas. This shall also including dining areas during cleaning operations.

8:24-7.4 Housekeeping

(a)-(i) (No change.)

(j) The traffic of unnecessary persons through the food preparation and utensil washing areas is prohibited.

(k)-(l) (No change.)

SUBCHAPTER *[10.]**9.* ENFORCEMENT PROVISIONS

8:24-*[10.8]***9.8*** Public posting of inspection reports

(a) (No change in text.)

(b) An inspection report shall be presented by the inspector to the owner or person in charge or in their absence any employee of the establishments at the completion of each inspection. The evaluation placard shall be posted immediately in a conspicuous place near the public entrance of the establishment in such a manner that the public may view the placard.

(c) (No change.)

8:24-*[10.9]***9.9*** (No change in text.)

8:24-*[10.10]***9.10*** Report of inspections

Whenever an inspection of a retail food establishment is made, the findings shall be recorded on an inspection report form approved by the State Department of Health. The inspection report form shall identify in a narrative form the violations of this chapter and shall be cross referenced to the section of the chapter being violated.

8:24-*[10.11]***9.11*** Evaluation of reports

(a) Immediately upon the conclusion of the inspection, the licensed health officer or licensed sanitary inspector shall issue the evaluation of the establishment and leave the original copy with the person in charge. Evaluations shall be as follows:

1. (No change.)

2. Conditionally Satisfactory—At the time of the inspection, the establishment was found not to be operating in substantial compliance with this chapter and was in violation of one or more provisions of this chapter. Due to the nature of these violations, a reinspection shall be scheduled. The reinspection shall be conducted at an unannounced time. A full inspection shall be conducted. Opportunity for reinspection shall be offered within a reasonable time and shall be determined by the nature of the violation.

3. Unsatisfactory—Whenever a retail food establishment is operating in violation of this chapter, with one or more violations that constitute gross insanitary or unsafe conditions which pose an imminent health hazard, the health authority shall issue an unsatisfactory evaluation. The health authority shall immediately request the person in charge to voluntarily cease operation until it is shown on reinspection that conditions which warrant an unsatisfactory evaluation no longer exists. The health authority shall institute necessary measures provided by law to assure that the establishment does not prepare or serve food until the establishment is re-evaluated. These measures may include embargo, condemnation and injunctive relief.

8:24-*[10.12]***9.12*** (No change in text.)

SUBCHAPTER *[11.]***10.*** REVIEW OF PLANS, MANAGER TRAINING AND CERTIFICATION

8:24-*[11.1]***10.1*** (No change in text.)

8:24-*[11.2]***10.2*** Pre-operational inspection

Whenever plans and specifications are required by N.J.A.C. 8:24-*[11.1]***10.1*** to be submitted to the regulatory authority, the regulatory authority shall inspect the retail food establishment prior to the start of operations, to determine compliance with the requirements of this chapter.

8:24-*[11.3]***10.3*** (No change in text.)

SUBCHAPTER *[12.]***11.*** SANITARY REQUIREMENTS FOR THE VENDING OF FOOD AND BEVERAGES

8:24-*[12.5]***11.5*** Interior construction and maintenance

(a)-(f) (No change.)

(g) In machines designed so that food contact surfaces are not readily removable, all such surfaces intended for in-place cleaning shall be designed and fabricated so that:

1.-4. (No change.)

(h) The openings into all nonpressurized containers used for the storage of vendible food, including water, shall be provided with covers which prevent contamination from reaching the interior of the containers. Such covers shall be designed to provide a flange which overlaps the opening, and shall be sloped to provide drainage from the cover wherever the collection of condensation, moisture, or splash is possible. Concave covers are prohibited. Any port opening through the cover shall be flanged upward at least three-sixteenths inch, and shall be provided with an overlapping cover flanged downward. Condensation, drip, or dust deflecting aprons shall be provided on all piping, thermometers, equipment, rotary shafts, and other functional parts extending into the food container unless a water-tight joint is provided. Such aprons shall be considered as satisfactory covers for those openings which are in continuous use. Gaskets, if used, shall be of safe materials, durable and relatively nonabsorbent, and shall have a smooth surface. All gasket retaining grooves shall be easily cleanable.

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

8:24-*[12.8]***11.8*** Single service articles

Single service articles shall be purchased in sanitary packages which protect the articles from contamination, shall be stored in a clean, dry place until used, and shall be handled in a sanitary manner. Such articles shall be furnished to the customer in the original individual wrapper or from a sanitary single service dispenser. All single service articles shall be protected from manual contact, dust, insects, rodents and other contamination.

8:24-*[12.9]***11.9*** (No change in text.)

8:24-*[12.10]***11.10*** Water supply

(a)-(c) (No change.)

(d) To prevent leaching of toxic materials caused by possible interaction of carbonated water, piping and contact surfaces, post-mix soft drink vending machines which are directly connected to the external water supply system shall be equipped with a double (or two single) spring-loaded check valves or other devices which will provide positive protection against the entrance of carbon dioxide or carbonated water into the water supply system. Backflow preventive devices shall be located to facilitate servicing and maintenance. No copper tubing or other potentially toxic tubing or contact surfaces

shall be permitted in or downstream from the check valves or backflow devices. These check valves or devices should be inspected and cleaned or replaced annually.

(e)-(f) (No change.)

(a)

DIVISION OF HEALTH FACILITIES EVALUATION

Hospital Licensing Standards
Funding for Regionalized Services
Adopted New Rules: N.J.A.C. 8:43G-5.10

Proposed: March 1, 1993 at 25 N.J.R. 792(a).
Adopted: April 21, 1993 by Bruce Siegel, M.D., M.P.H., Commissioner of Health (with approval of the Health Care Administration Board).
Filed: April 26, 1993 as R.1993 d.229, **without change.**

Authority: N.J.S.A. 26:2H-1 et seq., specifically 26:2H-5.

Effective Date: May 17, 1993.
Expiration Date: February 5, 1995.

Summary of Public Comments and Agency Responses:

A letter from The Hospital Center at Orange was the only public comment received by the Department.

COMMENT: The commenter states that the New Jersey Poison Control Information and Education System (NJPIES) should be funded, in entirety, by State government and objects to the requirement for hospitals to fund a portion of this service. The commenter adds that NJPIES is a Statewide program, not a "regionalized" service, and should therefore be funded through a broad base mechanism such as general tax revenues, or levies on firms that manufacture chemicals, pesticides and pharmaceuticals.

RESPONSE: Although the Department acknowledges the commenter's position, regrettably, there are no funds immediately available to fully fund operation of NJPIES beyond current levels of State and Federal grants. Hospitals are however, a principal user of the services of the poison network, and as such, bearing a portion of the cost is consistent with other governmental or public utility financing structures. The Department's ability to assure on-going maintenance of NJPIES through hospital rate-setting has been eliminated by P.L. 1992, c.160. Until such time that alternative funding can be identified, the Department believes it is essential that NJPIES continue without interruption. The Department is, therefore, unable to accept the commenter's request that hospitals be exempted from contributing toward the ongoing operation of NJPIES.

Full text of the adoption follows.

8:43G-5.10 Funding for regionalized services

All hospitals providing emergency room services shall be members in good standing of the New Jersey Poison Information and Education System established pursuant to N.J.S.A. 26:2-119 et seq.

(b)

PUBLIC HEALTH COUNCIL

Clinical Laboratory Licensure
Limited Purpose Laboratories
Adopted Repeal: N.J.A.C. 8:44-3
Adopted Amendments: N.J.A.C. 8:44-2.2

Proposed: February 16, 1993 at 25 N.J.R. 668(a).
Adopted: April 12, 1993 by the Public Health Council, William Frascella, Jr., O.D., Chairman.
Filed: April 14, 1993 as R.1993 d.200, **without change.**

Authority: N.J.S.A. 45:9-42.34.

Effective Date: May 17, 1993.
Expiration Date: November 2, 1993.

Summary of Public Comments and Agency Responses:

No comments received.

Summary of Hearing Officer's report:

No one appeared at the hearing on the proposed amendments before the Public Health Council, which was held on March 8, 1993, with William A. Frascella, O.D., serving as chairperson. The hearing record may be reviewed by contacting Susan Eates, Department of Health, Health-Agriculture Bldg., CN 360, Trenton, NJ 08625.

Full text of the adopted amendment follows:

8:44-2.2 Applicability of regulations

(a) (No change.)

(b) The regulations do not apply to the following:

1.-3. (No change.)

4. Blood banks licensed under P.L. 1963, c.33 (N.J.S.A. 26:2A-2 et seq.); and

5. Clinical laboratories possessing a Federal Certificate of Waiver as defined by Federal Clinical Laboratory Amendments of 1988 (CLIA'88) (P.L. 100-578) and regulations adopted thereunder (42 CFR Part 493, published in the Federal Register, February 28, 1992).

(c)

DRUG UTILIZATION REVIEW COUNCIL

List of Interchangeable Drug Products
Adopted Amendments: N.J.A.C. 8:71

Proposed: January 4, 1993 at 25 N.J.R. 55(a).
Adopted: April 13, 1993 by the Drug Utilization Review Council, Henry T. Kozek, Secretary.
Filed: April 26, 1993 as R.1993 d.228, **with portions of the proposal not adopted but still pending.**

Authority: N.J.S.A. 24:6E-6(b).

Effective Date: May 17, 1993.
Expiration Date: February 17, 1994.

Summary of Public Comments and Agency Responses:

No comments were received regarding the adopted products.

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 February 1, 1993. Mark A. Strollo, R.Ph., M.S., served as hearing officer. Two persons attended the hearing. Two comments were offered, as summarized in a previous issue of the New Jersey Register (see 25 N.J.R. 1221(a)). The hearing officer recommended that the decisions made be based upon available biodata. The Council adopted the products specified as "adopted," and referred the products identified as "pending" for further study.

The following products and their manufacturers were **adopted**:

Atenolol tabs 25mg	IPR
Cyclobenzaprine tabs 10mg	Invamed
Fluocinonide cream 0.05%	NMC Labs
Pindolol tabs 5mg, 10mg	Genpharm
Piroxicam caps 10mg, 20mg	Genpharm
Poly-Vi-Flor w/Iron 0.25mg/ml substitute	Hi-Tech
Rynatan ped susp substitute	Barre-Nat'l
Rynatuss ped susp substitute	Barre-Nat'l
Sulindac tabs 150mg, 200mg	Lederle
Valproic acid caps 250mg	Pharmacaps

The following products were **not adopted but are still pending**:

Aminophylline tabs 100mg, 200mg	West-ward
Atenolol/chlorthalidone 50/25, 100/25	Mylan
Cortisone acetate tabs 25mg	West-ward
Entex LA tabs substitute	Trinity
Histalet Forte substitute tabs	Trinity
Hydrocodone bitartrate/guaifenesin syrup	Barre-Nat'l
Hydrocortisone tabs 20mg	West-ward
Hyoscyamine sulfate elixir 0.125mg/5ml	Hi-Tech

Hyoscyamine tabs 0.125mg	Trinity
Ibuprofen tabs 400mg, 600mg, 800mg	Invamed
Metoclopramide oral solution 5mg/5ml	Silarex
Nadolol tabs 20mg, 40mg, 80mg, 120mg	Mylan
Naproxen tabs 250mg, 375mg, 500mg	Mylan
Naproxen tabs 250mg, 375mg, 500mg	Purepac
Nortriptyline caps 10, 25, 50, 75mg	Mylan
Oxtriphylline/guaifenesin elixir 100/50 per 5ml	Barre-Nat'l
Phenytoin suspension 125mg/5ml	Barre-Nat'l
Pindolol tabs 5mg, 10mg	Novopharm
Piroxicam caps 10mg, 20mg	Purepac
Prednisone tabs 5mg, 10mg, 20mg	West-ward
Rynatuss tabs substitute	Trinity
Singlet LA caps substitute	Trinity
Theo-Organidin elixir substitute	Barre-Nat'l
Triazolam tabs 0.125mg, 0.25mg	Mylan

OFFICE OF ADMINISTRATIVE LAW NOTE: See related notice of adoption at 25 N.J.R. 1221(a).

(a)

DRUG UTILIZATION REVIEW COUNCIL
List of Interchangeable Drug Products
Adopted Amendments: N.J.A.C. 8:71

Proposed: September 8, 1992 at 24 N.J.R. 2997(a).
Adopted: April 13, 1993 by the Drug Utilization Review Council, Henry T. Kozek, Secretary.
Filed: April 26, 1993 as R.1993 d.225, **with portions of the proposal not adopted but still pending.**

Authority: N.J.S.A. 24:6E-6(b).

Effective Date: May 17, 1993.
Expiration Date: February 17, 1994.

Summary of Public Comments and Agency Responses:
The Drug Utilization Review Council received the following comment pertaining to the proposed products affected by this adoption.

COMMENT: (From Procter & Gamble Pharmaceuticals in opposition to Zenith Laboratories' nitrofurantoin 50mg and 100mg capsules.) Procter & Gamble informed the Council that Zenith has not received FDA approval for its generic version of Macrodantin and, therefore, no action can or should be taken on this product.

RESPONSE: The Council confirmed that Zenith Laboratories' nitrofurantoin 50mg and 100mg capsules have received approval from the Food and Drug Administration. Therefore, the Council has adopted Zenith Laboratories' nitrofurantoin 50mg and 100mg.

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 October 5, 1992. Mark A. Strollo, R.Ph., M.S., served as hearing officer. Two persons attended the hearing. Four comments were submitted, as summarized in a previous notice of adoption (see 24 N.J.R. 4261(a) and 25 N.J.R. 582(b)). The hearing officer recommended that the decisions made be based upon available biodata. The Council adopted the products specified as "adopted," and referred the products identified as "pending" for further study.

The following products and their manufacturers were **adopted**:

Nitrofurantoin caps 50mg, 100mg	Zenith
Piroxicam caps 10 mg, 20 mg	Copley

The following products were **not adopted but are still pending:**

Albuterol sulfate inh. soln. 0.083%	Copley
Amiloride/HCTZ 5/50 tabs	Danbury
Atenolol tabs 50 mg, 100 mg	W-C
Betamethasone dipropionate cream 0.05%	ICN
Cephalexin caps 250 mg, 500 mg	Yoshitomi
Deconamine SR caps substitute	Nutripharm
Fluocinonide cream 0.05%	ICN
Granulex spray substitute	Topi-cana
Hydrocortisone cream 2.5%	ICN
Naproxen sodium tabs 275mg, 550mg	Danbury
Naproxen tabs 250mg, 375mg, 500mg	Danbury
Singlet caplet substitute	Nutripharm
Singlet LA caplet substitute	Nutripharm
Triamterene/HCTZ 37.5/25 tabs	Danbury

OFFICE OF ADMINISTRATIVE LAW NOTE: See related notices of adoption at 24 N.J.R. 4261(a) and 25 N.J.R. 582(b).

(b)

DRUG UTILIZATION REVIEW COUNCIL
List of Interchangeable Drug Products
Adopted Amendments: N.J.A.C. 8:71

Proposed: May 4, 1992 at 24 N.J.R. 1674(a).
Adopted: April 13, 1993, by the Drug Utilization Review Council, Henry T. Kozek, Secretary.
Filed: April 26, 1993 as R.1993 d.226, **with portions of the proposal not adopted but still pending.**

Authority: N.J.S.A. 24:6E-6(b).

Effective Date: May 17, 1993.
Expiration Date: February 17, 1994.

Summary of Public Comments and Agency Responses:
The Drug Utilization Review Council **did not receive any comments pertaining to the product affected by this adoption.**

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 May 26, 1992. Mark A. Strollo, R.Ph., M.S., served as hearing officer. Ten persons attended the hearing. Four comments were offered, as summarized in previous Registers (see 24 N.J.R. 2557(b), 24 N.J.R. 4260(b), 25 N.J.R. 582(a)). The hearing officer recommended that the decisions made be based upon available biodata. The Council adopted the products specified as "adopted," declined to adopt the products specified as "not adopted," and referred the products identified as "pending" for further study.

The following products and their manufacturers were **adopted**:

Ketoprofen caps 25 mg, 50 mg, 75 mg	Lederle

The following products were **not adopted but are still pending**:

Amoxicillin caps 250, 500 mg	Atral
Lactulose soln 10g/15ml	Technilab
Metoclopramide HCl syrup 5mg/5ml	Lemmon
Metoprolol tartrate tabs 100 mg	Geneva
Metoprolol tartrate tabs 50 mg	Geneva
Piroxicam caps 10 mg, 20 mg	Royce
Sucralfate tabs 1 g	Blue Ridge Labs
Vancomycin HCl oral soln powder 1g, 2g, 5g	Lederle

OFFICE OF ADMINISTRATIVE LAW NOTE: See related notices of adoption at 24 N.J.R. 2557(b), 3173(a) and 4260(b), and 25 N.J.R. 582(a).

(c)

DRUG UTILIZATION REVIEW COUNCIL
List of Interchangeable Drug Products
Adopted Amendments: N.J.A.C. 8:71

Proposed: March 1, 1993 at 25 N.J.R. 875(a).
Adopted: April 13, 1993 by the Drug Utilization Review Council, Henry T. Kozek, Secretary.
Filed: April 26, 1993 as R.1993 d.227, **with portions of the proposal not adopted but still pending, and with portions not adopted.**

Authority: N.J.S.A. 24:6E-6(b).

Effective Date: May 17, 1993.
Expiration Date: February 17, 1994.

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 March 29, 1993. Mark A. Strollo, R.Ph., M.S., served as hearing officer. One person attended the hearing. No comments were submitted. The hearing officer recommended that the decisions made be based upon available biodata. The Council adopted the products specified as "adopted," declined to adopt the products specified as "not adopted," and referred the products identified as "pending" for further study.

The following products and their manufacturers were **adopted**:

Amoxicillin chewable tabs 250mg	Biocraft
Auralgan ear drops substitute	Ambix
Desonide cream 0.05%	Copley
Erythromycin topical gel 2%	Glades/Stiefel
Erythromycin topical sol'n 2%	Paddock
Hydrocortisone acetate supp. 25mg	Paddock
Iodinated glycerol elixir 60mg/5ml	Roxane
Lactulose syrup 10g/15ml	Roxane
Lactulose syrup 10g/15ml	UDL Labs
Loperamide HCl caps 2mg	Roxane
Morphine sulfate supp 5, 10, 20, 30mg	Paddock
Nortriptyline caps 10mg, 25mg, 50mg, 75mg	Geneva
Novahistine DH elixir substitute	Halsey
Nystatin oral suspension 100,000u/ml	Roxane
Pindolol tabs 5mg, 10mg	Geneva
Pindolol tabs 5mg, 10mg	Zenith
Piroxicam caps 10mg, 20mg	TEVA
Robitussin AC syrup substitute	Halsey
Sulfamethoxazole/trimethoprim tabs 400/80	Roxane
Sulfamethoxazole/trimethoprim tabs 800/160R	Roxane
Thiothixene HCl intensol 5mg/ml	Roxane
Trimethobenzamide HCl supp. 100mg, 200mg	Paddock
Tussi-Organidin DM liquid substitute	Roxane
Tussi-Organidin liquid substitute	Roxane
Verapamil tabs 80mg, 120mg	Geneva

The following products were **not adopted**:

Guaifenesin syrup 100mg/5ml	Halsey
Robitussin CF syrup substitute	Halsey

The following products were **not adopted but are still pending**:

Alprazolam tabs 0.25mg, 0.5mg, 1mg, 2mg	Greenstone
Benzoyl peroxide gel 5%, 10%	Glades/Stiefel
Carbidopa/levodopa tabs 10/100, 25/100, 25/250	Geneva
Diflunisal tabs 250mg, 500mg	Purepac
Guaifenesin SR tabs 600mg	Theraids
Guanabenz acetate tabs 4mg, 8mg	Zenith
Hydrocortisone acetate supp. 25mg	Bio-Pharm
Indomethacin supp. 50mg	G&W
Ketoprofen caps 50mg, 75mg	Geneva
Methazolamide tabs 25mg, 50mg	Geneva
Methotrexate tabs 2.5mg	Barr
Metoprolol tabs 50mg, 100mg	Geneva
Naproxen sodium tabs 275mg, 550mg	Geneva
Naproxen tabs 250mg, 375mg, 500mg	Geneva
Oxazepam caps 10mg, 15mg, 30mg	Geneva
Pindolol tabs 5mg, 10mg	Purepac
Piroxicam caps 10mg, 20mg	Zenith
Procainamide HCl SR tabs 500mg, 750mg	Copley
Robitussin DAC syrup substitute	Halsey
Theophylline SR tabs 450mg	Sidmak
Triazolam tabs 0.125mg, 0.25mg	Greenstone
Trimethobenzamide HCl supp. 100mg, 200mg	Bio-Pharm
Tussi-Organidin DM liquid substitute	Bio-Pharm

HIGHER EDUCATION

(a)

BOARD OF HIGHER EDUCATION

Policies and Procedures Pertaining Strictly to County Community Colleges

Physical Facilities

Adopted Amendment: N.J.A.C. 9:4-1.12

Proposed: February 16, 1993 at 25 N.J.R. 668(b).
Adopted: April 16, 1993 by Board of Higher Education, Edward D. Goldberg, Chancellor and Secretary.
Filed: April 26, 1993 as R. 1993 d. 224, **without change.**

Authority: N.J.S.A. 18A:64A-7.

Effective Date: May 17, 1993.
Expiration Date: September 26, 1996.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows.

9:4-1.12 Physical facilities
(a)-(f) (No change.)
(g) Any construction project that involves the new construction, renovation, rehabilitation, or alteration of existing facilities, the total project cost of which does not exceed $2,000,000 will not require Board of Higher Education approval to proceed.

CORRECTIONS

(b)

THE COMMISSIONER

SECURITY AND CONTROL

Use of Chemical Agents; Storage

Adopted Amendment: N.J.A.C. 10A:3-3.7

Proposed: March 15, 1993 at 25 N.J.R. 1044(b).
Adopted: April 23, 1993 by William H. Fauver, Commissioner, Department of Corrections.
Filed: April 26, 1993 as R.1993 d.219, **without change.**

Authority: N.J.S.A. 30:1B-6 and 30:1B-10.

Effective Date: May 17, 1993.
Expiration Date: September 16, 1996.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows.

10A:3-3.7 Use of chemical agents; storage
(a) Tear gas, mace and related chemical agents shall be used in accordance with N.J.A.C. 10A:3-3.2.
(b)-(e) (No change.)

INSURANCE

(a)

DIVISION OF ADMINISTRATION

Producer Licensing

Readoption: N.J.A.C. 11:17

Proposed: March 1, 1993 at 25 N.J.R. 883(a).
Adopted: April 15, 1993 by Samuel F. Fortunato, Commissioner, Department of Insurance.
Filed: April 15, 1993 as R.1993 d.206, **without change.**

Authority: N.J.S.A. 17:1C-6(e), 17:1-8.1 and 17:22A-1 et seq.

Effective Date: April 15, 1993.
Expiration Date: April 15, 1998.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the readoption may be found in the New Jersey Administrative Code at N.J.A.C. 11:17.

(b)

DIVISION OF FINANCIAL EXAMINATIONS

Financial Examinations Monitoring System Data Submission Requirements for All Licensed Producers With Surplus Lines Authority and All Eligible Surplus Lines Insurers

Adopted New Rules: N.J.A.C. 11:19-3

Proposed: September 8, 1992 at 24 N.J.R. 3003(a).
Adopted: April 23, 1993 by Samuel F. Fortunato, Commissioner, Department of Insurance.
Filed: April 26, 1993 as R.1993 d.232 **with substantive and technical changes** not requiring additional and public review and comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 17:1-8.1, 17:1C-6(e), 17:22-6.40 et seq., 17:22-6.70 and 17:22A-17.

Effective Date: May 17, 1993.
Expiration Date: February 1, 1998.

Summary of Public Comments and Agency Responses:

Ten public comments were received from insurance companies (LeBoeuf, Lamb, Leiby and MacRae on behalf of Lloyd's of London, Health Care Insurance Company and the Home Insurance Company), an insurance association (The National Association of Independent Insurers), surplus lines producers, (Allendale Services Insurance Agency Incorporated, Continental/Marmorstein Agencies, DVUA of New Jersey, Inc., Tri-State General Insurance Agencies, U.S. and Overseas Agencies, Inc. and William H. Malone, Inc.).

COMMENT: One commenter stated that surplus lines agents' responsibilities currently include the reporting of information to the Department. The commenter stated that there is no need for these new requirements on surplus lines insurers. The commenter further stated that he does not see how the information that is being requested ties in with the solvency of the surplus lines marketplace.

RESPONSE: The Department is in the process of implementing a multi-faceted automated Financial Examination Monitoring System ("FEMS"). The Department believes that the FEMS system as a whole will assist the Department in monitoring the financial solvency of approximately 1,600 insurance and other risk assuming entities.

This rule is specifically designed to assist the Surplus Lines Examining Office in monitoring surplus lines activity in the State of New Jersey. The Surplus Lines Processing Subsystem ("SLPS") ties in with the solvency of surplus lines marketplace by interfacing with the Descriptive Data System ("DDS"). DDS provides online access to demographic information and a financial snapshot of all insurance and other risk assuming entities regulated by the Department.

COMMENT: One commenter suggested that the Department, using the same sources as being used for the overall system, design a program for brokers to submit their tax and guaranty funds information on diskette.

RESPONSE: The Department is currently evaluating the feasibility of allowing brokers to submit the required information on diskette or on hard copy.

COMMENT: One producer commented that his computer system cannot produce a diskette for reporting. The producer also stated that his current computer system cannot create an IBM standard tape label as required in N.J.A.C. 11:19-3.4. Finally, the producer stated that his current computer system cannot create a tape with a block size of 23,276.

RESPONSE: The commenter has misinterpreted the Department's new rules as applying to him. N.J.A.C. 11:19-3.4, which applies to surplus lines insurers, requires a report to be submitted by either cartridge or computer tape. This commenter is a producer. N.J.A.C. 11:19-3.5 applies to producers, and requires the submission of a complete New Jersey surplus lines producer's quarterly tax return comprising hard copy forms which are provided in Appendix B. The Department's rules do not require producers to submit information by diskette. As noted by the commenter, the Department has amended this rule to correct a typographical error, the block size should be 24,300 instead of 23,276.

COMMENT: One commenter stated that much of the data that the Department is requesting in the report is not currently available, because the company does not have its transaction number for each account and because providing this information will be expensive and time consuming.

RESPONSE: Companies are required by this subchapter to obtain the appropriate transaction number for each placement and provide this information on their reports. The transaction number consists of the producer's surplus line agent number which is assigned by the Department; the year of the inception of the placement; and a sequential number which is maintained by the agent. The Department recognizes that surplus lines insurers may incur costs to modify their systems, but in order to effectuate the goals of these rules insurers must report the requested information in the appropriate format.

COMMENT: One producer commented that he does not understand all of his responsibilities with respect to company reporting. The commenter inquired under what circumstances would he be considered the company, and asked who would be responsible to report Lloyd's of London's information.

RESPONSE: This commenter is a producer and not an insurer; therefore he is not required to report on behalf of the company. Eligible surplus lines insurers are responsible to report their own information as provided in these rules.

COMMENT: Several commenters expressed concern with the time alloted to modify their systems and to implement these rule changes (beginning January 31, 1993) and the likelihood of fines for non-compliance. One commenter suggested that implementation be delayed until 1994, and that the first report track the reporting dates for the Quarterly Annual Statements. The commenter further stated that, that would follow the internal preparation of material, for example the surplus lines tax report, which is currently due on March 1, of each year.

A second commenter suggested that a longer transition period be allowed—perhaps a three or six months grace period without impending threat of fines. Another commenter requested a moratorium on penalties for one year.

RESPONSE: In view of the practical problems expressed by these commenters, the Department has amended this rule upon adoption. Beginning July 1, 1993, producers are required to assign a transaction number to each New Jersey policy he or she places. All producers shall also provide the respective surplus lines insurer with the appropriate transaction number. Additionally, beginning July 1, 1993, insurers are required to begin to capture the information requested by this subchapter, in their electronic data processing systems, in a manner which will result in the appropriate information being stored and reported in the format requested to the Department.

COMMENT: One commenter stated that the responsibility for collecting and paying tax surplus lines risks in New Jersey resides with licensed surplus lines producers. The commenter believes that the data submission requirements to monitor reporting of premium and tax information by licensed producers is an appropriate exercise of the Department's regulatory authority. However, the commenter stated that surplus lines insurers are not licensed to do business in New Jersey and should not

be included within the scope of proposed new rule N.J.A.C. 11:19-3. The commenter suggested that the scope of the proposed rule be limited to licensed surplus lines producers only.

RESPONSE: The Department's rules apply to all licensed producers with surplus lines authority and all insurers eligible to transact surplus lines insurance business in New Jersey in accordance with N.J.S.A. 17:22-6.40 et seq. and 17:22-6.70 et seq. SLPS is designed to assist the Surplus Lines Examining Office monitor surplus lines activity in the State of New Jersey. SLPS is an automated reconciliation system and, in order to operate effectively, information must be received independently from both producers and insurers.

COMMENT: One commenter stated its opposition to the quarterly reporting requirements for unlicensed alien insurers, which the commenter does not believe is an efficient or effective answer to the Department's goals. The commenter stated that any attempt at compliance will be very costly and difficult. Additionally, the commenter stated that full and satisfactory compliance is not possible and believes that the request for reports will not and cannot match with surplus lines brokers quarterly reports in a way that the Department hopes and will only lead to confusion. The commenter further stated that with respect to its clients, the Department's proposed rules are substantially different from what has historically been required and the proposed rules are far more than a mere technical modification to existing practices. The commenter believes that it is important to consider this in evaluating the merits of these rules when applied to its clients.

RESPONSE: Despite this commenter's concern, insurers are able to obtain the information required by the Department. The Department recognizes that the cost and need for services will vary among insurers. It is, however, necessary for all eligible insurers which transact surplus lines insurance business in New Jersey to submit the information required by this subchapter in order for the FEMS-SLPS subsystem to operate optimally and effectively.

COMMENT: One commenter, representing Lloyd's Underwriters, stated that New Jersey, like many other states, requires surplus lines insurance to be placed through licensed in-state surplus lines producers. The commenter stated that business may only be placed with Lloyd's Underwriters by a specially authorized Lloyd's broker in London. As a result, at least two independent intermediaries are involved in any placement of a New Jersey surplus lines risk with Lloyd's. The commenter stated that in many situations the brokering chain is more extended. For example, the New Jersey surplus lines producer may not have contact with an appropriate Lloyd's broker. As a result, he or she will go through another wholesale broker situated in New Jersey or situated in another state which does have access to the necessary markets. These wholesaling brokers act as a conduit though which business originating all over the United States, and the world, flows to Lloyd's Brokers and ultimately to the Lloyd's market. The commenter stated that, to provide the requested quarterly reports, its clients would be compelled to attempt to trace tens of thousands of placements emanating from the United States and elsewhere through various brokering chains in an effort to segregate New Jersey risks from all other risks. The commenter stated that the extended nature of these brokering chains, in and of itself, make the segregation of New Jersey risks impossible to do with a degree of accuracy required for the reports to serve as an effective cross-check for tax compliance purposes. The commenter further stated that each broker in the chain uses its own filing system to record transactions. Thus, the insurer's policy number and the identification number and the producer/broker's binder will usually be different. The commenter stated that it is overly optimistic to hope that insurers located abroad can consistently and accurately identify New Jersey and non-New Jersey risks. The commenter stated that it is unrealistic to expect that items such as the New Jersey surplus lines broker's transaction control number will consistently find their way to London through the brokering chains. The commenter further stated that requiring the overseas insurer to provide reports based on the surplus lines broker's transaction control number effectively requires a report based upon a number which is frequently unavailable to the insurer. The commenter believes that, for this reason alone, the reporting system is flawed.

RESPONSE: The Department's new rules at N.J.A.C. 11:19-3.3(a)2 permit alien insurers which are not technically capable of reporting their net written premiums for New Jersey no later than 45 days after the end of the calendar quarter, to file their report nine months after the end of the calendar quarter. The Department recognizes that these rules may cause surplus lines insurers to incur costs in connection with assimilating, preparing and supplying the required information. The Department believes that these rules provide sufficient time for alien insurers which may experience difficulty initially in complying with these rules, to develop procedures necessary to report the requested information.

COMMENT: One commenter expressed concern with binding authorities. The commenter stated that in many cases, coverage will be bound by the wholesaling broker pursuant to a binding authority. The commenter stated that the wholesaling broker will bind the insurer to risk originating from an approved territory, which generally encompasses more than one state and which could encompass the entire country. The wholesaling broker's activity under the binding authority is then reported to the insurer on some agreed-upon periodic basis, for example, either monthly or quarterly. The commenter stated that New Jersey risks bound during the period reported are included with risks originating in other states. Surplus lines insurance businesses rightly focus on the brokers through whom the business must be placed. Thus, foreign (or "United Kingdom" (UK)) insurers may obtain records according to wholesaling brokers. The commenter stated that if the New Jersey surplus lines brokerage procures coverage through a broker in another state holding a binding authority, the U.K. insurer's record will reflect that the business emanated from the out-of-state wholesaler.

RESPONSE: Insurers are required to comply with the reporting requirements of this subchapter. Although the Department specifies the format by which the requested information shall be reported to the Department, it is up to each individual insurer to develop systems which will result in the appropriate information being gathered, so that it may be reported in accordance with this subchapter.

COMMENT: One commenter, representing Lloyd's, stated that its unique structure alone is an obstacle to complying with the Department's proposed rules. The commenter stated that Lloyd's is not a single insurer, instead it is an insurance marketplace where thousands of individual underwriters are grouped together into over 200 separate underwriting syndicates writing each for their own account and not one for another. Therefore, a risk placed with it is not written with a single insurer. The commenter stated that many different syndicates with certificates take some of the risk. Consequently, in addition to overcoming the practical obstacles outlined above, the commenter stated that it will be compelled to seek, retrieve and consolidate data on activities involving hundreds of syndicates and thousands of individual underwriters into a single quarterly report. The commenter further stated that it does not have a central data bank in place to break out accurately the underwriting activity of the various syndicates or risks which touch New Jersey from among the millions of risks written by underwriters through thousands of worldwide brokering chains. The commenter stated that it could only comply with the proposed rule requirements by initiating a complete overhaul of the market's recordkeeping procedures. The commenter stated that this project will certainly take many months to complete and will involve an enormous administrative cost.

RESPONSE: As a result of these rules, surplus lines insurers will be required to submit the information requested by the Department in the format specified by this subchapter. The Department recognizes that surplus lines insurers may incur costs in connection with assimilating, preparing and supplying the required information. In order to effectuate the goal of these rules, all insurers eligible to transact surplus lines insurance business in New Jersey in accordance with N.J.S.A. 17:22-6.40 et seq. and 17:22-6.70 et seq. must submit the required information. Therefore, it is up to each eligible insurer to develop procedures resulting in the appropriate information being reported to the Department in the specified format.

COMMENT: One commenter believes that the reports requested by the Department will be of little or no value in verifying and cross-checking New Jersey's surplus lines broker's quarterly reports. The commenter stated that the reports would be of little or no value, in part from an extended brokering chain, as well as from the frequently complex (and multi-state) nature of risks placed in the surplus lines market, and, additionally, from timing problems inherent in the surplus lines placement process.

RESPONSE: The Department disagrees. As long as insurers report the information requested by the Department in the format specified by the Department, the Department will be better able to reconcile and monitor tax and surcharges remitted by producers.

COMMENT: One commenter expressed concern with multi-state placements. The commenter stated that, for example, a multi-national corporation is domiciled and principally headquartered in New York and

has plants worldwide, including three plants in New Jersey. The commenter stated that the corporation procures property and liability coverage for its worldwide operations through a wholesaling surplus lines broker in New York. The broker places the business with a group of insurers which are eligible surplus lines insurers in New York. The commenter stated that typically insurers will record this placement as a New York risk and consequently, the New Jersey portion of the risk would not be reported under the proposed rules. The commenter stated that if the New Jersey surplus lines broker was involved in the placement of the New Jersey portion of the risk and recorded the transaction in his or her quarterly report to the State, the broker's report and the insurer's report will not match. Therefore, the commenter stated that risks are typically "wholesaled out" of New Jersey to another state. The commenter stated that, in such a case, the risk will be recorded as emanating from the state where the multi-national corporation and the wholesaler are located and will not show up on the proposed report. The commenter stated that, again, the insurer's report and the broker's report will not match. The commenter further stated that the reverse is true when a New Jersey wholesaler exports a risk emanating from a surplus lines broker in another state. The risk may well appear on the proposed insurer's report but would not be reflected upon any corresponding broker's report. The commenter further stated that where out-of-state binding authorities are involved, further mismatching is almost certain. The commenter stated that segregating New Jersey risks from non-New Jersey risks in a contract holder's bordereau would be extremely difficult. The commenter stated that the records of insurers focus upon the (binding authority) contract holder rather than the situs of individual risks which will cause the insurer's report to be over-inclusive when the contract holder is located in New Jersey and under-inclusive when the contract holder is located elsewhere. The commenter stated that in either case the insurer's report and the broker's report will not match.

RESPONSE: The Department intends to propose a Surplus Line Tax Allocation rule which will address the issue of premium allocation and taxation of multi-state risks (placements). This rule is separate and distinct from the current regulation. It is anticipated that upon adoption and implementation of such a rule, over time, the issues raised by this commenter will be adddressed within SLPS.

COMMENT: One commenter expressed concern with the timing considerations. The commenter stated that timing differences between when risks are bound by New Jersey producers and when they ultimately are recorded by an alien insurer can span as much as six to eight months, due to extended lines of communication. The commenter stated that a risk bound by a New Jersey broker in the first quarter of a given year will frequently not be booked by the insurer until the second quarter. The commenter stated that in such a case the insurer's first quarter report will be lower than the broker's report and the insurer's second quarter report will be higher. The commenter stated that neither report will match the corresponding broker's report. The commenter stated that it believes that the Department will be unable to use the insurer's quarterly report as a check against the broker's report because there will be a great number of discrepancies between the two which have nothing to do with the question of whether the law has been complied with or the tax paid. The commenter stated that each discrepancy will need to be resolved, thereby consuming time and resources. The commenter further stated that any additional tax revenue realized will most likely be more than offset by increased administrative costs. The commenter finally stated that implementation of this requirement will not increase and may actually reduce net available State revenue while driving up the cost of insurance to State residents and producing reports which are inherently irreconcilable.

RESPONSE: During the development of the SLPS system, timing considerations were recognized and addressed. The system will use the insurer's current quarter of information plus the previous quarters' information when performing reconciliations to the producers current quarterly tax return data. To reconcile under this system, timing differences will be eliminated.

With respect to the commenter's statement that each discrepancy will need to be resolved, the Department notes that the SLPS system will identify all discrepancies. The Surplus Lines Unit intends to focus on the most critical areas of discrepancy or variance, that is, largest dollar variances, unreported items, repeated non-reporting or incorrect reporting and other serious discrepancies. The system was never intended to resolve every discrepancy, due to the magnitude of surplus lines transactions. The Department believes that the cost of reivewing each discrepancy will be more than offset by the additional tax revenue realized. As stated above, the Department believes that SLPS will greatly enhance its efficiency and effectiveness by allowing the Surplus Lines staff to focus on the more important variances.

COMMENT: One commenter suggests an alternative to the Department's proposed rules. The commenter stated that the system of regulation of the surplus line market, which currently is in place in every state in the United States, correctly focuses upon the in-state surplus lines broker. The commenter stated that it is that broker who: is located in the state; licensed by the state; and is in the best position to provide the information desired by the Department. The commenter further stated that the best means to ensure accurate premium tax reporting is to develop an in-State Stamping Office. The commenter believes that it is fair to state that the establishment of Stamping Offices have, in other states, worked extremely well in enhancing the accuracy of tax collection on premiums paid to the surplus lines market.

RESPONSE: The Department disagrees with the commenter and does not believe that an in-State Stamping Office is necessary at this time. The Department believes that these rules permit it to effectively maintain and monitor tax and surcharge data for all licensed producers.

COMMENT: One commenter objected to the Department's proposed rules because it stated that the Department has access to state-of-the-art computer equipment and consultants to design this system. The commenter asserts that surplus lines producers unfortunately do not have the availability or the affordability to purchase services to design a program compatible with the Department. The commenter stated that the cost of retraining personnel needs to be considered. However, the commenter stated that, more importantly, the costs of computer equipment and expertise would not be affordable to surplus lines producers, especially in the view of the soft market cycle they are currently experiencing. The commenter suggests that since the Department has the available expertise required to design SLPS, the commenter believes that it would be best to have the Department supply the surplus lines producer with a program and diskette and provide information as required.

RESPONSE: At this time the Department's rules do not require surplus lines producers to supply the Department with information on diskette or tape. N.J.A.C. 11:19-3.5 sets forth the filing requirements for all licensed producers with surplus lines authority. The information requested by these rules can be captured on the appropriate forms which will be initially supplied by the Department.

COMMENT: One commenter objected to N.J.A.C. 11:19-3.5, which is the SLPS subsystem filing requirements for all licensed producers with surplus lines authority. This provision sets forth filing requirements for all licensed producers with surplus lines authority. The commenter suggested that one sheet be submitted for all individual licensees in the corporation if no business has been written, with each licensee signing the form, rather than a separate form for each individual, which the commenter stated is separate and unnecessary paperwork.

RESPONSE: Because all of the tax returns will be key-punched, a letter format will not be compatible with the SLPS sub-system.

COMMENT: One commenter objected to the definition of "transaction number" as proposed at N.J.A.C. 11:19-3.2. The commenter stated that the Department defines a transaction number as "14-characters (SLA number + year + sequential number)". The commenter stated that the Department also defines in its Tax Return Form (SLPS-1-Tax) that the SLA number is defined as "five digits with leading zeroes if necessary". Then, the commenter stated that on the Schedule to Support Tax Returns (SLPS-3-TRS) the Department defines the transaction number as "year + five digit sequential number with leading zeroes as necessary". The commenter stated that this definition of a transaction number with the SLA number in front would generate a 12 digit number not a 14-digit number as originally defined. The commenter further stated that the actual SLPS-3-TRS form showing the five digit SLA number at the top and an eight-digit number including the hyphen under the transaction column generates a 13 digit number.

Additionally, the commenter stated that, from a computer-generation point of view, it would be easy to supply a five-digit SLA number with leading zeros if necessary, a two-digit year number and a seven-digit sequential number with leading zeroes if necessary. The commenter stated that it is more difficult to supply a 14-digit number at one place, a 13-digit number in another, and a 12-digit number in still another place. The commenter stated that the transaction number as defined in N.J.A.C. 11:13-3.2 applies in all numerical transaction numbers, whereas the form shows a hyphen. The commenter stated that since the Department is

considering magnetic reports from insurers which will include the transaction numbers (which will have to be supplied by the producer), it believes that there might be some clarification of the number. The commenter suggested that the Department keep in mind from a computer point of view that it might be somewhat easier to program an all numeric transaction number.

RESPONSE: The commenter is confusing the terms "character" and "digits". The transaction number consists of 14 characters, the SLA number (five digits), a dash ("-"), the year of the placement (two digits), a dash, and the sequential number (five digits). For example 01234-56-78901, represents a transaction number (which consists of twelve digits and two dashes) as 14 characters. The SLA number is unique to each surplus lines producer. On the "Schedule To Support Tax Returns" (see 24 N.J.R. 3012), on the top left corner there appears a SLA number followed by five boxes. The producer only needs to record the SLA number (which is part of the transaction number) one time, the rest of the transaction number (the year and sequential number) is to be written in column (1). There is no need to keep repeating the SLA number each time a producer records a policy because it automatically precedes the numbers (the year and sequential number) listed in column (1).

COMMENT: One commenter stated that it fails to see how the proposed new rules will accomplish its stated objectives. The commenter stated that, to reduce or eliminate rote "number crunching", it suggests that the Department change its surplus lines law by discontinuing the requirement of affidavits by both producing broker and surplus lines agent as a diligent effort prior to placing business in the surplus lines market. The commenter also suggests that the Department discontinue the requirement of sending a copy of each daily report and endorsements to the surplus lines examining office. The commenter stated that a surplus lines agent is required by law to keep in his office in this State a full and true record of each surplus lines contract procured by him.

RESPONSE: Some of the issues which the commenter addresses require statutory changes and are beyond the scope of these rules. However, the Department intends to review the need for filing complete copies of the daily reports, non-monetary endorsements and other documents concurrent with the implementation of the SLPS system, to the extent allowable by the statute.

Summary of Agency-Initiated Changes:

The Department has made changes to the forms that surplus lines producers shall submit.

Changes made to form SLPS-1-TAX:

1. The heading was changed from "Mail to: New Jersey Department of Insurance, Surplus Lines Examining Office, CN-325, Trenton, NJ 08625" to State of New Jersey, Department of Insurance, The Surplus Lines Examining Office, 20 West State Street, CN-325, Trenton, NJ 08625-0325".
2. A box for stamping in the date was added to the upper right hand corner.
3. The boxes provided for the SLA# was moved from the right side of the form to the upper left hand side of the form.
4. Line 6, "Tax @ 3% (3% of Line 5)", was added.
5. Line 7, "Prior Period Credit Applied (If Any)", was added.
6. Line 10, "Tax @ 3% (3% of Line 9)", was added.
7. Line 11, "Prior Period Credit Applied (If Any)", was added.
8. Any references to line numbers were updated to reflect the above line changes.

Changes made to form SLPS-2-FRA:

1. The heading now reads:
   State of New Jersey
   Department of Insurance
   The Surplus Lines Examining Office
2. The term "relief" has been deleted.

Changes made to form SLPS-3-TRS:

1. The heading now reads:
   State of New Jersey
   Department of Insurance
   The Surplus Lines Examining Office
   20 West State Street, CN-325,
   Trenton, NJ 08625-0325

Changes made to form SLPS-4-GFS:

1. The heading was changed from "Mail to: New Jersey Surplus Lines Insurance Guaranty Association, P.O. Box 463, Chatham, New Jersey 07928" to "State of New Jersey, Department of Insurance, The Surplus Lines Examining Office, 20 West State Street, CN-325, Trenton, NJ 08625-0325, Quarterly Surcharge Statement, Mail to: New Jersey Surplus Lines Insurance Guaranty Fund, P.O. Box 1303, Cranford, New Jersey, 07016-1303.
2. A box for stamping in the date was added to the upper right hand corner.
3. The boxes provided for the SLA # was moved from the right side of the form to the upper left hand side of the form.

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

SUBCHAPTER 3. DATA SUBMISSION REQUIREMENTS FOR ALL LICENSED PRODUCERS WITH SURPLUS LINES AUTHORITY AND ELIGIBLE SURPLUS LINES INSURERS

11:19-3.1 Purpose and scope

(a) The purpose of this subchapter is to set forth the filing and reporting requirements and procedures for the submission of:

1. All eligible surplus lines insurers' quarterly net written premiums for the State of New Jersey; and
2. Tax and surcharge filings for all licensed surplus lines producers.

(b) These rules apply to all licensed producers with surplus lines authority and all insurers eligible to transact surplus lines insurance business in New Jersey in accordance with N.J.S.A. 17:22-6.40 et seq. and 17:22-6.70 et seq.

11:19-3.2 Definitions

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

"Alien insurer" means an insurer formed under the laws of any country other than the United States of America, its states, districts, territories, commonwealths or possessions.

"Commissioner" means the Commissioner of the New Jersey Department of Insurance.

"Department" means the Department of Insurance.

"Due date" means a date prior to or on which a submission shall be received by the Department.

"EBCDIC" means the Extended Binary Coded Decimal Interchange Code which is a computer code for representing data. This code is used in all IBM mainframe systems.

"Foreign insurer" means an insurer formed under the laws of a jurisdiction of the United States of America, other than the State of New Jersey.

"Insurer" or "insurance company" means an entity authorized or eligible to transact the business of insurance in New Jersey.

"ISI Number" means the nine digit identifying number issued by the NAIC to uniquely identify an "alien insurer."

"NAIC" means the National Association of Insurance Commissioners.

"NAIC number" means the five digit number assigned by the NAIC to uniquely identify a foreign or admitted insurer.

"Net written premiums" means direct gross premiums on insurance policies written by a surplus lines insurer less return premiums thereon. If a policy issued by a surplus lines insurer covers risks or exposures only partially located in this State, the "net written premiums" do not include premiums on the risks or exposures outside of the State.

"Transaction number" means the 14-character number made up of the producer's surplus line agent number (assigned by the Department), the year of the placements, and a sequential number (maintained by the agent).

"SLPS" means the Surplus Lines Processing Subsystem, which assists the Department in monitoring the activities of licensees which sell surplus lines insurance to New Jersey residents and matches quarterly agent tax data to quarterly company policy data.

"Surplus lines insurer" means an unauthorized insurer eligible to transact surplus lines insurance business in this State, in which an insurance coverage is placed or may be placed pursuant to N.J.S.A. 17:22-6.40 et seq.

11:19-3.3 General data filing requirements

(a) All eligible surplus lines insurers qualified to transact business in New Jersey shall report to the Department the information required by this subchapter on a quarterly basis beginning *[January]* ***July*** 1, 1993, in accordance with (a)1 or 2 below, and with the Appendices to this subchapter, incorporated herein by reference.

1. Foreign insurers and alien insurers shall report their net written premiums for the State of New Jersey no later than 45 days after the end of the calendar quarter. The due dates for the net written premiums reports are as follows: May 15 for the first quarter; August 15 for the second quarter; November 15 for the third quarter; and February 15 for the fourth quarter.

2. Alien insurers which are not technically capable to report pursuant to (a)1 above shall report their net written premiums for the State of New Jersey no later than nine months after the end of the calendar quarter. The due dates for the net written premiums reports are as follows: December 1 for the first quarter; March 1 for the second quarter; June 1 for the third quarter; and September 1 for the fourth quarter.

(b) All licensed surplus lines producers shall, on or before the end of the month following each calendar quarter, remit premium taxes and surcharges in accordance with the Appendices to this subchapter. The due dates for these filings are as follows: April 30; July 31; October 31; and January 31.

11:19-3.4 SLPS subsystem filing requirements for all eligible surplus lines insurers

(a) All eligible surplus lines insurers shall provide the Department with a report listing net written premiums for all insurance covering a subject of insurance resident, located, or to be performed in New Jersey by either cartridge (3480 model) or computer tape (6250 BPI, IBM compatible) in accordance with (b) and (c) below. Surplus lines insurers which write no business during a calendar quarter shall not file the report required by (c) below, but shall submit a signed affidavit to the Department attesting that no business was written for the quarter.

(b) An insurer's quarterly report to the Department shall list each policy and transaction number only once. Insurers shall combine all activity on the policy during the quarter and report only the policy's net written premiums for that quarter in conjunction with the transaction number assigned by the New Jersey surplus lines agent. If the placement is a multi-state policy, the net written premiums shall include only the New Jersey portion of the premium.

(c) Each eligible surplus lines insurer's report of their net written premiums for the State of New Jersey shall be set forth in the record layouts in the Appendices to this subchapter.

1. The report shall include an internal IBM standard tape label containing:

i. Data set name (INF.SLPS);

ii. The data shall be EBCDIC character set and alphas in upper case;

iii. Volume serial number (will be assigned by the company);

iv. Tape density;

v. Record format (must be fixed block);

vi. Record length (must be *[253]***300***);

vii. Block size (must be *[23,276]***24,300***); and

viii. Create date.

2. Tapes and cartridges may be delivered or mailed but shall be received by the Department by the due date to:

Surplus Lines Examining Office
New Jersey Department of Insurance
FEMS—SLPS Project
20 W. State Street
CN-325
Trenton, NJ 08625

i. If mailed, they shall be mailed in standard secure containers with a pre-addressed, prepaid return address label enclosed or attached.

3. Tapes and cartridges shall be clearly labeled with the company's name and the date. The box and the label shall be printed or typed in capital letters.

4. Surplus lines insurers shall submit either IBM compatible 3480 cartridges, or 6250 BPI tapes. (3480 cartridges are preferred, with 6250 BPI tapes as a secondary preference.)

5. An external label shall be affixed to the tapes or cartridges and shall include the following information:

i. The company's name and NAIC (or ISI) number;

ii. The volume sequence number if the file is multi-volume (for example, 1 of 5);

iii. The date when the tape or cartridge was mailed; and

iv. The letters "SL" on the external label indicating that the internal IBM standard tape information is included as provided in (c)1 above.

6. The submission shall also include a cover letter indicating the same information on the internal and external labels, and a signed affidavit of the surplus lines insurer attesting to the accuracy of the cartridges or tapes.

7. Surplus lines insurers that are not technically capable of providing the Department with an IBM standard label pursuant to (c)1 above, shall indicate that no internal label is included by writing the letters "NL" on the external label and on the cover letter.

11:19-3.5 SLPS subsystem filing requirements for all licensed producers with surplus lines authority

(a) All licensed producers with surplus lines authority shall assign a transaction number to each ***new or renewal*** policy he or she places. All subsequent endorsements shall be identified by the same transaction number. All surplus lines producers shall provide surplus lines insurers with the appropriate transaction number for each new, ***renewal,*** additional or return premium policy or endorsement***, including adjustments for policies prior to July 1, 1993***.

(b) All licensed surplus lines producers shall file with the Department or other authority as required a quarterly tax return in the form set forth in Appendix B to this subchapter.

(c) A complete New Jersey surplus lines producer quarterly tax return shall consist of the following forms:

1. SLPS-1-TAX (Tax Return and Certified Account by Surplus Lines Producer);

2. SLPS-2-FRA, if applicable (Schedule showing Fire Premiums and Taxes Payable to New Jersey Firemen's Relief Association);

3. SLPS-3-TRS (Schedule to Support Tax Returns); and

4. SLPS-4-GFS (Quarterly Surcharge Statement).

11:19-3.6 (Reserved)

11:19-3.7 Penalties

(a) Failure to comply with the provisions of this subchapter shall subject an eligible surplus lines insurer to penalties as provided in N.J.S.A. 17:22-6.61.

(b) Failure to comply with the provisions of this subchapter shall subject a licensed producer with surplus lines authority to penalties as provided in N.J.S.A. 17:22-6.61 and 17:22A-17.

APPENDIX A
Exhibit 1 (SLPS)

Header Record Layout

Field No.	Field Name	Start Pos	Field Type & Length	Comments
1	Record Type	1	X(1)	Format as "1"
2	Company Number	2	X(9)	NAIC or ISI number
3	Company Name	11	X(30)	
4	Quarter	41	X(1)	Format as 1,2,3, or 4
5	Year	42	X(4)	Format as CCYY
6	Filler	46	X(255)	Spaces
			300	

Note:

X denotes alphanumeric

Alphanumeric fields containing numeric values should be right adjusted and zero filled to the left with the sign in the left most character (specific instructions for each field are documented in the comment section).

APPENDIX A
Exhibit 2 (SLPS)

Header Record Layout
Description

Field No.	Field Name	Comments
1	Record Type	This field should contain the number "1" for this record type.
2	Company Number	This field should contain the company's NAIC or ISI number (If NAIC number, leave last four characters as spaces).
3	Company Name	This field should contain the first 30 bytes of the company's full business name.
4	Quarter	This field should contain the quarter of the year for which the data applies. Can only be a "1", "2", "3", or "4".
5	Year	This field should contain the year for which the data applies.
6	Filler	This field should contain spaces.

APPENDIX A
Exhibit 3 (SLPS)

Detail Record Layout

Field No.	Field Name	Start Pos	Field Type & Length	Comments
1	Record Type	1	X(1)	Format as "2"
2	Company Number	2	X(9)	NAIC or ISI number
3	Transaction Number	11	X(14)	Number assigned to the policy by the surplus lines agent
4	Name of Insured	25	X(30)	
5	Policy Number	55	X(20)	Number assigned to the policy by the company
6	Policy From Date	75	X(8)	Format as MMDDCCYY
7	Policy To Date	83	X(8)	Format as MMDDCCYY
8	Total Net Premium Amount	91	X(12)	Net premium amount (including cents). Should reflect the net amount of all business received on the policy for the quarter
9	Name of Producer	103	X(30)	Name of producing agent
10	Street1	133	X(30)	First 30 bytes of producer's street address
11	Street2	163	X(30)	Second 30 bytes of producer's street address
12	Street3	193	X(30)	Last 30 bytes of producer's street address
13	City	223	X(20)	Producer's city
14	State	243	X(2)	Two-letter abbreviation of producer's state
15	Zip5	245	X(5)	Producer's zip code
16	Zip4	250	X(4)	Last 4 bytes of producer's zip code
17	Filler	254	X(47)	Spaces
			300	

Note:
All fields must be filled. If producer is not known, fill all related fields with spaces.
X denotes alphanumeric

APPENDIX A
Exhibit 4 (SLPS)

Detail Record Layout
Description

Field No.	Field Name	Comments
1	Record Type	This field should contain the number "2" for this record type
2	Company Number	This field should contain the company's NAIC or ISI number (If NAIC number, leave last four characters as spaces).
3	Transaction Number	This field should contain the number assigned to the policy by the surplus lines agent. Format using the producer number (five characters), a dash ("—"), the year of the placement (two characters), a dash ("—"), and the sequential number (five characters). The format of this field is XXXXX—XX—XXXXX. The dashes must be included. If the policy is a direct placement, use the default number, 99999—99—99999.
4	Name of Insured	This field should contain the name of the insured. Left justify the name. Leave spaces in the unused portions of the field. Format placing last name first. Example: Doe, John.
5	Policy Number	This field should contain the number assigned to the policy by the company. Left justify the policy number. Leave spaces in the unused portion of the field.
6	Policy From Date	This field should contain the effective date of the policy.
7	Policy To Date	This field should contain the end date of the policy.
8	Total Net Premium Amount	This field should contain the total net premium information received for the policy during the quarter. The decimal point is implied. Should be right justified with leading zeros. The sign ("+" or "-") should be the first character.
9	Name of Producer	This field should contain the name of the producing agent (if known). Name must be provided if address is provided. Left justify the name. Leave spaces in the unused portion of the field. Format placing last name first. Example: Doe, John.
10	Street1	This field should contain the first 30 bytes of the producer's street address.
11	Street2	This field should contain the second 30 bytes of the producer's street address. This field may be spaces if street name fits in the Street1 field.
12	Street3	This field should contain the last 30 bytes of the producer's street address. This field may also be spaces if the street name does not require it.
13	City	This field should contain the producer's city.
14	State	This field should contain the two-position postal abbreviation of the producer's state.
15	Zip5	This field contains the producer's zip code (first 5 digits).
16	Zip4	This field contains the last four bytes of the producer's zip code. If not applicable, it should contain spaces.
17	Filler	This field should contain spaces.

APPENDIX A
Exhibit 5 (SLPS)

Trailer Record Layout

Field No.	Field Name	Start Pos	Field Type & Length	Comments
1	Record Type	1	X(1)	Format as "3"
2	Total Records	2	X(7)	Exclude header & trailer
3	Total Net Premiums	9	X(12)	Total net premiums written amount for the quarter (including cents).
4	Filler	21	X(280)	Spaces
			300	

Note:
All fields must be filled
X denotes alphanumeric

APPENDIX A
Exhibit 6 (SLPS)

Trailer Record Layout
Description

Field No.	Field Name	Comments
1	Record Type	This field should contain the number "3" for this record type.
2	Total Records	This field should contain the total number of records submitted on the tape. This excludes the header and trailer records.
3	Total Net Premiums	This field should contain the sum of the net premium amounts reported for each policy. The decimal point is implied. Should be right justified with leading zeroes. The sign ("+" or "-") should be the first character.
4	Filler	This field should contain spaces.

APPENDIX B

Instructions for Completing
Licensed New Jersey Surplus Lines Producer
Quarterly Tax Return

Introduction

Effective *[January 1, 1993]* ***with the adoption of N.J.A.C. 11:19-3 et seq.***, the Surplus Lines Unit automated its operations through the implementation of the Surplus Lines Processing Subsystem (SLPS) of the Department of Insurance's Financial Examinations Monitoring System (FEMS). The system was designed to simplify activities for both the Surplus Lines Unit and you, the Surplus Lines Producer. However, the success of this sytem is dependent on full compliance and cooperation from you and your agency. Failure to cooperate will *[render]* ***diminish*** the *[system ineffective]* ***system's effectiveness*** and result in additional work for both parties. Before any forms can be completed, you must fully understand the five basic rules involved in filing a surplus lines producer quarterly tax return. They are listed as follows:

Rule #1—YOU MUST READ AND FOLLOW THE INSTRUCTIONS EXACTLY AS THEY ARE EXPLAINED!

Rule #2—YOU MUST COMPLETE EVERY LINE ON THE TAX RETURN AS INSTRUCTED!

Rule #3—YOU MUST COMPLETE AND INCLUDE EVERY FORM AS INSTRUCTED WITH EACH QUARTERLY FILING!

Rule #4—YOU MUST PUT THE TAX RETURN FORMS IN THE REQUIRED ORDER!

Rule #5—YOU MUST INCLUDE INDIVIDUAL PRODUCER ZERO TAX RETURNS WITH EACH QUARTERLY FILING!

Failure to comply with any of these rules will result in non-filer status for you and your agency. Your tax return will be sent back to you and the Surplus Lines Unit will have no record of receiving it. If it has to be returned, your resubmission will be subject to the penalties of a late filing. IF YOU HAVE ANY QUESTIONS, PLEASE CALL ONE OF THE EXAMINERS AT THE SURPLUS LINES EXAMINING OFFICE! ***If you need personal assistance, you may also schedule an appointment to meet with an examiner in the Trenton Office.*** We are here to help you so feel free to call us at (609) 777-0498.

Completing the Tax Return

A complete New Jersey Surplus Lines Producer Quarterly Tax Return consists of the following forms:

1. SLPS-1-TAX (Tax Return and Certified Account By Surplus Lines Producer)
2. SLPS-2-FRA (Schedule Showing Fire premiums and Taxes Payable to New Jersey Firemen's Relief Association)
3. SLPS-3-TRS (Schedule to Support Tax Returns)
4. SLPS-4-GFS (Quarterly Surcharge Statement)

THESE FORMS MUST BE STAPLED TOGETHER OR OTHERWISE ATTACHED AND FILED IN THE ORDER LISTED ABOVE! For example, the form SLPS-1-TAX will always be the top form in the tax return filing, SLPS-2-FRA will always be the second, and so on.

Forms must be completed as necessary to support the Tax Return and Certified Account by the Surplus Lines Producer. For example, if a surplus lines producer does not place any Fire business, then that producer does not need to complete SLPS-2-FRA. It is important to note that no ***line*** item *[line]* should be left blank. If there is an item that is not applicable, you must enter either "0" for a numeric entry, or "N/A" for an alpha entry. Always make sure that you check each form *[for any line items not completed]* ***carefully to determine that all lines are completed as required***. Additionally, return (negative) premiums should always be shown using parentheses. Also, all monetary figures must be reported to the cent*[,]**.* *[no]* Rounding is ***not*** permitted.

It is suggested that you use these instructions as a checklist until completely familiar with the ***requirements of each of the four (4)*** forms *[requirements]*.

I. SLPS-1-TAX (Tax Return and Certified Account By Surplus Lines Producer)
—THIS FORM IS REQUIRED EVEN IF NO BUSINESS IS PRODUCED!

*☐ **Print your assigned SLA number in the five boxes provided in the upper left corner of the form. Lead zeros must be printed in the boxes not used, i.e. SLA #003 would now be shown as 00003, SLA #125A would now be shown as 0125A. EVERY BOX MUST CONTAIN A CHARACTER!***

☐ Indicate the quarter and year of the tax return by circling the appropriate number to designate the calendar quarter and inserting the last 2 digits of the year as shown at the top of the form.

☐ Provide the name under which you do business on Line 1 of the form. This should be the agency name for an organization's tax return; your name (as it appears on your license) for an individual tax return.

*[☐ Print your assigned SLA number in the five boxes provided in the upper right corner of the form. Lead zeros **must** be printed in the boxes not used, i.e. SLA #003 would now be shown as 00003, SLA #125A would now be shown as 0125A. EVERY BOX MUST CONTAIN A CHARACTER!]*

☐ Provide the location of your principal place of business on Line 2 of the form. This address must be a New Jersey location and the Surplus Lines Examining Office should be able to contact you by phone and by mail at this address.

☐ Provide the phone number for the organization or a number where you may be contacted during the day on Line 3 of the form. For organizations, this phone number should be the number listed for the address given on Line 2.

☐ Provide the total taxable Fire premiums written for the quarter on Line 5 of the form. This should include 999 Fire, if any. On property policies, only the portion of the premium allocable to Fire should be included on this line. If no Fire premiums are written, then enter a "0" on this line.

☐ Multiply the total taxable Fire premiums entered on Line 5 by three percent (3%), and enter this amount on Line 6 of the form. Again, if no Fire premiums are written, enter a "0" on Line 6.

*☐ **Provide the amount of credit applicable (if any) to the 3% FRA Tax on Line 7 of the form. If none, enter a "0" on Line 7 of the form.**

☐ **Subtract the amount shown on Line 7 from the amount shown on Line 6 and enter the result on Line 8 of the form.***

☐ Provide the total taxable "All Other" premiums written for the quarter on Line *[7]* ***9*** of the form. Simply stated, "All Other" premiums include any premiums that are not Fire premiums (e.g. Allied Lines and Casualty premiums are "All Other"). If no other "All Other" premiums are produced, then enter a "0" on Line *[7]* ***9***.

☐ Multiply the total taxable "All Other" premiums entered on Line *[7]* ***9*** by three percent (3%), and enter this amount on Line *[8]* ***10*** of the form. Again, if no "All Other" premiums are written, enter a "0" on Line *[8]* ***10***.

*☐ **Provide the amount of credit applicable (if any) to the 3% State Tax on Line 11 of the form.**

☐ **Subtract the amount shown on Line 11 from the amount shown on Line 10 and enter the result on Line 12 of the form.***

☐ Provide the total non-taxable Fire premiums written on Line *[9]* ***13*** of the form. Total non-taxable Fire premiums DOES NOT INCLUDE 999 FIRE! Non-coded Fire premiums are included in taxable Fire premiums. If no non-taxable Fire premiums are written, then enter a "0" on Line *[9]* ***13***.

☐ Provide the total non-taxable "All Other" premiums written on Line *[10]* ***14*** of the form. If no non-taxable "All Other" premiums are written, then enter a "0" on Line *[10]* ***14***.

☐ Add the total non-taxable Fire premiums entered on Line *[9]* ***13*** to the total non-taxable "All Other" premiums entered on Line *[10]* ***14*** and insert this amount on Line *[11]* ***15*** of the form.

☐ Type or print your name and title, and sign and date the form on the lines provided at the bottom.

☐ Draw a check, made payable to the "New Jersey Firemen's *[Relief]* Association for the amount shown on Line *[6]* ***8*** of the form. This check should be forwarded to the New Jersey Firemen's *[Relief]* Association (see section II—SLPS-2-FRA). Attach a copy of this check to your completed tax return that will be sent to the Surplus lines Examining Office as detailed under the "Introduction" section.

☐ Draw a second check, made payable to the "*[Treasurer—]*State of New Jersey", for the amount shown on Line *[8]* ***12*** of the form. This check will be attached to your completed tax return and sent to the Surplus Lines Examining Office as detailed in the "Introduction" section.

II. SLPS-2-FRA (Schedule Showing Fire premiums and Taxes Payable to New Jersey Firemen's *[Relief]* Association)

—THIS FORM IS NOT REQUIRED IF NO FIRE PREMIUMS ARE WRITTEN AND/OR NO BUSINESS IS PRODUCED!

☐ Print your assigned SLA number in the five boxes provided in the upper left corner of the form. Remember, lead zeros must be used, and all boxes must contain a digit or character.

☐ Indicate the quarter and year of the tax return by circling the appropriate number to designate the calendar year and inserting the last 2 digits of the year as shown under the SLA number.

☐ Provide the name under which you do business on the line provided. This should be the same as the name listed on Line 1 of SLA-1-TAX.

☐ Enter the page number and the total number of pages in the appropriate lines at the upper right corner of the form.

☐ Provide the three digit ISO code number for the municipality that corresponds with the location of the risk and enter it in the column marked "ISO Code". The ISO code can be found by using the list included with these instructions.

☐ Enter the municipality or appropriate fire district in the column marked "Location of Risk".

☐ Enter the zip code of the location in the column marked "Zip Code".

☐ Provide the Fire premium amount for the policy and enter it in the column marked "Premium". For property policies, include in this column only the portion of the premium allocable to Fire. YOU MUST USE PARENTHESES AROUND A NUMBER TO INDICATE A RETURN PREMIUM! Do NOT use a minus (–) sign! *[(]*e.g. use ($123.00) instead of –$123.00*[)]*

☐ Multiply the amount in the Premium column by three percent (3%) and enter this amount in the column marked "FRA Tax".

☐ Repeat the above steps each individual placement where Fire premiums are written. If you need additional space, use extra SLPS-2-FRA sheets and number them consecutively as necessary. Keep a cumulative total in the total boxes at the bottom right corner of the form.

☐ After verifying all entries, mail the completed form(s), along with a check made payable to the "New Jersey Firemen's *[Relief]* Association" for the amount of three percent (3%) of the total Fire premiums (as shown on Line 6 of SLPS-1-TAX), to the New Jersey Firemen's *[Relief]* Association, 50 Evergreen Place, East Orange, NJ 07018. Attach a copy of the form(s), together with a photocopy of your check, to the tax return that will be sent to the Surplus Lines Examining Office as detailed under the "Introduction" section.

III. SLPS-3-TRS (Schedule to Support Tax Returns)

—THIS FORM IS NOT REQUIRED IF NO BUSINESS IS PRODUCED!

☐ Print your assigned SLA number in the five boxes provided in the upper left corner of the form. Remember, lead zeros must be used, and all boxes must contain a digit or character.

☐ Indicate the quarter and year of the tax return by circling the appropriate number to designate the calendar quarter and inserting the last 2 digits of the year *[as shown under the SLA number]*.

☐ Provide the name under which you do business on the line provided. This should be the same as the name listed on Line 1 of SLA-1-TAX.

☐ Enter the page number and the total number of pages in the appropriate lines at the upper right corner of the form.

☐ Enter the transaction number assigned to the individual placement in the seven (7) boxes provided in Column 1 of the form. The first two digits of the transaction number indicate the year in which the placement occurred, i.e. if the placement occurred in the year 1993, then the first two digits of the transaction number would be "93". The remaining five digits of the transaction number represent a sequential number, assigned by you, indicating the order in which the placement occurred during the calendar year. For example, the first placement of the year would be numbered 00001, the second placement would be numbered 00002, and so on up to 99,999. EVERY BOX MUST CONTAIN A DIGIT! Remember to always use lead zeros when the sequential number is less than 5 digits. The system will NOT accept alpha suffixes to transaction numbers.

☐ Indicate the premium type code in Column 2 of the form. The premium type codes are "N" for new ***and renewal*** premiums; "A" for additional premiums; and "R" for return premiums. *[The new, additional, or return]* ***"N", "A", and "R"*** premiums must be listed on separate page(s). Do NOT put *[new, additional, or return]* ***"N", "A", and "R"*** premiums on the same page. YOU MUST USE A SEPARATE PAGE(S) FOR NEW ***AND RENEWAL***, A SEPARATE PAGE(S) FOR ADDITIONAL, AND A SEPARATE PAGE(S) FOR RETURNS.

☐ Provide the name of the insured as shown on the policy in Column 3 of the form.

☐ Enter the policy number of the placement in the twenty (20) boxes provided in Column 4 of the form. Start with the first box on the left and use as many boxes as necessary. The policy number may be alpha-numeric. It is important to enter the policy number exactly as it appears on the policy, including spaces. YOU MUST LEAVE A BLANK BOX ON THE FORM TO INDICATE A SPACE BETWEEN CHARACTERS! Always be sure to check for any errors.

☐ Enter the effective dates of the placement in Column 5 of the form, using slashes between month, day, and year, which are 2 digits each.

☐ Indicate the insurance company issuing the policy by entering the corresponding NAIC or ISI number in the nine (9) boxes provided in Column 6 of the form. The NAIC number is five digits in length,

and is used only by foreign insurance companies (those licensed in a U.S. jurisdiction). The ISI number (which is distinguished by its prefix, "AA") is nine characters in length, and is used only by alien (overseas) insurance companies. A list of each surplus lines insurer currently eligible in New Jersey and their respective NAIC/ISI number is included with these instructions. NOTE: When entering the five digit NAIC number, use only the required amount of boxes. That is, enter the five digits in the first five boxes and leave the remaining boxes blank.

☐ Provide the Fire premium amount, if any, and enter it in the column marked "Fire" under Column 7 of the form.

☐ Enter the "All Other" premium amount, if any, in the column marked "All Other" under Column 7 of the form.

☐ If the premium is non-taxable, then enter a "Y" in the column marked "N/T". Otherwise, leave this column blank. As with new ***and renewal***, additional, and return premiums, YOU MUST GROUP ALL NON-TAXABLE PREMIUMS ON A SEPARATE PAGE(S)!

☐ Repeat the above steps for each individual placement ***or transaction***. If you need additional space, use extra SLPS-3-TRS sheets and number as necessary. Keep a cumulative total in the total boxes at the bottom right corner of the form.

IV. SLPS-4-GFS (Quarterly Surcharge Statement)

—THIS FORM IS REQUIRED EVEN IF NO BUSINESS IS PRODUCED!

*☐ **Print your assigned SLA number in the five boxes provided in the upper left corner of the form. Remember, lead zeros must be used, and all boxes must contain a digit or character.***

☐ Indicate the quarter and year of the tax return by circling the appropriate number to designate the calendar quarter and inserting the last 2 digits of the year *[as shown at the top of the form]*.

[☐ Print your assigned SLA number in the five boxes provided in the upper right corner of the form. Remember, lead zeros must be used, and all boxes must contain a digit or character.]

☐ Provide the name under which you do business on the line provided. This should be the same as the name listed on Line 1 of SLA-1-TAX.

☐ Provide the location of your principal place of business on Lines 2 and 3 of the form. This address must be a New Jersey location and the Surplus Lines Examining Office should be able to contact you by phone or by mail at this address. Do not forget the zip code.

☐ Provide the phone number for the organization or a number where you may be contacted during the day on Line 4 of the form. For organizations, this phone number should be the number listed for the address given on Line 2.

☐ Provide the amount of new premiums written during the quarter on Line 5 of the form.

☐ Provide the amount of additional premiums written during the quarter on Line 6 of the form.

☐ Provide the amount of return premiums during the quarter on Line 7 of the form.

☐ Take the total of Line 5 plus Line 6 minus Line 7 and enter the result on Line 8 of the form.

☐ Compute the amount of surcharge due by multiplying the amount on Line 8 by four percent (4%) and enter this amount on Line 9 of the form.

☐ Provide the amount of interest received from your premium trust account deposits and enter it on Line 10 of this form.

☐ Total the dollar amount of the surcharges shown on Line 9 and the interest earned thereon from Line 10 and enter the total on Line 11 of the form.

☐ Provide the trust account number and the name and address of the financial institution in which it is established.

☐ Type or print your name, and sign and date the form on the lines provided at the bottom.

☐ Mail the completed form, along with a check made payable to the "New Jersey Surplus Lines Insurance Guaranty Fund" for the amount shown on Line 11, to the New Jersey Surplus Lines Insurance Guaranty Fund, P.O. Box *[463, Chatham, NJ 07928]* ***1303, Cranford, NJ 07016-1303***. Attach a copy of the form, together with a photocopy of your check, to the tax return that will be sent to the Surplus Lines Examining Office as detailed under the "Introduction" section.

Procedures for Filing the Tax Return

The four (4) forms with required copies, completed and attached together in the correct order, comprise a complete tax return filing. ***This package should be properly secured with a rubber band. A complete, separate duplicate copy of this filing must also be included. This separate duplicate copy should also be properly secured with a rubber band***. The tax return filing is to be filed with the Surplus Lines Examining Office *[within thirty (30) days of]* ***on or before the end of the month following*** the close of the calendar quarter. Therefore, they must be mailed on or before April 30, July 31, October 31, and January 31 for the first, second, third, or fourth calendar quarters, respectively.

Individual producer zero tax returns (i.e. no placements by that licensee) must accompany all quarterly surplus lines tax return filings and they must be filed ***separately*** for each surplus lines licensee of the organization. The zero tax return is made up of two (2) forms: SLPS-1-TAX, and SLPS-4-GFS. These forms must be filled out completely, and all lines requiring a monetary entry must contain a zero ("0"). ***A complete, separate duplicate copy of the zero tax return must also be included.*** DO NOT FORGET TO FILE YOUR INDIVIDUAL PRODUCER ZERO TAX RETURNS ALONG WITH YOUR ORGANIZATIONAL PRODUCER SURPLUS LINES TAX RETURN!

[However] ***Also be advised that***, while the individual producer zero tax returns may accompany the organizational producer tax return in the same envelope, they *[SHOULD]* ***MUST*** NOT be stapled or otherwise attached to the organizational producer tax return.

Additionally, if your organization does not produce any business in a calendar quarter, you must also file an organizational producer zero tax return.

If you have any questions on the instructions, or any questions pertaining to surplus lines, then you are encouraged to call the Surplus Lines Examining Office and/or any of the examiners at (609) 777-0498.

Thank you for taking the time to read these instructions and completing the forms accurately.

*[MAIL TO:

NEW JERSEY DEPARTMENT OF INSURANCE SURPLUS LINES EXAMINING OFFICE
CN 325, Trenton, NJ 08625

TAX RETURN AND CERTIFIED ACCOUNT BY SURPLUS LINES PRODUCER

For the 1 2 3 4 Quarter, 19____
(circle one)

To the Commissioner of Insurance of New Jersey: SLA # | | | | | |

1. Name of Surplus Lines Producer _____

2. I have a bona fide office in this State in which is kept a record of contracts of insurance countersigned or issued by me located at:

_____
(Street Address) (City or Town) (State) (Zip Code)

3. Telephone # (____) _____ - _____
(area code)

4. Pursuant to *N.J.S.A.* 17:22-6.58, there is submitted on the accompanying pages a verified report, in duplicate, of the surplus lines insurance transacted during the quarter circled above, a summary of which follows:

TAXABLE NET PREMIUMS:

5. Total Taxable Fire Premiums $_____.____

6. Amount Payable to "New Jersey Firemen's Relief Association" (3% of Line 5) $_____.____

7. Total Taxable All Other Premiums $_____.____

8. Amount Payable to the "State of New Jersey" (3% of Line 7) $_____.____

NON-TAXABLE NET PREMIUMS
(Insurance of risks of state, county, or municipal government or agency thereof)

9. Total Non-Taxable Fire Premiums $_____.____

10. Total Non-Taxable All Other Premiums $_____.____

11. Total Non-Taxable Net Premiums (Add Line 9 and Line 10) $_____.____

I declare under penalties of perjury that I have examined this statement including the schedules and statements attached thereto, if any, and to the best of my knowledge and belief the matters and information set forth therein are true, correct, and complete. I further certify that I am authorized to sign for the producer identified on Line 1 above.

_____ _____
Signature of Surplus Lines Produc

_____ _____
Date Name and Title
(Print or Type)]*

*STATE OF NEW JERSEY
DEPARTMENT OF INSURANCE
THE SURPLUS LINES EXAMINING OFFICE
20 West State Street, CN 325, Trenton, NJ 08625-0325

For Official Use Only

TAX RETURN AND CERTIFIED ACCOUNT BY SURPLUS LINES PRODUCER

SLA # | | | | | | For the 1 2 3 4 Quarter, 19____
(circle one)

To the Commissioner of Insurance of New Jersey:

1. Name of Surplus Lines Producer _____

2. I have a bona fide office in this State in which is kept a record of contracts of insurance countersigned or issued by me located at:

_____
(Street Address) (City or Town) (State) (Zip Code)

3. Telephone # (____) _____ - _____
(area code)

4. Pursuant to *N.J.S.A.* 17:22-6.58, there is submitted on the accompanying pages a verified report, in duplicate, of the surplus lines insurance transacted during the quarter circled above, a summary of which follows:

TAXABLE NET PREMIUMS:

5.	Total Taxable Fire Premiums	$ _____ . ____
6.	Tax @ 3% (3% of Line 5)	$ _____ . ____
7.	Prior Period Credit Applied (If Any)	$(_____ . ____)
8.	Amount Payable to the "New Jersey Firemen's Association" (Line 6) – (Line 7)	$ _____ . ____
9.	Total Taxable All Other Premiums	$ _____ . ____
10.	Tax @ 3% (3% of Line 9)	$ _____ . ____
11.	Prior Period Credit Applied (If Any)	$(_____ . ____)
12.	Amount Payable to the "State of New Jersey" (Line 10) – (Line 11)	$ _____ . ____

NON-TAXABLE NET PREMIUMS
(Insurance of risks of state, county, or municipal government or agency thereof)

13.	Total Non-Taxable Fire Premiums	$ _____ . ____
14.	Total Non-Taxable All Other Premiums	$ _____ . ____
15.	Total Non-Taxable Net Premiums (Line 13) + (Line 14)	$ _____ . ____

I declare under penalties of perjury that I have examined this statement including the schedules and statements attached thereto, if any and to the best of my knowledge and belief the matters and information set forth therein are true, correct, and complete. I further certify that I am authorized to sign for the producer identified on Line 1 above.

_____ _____
Date Signature of Surplus Lines Producer

_____
Name and Title
(Print or Type)

SLPS-1-TAX 4/93 (REV 12/17/92)*

***STATE OF NEW JERSEY**
DEPARTMENT OF INSURANCE
THE SURPLUS LINES EXAMINING OFFICE*

SCHEDULE SHOWING FIRE PREMIUMS AND TAXES PAYABLE

MAIL TO:
NEW JERSEY FIREMEN'S *[RELIEF]* ASSOCIATION
50 Evergreen Place, East Orange, NJ 07018

SLA # | | | | | |

1 2 3 4 Quarter, 19_____
(circle one)

Producer Name _____ Page ____ of ____

ISO Code	Location of Risk (Municipality or Fire District)	Zip Code	Premium	FRA Tax
			$	$
		Totals	$	$

SLPS-2-FRA 1/93

***STATE OF NEW JERSEY**
DEPARTMENT OF INSURANCE
THE SURPLUS LINES EXAMINING OFFICE
20 West State Street, CN 325, Trenton, NJ 08625-0325*

SLA # | | | | | |

SCHEDULE TO SUPPORT TAX RETURNS

Page ____ of ____

1 2 3 4 Quarter, 19____
(circle one)

Producer Name _____

(1) Transaction Number	(2) Code	(3) Name of Insured	(4) Policy Number	(5) Term From	(5) Term To	(6) NAIC/ISI #	(7) Premiums Fire	(7) Premiums All Other	(8) N/T
-							$	$	
-									
-									
-									
-									
-									
-									
-									
-									
-									
-									
-									
-									
					Cumulative Totals		$	$	

*[MAIL TO:

NEW JERSEY SURPLUS LINES INSURANCE GUARANTY ASSOCIATION
P.O. Box 463, Chatham, New Jersey 07928

QUARTERLY SURCHARGE STATEMENT

For the 1 2 3 4 Quarter, 19____
(circle one)

SLA # | | | | | |

1. Name of Surplus Lines Producer: _____
2. Street Address: _____
3. City, State: _____ Zip Code _____
4. Telephone #: (____) _____ - _____
(area code)
5. New Jersey new premiums written during quarter $ _____.____
6. New Jersey additional premiums written during quarter (+) $ _____.____
7. New Jersey return premiums written during quarter (-) $(_____.____)
8. Total New Jersey Net Premiums (Line 5) + (Line 6) - (Line 7) $ _____.____
9. Surcharge amount due (4% of Line 8) $ _____.____
10. Interest received on deposits* $ _____.____
11. Total surcharges and interest due (Line 9) + (Line 10) $ _____.____

— Remit amount on Line 11 payable to "NJ Surplus lines Insurance Guaranty Fund".

— Send check with copy of this statement to the Association at P.O. Box 463, Chatham, New Jersey 07928.

— An additional copy of this statement, together with a photocopy of your check, should be attached to your Quarterly Premium Tax Return that is mailed to the Surplus Lines Examining Office.

*Trust Account # _____ is established at the following financial institution:

Name: _____

Address: _____

CERTIFICATION

I declare under penalties of perjury that I have examined this statement including the schedules and statements attached thereto, if any, and to the best of my knowledge and belief the matters and information set forth therein are true, correct, and complete. I further certify that I am authorized to sign for the producer identified on Line 1 above.

_____
Signature of Surplus Lines Producer

_____ _____
Date Name and Title
(Print or Type)

SLPF-4-GFS 1/93]*

*STATE OF NEW JERSEY
DEPARTMENT OF INSURANCE
THE SURPLUS LINES EXAMINING OFFICE
20 West State Street, CN 325, Trenton, NJ 08625-0325

For Official Use Only

SLA # | | | | | |

QUARTERLY SURCHARGE STATEMENT

MAIL TO:

NEW JERSEY SURPLUS LINES INSURANCE GUARANTY FUND
P.O. Box 1303, Cranford, New Jersey 07016-1303

For the 1 2 3 4 Quarter, 19____
(circle one)

1. Name of Surplus Lines Producer: _____
2. Street Address: _____
3. City, State: _____ Zip Code _____
4. Telephone #: (____) _____ - _____
(area code)
5. New Jersey new premiums written during quarter $ _____.____
6. New Jersey additional premiums written during quarter (+) $ _____.____
7. New Jersey return premiums written during quarter (–) $(_____.__)
8. Total New Jersey Net Premiums (Line 5) + (Line 6) – (Line 7) $ _____.____
9. Surcharge amount due (4% of Line 8) $ _____.____
10. Interest received on deposits* $ _____.____
11. Total surcharges and interest due (Line 9) + (Line 10) $ _____.____

— Remit amount on Line 11 payable to "NJ Surplus lines Insurance Guaranty Fund".

— Send check with copy of this statement to the Association at P.O. Box 1303, Cranford, New Jersey 07016-1303.

— An additional copy of this statement, together with a photocopy of your check, should be attached to your Quarterly Premium Tax Return that is mailed to the Surplus Lines Examining Office.

*Trust Account # _____ is established at the following financial institution:

Name: _____

Address: _____

CERTIFICATION

I declare under penalties of perjury that I have examined this statement including the schedules and statements attached thereto, if any, and to the best of my knowledge and belief the matters and information set forth therein are true, correct, and complete. I further certify that I am authorized to sign for the producer identified on Line 1 above.

_____
Signature of Surplus Lines Producer

_____ _____
Date Name and Title
(Print or Type)

SLPS-4-GFS 4/93 (REV 12/17/92)*

LAW AND PUBLIC SAFETY

(a)

DIVISION OF CONSUMER AFFAIRS
LEGALIZED GAMES OF CHANCE CONTROL COMMISSION

Amusement Games Control

Adopted New Rules: N.J.A.C. 13:3

Proposed: March 1, 1993 at 25 N.J.R. 891(b).
Adopted: April 20, 1993 by the Legalized Games of Chance Control Commission, Robert J. Whelan, Chairman.
Filed: April 26, 1993 as R.1993 d.233, **without change.**

Authority: N.J.S.A. 5:8-79, 79.1, 85 and 107, and Executive Reorganization Plan No. 004-1992.

Effective Date: May 17, 1993.
Expiration Date: May 17, 1998.

Summary of Public Comments and Agency Responses:
No comments were received.

N.J.A.C. 13:3 expired April 25, 1993. Pursuant to N.J.A.C. 1:30-4.4(f), those rules which were proposed for readoption are adopted herein as new rules.

Full text of the expired rules adopted as new can be found in the New Jersey Administrative Code at N.J.A.C. 13:3.

(b)

DIVISION OF CRIMINAL JUSTICE

Arson Investigators: Training Requirements

Readoption with Amendments: N.J.A.C. 13:76

Proposed: March 1, 1993 at 25 N.J.R. 896(a).
Adopted: April 7, 1993 by Robert T. Winter, Director, Division of Criminal Justice.
Filed: April 16, 1993 as R.1993 d.208, **without change.**

Authority: N.J.S.A. 40A:14-7.1 and 52:17B-97 et seq.

Effective Date: April 16, 1993, Readoption
May 17, 1993, Amendments.
Expiration Date: April 16, 1998.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the readoption can be found in the New Jersey Administrative Code at N.J.A.C. 13:76.

Full text of the adopted amendments follows:

13:76-1.3 Definitions

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

...

"Basic Course for Investigators" means the curriculum prescribed by the Police Training Commission and conducted by the Police Services Section, Division of Criminal Justice, Department of Law and Public Safety, as an appropriate course of training for arson investigators.

"Basic Arson Investigation Course" means the curriculum prescribed and conducted by the Police Services Section, Division of Criminal Justice, Department of Law and Public Safety, as an appropriate arson investigation course.

"In-Service Training" means the curricula prescribed and conducted by the Police Services Section, Division of Criminal Justice, Department of Law and Public Safety, to provide selected advanced arson investigation training as may be deemed necessary.

"Equivalent course" means a course of instruction recognized by the Police Training Commission as being acceptable in lieu of the Basic Course for Investigators, or a course of instruction recognized by the Police Services Section, Division of Criminal Justice, as being acceptable in lieu of the Basic Arson Investigation Course or In-Service Training.

...

SUBCHAPTER 7. AUTHORITY OF THE ATTORNEY GENERAL

13:76-7.1 Authority of the Attorney General

All certified arson investigators, while in the actual performance of arson investigation duties, shall be subject to and comply with all applicable policies established by the Attorney General. These shall include rules and regulations, directives, advisory opinions and guidelines.

(c)

OFFICE OF EMERGENCY TELECOMMUNICATIONS SERVICES

9-1-1 Emergency Telecommunication System

Adopted Amendments: N.J.A.C. 13:81-1.2 and 2.1

Proposed: December 21, 1992 at 24 N.J.R. 4493(a).
Adopted: March 9, 1993 by Robert J. Del Tufo, Attorney General, Department of Law and Public Safety.
Filed: April 16, 1993 as R.1993 d.209, **without change.**

Authority: N.J.S.A. 52:17C-3(b) and 52:17C-15(b).

Effective Date: May 17, 1993.
Expiration Date: August 6, 1995.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows:

13:81-1.2 Definitions

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

...

"Conventional PSAP" means a PSAP that has on-site ANI controllers which are directly connected to one of the 9-1-1 OETS Statewide Network Tandem Switches via central office type trunks and requires on-site ALI multiplexers and other dedicated equipment and data circuits in order to receive, process or transfer 9-1-1 calls.

...

"Integrated PSAP" means a PSAP that is directly interconnected to one of the 9-1-1 OETS Statewide Network Tandem Switches, intercommunicates via Dual Tone Multi-Frequency (DTMF), and does not necessarily require on-site control cabinets or switches in order to receive, process or transfer 9-1-1 calls.

...

13:81-2.1 PSAP: required and recommended equipment

(a) Each PSAP call-taker position shall have the following equipment:

1.-2. (No change.)

3. Except for integrated PSAPs, an ANI display: A device which displays the telephone number from which the call was made. Typically, this display is also used for error indication and other messages generated by 9-1-1 telephone equipment;

4. ALI screen: A computer-like screen which displays the address location information (ALI) and telephone number of the telephone from which the 9-1-1 call was made, and which lists the primary police, fire, and EMS agency having jurisdiction in the area in which the address located;

5. Instant playback recorders: Either an:

i. Instant playback voice recorder that will record and is capable of instantly replaying a 9-1-1 call; or

ii. Instant playback voice/ALI screen recorder that will record and is capable of instantly replaying a 9-1-1 call and ALI data; and

6. An uninterruptible power supply (UPS) that offers a high degree of protection from power surges and spikes and has a capacity sufficient to keep all 9-1-1 telephone equipment fully operative for a minimum of 15 minutes.

(b)-(d) (No change.)

(e) Each PSAP shall be equipped with TTY/TDD devices in accordance with the American Disabilities Act of 1990 (Pub. L. 101-336) and amendments thereof.

(f)-(g) (No change.)

(h) The following PSAP equipment is recommended but not required:

1. Emergency generators for all critical electric circuits;

Recodify existing 3. and 4. as 2. and 3. (No change in text.)

TRANSPORTATION

(a)

DIVISION OF TRAFFIC ENGINEERING AND LOCAL AID

BUREAU OF TRAFFIC ENGINEERING AND SAFETY PROGRAMS

Speed Limits

Routes N.J. 82 In Union County

Adopted Amendment: N.J.A.C. 16:28-1.108

Proposed: March 15, 1993 at 25 N.J.R. 1061(b).

Adopted: April 19, 1993 by Richard C. Dube, Director, Division of Traffic Engineering and Local Aid.

Filed: April 22, 1993 as R.1993 d.214, **without change.**

Authority: N.J.S.A. 27:1A-5, 27:1A-6, and 39:4-98.

Effective Date: May 17, 1993.

Expiration Date: June 1, 1993.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows.

16:28-1.108 Route 82

(a) The rate of speed designated for the certain parts of State highway Route 82 described in this subsection shall be established and adopted as the maximum legal rate of speed:

1. For both directions of traffic:

i. (No change.)

ii. In Union Township, Union County:

(1) Zone 1: 35 miles per hour between the Springfield Township—Township of Union Corporate Line and Liberty Avenue (Co. Rd. 637) (approximate mileposts 0.45 to 0.80); thence

(2) Zone 2: 30 miles per hour between Liberty Avenue and Coolidge Avenue (approximate mileposts 0.80 to 2.60); thence

(3) Zone 3: 40 miles per hour between Coolidge Avenue and Route N.J. 439 except for 25 miles per hour when passing through the Holy Spirit Roman Catholic School zone and the Livingston School Zone (mileposts 3.23 to 3.58) while "25 mph when flashing" signs are operating during recess when the presence of children is clearly visible from the roadway or while children are going to or leaving school, during opening or closing hours (approximate mileposts 2.60 to 4.93).

(b)

DIVISION OF TRAFFIC ENGINEERING AND LOCAL AID

BUREAU OF TRAFFIC ENGINEERING AND SAFETY PROGRAMS

Restricted Parking and Stopping

Routes N.J. 7 In Essex County; N.J. 17 In Bergen County; and N.J. 71 In Monmouth County

Adopted Amendments: N.J.A.C. 16:28A-1.6, 1.9 and 1.38

Proposed: March 15, 1993 at 25 N.J.R. 1062(a).

Adopted: April 19, 1993 by Richard C. Dube, Director, Division of Traffic Engineering and Local Aid.

Filed: April 22, 1993 as R.1993 d.213, **without change.**

Authority: N.J.S.A. 27:1A-5, 27:1A-6, and 39:4-138.1, 39:4-197.5 and 39:4-199.

Effective Date: May 17, 1993.

Expiration Date: June 1, 1993.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows.

16:28A-1.6 Route 7

(a) (No change.)

(b) The certain parts of State highway Route 7 described in this subsection shall be designated and established as restricted parking space for the use of persons who have been issued special vehicle identification cards by the Division of Motor Vehicles in accordance with N.J.S.A. 39:4-197.5. Under the provisions of N.J.S.A. 39:4-199, permission is granted to erect appropriate signs of the following established handicapped parking spaces:

1. Restricted parking in the Town of Belleville, Essex County:

(1) (No change.)

(2) Along the east side:

(A)-(B) (No change.)

(C) 116-118 Washington Avenue—Beginning at a point 100 feet north of the northerly curb line of William Street and extending for a distance of 22 feet northerly therefrom.

(c) (No change.)

16:28A-1.9 Route 17

(a)-(d) (No change.)

(e) The certain parts of State highway Route 17 (Ridge Road) described in this subsection shall be 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 Borough of North Arlington, Bergen County:

i. Along the southbound side (Ridge Road):

(1) Beginning at the southerly curb line of Front Street and extending to a point 67 feet south thereof, from 7:00 A.M. to 4:00 P.M. Monday through Saturday.

16:28A-1.38 Route 71

(a)-(c) (No change.)

(d) The certain parts of State highway Route 71 described in this subsection are 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. No parking bus stop zones in Monmouth County:

i. In the Borough of Manasquan:

(1) Along the northbound (easterly) side:

(A) Mid-block bus stop:

1. Main Street—Beginning 128 feet north of the northerly curb line of Main Street and extending 135 feet northerly therefrom.
(2) Along the southbound (westerly) side:
(A) Near side bus stop:
1. Main Street—Beginning at the northerly curb line of Main Street and extending 105 feet northerly therefrom.
ii. In the Borough of Spring Lake Heights:
(1) Along the southbound (westerly) side:
(A) Mid-block bus stop:
1. Between Snyder Avenue and 2nd Street—Beginning 268 feet north of the northerly curb line of Snyder Avenue and extending 135 feet northerly therefrom.
(B) Near side bus stop:
1. Wall Road—Beginning at the southerly curb line of Wall Road and extending 105 feet southerly therefrom.
iii. In the Borough of Bradley Beach:
(1) Along Main Street on the northbound (easterly) side:
(A) Far side bus stops:
1. Ocean Park Avenue—Beginning at the northerly curb line of Ocean Park Avenue and extending 100 feet northerly therefrom.
2. La Reine Avenue—Beginning at the northerly curb line of La Reine Avenue and extending 100 feet northerly therefrom.
3. Fourth Avenue—Beginning at the northerly curb line of Fourth Avenue and extending 100 feet northerly therefrom.
(B) Near side bus stop:
1. Evergreen Avenue—Beginning at the southerly curb line of Evergreen Avenue and extending 105 feet southerly therefrom.
(2) Along Main Street on the southbound (westerly) side:
(A) Far side bus stops:
1. Ocean Park Avenue—Beginning at the prolongation of the northerly curb line of Ocean Park Avenue and extending 105 feet northerly therefrom.
2. Fourth Avenue—Beginning at the southerly curb line of Fourth Avenue and extending 100 feet northerly therefrom.
3. Evergreen Avenue—Beginning at the southerly curb line of Evergreen Avenue and extending 100 feet southerly therefrom.
(B) Near side bus stop:
1. Brinley Avenue—Beginning at the northerly curb line of Brinley Avenue and extending 105 feet northerly therefrom.

(a)

DIVISION OF TRAFFIC ENGINEERING AND LOCAL AID
BUREAU OF TRAFFIC ENGINEERING AND SAFETY PROGRAMS

Restricted Parking and Stopping
Route N.J. 77 in Cumberland County
Adopted Amendment: N.J.A.C. 16:28A-1.41

Proposed: March 15, 1993 at 25 N.J.R. 1063(a).
Adopted: April 19, 1993 by Richard C. Dube, Director, Division of Traffic Engineering and Local Aid.
Filed: April 22, 1993 as R.1993 d.216, **without change.**

Authority: N.J.S.A. 27:1A-5, 27:1A-6, 39:4-138.1 and 39:4-98.

Effective Date: May 17, 1993.
Expiration Date: June 1, 1993.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows.

16:28A-1.41 Route 77
(a) The certain parts of State highway Route 77 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 stopping or standing in Cumberland County:
i. In the City of Bridgeton:
(1) Southbound on the westerly side:
(A)-(M) (No change.)
(N) Beginning at the northerly curbline of East Commerce Street to a point 103 feet north therefrom.
(O)-(P) (No change.)
(Q) Beginning 55 feet north of the northerly curbline of Church Lane to a point 40.70 feet south of the southerly curbline of Church Lane.
(R) Beginning 50 feet north of the northerly curbline of McCormick Place to the northerly curbline of Route N.J. 49.
(2) Northbound on the easterly side:
(A)-(L) (No change.)
(M) Beginning at the northerly curbline of Route N.J. 49 to a point 105 feet north therefrom.
(N) Beginning at the southerly curbline of McCormick Place to a point 35.77 feet south therefrom.
(O) Beginning at the northerly curbline of McCormick Place to a point 90 feet north therefrom.
(P) Beginning at the southerly curbline of East Commerce Street to a point 200.28 feet south therefrom.
(Q) Beginning at the southerly curbline of Washington Street to a point 140.35 feet south therefrom.
2.-5. (No change.)
(b)-(d) (No change.)

(b)

DIVISION OF TRAFFIC ENGINEERING AND LOCAL AID
BUREAU OF TRAFFIC ENGINEERING AND SAFETY PROGRAMS

Turns
Route U.S. 1 Business in Mercer County
Adopted New Rule: N.J.A.C. 16:31-1.31

Proposed: March 15, 1993 at 25 N.J.R. 1064(a).
Adopted: April 19, 1993 by Richard C. Dube, Director, Division of Traffic Engineering and Local Aid.
Filed: April 22, 1993 as R.1993 d.215, **without change.**

Authority: N.J.S.A. 27:1A-5, 27:1A-6, and 39:4-125.

Effective Date: May 17, 1993.
Expiration Date: June 1, 1993.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows.

16:31-1.31 Route U.S. 1 Business
(a) Turning movements on the certain parts of State highway Route U.S. 1 Business described in this subsection are regulated as follows:
1. In the Township of Lawrence, Mercer County:
i. No U turn in both directions between Whitehead Road and the Brunswick Circle.
ii. No left turn in both directions between Whitehead Road and the Brunswick Circle, except at Cherry Tree Lane—Slack Avenue and Harmony Avenue.

(a)

DIVISION OF TRANSPORTATION SYSTEMS PLANNING
BUREAU OF MAJOR ACCESS PERMITS
State Highway Access Management Code Access Standards; Permits
Adopted Amendments: N.J.A.C. 16:47-3.8, 3.16, 4.3, 4.6, 4.7, 4.13, 4.14, 4.15, 4.16, 4.19, 4.27, 4.30, 4.33, 4.41, and 5.2, and Appendix B, C, D, E, N-1 and N-2
Adopted New Rule: N.J.A.C. 16:47 Appendix N

Proposed: March 1, 1993 at 25 N.J.R. 903(a).
Adopted: April 2, 1993 by Kathy A. Stanwick, Deputy Commissioner, Department of Transportation.
Filed: April 19, 1993 as R.1993 d.210, **without change.**

Authority: N.J.S.A. 27:1A-5, 27:1A-6, 27:7-4.41 and State Highway Access Management Act, P.L. 1989 c.32.

Effective Date: May 17, 1993.
Expiration Date: April 20, 1997.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows:

16:47-3.8 Access point control dimensions for streets and driveways
(a)-(d) (No change.)
(e) Driveway width (W) will be as follows:
1.-2. (No change.)
3. The driveway width construction may vary from the driveway width shown in the permit by up to five feet, provided that the maximum width and other requirements of this subsection are not violated.
(f)-(g) (No change.)
(h) Radius (R) shall be as follows:
1. Residential: 15 feet maximum. Refer to Figure C-3, Appendix C.
2. (No change.)
(i)-(q) (No change.)
(r) The driveway location may vary from the location shown in the permit by up to 10 feet, provided that the edge clearance, corner clearance and distance between access points requirements in this subsection are met.

16:47-3.16 Municipal and county actions
(a) As of September 21, 1992, no lot abutting a State highway shall be subdivided in a manner which would create additional lots abutting that highway unless all the abutting lots created are conforming under the Access Code or restricted from access to the State highway. Subdivisions are considered to be created on the date of preliminary municipal approval. Direct access from subdivided lots to a State highway shall only be permitted by the Department if the access meets the requirements of conforming lots under this Access Code. Nonconforming lots in existence as of September 21, 1992 shall not be subdivided in a manner which would make them less conforming, except that those nonconforming lots on State highways classified as access level 2 may be subdivided because of the creation of new street intersections.
(b)-(h) (No change.)

16:47-4.3 Permit process
(a)-(m) (No change.)
(n) The Department may revoke any permit after the Commissioner determines that reasonable alternative access is available for the lot served by the permit and that elimination of direct access will benefit the safety and efficiency of the State highway. The permit shall not be revoked until the alternative access is completed and available for use. Prior to revocation, the Department shall:
1.-4. (No change.)
5. Erect on the State highway and on connecting local highways suitable signs directing motorists to the new access location. When the Department provides signing for alternative access, it shall use generic, white messages on green or blue background signs of no more than eight square feet. The signing shall be placed in locations designated by the Commissioner and be maintained for a period of one year after the opening of the alternative access, after which time the Department may remove the signs; and
6. (No change.)
(o)-(r) (No change.)

16:47-4.6 Permits and permit fees
(a)-(k) (No change.)
(l) If, after issuance of a permit by the Department, a permittee is barred or prevented, directly or indirectly, from proceeding with the development by a legal action instituted by any State agency, political subdivision, or any other individual or party or by a directive or order issued by any State agency, political subdivision, or court of competent jurisdiction, the period of time prescribed by this Code for construction of an access point intersecting a State highway shall be tolled during the pendency of said legal action, directive, or order. The permittee shall notify the Regional Maintenance Office in writing and include its supporting documentation within 30 days of any action that may invoke this provision. If construction has already commenced, the permittee shall immediately contact the Regional Maintenance Office to ensure that the cessation of work does not create a hazard. The permittee shall restore any disturbed area at a time and in a manner prescribed by the Department or the Department may do so at the permittee's expense. The remaining access construction time shall again begin to run from the date on which the legal directive or order is removed. The permittee shall notify the Regional Maintenance Office or the Bureau of Major Access Permits, whichever issued the permit, in writing within 30 days of the date of such resolution or removal. The Department reserves the right to reevaluate the access permit conditions if the tolling time extends beyond five years from the date of the permit.
(m)-(n) (No change.)

16:47-4.7 Companion Department permits
Access permits do not cover all types of occupancy of the Department's right-of-way. Other permit applications may be required in conjunction with the access application. These applications will become companion applications to the access application. They will be reviewed together. All of the required permits will be issued at the same time. The Department may accept one access application for combining activities for access, drainage, curb, sidewalk, lot consolidation or subdivision, and landscape and issue a single access permit to authorize all of these activities.

16:47-4.13 Major access permits with a planning review process
(a)-(d) (No change.)
(e) An application shall be received by the Department within 12 months of the date of the pre-application meeting. If an applicant fails to meet this requirement, the applicant shall request another pre-application meeting pursuant to N.J.A.C. 16:47-4.12(a) and (b). The Bureau of Major Access Permits will notify the applicant in writing of acceptance or rejection of the application and verify the type of permit within 10 days of receipt. The Bureau of Major Access Permits will send a written notice of acceptability of the application for review to the applicant within 30 days of receipt by the Department.
(f)-(l) (No change.)
(m) A Certificate of Acceptance will be issued by the Bureau of Major Access Permits to the permitteee and a copy sent to the municipal building inspector within 10 calendar days of the Regional Maintenance Office's finding that the access conforms to the conditions of the permit. The Certificate of Acceptance may be issued after substantial completion of the construction within State right-of-way and prior to the completion of all work if the permittee provides a performance bond or other guarantee acceptable to the Department to ensure the work will be completed.
(n)-(o) (No change.)

16:47-4.14 Major access permits with planning review checklist
(a) (No change.)
(b) The following information shall be submitted with the application:
1.-46. (No change.)
47. Location of any access easement on the lot;
48. Applicability of the Pinelands Act; and
49. Travel demand management plan (optional).
(c) (No change.)

16:47-4.15 Concept review process
(a) (No change.)
(b) When seeking to obtain conceptual approval for a major access permit before preparing full-scale plans, the applicant shall submit a concept review application with plans or a sketch, including the support information listed in N.J.A.C. 16:47-4.16. A traffic impact study shall be included if a planning review is required.
(c) (No change.)

16:47-4.16 Concept review checklist
(a) (No change.)
(b) The following information shall be included in the application:
1.-21. (No change.)
22. Copies of transmittals of duplicate applications to the municipal clerk and county planning boards;
23. Location of any access easements on the lot; and
24. Travel demand management plan (optional).

16:47-4.19 Street intersections
(a) For new streets, applications for street intersections shall be accompanied by the items listed below. These applications shall be signed by a municipal official, a county official, or a developer. When the Department responds to the applicant and furnishes permit documents for signature, the permit must be signed by an official of the county or municipality.
1.-4. (No change.)
(b) For existing streets, the following application requirements apply:
1. (No change.)
2. Applications that do not involve an increase in the number of lanes intersecting the State highway are street improvement applications. These applications shall be accompanied by eight copies of a plan with the intersection enlarged at a scale of one inch equals 30 feet showing such detail as curb, gutter, sidewalk, curb radii, and drainage structures. These applications shall be signed by a county official, municipal official, or a developer. When the Department responds to the applicant and furnishes permit documents for signature, the permit shall be signed by an official of the county or municipality.
(c) If a local government or a developer seeks either a street intersection permit or street improvement permit as a result of traffic associated with development generating an increase of 500 or more daily trips, the application shall be signed by either a municipal official, a county official, or a developer. The fee shall be the fee for either a major access application or a major access application with planning review, whichever is deemed appropriate, based on the estimated street traffic at the State highway intersection, in accordance with Appendix N.

16:47-4.27 Unsignalized intersection standards
(a)-(c) (No change.)
(d) For driveways in:
1. Urban areas with a no-build LOS of E or better, the reserve capacity may decrease to 0. Reserve capacities for new driveways shall not be less than 0.
2. (No change.)

16:47-4.30 Traffic impact studies for major access and concept review applications
(a)-(c) (No change.)
(d) A traffic impact study shall include a traffic analysis. Extensive documentation is required for the Department to review and accept the traffic volumes presented in a traffic analysis. The logic and calculations that provide these volumes must be shown.
1.-2. (No change.)
3. The traffic assignment shall follow logically from the trip distribution. Any special conditions must be explained.
i. (No change.)
ii. Entering and exiting traffic shall be routed on public roadways and the applicant's lot. Routing on any other lot shall meet the requirements of N.J.A.C. 16:47-3.12(n).
4.-5. (No change.)
(e)-(g) (No change.)

16:47-4.33 Department initiated projects and permits
(a) The Department, either in conjunction with its construction projects or through separate access projects, may construct, revoke or modify highway access to provide access conforming to this chapter. The Department project design may use rules in existence at the time it initiated the design of those projects that have advanced beyond the completion of Phase 2 of the Department's plan development process.
(b) The Department's activities shall be classified as one of the following:
1. Adjustment of access:
i. This is restricted to changing the width of an access point by five feet or less, changing the location of an access point by 10 feet or less, or moving an access point away from the centerline of the highway, such as when the highway is widened.
ii.-iii. (No change.)
2. Modification of access:
i. This is restricted to changing the number of access points, changing the width of an access point by more than five feet, or changing the location of an access point by more than 10 feet. The changes shall be in accordance with the requirements of N.J.A.C. 16:47-3.4, 3.5 and 3.8. The modifications shall enable continuation of the apparent existing use on the lot;
ii.-iii. (No change.)
3. (No change.)
(c) (No change.)

16:47-4.41 Lot consolidation or subdivision permits checklist
(a) (No change.)
(b) The following information shall be submitted for both the lot consolidation and subdivision applications:
1.-15. (No change.)
16. Dimensions from the lot line to the edge of pavement;
17. Copies of transmittals of duplicate applications to the municipal clerk and county planning board; and
18. A copy of the deed or the preliminary subdivision approval.

16:47-5.2 Application requirements for change in classification
(a) (No change.)
(b) The application shall include:
1.-4. (No change.)
5. Existing land uses and size of use;
6. A list of lots for which development applications have been filed with the municipal planning board or zoning board of adjustment and the nature of such applications;
7.-12. (No change.)

APPENDIX B

STATE HIGHWAY ACCESS LEVEL BY ROUTE AND MILEPOST ACCESS LEVEL (AL)

1.-6. (No change.)

DESIRABLE TYPICAL SELECTIONS CODES (DTS) AND RIGHT OF WAY WIDTHS (R.O.W.) DESCRIPTION

2A-8C (No change.)

...

ROUTE	MILEPOST BEGIN	MILEPOST END	AL	DTS	CELL
322	6.30	10.85	4	4D	32

...

APPENDIX C

ACCESS PERMITTED ON STATE HIGHWAYS BASED ON DESIRABLE TYPICAL SECTION

ACCESS LEVEL	DIVIDED OR UNDIVIDED	PERMISSIBLE TURNING MOVEMENTS: AT INTERCHANGE	AT STREET	AT CONFORMING LOT DRIVEWAY	AT NONCONFORMING LOT DRIVEWAY	LEFT TURN TREATMENTS: LEFT TURNS AT INTERCHANGE	LEFT TURNS VIA JUGHANDLE	LEFT TURNS VIA LEFT-TURN LANE	LEFT TURNS WITHOUT LEFT-TURN LANE
1.	DIVIDED	L & R	NONE	NONE	NONE	YES	NO	NO	NO
2.	DIVIDED	L & R	L & R	NONE	R	YES	YES	NO	NO
3.	DIVIDED	L & R	L & R	L & R	L & R	YES	YES	NO	NO
4.	EITHER	L & R	L & R	L & R	L & R	YES	MAYBE	YES	NO
5.	UNDIVIDED	L & R	L & R	L & R	L & R	YES	NA	MAYBE	YES
6.	UNDIVIDED	NA	L & R	L & R	NA	YES	NA	MAYBE	YES

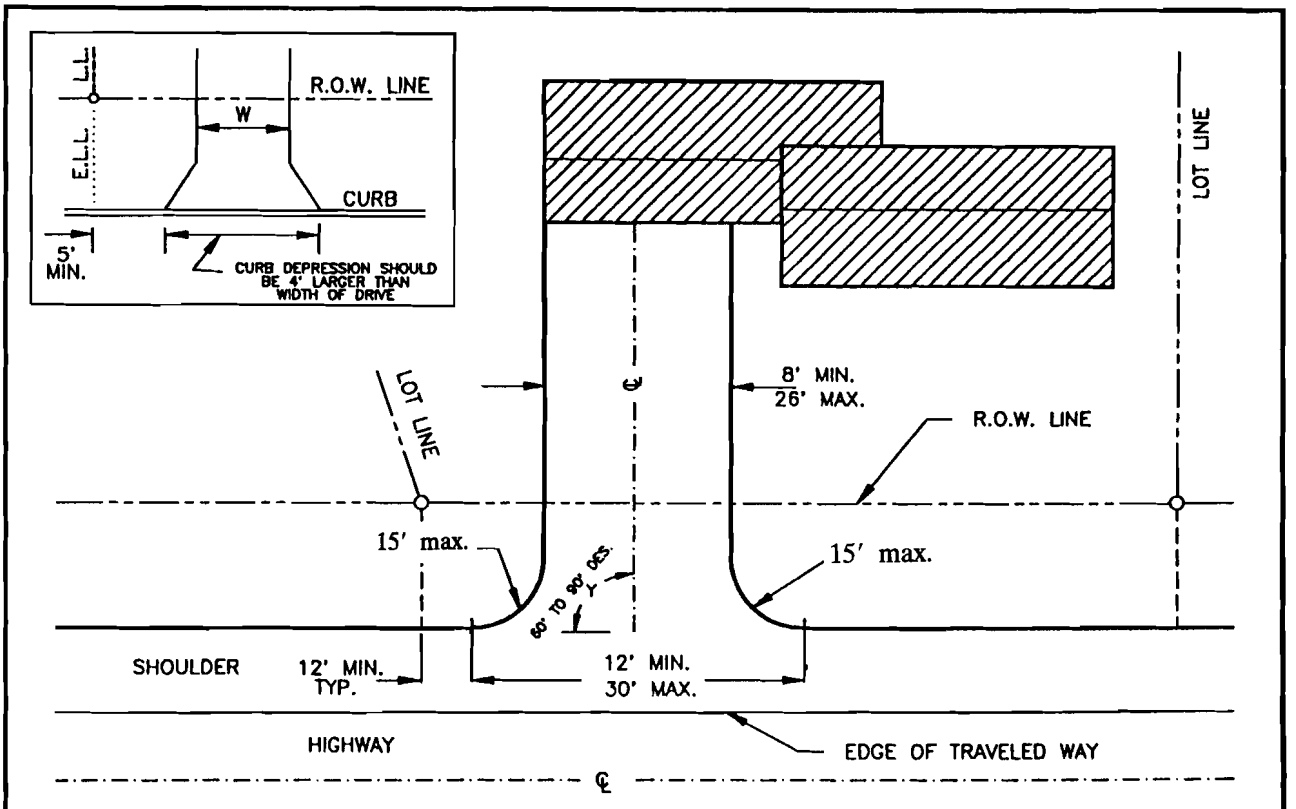
ACCESS LEVEL	DIVIDED OR UNDIVIDED	APPLICABLE SPACING REQUIREMENTS: INTERCHANGE	SIGNALIZED	UNSIGNALIZED	APPLICABLE DRIVEWAY DESIGN CRITERIA: SAFETY PER DESIGN MANUAL	CORNER CLEARANCE	EDGE CLEARANCE
1.	DIVIDED	YES	NA	NA	YES	NA	NA
2.	DIVIDED	YES	YES	YES	YES	YES	YES
3.	DIVIDED	YES	YES	YES	YES	YES	YES
4.	EITHER	YES	YES	YES	YES	YES	YES
5.	UNDIVIDED	YES	YES	YES	YES	YES	YES
6.	UNDIVIDED	YES	YES	YES	YES	YES	YES

GENERAL NOTES

L = LEFT
R = RIGHT
NA = NOT APPLICABLE
ALL TURNING MOVEMENTS REFER TO BOTH INGRESS AND EGRESS.
A TRAFFIC SIGNAL IS REQUIRED AT ALL JUGHANDLES.
IF A JUGHANDLE IS AT A STREET, THEN PERMISSIBLE MOVEMENTS APPLY TO BOTH.
IF TRAFFIC AT ACCESS POINT MEETS WARRANTS FOR A TRAFFIC SIGNAL, THEN THE SIGNALIZED SPACING STANDARDS MUST BE MET.
THE DEPARTMENT INTENDS TO MINIMIZE MEDIAN OPENINGS OR DIVIDED HIGHWAYS BY ELIMINATING THOSE NOT ASSOCIATED WITH JUGHANDLES AND LEFT TURN LANES.

8924C1

FIGURE C-1



RESIDENTIAL OR RESIDENCE
AND BUSINESS DRIVEWAY ON
DIVIDED OR UNDIVIDED HIGHWAY
(NOT TO SCALE)

8924-15

FIGURE C-3

APPENDIX C, Figure C-4—APPENDIX C, Figure C-24
(No change.)

APPENDIX D Spacing of Signalized Intersections for Various Progressive Speeds and Cycle Lengths

(No change in table.)

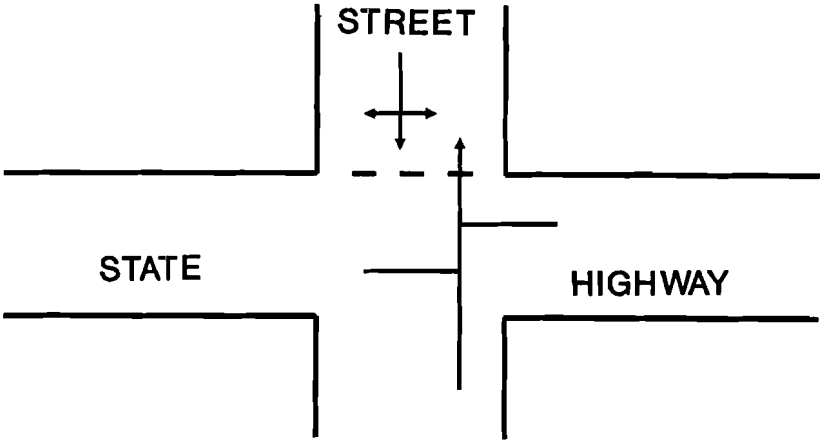
APPENDIX E
ACCESS APPLICATION THRESHOLDS

Category	Land Use Code	Use	Units	For Major + 500 Trips per day	For Major with planning 200 peak Hour Trips
...					
Business	150-140 (No change.)				
	130	Industrial Park	1,000 sf	71.8	219.8
		Flexspace (use LUC 770)	1,000 sf	33.2	119.8
		Distribution Centers	1,000 sf	50.7	222.0
			acre	6.1	25.8
...					
Office	710 (No change.)				
	750	Office Park	1,000 sf	43.8	83.5 AM peak
	760 (No change.)				
	770	Business Park	1,000 sf	33.2	119.8
	714-720 (No change.)				
...					
Entertainment	443	Movie Theater w/o Matinee	seat	223	556 Seat peak
	444-740 (No change.)		screens	2	4

...

APPENDIX N

STREET INTERSECTION AND IMPROVEMENT PERMIT APPLICATIONS



NEW STREET: All traffic to and from a proposed street is considered in determining the type of permit application.

WIDENING EXISTING STREET OR STREET IMPROVEMENT: All additional traffic to and from the existing street is considered in determining the type of permit application.

Recodify existing Appendices N-1 and N-2 as M-1 and M-2. (No change in text.)

OTHER AGENCIES

(a)

ELECTION LAW ENFORCEMENT COMMISSION

Public Financing; General Elections for the Office of Governor

Adopted Amendments: N.J.A.C. 19:25-15.3, 15.4, 15.5, 15.6, 15.10, 15.11, 15.12, 15.14, 15.16, 15.17, 15.21, 15.22, 15.24, 15.27, 15.28, 15.29, 15.30, 15.31, 15.32, 15.35, 15.43, 15.45, 15.48, 15.49, 15.50, 15.54 and 15.64

Adopted New Rule: N.J.A.C. 19:25-15.65

Proposed: March 1, 1993 at 25 N.J.R. 910(a).
Adopted: April 16, 1993 by the Election Law Enforcement Commission, Frederick M. Herrmann, Ph.D., Executive Director.
Filed: April 16, 1993 as R.1993 d.207, **without change.**
Authority: N.J.S.A. 19:44A-38.

Effective Date: May 17, 1993.
Expiration Date: October 1, 1995.

Summary of Public Comments and Agency Responses:
A public hearing before the Commission was conducted on March 15, 1993 but no witnesses testified. A transcript of the hearing is available for inspection at the offices of the Commission, 28 West State Street, 12th Floor, Trenton, New Jersey.
No comments were received.

Full text of the adoption follows:

19:25-15.3 Definitions for this subchapter
The following words and terms, when used in this subchapter, shall have the following meanings unless the context clearly indicates otherwise.

...

"Contribution eligible for match" means contributions from one contributor to be matched from public funds on a two-for-one basis. No contribution which must be or is intended by the contributor or the recipient to be refunded or repaid at any time, no loan obtained pursuant to N.J.S.A. 19:44A-44, no amount of the candidate's own funds in the aggregate in excess of $1,800, no in-kind contribution and no other moneys received by the candidate, his or her campaign treasurer, or deputy campaign treasurer, except those contributions described in N.J.S.A. 19:44A-29(a) shall be deemed contributions eligible for match. Funds received by an individual who

is "testing the waters" may be matched when the individual becomes a candidate if such contributions meet all the requirements of the regulations.

...

"Debate sponsor" means the organization or organizations to which the Commission has delegated the responsibility for conducting one or both of the televised interactive general election debates.

...

"Qualified candidate" means:

1. Any candidate for election to the office of Governor whose name appears on the general election ballot and who has deposited and expended $177,000 pursuant to N.J.S.A. 19:44A-32; and who, not later than September 1 preceding a general election in which the office of Governor is to be filled, notifies the Election Law Enforcement Commission in writing that the candidate intends that application will be made on the candidate's behalf for monies for general election campaign expenses pursuant to N.J.S.A. 19:44A-33, and signs a statement of agreement, in a form to be prescribed by the Commission, to participate in two interactive gubernatorial general election debates; or

2. Any candidate for election to the office of Governor whose name does not appear on the general election ballot, but who has deposited and expended $177,000 pursuant to N.J.S.A. 19:44A-32 and who, not later than September 1 preceding a general election in which the office of Governor to be filled, notifies the Election Law Enforcement Commission in writing that the candidate intends that application will be made on the candidate's behalf for monies for general election campaign expenses pursuant to N.J.S.A. 19:44A-33, and signs a statement of agreement, in a form to be prescribed by the Commission, to participate in two interactive gubernatorial general election debates.

...

19:25-15.4 Appointment of treasurers and depositories

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

(c) No political committee, other than the principal campaign committee designated pursuant to (a) above, may contribute to any candidate or expend on behalf of such candidate more than $1,800.

19:25-15.5 Pre-candidacy activity

(a) All funds or other benefits received and payments made pursuant to N.J.A.C. 19:25-3.1 by an individual, or a committee in his or her behalf, solely for the purpose of determining whether that individual should become a candidate (for example "testing the waters") are not contributions or expenditures. All funds so received shall be deposited in a separate depository established solely for that purpose. The individual or committee shall keep written records of all such funds received and payments made for a period of not less than four years after the transaction to which they relate occurred or four years after the date of the election to which they are relevant, whichever is longer.

(b)-(c) (No change.)

(d) The separate depository established pursuant to (a) above may be designated by that individual as the matching fund account under N.J.A.C. 19:25-15.17(b), provided that the account and all the contributions deposited in it meet all of the requirements of N.J.A.C. 19:25-15.17(b).

19:25-15.6 Contribution limits; applicability

(a) No candidate for the office of Governor, whether or not intending to participate in public funding, and no campaign treasurer or deputy campaign treasurer of such candidate shall knowingly accept from any person, candidate, political committee, or continuing political committee any contribution in aid of the candidacy of or in behalf of such candidate in the aggregate in excess of $1,800 in any general election.

(b) No State committee, and no campaign treasurer or deputy campaign treasurer of such State committee, shall knowingly accept from any person, candidate, political committee, or continuing political committee any contribution in aid of the candidacy of or in behalf of any candidate for the office of Governor in the aggregate in excess of $1,800 in any general election, whether or not such candidate intends to participate in public funding.

19:25-15.10 Non-participating candidates; generally

(a) A non-participating candidate is subject to the $1,800 limitation on contributions from a person, political committee or continuing political committee, pursuant to N.J.S.A. 19:44A-29.

(b) A non-participating candidate is subject to the $1,800 limit on guarantors of bank loans, except if the guarantor is the non-participating candidate himself or herself.

(c) (No change.)

19:25-15.11 Limitations on participating candidates

(a) Each candidate intending to participate in public funding, in addition to any other requirement imposed by the act (N.J.S.A. 19:44A-1 et seq.) or this subchapter, is subject to the following limitations:

1.-2. (No change.)

3. The amount which any qualified candidate may spend in aid of his or her candidacy shall not exceed $5,900,000, which amount shall include all expenditures for testing the waters activity prior to candidacy. Such amount shall not include expenditures listed in N.J.A.C. 19:25-15.26.

4. Contributions by any candidate in excess of $1,800 from his or her own funds in aid of his or her candidacy shall not be deposited in a matching fund account and shall not be calculated in determining if such candidate is a qualified candidate eligible for public matching funds.

19:25-15.12 Who may or may not contribute; generally

(a) No person, political committee or continuing political committee, other than a candidate contributing his or her own funds to his or her campaign, shall make any contribution to any candidate, the candidate's campaign treasurer or deputy campaign treasurer, or to any other person or committee, in aid of the candidacy of or in behalf of a candidate, whether or not participating in public funding, for election to the office of Governor in a general election, in the aggregate in excess of $1,800. Any such contribution in excess of $1,800 must be promptly returned to the contributor, and evidence of repayment shall be submitted to the Commission.

(b) (No change.)

(c) A corporation, association or labor organization or any subsidiary, affiliate, branch, division, department or local unit of any such corporation, association or labor organization shall not make any contribution to or on behalf of a candidate which, when added to any other contribution by any related or affiliated corporation, association or labor organization, exceeds $1,800 in the aggregate. Whether such corporation, association or labor organization is related or affiliated shall depend on the circumstances existing at the time of such contribution, including, but not by way of limitation, the degree of control or common ownership with related or affiliated corporations, associations or labor organizations, the source and control of funds used for such contributions and the degree to which the decisions whether to contribute, to what candidate and in what amount are independent decisions.

19:25-15.14 Contributions eligible for match; generally

(a) (No change.)

(b) Only contributions in cash or by check, money order or negotiable instrument shall be contributions eligible for match. Loans shall not be eligible for match. In-kind contributions shall not be eligible for match, but will count toward the individual contribution limit of $1,800 and the overall expenditure limit contained in N.J.S.A. 19:44A-7 except for expenses not subject to expenditure limits pursuant to N.J.A.C. 19:25-15.26. The total of all contributions eligible for match from any person or political committee, or continuing political committee shall not exceed $1,800 in the aggregate.

(c) A maximum of $1,800 in the aggregate of a candidate's own funds may be deposited in the matching fund account.

(d)-(e) (No change.)

19:25-15.16 Limitation on contributions eligible for match

(a) Any contribution in the form of the purchase price paid for an item with significant intrinsic and enduring value (such as a watch)

shall be eligible for match only to the extent the purchase price exceeds the fair market value of the item or benefit conferred on the contributor, and only the excess will be included in calculating the $1,800 contribution limit.

(b) A contribution in the form of the purchase price paid for admission to a testimonial affair as defined in N.J.A.C. 19:25-1.7 shall be a contribution eligible for match and for purposes of the $1,800 limitation.

(c) (No change.)

19:25-15.17 Matching of funds

(a) (No change.)

(b) The campaign treasurer or deputy campaign treasurer of the candidate shall open a matching fund account in a national or a State bank pursuant to N.J.S.A. 19:44A-32 which shall be designated Matching Fund Account of (name of candidate) and in which only contributions eligible for match may be deposited. The campaign treasurer or deputy campaign treasurer of such candidate shall deposit in such matching fund account, funds to be matched in aid of the candidacy of or in behalf of such candidate. Such deposit shall be made within 10 days of receipt and shall include only moneys received in accordance with this subchapter and N.J.S.A. 19:44A-29 and N.J.S.A. 19:44a-11 and 12.

(c) A candidate seeking to become eligible to receive matching funds shall certify to the Commission in a written statement signed by the candidate that he or she is a candidate for Governor in a general election and that he or she has received and deposited into his or her matching fund account contributions eligible for match of at least $177,000 from persons, political committees, or continuing political committees each of whose contributions in the aggregate does not exceed $1,800 and that at least $177,000 of such contributions have been expended. "Expended" for this purpose shall mean disbursed or irrevocably committed by a legally binding commitment for expenditure in the campaign and ultimately disbursed.

(d) The statement referred to in (c) above shall include an original and two photocopies of a typed or printed list of contributors showing each contributor's full name and full mailing address (number, street, city, state, zip code), the date of receipt of each contribution by the candidate and of the deposit into the matching fund account, the dollar amount of each contribution submitted for match, the type of contributor of each contribution from a list of contributor types to be provided by the Commission, and the total amount of all contributions submitted for match. The list of contributors shall be segregated by deposit. The statement shall also include an original and two photocopies of a typed or printed list of contributors of contributions not eligible or submitted for match and any other receipt (for example, in-kind contributions, contributions intended to be repaid, or interest on invested funds), showing each contributor's full name and full mailing address (number, street, city, state, zip code), the date of receipt of each such contribution by the candidate, the dollar amount of each such contribution, and the type of contributor of each contribution from a list of contributor types to be provided by the Commission. The statement shall also include an original and two photocopies of a list of repayment by the candidate of any contribution, including any loan described under N.J.A.C. 19:25-15.30.

(e) (No change.)

(f) The certification shall include three photocopies of the face of each check or other written instrument as described in N.J.A.C. 19:25-15.14 for each contribution which the candidate submits to receive matching funds. Where a check is endorsed by some person other than the principal campaign committee, the face and back must be photocopied. The photocopies shall be segregated by deposit, sorted in the order in which the contributors are listed pursuant to (d) above and accompanied by copies of the relevant receipted deposit slips.

(g) The initial certification shall include three photocopies of checks, receipted bills, contracts or the like, as proof of the expenditure of at least $177,000.

(h)-(j) (No change.)

(k) Each submission for public matching fund payments shall include an original and two photocopies of a cumulative list of all contributions received by a candidate from the beginning of his or her candidacy which list shall contain for each contribution the full name and full mailing address (number, street, city, state, zip code) of the contributor, the date or dates of receipt of contributions by the candidate, the aggregate total amount contributed by each contributor and the type of contributor from a list of contributor types to be provided by the Commission, and which list shall:

1. Be arranged alphabetically by contributor name and which shall contain written authorization by the candidate for public disclosure of all contributions to the candidate; or

2. Be separated into an alphabetical list of all contributors whose contributions in the aggregate exceed $100.00 and an alphabetical list of all contributors whose contributions are in the aggregate $100.00 or less and which shall contain authorization by the candidate for public disclosure only of contributors whose contributions in the aggregate exceed $100.00

19:25-15.21 Receipt of public funds; generally

The campaign treasurer or deputy campaign treasurer of any qualified candidate for election to the office of Governor in a general election shall promptly receive in behalf of such qualified candidate public moneys in an amount equal to twice the amount of each contribution eligible for match and deposited in such qualified candidate's matching fund account, described in N.J.S.A. 19:44A-32, except that no payment shall be made to any candidate from such fund for general election campaign purposes for the first $59,000 deposited in such candidate's matching fund account.

19:25-15.22 Receipt of public funds; limitation

(a) (No change.)

(b) The maximum amount which any qualified candidate may receive from public funds shall not exceed $3,900,000.

19:25-15.24 Use of public funds

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

(c) Any disbursement made from a candidate's public fund account which results in the purchase of time on radio and television stations pursuant to (a) above shall be documented by signed media affidavits of the radio or television station, to be obtained by the candidate, his or her campaign treasurer, or deputy campaign treasurer within 14 days following the actual use of such media time. Such media affidavits shall be maintained pursuant to N.J.A.C. 19:25-15.42.

(d) Any disbursement made from a candidate's public fund account shall be identified on campaign reports and submissions for public matching funds to include the check number, date of payment, full name of payee, full payee mailing address, amount of payment, and a complete statement of the purpose of the disbursement which includes the applicable permitted use of public funds contained in (a) above.

(e) A reimbursement made to a depository or matching fund account of a candidate from the public fund account of that candidate for an expenditure or expenditures permitted under (a) above shall:

1. Be made by individual check from the public fund account in the exact amount of the expenditure or expenditures being reimbursed;

2. Be specifically identified as a reimbursement on the report required pursuant to N.J.A.C. 19:25-15.20(b) and on campaign reports required by the Act; and

3. Contain a list of the previously paid expenditure or expenditures permissible under (a) above for which the reimbursement is being made.

(f) (No change in text.)

19:25-15.27 Travel expenses

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

(c) If any individual, including a candidate, uses a government-owned or government-leased vehicle for transportation to aid or promote a campaign for nomination for election to the Office of Governor, such use shall:

1. Be reported as a travel expense pursuant to (b) above;

2. Be valued for purposes of reports required to be filed under the Act and for purposes of the expenditure limit contained in the Act (N.J.S.A. 19:44A-7) by the reasonable commercial value of the transportation services to the candidate pursuant to N.J.A.C. 19:25-15.31; and

3. Be reimbursed immediately from campaign funds to the appropriate government entity providing the conveyance or vehicle.

19:25-15.28 Independent expenditures

(a) Independent expenditures shall not be deemed to be expenditures within the meaning of N.J.S.A. 19:44A-7, but all such expenditures shall be subject to all the reporting and disclosure requirements of the act. Each person, political committee, or continuing political committee making independent expenditures who is required to file reports pursuant to N.J.A.C. 19:25-12.7 or 12.8 shall include in the reports required under the act a sworn statement on a form provided by the Commission that such independent expenditure was not made with the cooperation or prior consent of, or in consultation with or at the request or suggestion of, the candidate or any person or committee acting on behalf of the candidate.

(b) (No change.)

19:25-15.29 Coordinated expenditures

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

(c) A reference to a gubernatorial candidate appearing in campaign literature or material circulated to voters by direct mail and paid for by non-gubernatorial candidates, as hereinafter defined, or by political party committees, as defined in N.J.A.C. 19:25-1.7, shall be deemed insubstantial and not subject to (a) above provided that:

1. The reference consists of no more than a single use of the gubernatorial candidate's name in the text, and a single use of the gubernatorial candidate's name within a slate or listing of the names of gubernatorial and non-gubernatorial candidates, and a single photograph or depiction of the gubernatorial candidate provided that a photograph or depiction of each non-gubernatorial candidate larger or of equal size to the gubernatorial candidate's photograph or depiction is included; and

2.-3. (No change.)

(d)-(h) (No change.)

19:25-15.30 Borrowing of funds; repayment

Any candidate, the candidate's campaign treasurer or deputy campaign treasurer may borrow funds from any national or State bank, provided that no person or political committee other than the candidate or the State committee may in any way endorse or guarantee such loan in the aggregate in excess of the $1,800 contribution limit. Except for a non-participating candidate guaranteeing a loan to his or her campaign, the amount so borrowed shall not at any one time in the aggregate exceed $50,000 and must be repaid in full by such candidate or his or her campaign treasurer or deputy campaign treasurer from moneys accepted or allocated pursuant to N.J.S.A. 19:44A-29 not later than 20 days prior to the general election. Certification of such repayment shall be made by the borrower to the Commission not later than 15 days prior to the date of the general election. In the event of the failure of the borrower to repay timely the full amount of the loan or to certify properly such repayment to the Commission, all payment of public funds to such candidate shall promptly cease and the Commission shall take action as directed by the act to prohibit the expenditure by the candidate of moneys received from the fund and any other moneys received by him or her in aid of his or her candidacy in such general election.

19:25-15.31 Computation of value of goods and services

(a) Goods and services shall, for purposes of the reports required to be filed under the act and for purposes of the expenditure limitation contained in section 7 of the act (N.J.S.A. 19:44A-7) where applicable, be valued by the reasonable commercial value of such goods and services to the candidate, whether or not the cost or value of such goods or services to the contributor or other provider of those services is higher or lower than such reasonable commercial value.

1. Example 1: Candidate Y, a candidate for the office of Governor who has chosen to accept public funding, obtains the use of a helicopter for travel of the candidate for campaign purposes. By agreement with the owner of the helicopter, the campaign committee for the candidate will pay $200.00 per hour which represents the cost to the owner of the maintenance and operation of the helicopter. The reasonable commercial value of the use of the helicopter is $400.00 per hour. In this example, the amount of $200.00 per hour paid by the campaign committee of the candidate to the owner for use of the helicopter is not includable as an expenditure for purposes of the expenditure limitations contained in section 7 of the act (N.J.S.A. 19:44A-7). The difference between the $200.00 per hour actually paid for use of the helicopter and the reasonable commercial value normally charged by the owner for the use of the helicopter, represents a contribution from the owner of the helicopter to the candidate in the amount of $200.00 per hour. The candidate would obtain the use of the helicopter under this arrangement from a lawful contributor for campaign purposes for not more than nine hours. If the candidate obtained the use of the helicopter for 10 hours under this arrangement, the owner of the helicopter would have made an unlawful contribution to the candidacy of the candidate, since the aggregate of the contributions ($2,000) from that contributor in this instance would have exceeded $1,800.

2. Example 2: Candidate Y in example 1, wishes to obtain the use of the helicopter from the owner for 15 hours, and the campaign committee for the candidate pays to the owner the reasonable commercial value of $400.00 for each hour, or a total of $6,000. The amount paid to the owner is not an expenditure within the expenditure limitation contained in section 7 of the act (N.J.S.A. 19:44A-7). On these facts the owner has made no contribution to the candidate.

3. (No change.)

(b) (No change.)

19:25-15.32 Establishment of State committee account; contribution limit

(a) (No change.)

(b) Upon or after establishment of a State committee account by a State committee, such State committee may allocate and deposit certain contributions received by it in such account. Only a contribution of up to $1,800, or up to $1,800 of a contribution in excess of $1,800 may be so deposited, and only if such deposit does not result in the contributor exceeding a contribution of $1,800 in the aggregate to such or on behalf of such candidate.

(c)-(d) (No change.)

19:25-15.35 Notice by State committee to contributor

(a) The campaign treasurer or deputy campaign treasurer of any State committee depositing any contribution in a State committee account of such State committee must give written notice of such deposit to the contributor within 48 hours of such deposit, and such notice shall contain the following information:

1. (No change.)

2. The allocated contribution counts toward the $1,800 the contributor may contribute to a candidate for the office of Governor.

3.-5. (No change.)

19:25-15.43 Disclosure of information

The statements and certifications submitted by a candidate in accordance with N.J.A.C. 19:25-15.17 shall not be public records and shall not be available for public inspection; provided, however, the Commission shall from time to time publish a listing which shall contain the information included in the statements and certifications for each contribution, except that it shall not include the name, address or amount of contribution of any contributor whose contributions in the aggregate are $100.00 or less unless the candidate authorizes such disclosure in writing.

19:25-15.45 Postelection contribution; postelection payment of expenses

(a) Any person, political committee, or continuing political committees otherwise eligible to make political contributions to a candidate or a State committee may make a contribution in aid of the

candidacy of a candidate after the date of such general election provided such person or political committee does not exceed $1,800 in the aggregate for such general election.

(b)-(d) (No change.)

19:25-15.48 Candidate statement of qualification before participation in public financing

(a) A candidate who intends to apply to the Commission for public matching funds on a date later than September 1 preceding a general election for the office of Governor must on or before September 1 preceding the general election for Governor file:

1. A certified statement of qualification containing evidence that $177,000 has been deposited and expended pursuant to N.J.S.A. 19:44A-32 for gubernatorial general election campaign expenses. Evidence that $177,000 has been deposited and expended shall be filed with the Commission on September 1 preceding a general election for the office of Governor and in a form to be prescribed by the Commission.

2. Each contribution submitted in the report required by (a)1 above as evidence that $177,000 in contributions has been deposited must be accompanied by a written statement which shall identify the individual making the contribution by full name and full mailing address (number, street, city, state, zip code), the name of the candidate, the amount and date of receipt of the contribution, and shall bear the signature of the contributor. The requirement of such written statement shall be deemed to be satisfied in the case where a contribution is made by means of a check, money order or other negotiable instrument payable on demand and to the order for, or specially endorsed without qualification to, the candidate or to his campaign committee, if such check, money order or instrument contains all of the foregoing information.

3. Each disbursement submitted in the report required by (a)1 above as evidence that $177,000 has been expended for general election expenses shall include two photocopies of checks, receipted bills, contracts, or similar documents as evidence of the expenditure of at least $177,000.

(b)-(c) (No change.)

19:25-15.49 Statement of candidates electing to participate in debates

(a) A candidate who has not by September 1 preceding a general election applied to the Commission for public matching funds may elect to participate in the series of interactive gubernatorial general election debates by:

1. (No change.)

2. Filing a statement of qualification containing evidence that $177,000 has been deposited and expended pursuant to N.J.S.A. 19:44-32 for gubernatorial general election expenses. The statement of qualification shall contain the same information as that required at N.J.A.C. 19:25-15.48(a).

(b)-(c) (No change.)

19:25-15.50 Application to sponsor debates

(a) To be eligible for selection by the Commission to sponsor one or both of the interactive gubernatorial general election debates, an organization:

1.-2. (No change.)

3. Must have previously sponsored one or more televised debates among candidates for Statewide office in New Jersey since 1976.

(b) Any association of two or more separately owned news publications or broadcasting outlets, including newspapers, radio stations or networks, and television stations or networks, having between or among them a substantial readership or audience in this State, and any association of print or broadcast news or press service correspondents having among them a substantial readership or audience in this State, shall be eligible to sponsor any such gubernatorial general election debate, without regard to whether that association or any of its members shall previously have sponsored any debate among candidates for Statewide office.

(c) (No change in text.)

19:25-15.54 Complaint alleging failure to participate in debate

(a) (No change.)

(b) Service of a complaint alleging failure to participate in a general election debate shall be made by the complainant by personal service or by certified mail, return receipt requested upon the respondent candidate, the debate sponsor, and any person named in the complaint.

19:25-15.64 Contributions and loans prior to candidacy

(a) Each candidate for the office of Governor who did not participate in the preceding primary election, whether or not intending to participate in public funding of the general election for Governor, shall certify to the Commission in writing within 10 days after the date of commencement of his or her candidacy that:

1.-2. (No change.)

3. No contributions in excess of $1,800 in the aggregate from a person, political committee, or continuing political committee had theretofore been received for pre-candidacy "testing the waters" activity; or contributions in excess of $1,800 in the aggregate have been received for that purpose, and the amount of each contribution in excess of $1,800 in the aggregate has been returned to the contributor. The certification shall include:

i. A list of all contributors who contributed more than $1,800 and the dates and amounts of all such contributions; and

ii. (No change.)

(b)-(f) (No change.)

19:25-15.65 Complaints alleging violation of general election expenditure limit

(a) Any complaint filed with the Commission alleging violation by a general election candidate receiving public matching funds of the general election expenditure limit in N.J.A.C. 19:25-15.11(a)3 shall:

1. Be in writing and be verified; and

2. Contain a detailed statement alleging with specificity all facts known to the complainant pertinent to the alleged violation of the general election expenditure limit.

(b) Service of a complaint alleging violation of the general election expenditure limit shall be made by the complainant by personal service or by certified mail, return receipt requested, upon the respondent candidate, the Commission, and any person named in the complaint.

(a)

NEW JERSEY ECONOMIC DEVELOPMENT AUTHORITY

Fee for Modifying or Restructuring Payment Terms for a Loan or Loan Guarantee Project

Adopted Amendment: N.J.A.C. 19:30-6.4

Proposed: March 1, 1993 at 25 N.J.R. 916(a).

Adopted: April 6, 1993 by the New Jersey Economic Development Authority, Richard L. Timmons, Assistant Deputy Director.

Filed: April 23, 1993 as R.1993 d.217, **without change.**

Authority: N.J.S.A. 34:1B et seq., specifically 34:1B-5(k) and (l).

Effective Date: May 17, 1993.

Expiration Date: July 23, 1995.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows.

19:30-6.4 Post-closing fees

(a) The fees in this section are due and payable upon the closing of the bond amendment, approval of change of ownership, or signing of modification consent, waiver, etc.

1.-7. (No change.)

8. For modifying or restructuring payment terms for a loan or loan guarantee project, a fee of $500.00 shall be charged.

(b) (No change.)

(a)

CASINO CONTROL COMMISSION
Applications
Readoption: N.J.A.C. 19:41

Proposed: March 1, 1993 at 25 N.J.R. 916(b).
Adopted: April 7, 1993 by the Casino Control Commission, Steven P. Perskie, Chairman.
Filed: April 15, 1993 as R.1993 d.205, **without change**.

Authority: N.J.S.A. 5:12-63c, 69a, 70a-c, 70e, 89, 90, 91, 92, 93, 139 and 141.

Effective Date: April 15, 1993.
Expiration Date: April 15, 1995.

Summary of Public Comments and Agency Responses:
No comments received.

Agency Note: The Commission has set an expiration date of April 15, 1995 for chapter 41, rather than the five-year expiration date which would otherwise apply pursuant to Executive Order No. 66(1978). Such change is part of a comprehensive revision of the readoption schedule which the Commission intends to implement for all chapters in Title 19.

Full text of the readoption may be found in the New Jersey Administrative Code at N.J.A.C. 19:41.

(b)

CASINO CONTROL COMMISSION
Hearings
Readoption: N.J.A.C. 19:42

Proposed: March 15, 1993 at 25 N.J.R. 1082(a).
Adopted: April 22, 1993 by the Casino Control Commission, Steven P. Perskie, Chairman.
Filed: April 26, 1993 as R.1993 d.222, **without change**.

Authority: N.J.S.A. 5:12-63a, 63b, 63c, 63d, 63e, 63g, 64, 65, 66, 69a, 70d, 70e, 71, 80, 86, 89, 90, 91, 92, 94, 95, 102, 107, 108, 109, 129 and N.J.S.A. 52:14B-4, 8 and 12.

Effective Date: April 26, 1993.
Expiration Date: August 15, 1995.

Summary of Public Comments and Agency Responses:
No comments received.

Agency Note: The Commission has set an expiration date of August 15, 1995 for chapter 42, rather than the five-year expiration date which would otherwise apply pursuant to Executive Order No. 66(1978). Such change is part of a comprehensive revision of the readoption schedule which the Commission intends to implement for all chapters in Title 19.

Full text of the readoption may be found in the New Jersey Administrative Code at N.J.A.C. 19:42.

(c)

CASINO CONTROL COMMISSION
Gaming Equipment
Readoption: N.J.A.C. 19:46

Proposed: March 1, 1993 at 25 N.J.R. 918(a).
Adopted: April 7, 1993 by the Casino Control Commission, Steven P. Perskie, Chairman.
Filed: April 15, 1993 as R.1993 d.204, **without change**.

Authority: N.J.S.A. 5:12-63c, 69a, 70f, 70i and 100.

Effective Date: April 15, 1993.
Expiration Date: April 15, 1998.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the readoption may be found in the New Jersey Administrative Code at N.J.A.C. 19:46.

(d)

CASINO CONTROL COMMISSION
Rules of the Games
Readoption: N.J.A.C. 19:47

Proposed: March 1, 1993 at 25 N.J.R. 919(a).
Adopted: April 7, 1993 by the Casino Control Commission, Steven P. Perskie, Chairman.
Filed: April 15, 1993 as R.1993 d.203, **without change**.

Authority: N.J.S.A. 5:12-63c, 69a, 70f and 100.

Effective Date: April 15, 1993.
Expiration Date: April 15, 1996.

Summary of Public Comments and Agency Responses:
No comments received.

Agency Note: The Commission has set an expiration date of April 15, 1996, rather than the five-year expiration date which would otherwise apply pursuant to Executive Order No. 66(1978). Such change is part of a comprehensive revision of the readoption schedule which the Commission intends to implement for all chapters in Title 19.

Full text of the readoption may be found in the New Jersey Administrative Code at N.J.A.C. 19:47.

(e)

CASINO CONTROL COMMISSION
Casino Hotel Alcoholic Beverage Control
Readoption: N.J.A.C. 19:50

Proposed: March 15, 1993 at 25 N.J.R. 1085(a).
Adopted: April 22, 1993 by the Casino Control Commission, Steven P. Perskie, Chairman.
Filed: April 26, 1993 as R.1993 d.220, **without change**.

Authority: N.J.S.A. 5:12-70q and 103.

Effective Date: April 26, 1993.
Expiration Date: December 15, 1993.

Agency Note: The Commission has set an expiration date of December 15, 1993 for chapter 50, rather than the five-year expiration date which would otherwise apply pursuant to Executive Order No. 66(1978). Such change is part of a comprehensive revision of the readoption schedule which the Commission intends to implement for all chapters in Title 19.

Summary of Public Comments and Agency Responses:
COMMENT: The Division of Gaming Enforcement suggested that a reference to Type VI CHAB authorized locations (casino simulcasting facilities) be added to N.J.A.C. 19:50-1.5(d)-(e).
RESPONSE: Such substantive modification to the proposed readoption would require additional public notice and comment. The Commission will consider the commenter's suggestion for publication as a future proposed amendment.

Full text of the readoption may be found in the New Jersey Administrative Code at N.J.A.C. 19:50.

(a)

CASINO CONTROL COMMISSION

Equal Employment Opportunity

Readoption with Amendment: N.J.A.C. 19:53

Proposed: February 16, 1993 at 25 N.J.R. 684(b).
Adopted: April 22, 1993 by the Casino Control Commission, Steven P. Perskie, Chairman.
Filed: April 26, 1993 as R.1993 d.221, **with substantive changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 5:12-63c, 134 and 135.

Effective Date: April 26, 1993, Readoption;
May 17, 1993, Amendment.
Expiration Date: December 15, 1995.

Agency Note: As the Commission stated in the Notice of Proposal, the readoption of N.J.A.C. 19:53 was published in accordance with Executive Order No. 66(1978), without change, pending the completion of a comprehensive review and revision of that chapter. As anticipated, proposed new rule N.J.A.C. 19:53 and the proposed repeal of the rules readopted herein were approved for publication by the Commission on March 17, 1993 and were published in the April 19, 1993 New Jersey Register at 25 N.J.R. 1675(a). A public hearing regarding the proposal was held on May 7, 1993.

This readoption specifies an early expiration date of December 15, 1995, rather than the five-year effective date that would otherwise apply pursuant to Executive Order No. 66(1978). Such change is part of a comprehensive revision of the readoption schedule that the Commission plans to implement for all chapters in Title 19K.

Summary of Public Comments and Agency Responses:

A public hearing regarding this proposed readoption was held at the request of the New Jersey Department of the Public Advocate ("Public Advocate") on April 21, 1993, at the Commission's Atlantic City offices. The Public Advocate did not appear at the hearing. The hearing was conducted by the full panel of five Casino Control Commissioners. No specific recommendations were made other than to adopt the readoption with the changes articulated below. Interested parties can review a transcript of the Commission hearing at the Casino Control Commission office, Tennessee Avenue and the Boardwalk, Atlantic City, New Jersey 08401. Oral comments were presented by the Community Health Law Project, which also spoke on behalf of the Eastern Paralyzed Veterans' Association, the Association for Retarded Citizens of New Jersey, Disabled Information Awareness and Living, United Cerebral Palsy of New Jersey, Mental Health Association in New Jersey and Handicapped Advocates for Independent Living. The comments at the public hearing are as follows:

COMMENT: The commenter suggested that N.J.A.C. 19:53-1.8, Reasonable accommodations to the physically handicapped and the mentally handicapped, has been preempted by Title I of the Americans with Disabilities Act, 42 U.S.C.A. 12101 et seq. and Federal regulations thereunder.

RESPONSE: The Commission agrees that "reasonable accommodation" must be afforded in accordance with the requirements of Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 et seq. and the Law Against Discrimination, N.J.S.A. 10:5-1 et seq., and regulations thereunder. The Commission has included such a provision in its recently proposed new rules N.J.A.C. 19:53. However, since compliance with such standards is mandated by Federal law, such change to N.J.A.C. 19:53-1.8 need not await additional public notice and comment and can be included as a modification to this readoption.

COMMENT: It was argued that the Commission must promulgate numerical goals for the employment of persons with disabilities, pursuant to N.J.S.A. 5:12-134 and 135.

RESPONSE: Such substantive modifications to the proposed readoption could not be adopted at this time without additional public notice and comment. However, the Commission has determined to include these substantive comments in the record of the May 7, 1993 hearing regarding the proposed new EEO rules.

In addition, written comments were submitted by the Public Advocate; Resorts International Hotel, Inc. ("Resorts"); the Community Health Law Project; Handicapped Advocates for Independent Living ("HAIL"); Dial, Inc. for Independent Living ("Dial"); United Cerebral Palsy Associations of New Jersey, Inc. ("United Cerebral Palsy"); the Association for Retarded Citizens of New Jersey ("the Arc"); and the New Jersey Developmental Disabilities Council ("DDC").

COMMENT: HAIL, Dial, the Arc, United Cerebral Palsy and DDC urged the Commission to amend chapter 53 to establish numerical goals for the hiring of persons with disabilities. DDC also urged the adoption of set-asides for casino business with disabled-owned enterprises.

RESPONSE: As previously noted herein and in the Notice of Proposed Readoption, the Commission has undertaken a comprehensive reevaluation of the rules in N.J.A.C. 19:53, resulting in a recent proposal to extensively revise N.J.A.C. 19:53. The Commission notes that the comments are not responsive to this proposed readoption, and such substantive additions to the proposed readoption could not be adopted at this time without additional public notice and comment.

COMMENT: Resorts contends that the current rules are "inefficient, impractical and ill-suited to the achievement of any constructive social or regulatory purpose."

RESPONSE: As the Commission expressly stated in the Notice of Proposed Readoption, the readoption of N.J.A.C. 19:53 was proposed without change pending the publication of new rules anticipated to substantially revise chapter 53. As noted above, such proposal, which would result in the repeal of the rules readopted herein, was approved for publication on March 17, 1993 and a public hearing on the proposal was held on May 7, 1993.

COMMENT: The Public Advocate commented that the current rules "fall short" of the affirmative action requirements needed to advance the employment opportunities available to disabled persons."

RESPONSE: Again, substantive additions to the proposed readoption could not be adopted at this time without additional public notice and comment.

COMMENT: Dial, the Community Health Law Project, United Cerebral Palsy and the Arc suggested that N.J.A.C. 19:53-1.8, Reasonable accommodations to the physically handicapped and the mentally handicapped, has been preempted by Title I of the Americans with Disabilities Act, 42 U.S.C.A. 12101 et seq. and Federal regulations thereunder.

RESPONSE: As noted above, the Commission agrees that "reasonable accommodation" must be afforded in accordance with the requirements of the ADA and the Law Against Discrimination and has included such a provision in its proposed new rules and as a modification to this readoption.

Full text of the readoption may be found in the New Jersey Administrative Code at N.J.A.C. 19:53.

Full text of the adopted amendment follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*).

19:53-1.8 Reasonable accommodations to the physically handicapped and the mentally handicapped

*[(a) Reasonable accommodation to the physically handicapped and the mentally handicapped shall include:

1. Making facilities used by employees or students readily accessible to and usable by such handicapped persons, and

2. Job or course restructuring, part-time or modified schedules, acquisition or modification of devices or equipment, the provision of readers or interpreters and other similar actions.

(b) In determining whether an accommodation would impose an undue hardship on the operation of a contractor's, subcontractor's, applicant's or licensee's enterprise, the factors to be considered include:

1. The overall size of the contractor's, subcontractor's, applicant's or licensee's workforce or enrollment with respect to the number of employees or students, number and type of facilities, and size of budget;

2. The type of the contractor's, subcontractor's, licensee's or applicant's operation including the composition and structure of the contractor's, subcontractor's, applicant's or licensee's workforce or enrollment; and

3. The nature and cost of the accommodation needed.]*

Reasonable accommodation in employment to persons with disabilities required of casino licensees or applicants shall be afforded in accordance with the requirements of the Law Against Discrimina-

tion, N.J.S.A. 10:5-1 et seq., and attendant regulations, and Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 et seq., and attendant regulations.*

(a)

CASINO CONTROL COMMISSION

Temporary Adoption of New Rules and Amendments
Gaming Schools
Accounting and Internal Controls
Gaming Equipment
Rules of the Games
Poker

Authority: N.J.S.A. 5:12-69(e), 70(f) and 100(e).

Authorized By: Steven P. Perskie, Chairman, Casino Control Commission.

Take notice that the Casino Control Commission shall, pursuant to N.J.S.A. 5:12-69(e), conduct an experiment for the purpose of determining whether various temporary amendments and new rules concerning the game of poker should be adopted on a permanent basis. The experiment shall be conducted in accordance with temporary rules which will be posted in each casino participating in the experiment and will also be available from the Commission upon request.

Specifically the test would allow any casino licensee which wishes to participate in the experiment, and which meets all terms and conditions established by the Commission, to offer the game of poker to the public beginning on or about June 14, 1993. The experiment would continue for the maximum period of time authorized by N.J.S.A. 5:12-69(e), unless otherwise terminated by the Commission pursuant to the terms of the experiment.

Should the temporary amendments and new rules prove successful, the Commission will take the steps necessary to permanently adopt them in accordance with the Administrative Procedure Act and N.J.A.C. 1:30.

(b)

CASINO CONTROL COMMISSION

Temporary Adoption of New Rules and Amendments
Accounting and Internal Controls
Gaming Equipment
Rules of the Games
Card-O-Lette

Authority: N.J.S.A. 5:12-5, 69(e), 70(f) and 100(e).

Authorized By: Steven P. Perskie, Chairman, Casino Control Commission.

Take notice that the Casino Control Commission shall, pursuant to N.J.S.A. 5:12-5 and 69(e), conduct an experiment for the purpose of determining whether various temporary amendments and new rules, concerning the game of Card-O-Lette should be adopted on a permanent basis. The experiment shall be conducted in accordance with temporary rules which will be posted in each casino participating in the experiment and will also be available from the Commission upon request.

Specifically the test would allow any casino licensee which wishes to participate in the experiment, and which meets all terms and conditions established by the Commission, to offer the game of Card-O-Lette to the public beginning after May 24, 1993, on a specific date to be determined by the Commission, which date will be posted in each casino participating in the experiment. The experiment would continue for the maximum period of time authorized by N.J.S.A. 5:12-69(e), unless otherwise terminated by the Commission pursuant to the terms of the experiment.

Should the temporary amendments and new rules prove successful, the Commission will permanently adopt them in accordance with the public notice and comment requirements of the Administrative Procedure Act and N.J.A.C. 1:30.

ENVIRONMENTAL PROTECTION AND ENERGY

(c)

DIVISION OF FISH, GAME AND WILDLIFE
FISH AND GAME COUNCIL

Notice of Administrative Correction
1992-93 Game Code
Migratory Birds
N.J.A.C. 7:25-5.13

Take notice that the Office of Administrative Law has discovered an error in the current text of N.J.A.C. 7:25-5.13(c). As reflected in the publications of the amendment to this subsection as part of the 1992-93 Game Code, the subsection begins, "A person shall not take ..." (see 24 N.J.R. 1847(a) and 2715(b)). However, in incorporating that amendment into the New Jersey Administrative Code through the 8-17-92 Code update, the word "not" was inadvertently deleted. Through this notice of administrative correction, published in accordance with N.J.A.C. 1:30-2.7, the error is rectified.

Full text of the corrected rule follows (addition indicated in boldface **thus**):

7:25-5.13 Migratory birds

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

(c) A person shall **not** take, attempt to take, hunt for or have in possession, any migratory game birds, including waterfowl, except at the time and in the manner prescribed in the Code of Federal Regulations by the U.S. Department of the Interior, U.S. Fish and Wildlife Service, for the 1992-93 hunting season. The species of migratory game birds, including waterfowl, that may be taken or possessed and unless otherwise provided the daily bag limits shall be the same as those prescribed by the U.S. Department of the Interior, U.S. Fish and Wildlife Service for the 1992-93 hunting season.

(d)-(s) (No change.)

(d)

DIVISION OF FISH, GAME AND WILDLIFE

Notice of Administrative Changes
Marine Fisheries
Weakfish Management
N.J.A.C. 7:25-18.12

Take notice that the Department of Environmental Protection and Energy has requested, and the Office of Administrative Law has agreed to permit, certain changes to cross-references in N.J.A.C. 7:25-18.12. As adopted effective January 19, 1993, former subsection (a) of this rule, which addressed weakfish size limits, was deleted and revised provisions on weakfish size were added at N.J.A.C. 7:25-18.14(j)2. In order to properly reflect the deletion of subsection (a), the recodification of former subsections (b) through (h) as (a) through (g), the deletion of former subsection (i), and the addition of N.J.A.C. 7:25-18.14(j)2, cross-references in N.J.A.C. 7:25-18.12(b) through (g) need to be revised through this notice of administrative change, published pursuant to N.J.A.C. 1:30-2.7.

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

7:25-18.12 Weakfish management

(a) (No change.)

(b) A person shall not remove the head, tail or skin or otherwise mutilate to the extent that its length or species cannot be determined any weakfish, except after such weakfish has been landed to any ramp, pier, wharf, dock or other shore structure where it may be inspected for compliance with the appropriate size limits, except that

weakfish fillets with the skin attached may be landed provided they are not less than the minimum size specified at N.J.A.C. 7:25-18.1(b) [and at (a) above] **or 7:25-18.14(j)2.**

(c) Any person violating the provisions of (a)[,] **or NJ.A.C. 7:25-8.14(j)2**(b) [or (c)] above shall be liable to a penalty of $20.00 for each fish taken or possessed. Each fish taken or possessed shall constitute an additional separate and distinct offense.

(d) A person shall not take, or attempt to take, any weakfish by any means other than angling, and a person shall not possess more than ten weakfish, during the closed seasons beginning June 7 through June 30 and October 20 through December 31 except as provided in [(g) and (i)] **(f)** below. After advertisement and public distribution of the Council meeting agenda and consultation with the Marine Fisheries Council, the Commissioner may modify the closed seasons specified above upon notice provided the spring closure established is between May 15 and June 30 and the fall closure established is between October 1 and December 31. The Department shall provide notice of any change by filing and publishing in the New Jersey Register. All such notices shall be effective when the Department files notice with the Office of Administrative Law or as specified otherwise in the notice.

(e) A person shall not set, tend, or attempt to set or tend a drifting, staked or anchored gill net in Delaware Bay during the spring closed season specified in [(e)] **(d)** above or as modified by the Commissioner by notice except as follows:

1.-3. (No change.)

(f) A person shall not sell, barter, possess for sale or barter, or offer for sale or barter any weakfish landed in New Jersey during the closed seasons specified in [(e)] **(d)** above, or as modified by the Commissioner, except weakfish harvested by otter trawl during the fall closure.

(g) Possession of greater than 10 weakfish at any time during the closed seasons shall be prima facie evidence of violation of the no sale provision [(g)] **(f)** above.

(a)

DIVISION OF RESPONSIBLE PARTY SITE REMEDIATION

Procedures for Department Oversight of the Remediation of Contaminated Sites

Adopted New Rules: N.J.A.C. 7:26C

Proposed: April 6, 1992 at 24 N.J.R. 1281(b).
Adopted: April 5, 1993 by Scott A. Weiner, Commissioner, Department of Environmental Protection and Energy.
Filed: April 6, 1993 as R.1993 d.186, **with substantive and technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3) **and with the proposed repeal and new rules at N.J.A.C. 7:26B-7 and the proposed amendment to N.J.A.C. 7:26B-9.3 not adopted.**
Authority: N.J.S.A. 13:1D-1 et seq., 13:1E-1 et seq., 13:1K-6 et seq., 58:10-23.11 et seq., and 58:10a-21 et seq.
DEPE Docket Number: 09-92-03.
Effective Date: May 17, 1993.
Operative Date: July 1, 1993.
Expiration Date: May 17, 1998, N.J.A.C. 7:26C;
November 18, 1997, N.J.A.C. 7:26B.

On April 6, 1992 at 24 N.J.R. 1281(b), the Department of Environmental Protection and Energy (Department) proposed a new chapter, N.J.A.C. 7:26C, to codify the oversight documents used by the Site Remediation Program for the remediation of contaminated sites. These rules, together with the proposed Techical Requirements for Site Remediation (N.J.A.C. 7:26E), will establish the core of the Department's site remediation program.

Public hearings to accept testimony on the proposed new chapter were held on June 3 and 4, 1992. The public comment period on the proposal closed on July 6, 1992.

Summary of Hearing Officer Recommendations and Agency Responses:

On April 6, 1992, the Department of Environmental Protection and Energy (Department) proposed amendments and new rule at N.J.A.C. 7:26C. The Department held two public hearings concerning the new rule. The first public hearing was held on June 3, 1992 in New Brunswick, New Jersey, and the second public hearing was held on June 4, 1992 in Trenton, New Jersey. The Department accepted written comments through July 6, 1992.

Lance R. Miller, Assistant Commissioner for the Department's Site Remediation Program served as the hearing officer at the public hearing held on June 3, 1992. Karl J. Delaney, the Department's Director of the Division of Responsible Party Site Remediation served as the Hearing Officer at the public hearing held on June 4, 1992. Assistant Commissioner Miller and Director Delaney recommended that the Department adopt the rule with the changes described in the response to the specific comments as stated in the Summary of Public Comments and Agency Responses below. The Department agrees with the recommendation.

Interested persons may inspect the public hearing record, or obtain a copy upon payment of the Department's normal copying charges, contacting:

Robert Santalocci
Office of Legal Affairs
Department of Environmental Protection and Energy
401 East State
CN 402
Trenton, New Jersey 08625-0402

In the year that has passed since the Department proposed the Procedures for Department Oversight of the Remediation of Contaminated Sites, N.J.A.C. 7:26C, the Legislature has focused considerable attention toward reevaluating the process to remediate contaminated property in an effort to create a more streamlined and predictable process. The focus of this legislative attention has been Senate Bill No. 1070 (S1070) which would amend and supplement the Environmental Cleanup Responsibility Act, N.J.S.A. 13:1K-6 et seq., and impact remediation under all other New Jersey statutes. As a result of over a year of deliberations, and with the support of the Department, on March 22, 1993, the Senate passed S1070 by a vote of 39 to 0. The Assembly accepted S1070 in April, and the Department anticipates that the Bill will be voted upon in the next several months.

S1070 would establish detailed public policy regarding the procedures and the remediation standards that are to be used by the Department when overseeing the remediation of contaminated sites. Consequently, there is some overlap between S1070 and the Procedures for the Department Oversight of the Remediation of Contaminated Sites, and in limited instances, differences between the two. Where possible, the Department has modified N.J.A.C. 7:26C on adoption so that it is consistent with the public policy articulated in the Senate's overwhelming approval of this bill. One example of this is that, on adoption, the Department has deleted the phrase "feasibility study" from N.J.A.C. 7:26C and replaced it with the phrase "remedial alternative analysis" to emphasize that the Department is not requiring a Superfund type feasibility study, which has the reputation of being costly and overly complex, when it is seeking an analysis, which can be as short and simple as a one page document, of remedial action alternatives. This modification is consistent with S1070, which lists substantially the same criteria for evaluating remedial action alternatives, but does not define these criteria as a feasibility study to highlight the Senate's intent that the requirements of S1070 are not identical to Federal law.

The Department, however, was unable to make all the changes necessary to make the technical rules consistent with S1070 on adoption since many would be considered substantive changes requiring additional notice and comment pursuant to the Administrative Procedure Act, N.J.S.A. 54:14B-1 et seq. When S1070 is enacted, the Department will reevaluate all of its rules, including N.J.A.C. 7:26C, to ensure that they are consistent with the legislative direction given in S1070.

The Department received written and verbal comments from 44 commenters during the public comment period on the proposal ending July 6, 1992. The following is a list of people who made either oral or written comments directly related to the proposed new rules:

Allied-Signal Inc.
American Cyanamid Company
American National Can
Atlantic Electric

Brown Rudnick Freed & Gesmer
Chemical Industry Council of New Jersey
Chemical Waste Management of New Jersey
Chevron U.S.A. Inc.
Clapp & Eisenberg
Cohen, Shapiro, Polisher, Shiekman and Cohen
Colonial Pipeline Company
Commerce and Industry Association of New Jersey
Blair Domniniak
E.I. du Pont de Nemours and Company
Edwards & Angell
Exxon Company, U.S.A.
First Fidelity Environmental
The General Electric Company
Hackensack Water Company
Hoffman-La Roche Inc.
Kaye, Scholer, Fierman, Hays and Handler
Mobil Oil Corporation
New Jersey Business & Industry Association
New Jersey Builders Association
New Jersey State Bar Association
Al Nesheiwat
Petroleum Council of New Jersey
Rutgers Environmental Law Clinic on behalf of:
American Littoral Society
Association of New Jersey Environmental Commissions
Clean Ocean Action
Coalition Against Toxics
Delaware Riverkeeper
Environmental Defense Fund
Ironbound Committee Against Toxic Waste
Mansfield Township Environmental Commission
Natural Resources Defense Council
New Jersey Environmental Federation
New Jersey Public Interest Research Group
People United for a Klean Environment
Sierra Club—New Jersey Chapter
Shell Oil Company
Tellus Environmental Consultants
United States Environmental Protection Agency
Wheaton Industries, Inc.

Summary of Public Comments and Agency Responses:

Summary General Comments

Authority

COMMENT 1: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company stated that New Jersey Department of Environmental Protection and Energy cites various New Jersey statutes as legislative authority for the Oversight Regulations. However, only one of the cited statutes, Comprehensive Environmental Response, Compensation and Liability Act, provides any specific legal authority for the issuance of an oversight document and this authority is limited to sites remediated pursuant to Comprehensive Environmental Response, Compensation and Liability Act. There is no statutory authority justifying the far-reaching scope of the proposed regulations. The Administrative Procedure Act of New Jersey, N.J.S.A. 52:14B-4(a)(2), and the Rules for Agency Rulemaking, N.J.A.C. 1:30-3.1(d), make clear that the Department must cite "specific legal authority" for each proposed rule.

The Department states that the proposed rules are intended to comply with the decision in *Woodland Private Study Group, et al. v. Dept. of Environmental Protection,* 109 *N.J.* 62 (1987). However, Woodland did not involve the issuance of an oversight document. The court in Woodland held that a Department "policy statement" regarding the participation of responsible parties in the development of Remedial Investigations and Feasibility Studies was rulemaking and therefore subject to notice and comment. The Woodland court did not contemplate the promulgation of pervasive and overreaching regulations not grounded in any statutory authority.

Pursuant to the Administrative Procedure Act the burden is on the Department to cite the legal authority for each proposed rule. The Department has not met this burden as it has not, and in fact cannot, cite specific legal authority enabling it to create an enforcement scheme of this magnitude which strips the public of rights granted to it by the U.S. Constitution, legislatively enacted statutes and binding case law.

Administrative agencies are non-representative bodies with few legal restraints on their actions. One restraint imposed on them, however, is the requirement that their exercise of governmental power must not exceed the boundaries authorized by the legislature. The Department, in promulgating these Oversight Regulations, has exceeded the scope of its authority and, thus, violated the Administrative Procedures Act.

The Department accurately notes in the regulatory background that "there are several major federal and state programs currently regulating contaminated sites in New Jersey." None of these statutes requires or even authorizes administrative consent orders (except with respect to the federal government in the case of Comprehensive Environmental Response, Compensation and Liability Act). The Department does not have the authority to require that parties abrogate specific terms, rights and responsibilities provided by these underlying statutes. The terms and conditions of consent orders ought not to have the effect of requiring that parties waive important rights granted by the underlying statutes, or impose burdens on them not reflected by these statutes.

RESPONSE: The Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the rules for agency rulemaking, N.J.A.C. 1:30, do not require the Department to identify the specific legal authority on which it relies for each particular section of the rule. The agency is only required to "include a citation to the specific N.J.S.A. statutory authority for the proposed rule." N.J.A.C. 1:30-3.1(d). By listing the various statutory authorities, including Department's implementing statute at N.J.S.A. 13:1D-1 et seq., the Department complied with the requirements of the Administrative Procedure Act.

The Department believes it has ample authority to promulgate a comprehensive set of rules that address how the Department will oversee remediation of contaminated sites by another person. As discussed in more detail below, the Department was specifically directed to adopt a Hazardous Substance Contingency Response Master Plan pursuant to N.J.S.A. 58:10-23.24. The Legislature determined that such a Statewide master plan for the cleanup of chemical contamination was essential due to a recognized need for a systematic and consistent approach to the detoxification of various contaminated sites. N.J.S.A. 58:10-23.20. The oversight rules form an integral part of the statewide master plan insomuch as they ensure that human health will be adequately protected when a third person performs the remediation, just as if the Department were conducting the remediation.

In addition to the Department's explicit authority to promulgate these rules at N.J.S.A. 58:10-23.20, the Department is authorized to specifically promulgate these rules pursuant to the Spill Compensation and Control Act and the Environmental Cleanup Responsibility Act. For example, N.J.S.A 58:10-23.11t gives the Department the authority to promulgate rules as it deems necessary to accomplish its purpose and responsibilities under the Spill Compensation and Control Act. The Spill Compensation and Control Act is to be liberally construed to effect its purposes pursuant to N.J.S.A. 58:10-23.11x. Therefore, the Department is authorized to promulgate rules to deal with the prevention of discharges, as well as with containment, cleanup and removal after a spill has occurred. See *GATX Terminals Corp. v. New Jersey Dept. of Environmental Protection,* 86 *N.J.* 46 (1981).

In addition, the Department has broad statutory authority pursuant to the Water Pollution Control Act to promulgate rules to prevent, control or abate water pollution and to carry out the intent of the Water Pollution Control Act. N.J.S.A. 58:10A-4. One of the purposes of the Water Pollution Control Act is to restore, enhance and maintain the chemical, physical, and biological integrity of its waters, to protect public health, to safeguard fish and aquatic life and scenic and ecological values, and to enhance the domestic, municipal, recreational, industrial and other uses of water. N.J.S.A. 58:10A-2.

Furthermore, under its enabling statute at N.J.S.A. 13:1D-9, the Department is mandated to formulate policies for the conservation of natural resources, the promotion of environmental protection and the prevention of pollution in the environment. These declarations of public policy in the Department's enabling legislation, serve as an additional source for the authorization of comprehensive regulations related to the remediation of contaminated sites.

As the commenters note, various statutes in New Jersey regulate ongoing discharges to the environment differently. Thus, the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., regulates discharges to the surface and ground waters of the State pursuant to the New Jersey Pollutant Discharge Elimination System permitting program, whereas the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq., focuses on preventing discharges from regulated units. Furthermore, varying statutes

provide for different enforcement mechanisms to the Department. These facts, however, should not lead to the conclusion that the Department is without statutory authority to promulgate a comprehensive set of rules that deal with the overlapping problems associated with the discharge and disposal of hazardous substances and wastes or pollutants to the land and waters of the State, and the need for the prevention or mitigation of contamination and restoration of natural resources.

With the exception of the Environmental Cleanup Responsibility Act program, for the past two decades the Department has approached site remediation efforts from a media specific basis. Ground water was often remediated pursuant to a New Jersey pollutant discharge elimination system discharge to groundwater permit, but because the focus of those who issued the New Jersey Pollutant Discharge Elimination System—Discharge to Ground Water permit was on ground water, contaminated soil at the site may not have been concurrently remediated. This media specific focus led to a fragmented approach to site remediation efforts. Often times, the Department and the regulated party were required to review remediation work already completed to see if additional action needed to be taken. The Department has determined that this fragmented approach is not efficient or cost effective. Therefore the Department proposed the Procedures for Department Oversight of the Remediation of Contaminated Sites so that contaminated sites could be remediated in a consistent manner throughout the State. The Department's approach to deal with contaminated sites across statutory lines is consistent with the Legislature's multimedia approach to ongoing discharges as articulated in the recently adopted Pollution Prevention Act, N.J.S.A. 13:1D-35 et seq.

Under the Spill Compensation and Control Act, the Department has broad authority to either cleanup and remove a discharge or direct the discharger to cleanup and remove the discharge. N.J.S.A. 58:10-23.11f(a)1. The Department, in delegating its authority to remediate a discharge may dictate how that cleanup is to be conducted so that it is done in a manner that is protective of human health and the environment. Thus, pursuant to the Spill Compensation and Control Act, the Department has the flexibility to effect a cleanup by what it considers to be the most appropriate means. See *Superior Air Products Co. v. N.L. Industries Inc.,* 216 *N.J. Super.* 46 (App. Div. 1987). The Department has appropriately approached this task by establishing one set of requirements applicable to all contaminated sites.

The Department disagrees with the commenters' contention that the Department's authority to control site remediation varies considerably depending on the statute involved. As noted above, the broadest definition of discharge is found in the Spill Compensation and Control Act and the Spill Compensation and Control Act is applicable to all contaminated sites. Furthermore, the authorizing legislation for these rules all deal with the same subject matter—the prevention and remediation of environmental contamination. As such, all statutes must be read together to effectuate the legislature's purpose in ensuring that contaminated sites are remediated. Thus, the Department does not have to wait for the Environmental Cleanup Responsibility Act to be triggered in order to demand that a discharge be remediated. Nor does the Department have to focus on the remediation of an underground storage tank if there happens to be such a tank at the site. Thus, the Spill Compensation Control Act, the Water Pollution Control Act, the Environmental Cleanup Responsibility Act, Solid Waste Management Act and the Underground Storage of Hazardous Substances Act must be read in a manner that harmonizes their objectives.

Finally, all environmental statutes, to the extent that they are necessary for the general health, safety and welfare of the people of the State, are to be liberally construed to effectuate their purposes. Thus, while the Department agrees that there may be some minor inconsistencies between the Water Pollution Control Act and the Spill Compensation and Control Act, the Department does not agree that these inconsistencies must dictate that there can be no comprehensive set of rules regarding the remediation of contaminated sites. In enacting all of these statutes, the Legislature was concerned with environmental contamination in New Jersey and its proper prevention and remediation. The Procedures for Department Oversight of the Remediation of Contaminated Sites implement that legislative objective.

COMMENT 2: Exxon Company, U.S.A. commented that the Legislature did not mandate a "... systematic and consistent approach to the remediation of sites." Instead, it stipulated that the Department of Environmental Protection and Energy develop better procedures and review by multi-party groups (N.J.S.A. 58:10-23.30). Also, an economic impact analysis should be performed that covers all business effects including potential for loss of jobs.

RESPONSE: Exxon Company, U.S.A. appears to have confused its citations of the appropriate statutes. N.J.S.A 58:10-23.20 reads in pertinent part:

> The Legislature finds and declares that:
> a. The recognition of the threat of serious, and in some cases irreversible, environmental pollution by toxic chemicals stored, legally or otherwise, at various sites around the State has prompted the recent *need for a systematic and consistent approach* to the detoxification of those sites (emphasis added);

In addition, the Department is unable to decipher Exxon's intent in citing the enforcement section of the Clean Ocean Act, N.J.S.A. 58:10-23.25, specifically N.J.S.A. 58:10-23.30, in its comments on this rule proposal. Finally, Exxon Company, U.S.A. suggested that the Department should perform an economic impact analysis. The Department included in the proposal the economic impact statement required by N.J.A.C. 1:30-3.1(f)3.

The Department disagrees with Exxon's suggestion that an economic impact is necessary beyond that which the Department included in the proposal. The Department included a statement of the expected economic impact of the proposal as required by the Administrative Procedure Act and the rules promulgated pursuant to that act, N.J.A.C. 1:30.

Need for Remediation

COMMENT 3: Allied-Signal, Inc., E.I. du Pont de Nemours and Co., and The General Electric Company stated that early in its Summary, the Department suggests that every contaminated site requires remediation ("the necessity to remediate contaminated sites is self-evident") and further states that "there has been a continual loss of potable water supplies throughout the State caused by contamination." It would be helpful if the Department provided some data to support these contentions. Many contaminated sites require remediation and, where there is an actual risk to public health or the environment, remediation should promptly be undertaken. However, the State does not use nor is it as likely in the future to use every available source of groundwater, some of which may be impacted by historical conditions. Not every site that has anthropogenic effects necessarily poses a health or safety risk to the public. It is not "self-evident" that every contaminated site must be remediated. Today's regulatory environment means that groundwater supplies are better protected today than ever before, and there does not appear to be a "continual" loss of potable water supplies. Indeed, the Statewide figures suggest that only a fraction of one percent of the State's available potable groundwater has been impacted to an extent requiring remediation. While the Department may need management tools to address the inventory of sites that are documented and do require remediation, it is misleading to the general public to create an impression that these particular oversight regulations are necessitated by a program that is beyond the State's powers to prioritize and address carefully and deliberately without major dislocations to the economy of the State, its job base, and its ability to attract and continue to maintain businesses in the State.

RESPONSE: The commenters appear to have misinterpreted the Department's use of the term remediation. As defined in these rules and as used by the Department in the Summary to which the commenters refer, the Department has consistently used "remediation" to refer to the process of investigating and cleaning up a contaminated site. A contaminated site is a site at which contaminants are present. The Department's statement was meant to support the proposition that all such sites need, at a minimum, further investigation to determine whether or not the site poses an unacceptable threat to human health or the environment.

Remediation does not mean, as the commenters appear to imply, only the implementation of a remedial alternative necessary to protect human health and the environment. The initial phases of remediation involve the investigation of a contaminated site in order to better understand any possible threat the site poses to human health and the environment. Upon completion of this phase of the process, the Department could very well conclude that no further action is necessary to protect human health and the environment.

The Department strongly disagrees with the commenters to the extent they were suggesting that the Department should be "writing off" any

areas or natural resources of New Jersey or that the protection of humans is its only concern.

United States Environmental Protection Agency Acceptance

COMMENT 4: Mr. Nesheiwat questioned whether the voluntary remediation program will be approved by the United States Environmental Protection Agency.

RESPONSE: The United States Environmental Protection Agency has reviewed the proposed rule and "endorses the use of administrative consent orders at priority sites and memoranda of agreement at non-priority sites. [The United States Environmental Protection Agency] anticipate[s] that use of the memorandum of agreement will increase the willingness of facilities to expedite cleanups...." Letter dated July 15, 1992 from Conrad Simon, Director, Air & Waste Management Division, United States Environmental Protection Agency, to Samuel A. Wolf, Esq., Office of Legal Affairs, New Jersey Department of Environmental Protection and Energy. In addition, Senator Lautenberg has announced that he will be introducing legislation designed to encourage voluntary cleanups. This legislation will be based upon state oversight of the voluntary cleanups.

Prioritization

COMMENT 5: Rutgers Environmental Law Clinic said that the proposed regulations state that Department of Environmental Protection and Energy, "on a periodic basis," will identify contaminated sites of high priority that Department of Environmental Protection and Energy intends to address with public funds unless a private party agrees to fund/implement remediation pursuant to an administrative consent order under this subchapter. N.J.A.C. 7:26C-5.2(a)1; 24 N.J.R. 1294. Apparently simultaneously, the Department of Environmental Protection and Energy will notify the responsible party of the Department of Environmental Protection and Energy's intent. N.J.A.C. 7:26C-5.2(a)2. First of all, the Department of Environmental Protection and Energy must define "on a periodic basis." The Department of Environmental Protection and Energy should publicly announce its list of high priority sites at least once every three months. Second, the Department of Environmental Protection and Energy should identify when it intends to begin the expenditure of public funds to do the cleanup, the expected cost of that cleanup, and the length of time it expects that the cleanup will take. In doing so, the Department of Environmental Protection and Energy will increase the incentive for the responsible party to step forward and undertake the cleanup so as to avoid the treble costs which the Department of Environmental Protection and Energy would otherwise ultimately impose on the responsible party. Finally, the Department of Environmental Protection and Energy should also include the names of the responsible parties in its public announcement of the sites which it intends to clean up with public funds. This too will encouarge those responsible to come forward and undertake the cleanup.

Rutgers Environmental Law Clinic also commented that the proposed regulations contain no description whatsoever of the standards which the Department of Environmental Protection and Energy intends to use when assigning priority to the universe of sites which it regulates. It is impossible to effectively and completely comment upon the various legal mechanisms described in these regulations, such as administrative consent orders and memoranda of agreement, when it cannot be determined which types of facilities will be identified as a high priority and which others will be left to lower priorities.

COMMENT 6: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company commented that the Department insists on keeping confidential the list of sites, the enforcement priority of the sites, and the basis on which they are "ranked." The Department argues that "the use of the prioritized list for enforcement action requires the Department to keep the site priority ranking confidential."

Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company also commented they understand the need to prioritize sites, and they believe the public should have access to the criteria used to establish the priority list.

The proposed regulations in many respects do not conform with the requirements for rulemaking mandated by the Legislature in P.L. 1982, c.202 and P.L. 1993, c.222 (codified as N.J.S.A. 58:10-23.15 through 23.34). The "secret" priority list to be developed by the Department is flatly inconsistent with the requirements of the statutes.

In 1982, by P.L. 1982, c.202 (codified at N.J.S.A. 58:10-23.15 et seq.), the Department was required to prepare and adopt a master list for the cleanup of hazardous discharge sites together with "a ranking, based on criteria established by the Department pursuant to P.L. 1983, c.222 (N.J.S.A. 58:10-23.30 et seq.) of the sites in the order in which the Department shall review the master list once every six months and modify it as necessary."

Pursuant to N.J.S.A. 58:10-23.17, the master list is to be prepared and adopted and made available to each municipality in which there is located a hazardous discharge site "and to all other interested persons." The Department is required to hold public hearings with respect to the proposed master list.

By P.L. 1983, c.222 (N.J.S.A. 58:10-23.20 et seq.) the Legislature recognized that among other things "serious allegations had been made that efforts to detoxify sites of hazardous discharge have been fraught with ineffective administration." The legislature required that program inefficiencies and ineffectiveness be identified and that there be a "contingency response plan to serve as the basis for a State-wide master plan for the cleanup of chemical contamination." Specifically, the Department was required to develop a hazardous substance contingency response master plan pursuant to the Administrative Procedure Act (N.J.S.A. 58:10-23.24) which shall "to the greatest extent practicable and feasible, incorporate the findings and recommendations of the [Hazardous Waste Advisory] Council."

COMMENT 7: Chevron U.S.A. Inc. stated that an objective quantitative scoring system to identify high priority sites needs to be promulgated. Additionally, appropriate administrative procedures must be provided that will allow the public and the regulated community the ability to adjudicate these designations.

Chevron U.S.A. Inc. commented that as used in the proposed rules, a "High Priority" site is the dividing point between oversight cases where financial assurance and penalty provisions are applicable for responsible party actions. More importantly it defines those sites where public funds may be used. The cost of these provisions and the number and type of sites where these provisions might be made to apply should be understood by the regulated community in order that the potential reach and cost of these rules can be adequately assessed.

The Department has not provided a list of sites or a system for ranking sites, a responsible party has no way of knowing whether their site is, or is being considered to be, designated "high priority." The responsible party may already have initiated remediation of the site "at risk" or choose to remediate under another Department Oversight Document (such as a memorandum of agreement). A person should not be required to execute an administrative consent order for a high priority site. As is given in N.J.A.C. 7:26C-1.1, Scope, a person should be able to follow these "procedures to determine the applicable oversight document for a contaminated site."

COMMENT 8: Colonial Pipeline Company stated that the Department has indicated that sites will be ranked and the list will be confidential. It cannot be ascertained if the ranking procedure has been subject to peer review, nor has a mechanism been proposed to determine if the data used in the ranking procedure is accurate and correct.

COMMENT 9: Chemical Waste Management of New Jersey stated that parties should be able to review the basis for the Department's prioritization of a given site in order to ascertain whether, as an initial matter, such prioritization is appropriate. This is particularly true when a site is ranked as a high priority site—where a party is expected to commit to perform the entire cleanup of a site even before the contamination at a site is fully delineated and before the Department makes specific decisions regarding the remedy to be selected. Denial of priority list access would also significantly impede a party's ability and legitimate right to object to or defend against actions based on the Department's ranking of sites, thereby violating responsible parties' constitutional due process protection. Importantly, if denied access to the priority list, a party will likely be deprived of essential information relevant to determining whether a Department's actions at a particular site were arbitrary, capricious or unreasonable.

Chemical Waste Management of New Jersey also commented that the distinction between a high and low priority site as contemplated by the proposed Department oversight rules directly and significantly influences the extent of remediation a party will be required to perform at a given site, the concomitant costs associated with the remediation and the enforcement mechanisms available to the Department to ensure compliance with remediation commitments.

They further commented that preventing a party access to the priority list may also discourage voluntary remediation at contaminated sites through the utilization of memoranda of agreement. As stated in the proposed rules, the Department anticipates that in order to avoid more

stringent remedial obligations pursuant to administrative consent orders, a responsible party may wish instead to enter into a memorandum of agreement before a site reaches the Department's high priority list in order to commit to perform one phase of a site remediation. 24 N.J.R. 1284. If denied access to the priority list to determine which sites have been identified as low priority sites, a party may fail to pursue this voluntary remedial option.

COMMENT 10: New Jersey Business and Industry Association commented that the Department should advise responsible parties at "high priority" sites of their score in each category of factors so that the responsible party has a basis to object to the designation. Furthermore, publishing the score will increase the confidence of the public and the regulated community that the Department is objectively ranking contaminated properties.

COMMENT 11: New Jersey State Bar Association commented that there is no indication that the priority list will be available to interested parties, or to the public at large. What this means, then, is that the regulated community is unable to form an independent judgment as to whether or not a site is high priority, has no information from the agency as to whether or not the agency considers the site a high priority, and has no idea of where the site may rank on the "priority list." In the absence of any objective criteria, a site apparently becomes a "high priority site" as it moves up on the list.

New Jersey State Bar Association commented that the proposed definition of "high priority site" references a schedule of sites to be remediated with public funds. Is this schedule going to be made a matter of public record, similar to the national priorities list, or must the regulated community continue to engage in guesswork regarding the relative priority of sites on this list?

COMMENT 12: Chemical Industry Council of New Jersey commented that by making these factors public and reporting on how a particular site rated according to these factors, a responsible party who has been named to remediate a "high priority site" can seek solace in the fact that the Department has engaged in an objective evaluation of conditions at the site rather than simply subjectively deciding that a site is a "high priority site." Moreover, it gives parties an opportunity to object, upon a rational basis, the designation of "high priority sites." By identifying objective criteria the site will become a "high priority" as a result of actual environmental conditions rather than as a function of moving up the list of contaminated sites.

Chemical Industry Council of New Jersey also commented that in order to determine which sites are "high priority sites," the Department will rank all properties which are contaminated or which are suspected to be contaminated in a master list. While it is seemingly a good idea to formulate a list of contaminated sites so that the Department can focus its efforts appropriately, the presently proposed method to formulate that list is subject to criticism because the priority list is not going to be made public. Indeed, the preamble to the proposed regulations states that: The use of the prioritized list for enforcement action requires the Department to keep the site priority ranking confidential. Keeping the list secret may undermine the Department's stated goal that responsible parties will come forward prior to the Department reaching the contaminated sites on its priority list and take the appropriate enforcement action for site remediation. By publishing a prioritized list of contaminated sites, those responsible parties who rank near the top of the list will be motivated to come forward and initiate cleanup activity without having the Department cajole them into entering an administrative consent order. In other words, if a responsible party knows that it is on a "hit list," it is more likely to come forward and initiate cleanup activities over which it has control, rather than have the Department force the responsible party to undertake those activities under an administrative consent order.

COMMENT 13: Commerce and Industry Association of New Jersey stated that while it agrees that the Department and the regulated community need a mechanism to protect sensitive business information, the Department's proposal not to reveal the high priority site list or how the list was developed is inconsistent with the tradition of openness and fairness that the people and business community of New Jersey have come to expect from their government. The information the Department will no doubt rely on in compiling the high priority site list (permit records, Community Right To Know filings, spill reports, waste manifests) is already available to the public and its disclosure, while potentially embarrassing for some companies, will ultimately only encourage responsible parties to come forward. Additionally, there are methods available that have been tested in the courts (for example, the United States Environmental Protection Agency's Hazard Ranking System model) that allow for a system of site prioritization based on a number of quantifiable and objective criteria.

Commerce and Industry Association of New Jersey further commented that it would appear that by publishing the list of such "high priority sites," the Department may well avoid the need for an enforcement action by confirming that a site is a "high priority site" and thereby encouraging the parties who may be responsible for that site to come forward voluntarily. Indeed, in a somewhat contradictory statement, the preamble notes that the provision of the memorandum of agreement mechanism will, hopefully, inspire parties to avoid the necessity for the issuance of an administrative consent order by "coming forward prior to the Department reaching the contaminated site on its priority list and taking appropriate enforcement action for site remediation." (24 N.J.R. 1284 second column). By failing to publish the list, however, the responsible party cannot have any idea as to when the Department will reach the contaminated site on its priority list and cannot therefore, make an educated assessment as to when or whether to come forward.

RESPONSE TO COMMENTS 5 TO 13: Over the last several years, the Department has begun to develop the individual segments of what will eventually become New Jersey's Hazardous Substance Contingency Response Master Plan as defined in N.J.S.A. 58:10-23.24. Some of the segments which are critical to defining how New Jersey will respond to remediation of contaminated sites include: improved emergency response capabilities; an aggressive contaminated site discovery and identification program; development of state-of-the-art standards and other technical requirements for the remediation of contaminated sites; standardized and consistent Department oversight mechanisms to ensure that privately conducted remediations accomplish the same goals and objectives as a publicly conducted remediation; improved contracting mechanisms to allow the Department to oversee the public remediation of contaminated sites; an open public information and participation program; the publication of annual Site Remediation Program Status and Site Status Reports; and a first in the nation pollution prevention program designed to prevent the occurrence of new contaminated sites. While this has been a significant effort by the Department, several segments of the master plan are still in the developmental stages.

One of the uncompleted segments is the master list or Comprehensive Site List of contaminated sites. There are three different, but closely related, aspects in the development of the master list. The first is a compilation or inventory of contaminated sites. The second is the evaluation or scoring of each of these sites as to the level of risk they pose to human health and the environment. The third is the scheduling of the sites according to the Department's intent to use public funds to remediate them. As suggested in the comments, each of these aspects will be the subject of subsequent rulemaking by the Department.

The master list will be a compilation of all known and suspected contaminated sites in New Jersey, not just priority sites. This is in contrast to the Comprehensive Environmental Response, Compensation and Liability Act's National Priority List of the most contaminated sites in the country. Not all known or suspected contaminated sites in the country are put on the National Priority List. Instead, the United States Environmental Protection Agency uses a threshold score to determine whether or not a site is included.

Presently, the Department is still compiling the master list from information in the Department's files. While the Department had hoped to have completed this task by now, the end of this year appears as the likely completion of this project. The Department will continue to add sites to the master list as additional contaminated sites are discovered.

When developed, the Department will make available to the public all information related to the master list required by law to be subject to public review. Any further debate on this issue at this time would be premature since the Department has completed neither the compilation of the list nor its legal review of the extent of the information required to be made available to the public. All interested parties will have sufficient opportunity to further address this issue when the Department proposes the master list. Prior to the development of the master list, a responsible party, requesting information on how the Department identified a site as a priority site, will have an opportunity to discuss this designation with the Department during the negotiation period of the administrative consent order.

The second aspect of the master list is the scoring of each site on the list. The Department is currently developing a system of scoring each contaminated site in terms of the relative risk presented. To develop

its remedial priority scoring system, the Department began with the Hazardous Ranking System the United States Environmental Protection Agency developed under Superfund and then incorporated the recommendations of the New Jersey Hazardous Waste Advisory Council in its 1985 report "Analysis of New Jersey's Hazardous Discharge Site Cleanup Program," as well as more recent developments in the scoring procedures for evaluating threats that contaminated sites pose to human health and the environment. When completed, the Department will promulgate this process in rules as required by law. The Department anticipates soliciting public input to the development of this rule to result in a rule proposal within the year.

The final piece to this segment, and perhaps most difficult to develop, its the ordering of the thousands of sites for public funding. There are three primary pieces of this aspect of the master list. The first is the amount of state resources available to the Department to manage the remediation of publicly conducted remediation projects. The second is the dynamics involved in attempting to maintain a prioritized listing of the worst contaminated sites for the Department to remediate. The third is the length of the planning horizon which the Department can reasonably expect the specific site information to remain constant.

The Department requires agency personnel to oversee and audit public remediation projects, and money, to fund the agency personnel and the private contractors who will perform the remediation with oversight from the Department. Each of these resources may vary considerably from year to year for a number of reasons.

The level of staffing in the Site Remediation Program has not increased in the State's current fiscal year. Based on budgetary constraints, additional staff resources may not be available. However, the Department does have some ability to transfer staff from one part of the Site Remediation Program to another. The success of the Department's Voluntary Cleanup Program has required that the Department dedicate a larger percentage of available staff to this area. As a result, the staff available for other remediation projects is decreased. The number, complexity and scheduling of ongoing remediation projects also affects the availability of staff resources. As remediation is completed at a site, staff resources become available to dedicate to another site.

As discussed in more detail below, the Site Remediation Program is funded completely independent of general treasury funds. The many variables affecting available financial resources include the success of the State's cost recovery efforts to replenish the public funds available for this purpose and the Department's success in negotiating to have private rather than public dollars spent for site remediation.

The final issue concerning the Department's identifying the contaminated sites in the order in which the Department will use public resources to remediate the sites is the breadth of the horizon in which the Department can reasonably plan for the use of its resources. The amount of data and other relevant information available to the Department relative to contaminated sites can change considerably over time. With a relatively short planning horizon, then, the Department can ensure that less will change to force it to modify its schedule. As the length of the planning horizon is extended, however, the certainty decreases to a point where it simply vanishes. A planning horizon which encompasses all of the tens of thousands of contaminated sites that will be on the master list would certainly be beyond the bounds of reasonable planning.

A more reasonable approach would be for the Department to identify those contaminated sites at which it expects to use public funds for remediation during a given fiscal year. In this way, the Department would be able to inform both the general public as well as the parties responsible for the contaminated sites that it will be using public funds to remediate unless a third party steps forward and signs an administrative consent order. The Department will, therefore, publish on a periodic basis the sites it has scheduled for public funding during each fiscal year. This will represent the Department's priority site list.

Economic Impact

COMMENT 14: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company commented that the Department's proposal is devoid of any meaningful consideration of economic impact or cost effectiveness despite the fact that New Jersey Department of Environmental Protection and Energy is required by law to consider these factors. The New Jersey Administrative Procedure Act and Rules for Agency Rulemaking specifically mandate that these factors be considered. All notices of proposed rules must contain a "description of the expected socioeconomic impact of the rule." N.J.S.A. 52:14B-4(a)(2). The notice must contain an "economic impact statement which describes the expected costs, revenues, and other economic impact upon . . . any segments of the public proposed to be regulated." N.J.A.C. SS1:30-3.1(f)3.

The brief discussion of cost in the New Jersey Department of Environmental Protection and Energy's "Economic Impact" section falls far short of this type of economic impact statement. 24 N.J.R. 1288. The New Jersey Department of Environmental Protection and Energy does not even attempt to predict the economic impacts of the proposed rules upon the potentially responsible parties and others performing investigation and remediation under the Department's oversight documents. The Department obliquely suggests that the rules will have a positive economic impact "on the State as a whole," but gives no estimates of the possible impact of the rule on the costs and revenues of small or large companies. *Id.* It does not appear that the proposed rules contemplate any mechanism for consideration of costs, either on an industry-wide or site-specific basis.

The New Jersey Department of Environmental Protection and Energy is required to consider cost impact ("practicability") under the Environmental Cleanup and Responsibility Act, the Water Pollution Control Act, and the Spill Compensation and Control Act. The Environmental Cleanup and Responsibility Act defines "cleanup plan" expressly to include "recommendations regarding the most practicable method of cleanup" and a cost estimate of the cleanup plan. N.J.S.A. 13:1K-8(a). The Spill Compensation and Control Act provides for the cost-effectiveness of remedial plans to be taken into account, that removal of hazardous substances and actions to minimize damage from discharges shall, to the greatest extent possible, be in accordance with the National Contingency Plan for removal of oil and hazardous substances. N.J.S.A. 58:10-23.11f(a). The National Contingency Plan, in turn, provides for costs to be considered at three stages of remedy selection: the remedy screening stage (40 C.F.R. 300.430(e)(7)(iii)), the evaluation of remedial alternatives (40 C.F.R. 300.430(e)(9)(iii)(G)), and the final remedy selection (40 C.F.R. 300.430(f)(1)(ii)(D)).

In sum, the proposed rules exceed the New Jersey Department of Environmental Protection and Energy's statutory authority to the extent that they require any mechanism for investigation or remediation that is not practicable from both an economic and technical standpoint. The commenters recommend that New Jersey Department of Environmental Protection and Energy reevaluate the proposed rules in terms of its cost-effectiveness and economic impact, and expressly provide in the oversight documents that these cost factors are to be considered in imposing remedial obligations.

COMMENT 15: Colonial Pipeline Company commented that the economic impact of entering into these administrative orders and memoranda of agreement can be accurately determined and will be of low cost when compared to the overall remedial program. What is not noted in the discussion is the economic impact resulting from the implementation of both the cleanup standards and the technical standards. The economic impact related to the three proposed rules need to be quantified and discussed as a total package in the appropriate "Economic Impact" analyses for each of the proposed regulations.

RESPONSE TO COMMENTS 14 AND 15: The intent of the proposed rules is to codify a process which has been, up until this point, Department policy. For this reason, the economic impact discussion in the summary of these proposed rules is brief, as the costs associated with these rules are not new to the regulated community and, therefore, do not create a new economic impact by its promulgation. This is even true of the voluntary cleanup program as the Department would have eventually negotiated administrative consent orders, sought recovery of its administrative costs, or issued other enforcement documents for the remediation of these sites. What appears new is the oversight cost formula; however, again, the Department has historically calculated oversight costs using the various multipliers and hour for hour accountings of employees work on a particular site. This policy provides the Department with the reimbursement for the time spent ensuring that remediation is performed in accordance with all applicable State, Federal and local rules and regulations.

The factors that affect the costs of a contaminated site cleanup are so varied that estimated cleanup costs were not included in the summary so as not to mislead the regulated community with respect to the cost of a cleanup in the site remediation program or to the impact that these rules would have on such activity. As stated previously, the administrative consent order does not change the way business has been conducted in New Jersey, it merely codifies it.

Relationship With Technical Rules

COMMENT 16: Hoffman-LaRoche Inc. suggested that any requirements in this proposal referring to proposed N.J.A.C. 7:26E, Technical Requirements for Site Remediation, should be reserved until those such requirements have been appropriately commented on by the regulated community and finalized.

RESPONSE: The Department agrees that the rule promulgation process should be completed prior to the Department requiring the regulated community to comply with a rule proposal. The Department understood and wished to emphasize the close relationship between this proposal, the "Procedures for Department Oversight of the Remediation of Contaminated Sites" and the "Technical Requirements for Site Remediation" cited by the commenter. It was for this reason that the Department scheduled overlapping comment periods and will make both rules operative July 1, 1993.

COMMENT 17: Commerce and Industry Association of New Jersey urged the Department to consider why, given the high level of licensing and certification that the Department currently requires of consultants and contractors performing environmental services in the State, an extensive and perhaps costly Department oversight role is needed.

RESPONSE: The only certification or licensing program for individuals involved in the environmental consulting business is laboratory certification and underground storage tank certification. These represent only a small portion of contractors who do remediation work. The Department has chosen to increase the efficiency of its oversight program rather than initiate expanded licensing programs. Such programs would not provide Department approval that technical standards had been met, nor would they facilitate the integration of publicly funded cleanups into a comprehensive strategy.

COMMENT 18: Colonial Pipeline Company recommended that the Department establish oversight contracts with a number of consultants to provide oversight activities and allow the responsible party to select a contractor for oversight work. It is not in the best interest of the state or the responsible party to have the Department provide oversight. The utilization of private consultants will allow the Department to operate in a more efficient manner with a minimum of personnel.

RESPONSE: Private contracting for oversight services would likely result in increased costs to responsible parties to ensure profits to the contractor, and loss of Department control over the quality of the services.

Subchapter 1. General Information

N.J.A.C. 7:26C-1.1 Scope

COMMENT 19: The New Jersey Business and Industry Association stated that N.J.A.C. 7:26C-1.1(b) confirms that persons who voluntarily respond still must comply with all other applicable statutes and regulations. It should also, however, include a specific provision that voluntary participation by a person will not increase that person's obligations or liabilities beyond that contained in the oversight document.

COMMENT 20: The Commerce and Industry Association of New Jersey suggested the following language to replace N.J.A.C. 7:26C-1.1(b):

> The participation by any person in any of the procedures outlined in this chapter shall neither relieve that person from responsibility to comply with all applicable statutes and regulations nor increase that persons duties and obligations under existing statutes and regulations.

COMMENT 21: Chevron U.S.A. Inc. suggested that a new N.J.A.C. 7:26C-1.1(e) should read:

> "The participation by any person in any of the procedures outlined in this chapter shall not be construed as an admission by such person of any fact, fault or liability under any statute or regulation for conditions which existed before, during or after person's participation in any of the procedures outlined in this chapter nor shall it be construed as a waiver of any right or defense person may have with respect to same."

The New Jersey Department of Environmental Protection and Energy wants to encourage private parties to come forward on a voluntary basis to remediate contaminated sites of lower environmental priority. In furtherance of that aim, the New Jersey Department of Environmental Protection and Energy should clearly provide within the rules that parties who participate do so without fear of admission of guilt or waiver of defenses.

COMMENT 22: Allied-Signal, Inc., E.I. du Pont de Nemours and Co., and The General Electric Company proposed that the following language be added to proposed N.J.A.C. 7:26C-1.1, Scope, as N.J.A.C. 7:26C-1.1(c):

> "Nothing in this chapter shall be construed as limiting any legal, equitable, or administrative rights or remedies against the Department which any person may have under any applicable law or regulation unless specifically, voluntarily and knowingly waived in writing by such person. These regulations are not to be construed in derogation of such rights and remedies."

RESPONSE TO COMMENTS 19 TO 22: The Department understands the commenters' concerns and has amended N.J.A.C. 7:26C-1.1(b) to the extent the suggested language is consistent with the rest of the subchapter. One example where a party knowingly waives its rights is its waiver to a hearing on a permit required for the remediation to the extent the permit is consistent with the oversight document.

COMMENT 23: Allied-Signal, Inc., E.I. du Pont de Nemours and Co. and The General Electric Company suggested that there be added to N.J.A.C. 7:26C-1.1 the following proposed language as N.J.A.C. 7:26C-1.1(d):

> "The Department shall, upon its own initiative or upon the request of any party, waive, modify or amend any term or condition of any applicable oversight document based upon site specific considerations where necessary to promote an efficient and timely assessment, investigation or remediation."

RESPONSE: The Department does not agree with this comment. The inclusion of such language into this rule would completely nullify the intended purpose of this rule for the Department not to have to negotiate each oversight document for each individual case. If any provision could be changed and any provision could be added, there would be no benefit to having the oversight documents in a rule.

COMMENT 24: The New Jersey State Bar Association suggested that a statement be added to the effect that nothing in this chapter shall be deemed to require the execution of an oversight document with the Department as a condition to conducting any investigation or remediation of a contaminated site.

COMMENT 25: Exxon Company U.S.A. commented that the scope of this rule does not provide for "at risk" work. These procedures should not prohibit any person from conducting an investigation at their own risk, if they are in compliance with all applicable boring and well permits. Further, the Department's other proposed rule, "Technical Requirements for Site Remediation" (N.J.A.C. 7:26E-1.6(a)) states that "all work being conducted at a site ... whether or not being done with Department oversight shall ... follow the format and contain the information ..." outlined in the rule. This provision clearly allows for "at risk" work (without Department oversight) to be performed and submitted for Department approval if all the procedures are followed. As the Department states in the preamble (24 N.J.R. 1281), "these rules, together with the Cleanup Standards ... and the technical rules for remediation of contaminated sites ... establish the core of the Department's site remediation program. Therefore, the provisions in the rules must be consistent. It is recommended that N.J.A.C. 7:26C-1.1(a) be revised and N.J.A.C. 7:26C-1.1(c) be added, as follows: (a) "This chapter identifies the documents available to a person who participates in the remediation of a contaminated site or the assessment and investigation of a potentially contaminated site under Department oversight, and present the procedures to determine the applicable oversight documents for a particular site." (c): "The provisions of this chapter shall not prohibit a person to implement an assessment and investigation of a potentially contaminated site at risk."

COMMENT 26: Allied-Signal, Inc., E.I. du Pont de Nemours and Co., and The General Electric Company commented that the Department should make clear that not everyone conducting cleanup activities must necessarily obtain a consent order. The Commenters suggest that language be added to proposed N.J.A.C. 7:26C-1.1(b) to add the following sentence: "Nothing in this chapter shall obligate any person to consent to any administrative order."

COMMENT 27: Chevron U.S.A. Inc. suggested that N.J.A.C. 7:26C-1.1(c) should be added to read "(c) A person may conduct remedial investigations or remedial actions without a Department oversight document. This regulation is not intended to prevent, discourage or delay 'at-risk' remediation." The regulated community must have the option to conduct investigations and remedial actions

without Department oversight. Requiring Departmental oversight and a regulatory document may result in slowing down the cleanup process. Many real estate transactions, which are not subject to the Environmental Cleanup Responsibility Act, typically involve some type of environmental audit. Additionally, many Environmental Cleanup Responsibility Act applicable transactions start with pre-Environmental Cleanup Responsibility Act investigations. Many smaller cleanups can be conducted in relatively short periods of time. For example, excavating soils from a limited product spill. The regulated community recognizes that Spill Compensation and Control Act reporting requirements, monitoring well permits and other applicable regulatory requirements will still have to be met. However, the Department should not put additional regulatory impediments which can potentially delay a responsible party's remedial action.

RESPONSE TO COMMENTS 24 TO 27: The Department agrees with the idea of Chevron U.S.A. Inc.'s comment and believes the change to N.J.A.C. 7:26C-1.1(c) in response to Comment 26 above accomplishes that intent.

COMMENT 28: Chevron U.S.A. Inc. suggested a new N.J.A.C. 7:26C-1.1(d) should be added to read as follows "(d) This chapter also provides the procedures used to obtain regulatory approval for a sites compliance with applicable media cleanup standards." Real estate transactions typically require some type of environmental audit. Additionally, sites may choose to conduct at-risk cleanups. Sites undertaking at-risk remedial actions should have a regulatory mechanism available to evaluate compliance with applicable cleanup standards. Chevron U.S.A. is proposing that this regulation provide a mechanism for Department review, comment and/or approval of this data. A new subchapter, N.J.A.C. 7:26C-6, should be added to provide this opportunity.

RESPONSE: The Department agrees with the idea behind the commenter's suggestion above and will amend the rule accordingly. The regulatory mechanism suggested by Chevron U.S.A. Inc. for evaluating at-risk cleanups is the voluntary cleanup program. Therefore, a separate subchapter is not needed for these reviews and the memorandum of agreement can be used to evaluate at-risk remedial actions.

N.J.A.C. 7:26C-1.2 Certifications

COMMENT 29: Wheaton Industries, Inc. commented that the Department has not provided a rationale to justify requiring that two separate certifications accompany submissions to the Department. The certification required by proposed N.J.A.C. 7:26C-1.2(b) must be signed by "the highest ranking individual with overall responsibility for implementing the remediation of a site," a description which is ambiguous and difficult to apply. The requirement in N.J.A.C. 7:26C-1.2(c)2i to have the certification signed by a corporate vice president is inappropriate for a corporation of Wheaton's size, in which it is unreasonable to expect a corporate vice president to exercise personal oversight over, for example, all minor spill or leaking tank cleanups at all corporate facilities.

As an alternative, Wheaton Industries, Inc. recommends dropping the certification required by N.J.A.C. 7:26C-1.2(b), and directing the certification required by N.J.A.C. 7:26C-1.2(c) to be signed by a corporate officer or by any duly-authorized official with senior management responsibility including overall management of the facility or site in question. Compare N.J.A.C. 7:14A-2.4(b). By revising the certification requirement this way, the regulations would still hold a highly-ranked corporate official responsible for delivering accurate information to the Department without placing responsibility of unreasonable breadth and depth on any one senior officer of a large corporation.

COMMENT 30: Exxon Company U.S.A. recommends changing N.J.A.C. 7:26C-1.2(c)2i to read, after corporation, as follows: "... by the highest ranking individual with overall responsibility for implementing the remediation of a site." These changes are needed to prevent and/or minimize needless time delays and to clearly reflect typical corporate management authority, control and responsibility. In large corporations such as Exxon Company U.S.A., "a principal executive officer of at least the level of vice president" is not involved in the day-to-day operations or decision making of detailed actions, activities, data gathering, etc., at sites in New Jersey. The authority and responsibility for these activities are delegated to local managers (as they should be). Furthermore, typically, and in Exxon Company U.S.A.'s case specifically, Exxon Company U.S.A.'s "vice president" is located in Houston, Texas. Requiring him to sign an information and data document adds no value to the process. In most situations it will hinder the process due to time delays.

Exxon Company U.S.A. further commented that the second certification is unnecessary and overly burdensome, and it is therefore recommended that it be deleted.

COMMENT 31: Cohen, Shapiro, Polisher, Shiekman and Cohen suggested that limiting N.J.A.C. 7:26C-1.2(c) to a "principal executive officer of at least the level of vice president" is inappropriate. Many large companies have hundreds of contaminated sites throughout the country. If each site necessitated personal examination, inquiry and familiarity by an individual with the position of vice president or above, there would have to be a wholesale creation of vice presidents with the sole effect of gutting a corporation's management structure to comply with an excessive regulatory policy. The individual responsible for day-to-day operation of the facility and the individual responsible for managing the day-to-day remedial project should also be authorized to execute the N.J.A.C. 7:26C-1.2(c)2 certification.

Cohen, Shapiro, Polisher, Shiekman and Cohen further commented that given the technical and historical complexities of many sites, it is inappropriate to require such a certification. In many cases, no one will be able to certify to the absolute truth, accuracy and completeness of any information provided to the Department. Rather, the certification should provide as follows: "I certify under penalty of law that I believe the information provided in this document . . ." The intent of this section, which imposes some obligation on the certifying person to make himself or herself familiar with the underlying documentation and to verify its accuracy and reliability, is satisfied by inserting the suggested language.

COMMENT 32: Chevron U.S.A. Inc. suggested amending N.J.A.C. 7:26C-1.2(b) to read in part "I certify under penalty of law that the information provided in this document is true, accurate and complete to the best of my knowledge, information and belief. I am aware that there are civil penalties for knowingly submitting false, inaccurate or incomplete information and that it is a crime to make a false statement which is not believed to be true. I am also aware that if I knowingly direct or authorize the violation of any statute, I am personally liable for the penalties." It is unrealistic to expect that individuals exist which possess the detailed personal knowledge required to make the certification requested especially at the larger and/or older facilities. Likewise, to require individuals to sign a certification which specifies they will be committing a crime of a certain degree if they are later found to have knowingly made a false written statement, that is, the certification, creates a needless potential deterrent to the Department's overall goal to encourage voluntary participation by private parties.

Chevron U.S.A. Inc. also suggested to amend N.J.A.C. 7:26C-1.2(c) to read in part "I certify under penalty of law that I am familiar with the information submitted herein and that based on my inquiry of those individuals immediately responsible for obtaining the information and to the best of my knowledge, information and belief the submitted information is true, accurate and complete. I am aware that there are civil penalties for knowingly submitting false, inaccurate or incomplete information and that it is a crime to make a written false statement which is not believed to be true. I am also aware that I knowingly direct or authorize the violation of any statute, I am personally liable for the penalties."

Chevron U.S.A. Inc. further suggested revising N.J.A.C. 7:26C-1.2(c)2i to read "For a corporation, by a principal executive officer or at least Vice President or officer duly authorized by a corporate resolution;" For the larger corporations (especially multi-national ones) whose offices and officers are geographically dispersed over a wide area, it is not a simple matter to have ready access to an officer of the level of vice president who also happens to possess the kind of knowledge called for in the certification. The certification by an officer of the corporation (of a level lower than vice president) who is duly authorized by Board Resolution to so certify should be sufficient for the Department's purposes.

COMMENT 33: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company commented that this certification requirement is burdensome and unworkable for most large corporations. Many major business organizations have hundreds of environmental matters under consideration on a regular basis and employ scientists, attorneys and other professional personnel in offices throughout the country to manage these matters. It is neither possible, nor necessary, for the vice-president responsible for a large company's environmental affairs to be familiar with the details of each submission affecting a site in New Jersey. To require that the responsible vice-president personally

examine all information submitted to the Department and make direct inquiry of the "individuals immediately responsible for obtaining the information" (possibly including sampling technicians and laboratory personnel) would seriously delay site cleanups in New Jersey.

The certification requirement in N.J.A.C. 7:26C-1.2(c) should be amended to require the same type of certification currently required under the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., which provides that the submission must be signed by the "highest ranking official having day-to-day managerial and operational responsibilities for the discharging facility, who may, in his absence, authorize another responsible high ranking official to sign." N.J.S.A. 58:10A-6(f)(5). If the site is not an operating facility, the regulations should provide for certification by the corporate official having day-to-day responsibility for the corporation's remedial activities in connection with the site.

Moreover, it is inappropriate to ask a person to certify that he is aware that any false or incomplete information means he is "committing a crime of the fourth degree." The ordinary lay person would have no such understanding. The language raises significant due process questions. Moreover, it is highly doubtful that it could be a crime of any degree to knowingly submit **incomplete** information, particularly where the certification may be otherwise in support of an entirely voluntary agreement. It ought to be sufficient for the Department if the person acknowledges that there are significant civil penalties "and possible criminal sanctions" for knowingly submitting false, inaccurate or incomplete information.

It does not follow that a person who knowingly directs or authorizes the violation of a statute is necessarily personally liable for civil penalties. Where the act is undertaken in one's corporate capacity on behalf of a corporation, the violation may be solely the corporation's. The reference in the certification to "the violation of any statute" appears on the surface to be unconstitutionally vague. Overall the certification is misleading. It suggests a set of sanctions which may not be available at all. It is proposed that the language be modified to state as follows:

> "I certify under penalty of law that, to the best of my knowledge, information and belief, the information provided in this document is true, accurate and complete. I am aware that there are significant civil and possible criminal penalties and sanctions for knowingly submitting false, inaccurate or incomplete information, and that under appropriate circumstances I may be personally liable for such penalties and sanctions."

The proposed second tier certification is only possible in the case of a single entity bound to the oversight document. In the case of a multi-party response, there may be no single officer to whom such responsibility should apply. Proposed N.J.A.C. 7:26C-1.2(c)2iv should be changed to read: "For persons other than (c)2i through iii above, by any person designated by the person(s) making the submission."

RESPONSE TO COMMENTS 29 TO 33: The Department proposed that any person making a submission pursuant to an oversight document required by this chapter must include with the submission a two-part certification. The purpose of the first certification is to ensure that the highest ranking official with overall responsibility for implementing the remediation of a site has reviewed the submission to ensure that the information is true, accurate and complete. The purpose of the second certification is to ensure that a high level official of the business entity has personally examined and is familar with the information submitted and that individual, based upon inquiry of the individuals involved in preparing, believes that the information is true, accurate and complete.

This dual certification furthers the legitimate public policy of having the Department base its decisions to protect human health and the environment on complete and accurate information. Without this assurance, the Department cannot ensure the public that it will be adequately protected.

The certification language the Department proposed in this chapter is very similar to the certification language which currently exists in many of the other regulatory programs, and is identical to the certification language promulgated pursuant to the Environmental Cleanup Responsibility Act, N.J.S.A. 13:1K-6 et seq. See N.J.A.C. 7:26B-1.13. The regulated communities in those other regulatory programs have generally not experienced the problems the commenters allege will result from this proposal. The Department concludes from this that the language as proposed is reasonable to achieve the above state objectives.

There is, however, one difference between this proposal and those other regulatory schemes. In this proposal, the Department neglected to include a provision allowing another representative of the business entity to execute the certification in certain circumstances, as the Department allows in other regulatory programs. See, for example, N.J.A.C. 7:14A-1.4(b). The Department believes that this inadvertent omission, identified by several of the commenters, is the source of the major concerns expressed here. In response to this omission, the Department has amended the provision by adding the previously omitted language. However, to ensure Departmental consistency, the Department will review its various certification requirements and determine the need for future rulemaking.

COMMENT 34: The Commerce and Industry Association of New Jersey noted that there was a typographical error in that the "of" in the first line of N.J.A.C. 7:26C-1.2(c)2ii should read "or."

RESPONSE: All typographical errors have been corrected.

N.J.A.C. 7:26C-1.3 Definitions

COMMENT 35: Allied-Signal, Inc., E.I. du Pont de Nemours and Co., and The General Electric Company stated that because the oversight documents purport to govern compliance with other substantive statutes, rules and regulations, they object to changes in the definitions that go beyond the statutory and regulatory definitions applicable to the conduct as exceeding the Department's statutory authority. The Oversight Documents suggest an expansion of statutory obligations through the oversight documents beyond that authorized by the statutes in issue. Therefore, the Department ought to add the following sentence to N.J.A.C. 7:26C-1.3: The definitions of this chapter shall not abrogate or enlarge the duties and responsibilities of the party to any oversight document beyond or inconsistent with the operative definitions of the applicable statute or regulations promulgated under the applicable statute.

RESPONSE: These rules apply to the remediation of contaminated sites and to the extent that they are inconsistent with other regulations promulgated under the same statutory authorities, these rules will supersede for those activities being performed under an oversight document.

"Administrative consent order"

COMMENT 36: The Rutgers Environmental Law Clinic noted that the definition of "administrative consent order" states that, where these regulations would otherwise require an administrative consent order, the Department may decide to only require a memorandum of agreement where the responsible party is a public entity. N.J.A.C. 7:26C-1.3, 24 N.J.R. 1290. Public entities which are responsible for contamination should be subject to enforceable documents, real deadlines and meaningful requirements. Public entities are responsible parties in regard to a number of severely contaminated sites and the Department should not abandon its authority to compel performance of environmentally necessary action by those entities. See, for example, *Avers v. Jackson Township,* 106 *N.J.* 557 (1987). If a site has been determined to be a high priority site, a memorandum of agreement should not be used regardless of the identity of the responsible party. The potential harm to the environment and public health from a site is independent of the status of the responsible party. The New Jersey Department of Environmental Protection and Energy's response to that site should be just as independent of the status of the responsible party. If an administrative consent order is the otherwise appropriate document to be used under the regulations, that decision should not be different simply because a public entity is the responsible party. Memoranda of agreement must not be used for high priority sites merely because a public entity is the responsible party.

COMMENT 37: The New Jersey State Bar Association noted that under the proposed definition of "administrative consent order," the Department seems to be creating an exception for public entities which would permit such entities to operate under the terms of a memorandum of agreement as opposed to either an Environmental Cleanup Responsibility Act Administrative Consent Order or Responsible Party Administrative Consent Order, even with respect to alleged "high priority" sites. What is the basis for permitting public entities to operate under a memorandum of agreement, and not offering the same option to the private sector? Is there a guarantee of funds availability when the responsible party is a public entity?

COMMENT 38: Exxon Company U.S.A. noted that the Department has not defined "administrative order" and "memorandum of understanding" in this rule. Therefore, it is recommended that the definition of oversight document include a New Jersey Pollutant Discharge Elimination System permit. Also, reference to "memorandum of understanding" should be deleted as the term is not defined. Finally,

the Department should add the definition of "administrative order" to this rule and reference the Water Pollution Control Act (N.J.S.A. 58:10A).

COMMENT 39: The New Jersey Business and Industry Association commented that the regulations should provide a definition of the term "memorandum of understanding." Moreover, the special treatment afforded to public entities is questioned. The proposal permits the Department to grant a memorandum of understanding to public entities presumably even for high priority sites. If a memorandum of understanding is similar to a memorandum of agreement, the Department has not provided any reasons justifying why a public entity should be allowed to enter into a memorandum of understanding for a high priority site when a private entity is denied a memorandum of agreement for such a site. Such inequitable treatment would appear to be unwarranted.

COMMENT 40: The Commerce and Industry Association of New Jersey commented that the term "memorandum of understanding" should be defined. The distinction between private parties and public entities is questioned. This proposal permits the Department to issue, at its own discretion, a memorandum of understanding to public entities. If a memorandum of understanding is similar to a memorandum of agreement, the distinction created in the definition of administrative consent order should, then, be justified and explained. Presumably a memorandum of understanding would apply to "high priority" sites as well, at which private parties are not entitled to a memorandum of agreement. In addition, the term "person" includes both public and private parties.

COMMENT 41: Chevron U.S.A. Inc. suggested that the Department delete or define reference to "Memorandum of Understanding," in N.J.A.C. 7:26C-1.3. This term is not used or defined in this set of regulations. If the Department intends to include the term, then it must be defined and public comment provided.

RESPONSE TO COMMENTS 36 TO 41: Although the Department agrees that the potential harm to human health and the environment from a contaminated site is independent of the status of a responsible party, private parties and public entities have different operating constraints which warrant different control documents. A public entity uses public funds (for example, tax dollars/toll receipts) to perform cleanups. Requiring penalties and financial assurance in these cases may not serve the public interest.

The commenters seem to have misunderstood the use of the term memorandum of understanding. This agreement is analogous to an administrative consent order except for financial assurance and stipulated penalties. A memorandum of agreement is an entirely different agreement used in the case of voluntary cleanups. The Department will provide the definition of memorandum of understanding the clarification of N.J.A.C. 7:26C-1.3 and 5.4.

The Department does not consider New Jersey Pollutant Discharge Elimination System permits oversight documents for the purposes of these rules because the scope of such permits is not the same as an administrative consent order or a memorandum of agreement.

"Commissioner"

COMMENT 42: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company commented that the definition of Commissioner is proposed to include "his or her authorized representative." There is no explanation how the Commissioner in fact delegates authority or any limitations as to whom that authority is delegated. Certain decision making, such as may arise in dispute resolution, or in the determination as to whether departmental action is final agency action, requires the action of the Commissioner and only the Commissioner. Where the authorized representatives of the Commissioner is charged with responsibility, that person would be acting with the authority of the "department." The Commissioner should be defined as simply the Commissioner of the Department of the Environmental Protection and Energy without reference to the phrase "or his or her authorized representative."

RESPONSE: Pursuant to 13:1D-1 et seq., the Commissioner may delegate to subordinate offices or employees in the Department such of his powers as he or she may "deem desirable." Therefore, the term "his or her authorized representative" is appropriately placed in this definition. The Commissioner cannot be expected to be the sole decision maker for the numerous contaminated sites in New Jersey. If the Commissioner did not delegate such authority, responsible parties might criticize the Department for the delays that would occur waiting for critical decisions to be handed down from the Commissioner's office.

"Contaminant"

COMMENT 43: Cohen, Shapiro, Polisher, Shiekman and Cohen objected to the use of the term "pollutant" without the modifier "hazardous" in this definition, because they understand the thrust of these rules to be the remediation of conditions which are hazardous to human health or the environment. "Pollutant," as defined by the Water Pollution Control Act, includes a much broader range of constituents than it would appear that the Department intends to address through its oversight program. For instance, by this definition, "contaminant" could include relatively innocuous constituents such as Total Suspended Solids or Biological Oxygen Demand. The impact of the oversight rules should be reserved solely for those constituents that are truly and consistently hazardous. Therefore, they recommended that the definition be revised: " 'Containment' means any discharged hazardous substance, hazardous constituent, hazardous waste or hazardous pollutant."

COMMENT 44: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company commented that the Department proposes to encompass within the defined term not only "hazardous" substances and wastes regulated under the Spill Compensation and Control Act and the Solid Waste Management Act, but any "pollutant" under the Water Pollution Control Act. Since many of the programs, such as Environmental Cleanup Responsibility Act and the Spill Compensation and Control Act, are limited to "hazardous substances," the definition of "contaminant" in an oversight document may suggest that the party is obligated beyond what the statute requires. The Department does not have such authority.

RESPONSE TO COMMENTS 43 AND 44: As discussed in more detail above, the Department has promulgated these rules pursuant to a number of environmental laws. One set of circumstances generally triggers multiple environmental statutes. Rather than to require a person to go through each of the regulatory programs separately, the Department's objective was to establish a single-step, comprehensive site remediation program which will provide full remediation compliance for the regulated community with respect to all such environmental laws. In order to accomplish this objective, the Department combined within the definition of "contaminant" all of the various substances identified within the State's site remediation laws.

Several commenters suggested that the Department limit the scope of this program as it relates to pollutants under the Water Pollution Control Act by only including "hazardous" pollutants. The Water Pollution Control Act does not define "hazardous pollutant," as the commenter suggests, based upon a general statement of a pollutant's potential to be "hazardous" to human health and the environment, but rather on a list of pollutants which by legislative policy are determined as hazardous. This statutory list does not include all pollutants that may in fact be "hazardous" to human health and the environment. The actual contaminants which become the focus of a particular remediation will of course depend on the specific circumstances of the case.

The Department's experience has been that the majority of substances which drive cleanups at contaminated sites are in fact on the list of hazardous substances promulgated at N.J.A.C. 7:1E. To the extent that a person wants a Department sign-off of the remediation under all of the applicable environmental laws, however, all contaminants at the site would have to be investigated.

In response to several of the comments received on this definition, the Department has modified the definition to make it clear that contaminant means only the following substances if discharged: hazardous substances, hazardous constituents, hazardous wastes and pollutants.

"Contaminated site"

COMMENT 45: The New Jersey Business and Industry Assocation commented that some accommodation should be made in this definition to the limitation imposed by the New Jersey Superior Court, Appellate Division limiting the Department's discretion in Environmental Cleanup Responsibility act cases in regard to off-site contamination.

RESPONSE: Between the time when the commenter submitted this comment and the Department's response, the New Jersey Supreme Court reversed the Appellate Division's decision. See, *In re: Adoption of N.J.A.C. 7:26B,* 128 *N.J.* 442 (1992).

COMMENT 46: Cohen, Shapiro, Polisher, Shiekman and Cohen suggested that the term "contaminated site" is not necessary and should be deleted. The term "area of concern" should be used instead. The commenter believes that the term "contaminated site" could adversely impact the relationship between a landowner and potential lender or

transferee. For example, an off-site area overlying a contaminated groundwater plume would presumably be a "contaminated site" under the definition. Thus, a landowner located one-half mile from the source of the contamination might find its property designated as a "contaminated site" because the groundwater plume underlies its site. Such a definition could give rise to unnecessary problems in dealing with lenders or purchasers. The commenter suggests that "area of concern" be defined as: "The site or part of the site required to be addressed by one or more of the statutes under whose authorization these rules are promulgated, which is or is reasonably believed to be affected by a discharge."

COMMENT 47: The New Jersey State Bar Association commented that the proposed definition of "contaminated site" includes "environmental media which contain contaminants", as well as "all contamination." What is the intended distinction between these two elements of the definition? Also, the reference to "any applicable clean-up standard" seems to provide for the potential applicability of clean-up standards which are either more or less stringent than those currently proposed by the Department. Is this the intent?

COMMENT 48: Exxon Company U.S.A. commented that the definition of contaminated site differs from the definition in the proposed media Cleanup Standards (N.J.A.C. 7:26D) in that it includes off-site areas. In the preamble to this rule, the Department often groups the proposed Oversight Rules (N.J.A.C. 7:26C), Cleanup Standards (N.J.A.C. 7:26D) and Technical Requirements (N.J.A.C. 7:26E) together and refers to the three as "the core of the Departments Site Remediation Program" (24 N.J.R. 1281). The Department also refers to the proposed Cleanup Standards as providing "clearly articulated, predictable levels to which contaminated sites must be remediated" (24 N.J.R. 1283). Therefore, the definition of "contaminated site" in this rule should be identical to that in the proposed Cleanup Standards so that the levels are applied in the manner that they were derived.

It is recommended that the following language, "... and includes all contamination at an industrial establishment facility or other site and all contamination which is emanating, or which has emanated, therefrom," be deleted from the definition of "contaminated site" to be consistent with the proposed Cleanup Standards and to reflect the fact that a person cannot remediate another person's property.

COMMENT 49: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company commented that the Department defines the term "contaminated site" to include off-site contamination emanating from the site (an issue currently before the New Jersey Supreme Court under the Environmental Cleanup Responsibility Act), and would obligate a party to remediate contaminants that were released from the site by parties completely unconnected with the present owner and operator. The phrase "and all contamination which is emanating, or which has emanated, therefrom" raises substantial legal and policy issues. The underlying statute does not authorize the Department's expansive definition and this language should be deleted. Rather, in a specific oversight document, the parties ought to consider whether the Department has any authority to compel investigation or remediation of such scope.

COMMENT 50: Atlantic Electric noted that N.J.A.C. 7:26C-3 applies to "contaminated sites." The term "contaminated site" is broadly defined to include any contamination at an industrial establishment, facility or other site, see 24 N.J.R. 1290, column 2. Consistent with the intent of the regulations, it would be appropriate to clarify that cleanup of routine spills that occur are not intended to be subject to the memorandum of agreement procedure. Similarly, the Company requests a clarification that cleanup of discharges of dielectric fluid from accidents involving Company owned electric equipment typically located on utility poles throughout southern New Jersey would not trigger the need for a memorandum of agreement.

COMMENT 51: Hoffman-La Roche, Inc. commented that "contaminated site" should be defined the same as in N.J.A.C. 7:26D, Cleanup Standards for Contaminated Sites.

COMMENT 52: Chevron U.S.A. Inc., suggested that the contaminated site definition should be revised to read " 'Contaminated site' means those portions of environmental media that contain one or more contaminants that exceed any applicable cleanup standard which were caused by a discharge, as defined by the applicable enabling statute." The proposed cleanup standards specifically address only those contaminants that are the result of a "discharge." "Discharge" is defined differently in each of the enabling statutes and is specific as to environmental media, action and result.

RESPONSE TO COMMENTS 46 TO 52: The Department agrees with the comments that the same definition of "contaminated site" be used in all of the rules (Procedures for Department Oversight of the Remediation of Contaminated Sites and Technical Requirements for Site Remediation). The Department has modified the appropriate definitions to implement this objective.

Wheaton Industries, Inc. suggested deleting the language in the definition concerning "contamination which is emanating, or which has emanated, therefrom" on the basis that "a person cannot remediate another person's property." In New Jersey, a person otherwise liable for contamination not only can but also has a legal obligation to do just that, remediate another person's property. See, for example, *In re: Adoption N.J.A.C. 7:26B,* 128 *N.J.* 442 (1992) where the Supreme Court ruled that the Environmental Cleanup Responsibility Act applies to contamination emanating or which has emanated from an industrial establishment.

The Department intended no distinction between "environmental media which contain contaminants" and "all contamination." On the contrary, the Department drafted the definition in this manner in order to stress that a contaminated site includes both any contaminated environmental media and any contamination which is or has emanated from the premises.

The New Jersey State Bar Association suggested that the definition of "contaminated site" was unnecessary since the rules contained a definition of "area of concern." The contaminated site is the larger geographic unit which may include one or more areas of concern.

While sensitive to the relationship between a landowner and a potential lender or transferee, the Department cannot ignore the fact that if a site is contaminated, even if the source of the contamination is off site, it poses a potential threat to human health and the environment and should be remediated. To suggest otherwise by calling it something else could be misleading.

"Decision document"

COMMENT 53: Chevron U.S.A. Inc. suggested that the definition of decision document definition should have the term "and risks posed by conditions at the site" deleted. The proposed Cleanup Standards, N.J.A.C. 7:26D, provide cleanup standards for contaminated sites. The standards are, for the most part, risked based. As most sites will use the criteria as action levels and cleanup standards there is no need for this requirement in the definition of decision document. Additionally, there should be a distinction made between identifying and quantifying risks. If the Department does require a discussion of risks posed by conditions at the site it should be limited to identification of the potential risks.

COMMENT 54: The New Jersey Business and Industry Association voiced concern regarding the scope of the decision document regarding the selection of remedial actions. The standard Environmental Cleanup Responsibility Act Administrative Consent Order set forth in Appendix B suggests in Section VI that the Department shall select a remedial action. Historically, the Department has only approved a remedy selected by the Environmental Cleanup Responsibility Act-ordered party. Department selection of a remedy would result in an entirely different, unauthorized, and unwelcome intrusion into the already slow and cumbersome Environmental Cleanup Responsibility Act process.

COMMENT 55: Exxon Company U.S.A. stated that the Department has proposed Cleanup Standards based on a risk analysis to ensure adequate protection of human health. The requirement that a decision document summarize "risks posed by conditions at the site" then, is meaningless. The Department has clearly defined that risk for residential standards and non-residential surface soil standard, and set cleanup standards on what it considers an acceptable level of risk. This requirement, then, should only apply to alternate cleanup standards (other than nonresidential surface soil standards) and deferrals, where the risk is less defined. It is recommended that "and risks posed by conditions at" be deleted so that it reads: "Decision document means a document issued by the Department ... the decision document summarizes the history and characteristics of the site...."

COMMENT 56: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company commented that this definition, modeled on Comprehensive Environmental Response Compensation and Liability Act decision making, is unnecessary for most sites, particularly Environmental Cleanup Responsibility Act sites as to which there is no statutory mandate requiring consideration of alternatives. The definition creates confusion as to whether such a document is required or mandated

or whether the Department will use one in every case, including the most simple cases. The definition itself is merely descriptive of something which the Department might do and is unnecessary to an understanding of the scope of the oversight document. Accordingly, it is suggested that the definition be deleted. Further, the Comprehensive Environmental Response Compensation Liability Act decision document is the subject of public comment. It is unclear whether the various decisional documents the Department will create will go through public comment, since they are not envisioned by most of the underlying statutes to which this rule purports to apply. As such, it is beyond the Department's authority to require one for each site.

RESPONSE TO COMMENTS 53 TO 56: The Department has determined that the inclusion of a decision document in the remedial process makes sense for several important reasons. The purpose of such a document is to provide the public with the basic information and a narrative of the process which led to a particular action at a site without having to perform a detailed review of the files on a particular site. The document is prepared by the Department, not the responsible party, thus the Department will have a "written record" of the decision making policy for a particular site. Although the process is modeled after Comprehensive Environmental Response Compensation and Liability Act, it is clearly not a Comprehensive Environmental Response Compensation and Liability Act document and, therefore, public comment is not required. The Department drafts the decision document and does so based on its choice for the appropriate remedial action. This does not preclude a responsible party from presenting its case for a particular remedial action plan. This is how the Environmental Cleanup Responsibility Act program has operated. The administrative consent order as proposed in Appendices B and C does not change the way the Department deals with remedial action decisions. Clearly the Department has always had the ultimate responsibility for remedial selection. This process is now more clearly articulated in the rule.

The "risks" posed by a site that are referenced in the definition are those risks which originally gave cause for concern. For example, if there was a discharge from a tank that threatened a potable well, there would be risks posed to those individuals who used the well. Remediation would be necessary. The decision to remediate was triggered by the discharge from the tank. The remedial alternative as well as the site's priority would be impacted by the risk associated with use of the well. This initial risk would be indicated in the Decision Document. The same can be said for deferrals. Any and all information on risk should be evaluated by the Department if anything other than a final, permanent remedy is employed to the accepted unrestricted use cleanup standards at a site. If qualitative and quantitative information is available, the appropriate information will be referenced in the document. There is no apparent reason to limit the public's exposure to such information.

"Discharge"

COMMENT 57: Chevron U.S.A. Inc. suggested that the definition of discharge should be revised to read "A release as defined in the enabling statute." As previously commented, the Spill Compensation and Control Act, the Water Pollution Control Act and the Environmental Cleanup Responsibility Act contain different definitions of discharge. Where the Legislature was precise in definition, the rules should not be liberally construed to address actions or damages not specifically contemplated in the enabling legislation. For example, in N.J.S.A. 58:10-23.11b, "discharge" means any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of hazardous substance into the waters of the State or onto lands from which it might flow or drain into said waters, or into waters outside the jurisdiction of the State when damage may result to the lands, waters or natural resources within the jurisdiction of the State.

COMMENT 58: Hoffman-La Roche, Inc. commented that "discharge" should be defined consistently with other environmental regulations. Also, building interiors are not waters or lands of the State and should be deleted from the definition.

COMMENT 59: Exxon Company U.S.A. noted that as stated in the preamble to this rule, "a wide range of statutory programs are involved in the remediation of contaminated sites in New Jersey (24 N.J.R. 1281). In proposing this rule, the Department is coordinating its "oversight of these activities into a single, comprehensive, and coordinated structure ... (so that) all remediation is conducted in a manner consistent with prevailing technical requirements and achieves the applicable Cleanup Standard" (24 N.J.R. 1281-1282). While several aspects of the different Statutory programs for site remediation can be compiled into a "single, comprehensive, and coordinated structure," the trigger for the program cannot. In site remediation, the trigger is an unpermitted discharge. Each statute has its own definition of "discharge," unique to its regulatory area. Therefore, the use of one definition of "discharge" when outlining Department oversight is inconsistent with the enabling statutes. It is recommended that the definition be revised, as follows: "discharge means any act defined as a discharge pursuant to the statutory program under which the Department is regulating cleanup of the contaminated site. A discharge does not include a discharge pursuant to and in compliance with a valid State or Federal permit.

COMMENT 60: Cohen, Shapiro, Polisher, Shiekman and Cohen objected to the proposed definition of "discharge" because it is not consistent with other definitions of that term provided in the statutes that give rise to these Oversight Rules. In fact, some of the confusion stems from the fact that "discharge" is defined differently in several statutes. Unless and until the Legislature revises these definitions to make them consistent, there will continue to be uncertainty in its application. Pursuant to the Underground Storage Tank Act, "discharge" means "the intentional or unintentional release by any means of hazardous substances from an underground storage tank into the environment." N.J.S.A. 58:10A-22.c. Under the Spill Compensation and Control Act, "discharge" means "any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of hazardous substances into the waters or onto the lands of the State, or into waters outside the jurisdiction of the State, when damage may result to the lands, waters or natural resources within the jurisdiction of the State." N.J.S.A. 10-23.11b. Additionally, we note that none of the statutes defines "discharge" expressly to include the interiors of buildings. It is entirely inappropriate that these regulations extend the Department's oversight to building interiors when neither the Spill Compensation and Control Act, the Water Pollution Control Act or any other statute authorizes this vast extension of authority. A discharge of gasoline from an underground tank simply does not authorize the Department either to issue an administrative order or require the responsibility party to execute an administrative consent order which would obligate the party to investigate the beams in the factory on the subject site. The proposed definition most closely resembles that under the Spill Compensation and Control Act, but it includes an additional phrase—"hazardous constituent, hazardous waste or pollutant"—that is not contained in any other statutory definition of this term. Moreover, the concepts of "hazardous constituent," "hazardous waste," and "hazardous pollutant" are already included within the definition of "contaminant" in the proposed rules. Thus, at the least, the addition of this phrase is redundant. The inconsistency of the statutory definitions is difficult to resolve, and given the wide variety of meanings which the Legislature has assigned to the word "discharge," we do not see an easy way to provide one universally-applicable definition in these regulations. A more appropriate means of handling this dilemma would be to reference the various statutory definitions of the term and indicate that the definition of "discharge" will depend, in any given case, on the definition of that term in the statute under which the cleanup in question is authorized. In the absence of an applicable statutory definition, we suggest that the definition under the Spill Compensation and Control Act (N.J.S.A. 58:10-23.11b) would be most appropriate, with the addition of the last clause in the proposed rule to address permitted discharges. Thus, our recommendation for this definition is: "Discharge" has the same meaning as provided within the statute which authorizes the cleanup, except that "discharge" does not include a discharge pursuant to and in compliance with a valid State or Federal permit. In the event that the authorizing statute does not define the term "discharge," the term will have the same meaning as provided under N.J.S.A. 58:10-23.11b, as modified herein to exclude discharges pursuant to State or Federal permit.

RESPONSE TO COMMENTS 57 TO 60: The Department received a wide range of comments on the definition of discharge. To put these comments in the appropriate context it is important to review the relevant statutory definitions of discharge.

The Underground Storage of Hazardous Substances Act, at N.J.S.A. 58:10A-22c, defines discharge as "the intentional or unintentional release by any means of hazardous substances from an underground storage tank into the environment."

The Water Pollution Control Act, at N.J.S.A. 58:10A-3e, defines discharge as "any intentional or unintentional act or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying

or dumping of a pollutant into the waters or onto the lands or into wells from which it might flow or drain into said waters or into waters or onto lands outside the jurisdiction of the State which pollutant enters the waters of the State. 'Discharge' includes the release of any pollutant into a municipal treatment works."

The Spill Compensation and Control Act, at N.J.S.A. 58:10-23.11b, defines discharge as "any intentional or unintentional act or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of a hazardous substance into the waters or onto the lands of the State, or into waters outside the jurisdiction of the State when damage may result to the lands, waters, or natural resources within the jurisdiction of the State."

The Environmental Cleanup Responsibility Act, *N.J.S.A.* 13:1K-6 et seq., does not define discharge, contrary to the assertion of Allied-Signal, Inc., E.I. du Pont de Nemours and Co., and the General Electric Company.

For the purposes of these rules, particularly given the statutory mandates for the liberal construction of these statutes for the general health, safety, and welfare of the people of this State (see, for example, N.J.S.A. 58:10-23.11x and N.J.S.A. 58:10A-12), these definitions can and should all be read together. This is particularly so since a discharge triggers the requirements of more than one, and generally multiple, statutory remediation programs.

The Department's challenge, then, was to fashion this legislative patchwork approach into a functional garment of whole cloth. To accomplish this, the Department included all of the "substances" identified in the various statutes: hazardous substances (Underground Storage of Hazardous Substances Act), which include hazardous wastes and hazardous constituents (Spill Compensation and Control Act and Environmental Cleanup Responsibility Act), and pollutants (Water Pollution Control Act).

The Department has reevaluated the proposed definition of discharge in light of the above noted statutory definitions of "discharge" and the above comments. The last sentence in the proposed regulatory definition: "A discharge does not include a discharge pursuant to and in compliance with a valid State or Federal permit[,]" does not appear in any of the applicable statutory definitions. The Department, therefore, has deleted this sentence from the rule.

That such a change is in fact consistent with the statutory construct of this term can be illustrated by the analysis of one statutory example. After defining a discharge, N.J.S.A. 58:10-23.11bh, the Spill Compensation and Control Act then prohibits discharges of hazardous substances, unless the discharge is "pursuant to and in compliance with the conditions of a Federal or State permit." N.J.S.A. 58:10-23.11c. Under this statutory scheme, a discharge of a hazardous substance pursuant to a permit remains a discharge under the Spill Compensation and Control Act, it is, however, not a prohibited discharge.

A discharge does not have to originate on the contaminated site undergoing remediation for these rules to apply to the contaminants from that discharge which may have moved onto the site from another location.

The Department is still evaluating the comments concerning the inclusion of express clarifying language in the definition of discharge referencing interiors of buildings. For this reason, the Department is not adopting this part of the proposal at this time. The Department addresses this issue further, however, in the following response.

"Environmental medium"

COMMENT 61: Colonial Pipeline Company commented that the definition of environmental medium is all encompassing. Either delete "structures" or define those which are likely to be considered an environmental media of concern. For example, a full and operational tank subject to the Underground Storage of Hazardous Substances Act, tested to be safe and sound, could be considered an "environmental medium."

COMMENT 62: Cohen, Shapiro, Polisher, Shiekman and Cohen commented that the definition of environmental medium includes the term "structure." Simply put, a structure is not an environmental medium. Moreover, these proposed regulations contain no definition of the word "structure." Is an underground tank a structure? Is a fence post a structure? Is a garage a structure? Is an unoccupied shed a structure? Is an above ground tank a structure? If a structure is an environmental medium, then the Department presumably proposes to regulate virtually all activities which take place within any structure within the State of New Jersey. We suggest that the term "structure" be removed from this definition.

COMMENT 63: Chevron U.S.A. Inc. commented that the definition of environmental medium should be revised to read "... means any component such as soil, air, sediment, ground water or surface water addressed by applicable, enabling statute for that site. Environmental medium is referenced in the definition for "discharge" and should be defined as a function of the appropriate "discharge" definition. A "structure" is not a regulated environmental media under most of the enabling environmental statutes.

COMMENT 64: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company commented that most environmental statutes do not prescribe specifically that building interiors are part of the environment" to be addressed by that particular statute. Moreover, the term "structures" is not within the ordinary common understanding of the phrase "environmental medium." The definition is at worst misleading and at best is a basis for overreaching. The word "structures" should be deleted.

COMMENT 65: Hoffman-La Roche Inc. commented that structures are not naturally occurring environmental media and should be deleted from the definition. In fact they seriously question what statutory authority the Department asserts to declare a spill in a building interior to be a discharge to the environment. They feel these definitions greatly exceed any statute they are aware of and, as such, are *ultra vires.*

COMMENT 66: Exxon Company U.S.A. commented that "buildings" and "structures" are not natural resources and should not be included in this definition. These are regulated under Occupational Safety and Health Administration. Therefore, the word "site" should be added to the definition, as follows: "Environmental medium means any site component such as soil, air, groundwater or surface water."

Exxon Company U.S.A. further commented that environmental medium means any component such as soil, air, sediment, structures, groundwater or surface water. The definition in this rule should be consistent with the language in the proposed Cleanup Standards.

RESPONSE TO COMMENTS 61 TO 66: The Department included "structures" in the definition of environmental medium for three very important reasons. First, any structure at a contaminated site may act as a source or reservoir of contaminants that may subsequently be released in an uncontrolled manner into the environment. As such, the contaminants pose a legitimate concern for the Department in cleaning up and removing contaminants which post an unacceptable risk to human health and the environment. An example of this would be a building interior floor on which polychlorinated biphenyl containing oil has spilled in a setting which includes regular pedestrian traffic across the oil covered floor prior to exiting the building. A likely result may be the movement of the polychlorinated biphenyl contamination outside, increasing the likelihood of subsequent exposure to other individuals and other parts of the environment. In this way, the floor of the building (that is, the structure) can act as part of the exposure pathway from a source to sensitive endpoints (for example, humans who come in contact with the soil outside the building or the soil itself).

Second, it is clear that a spill of certain contaminants inside a structure may work their way through the walls or floors of the structure into the ambient environment. See, for example, *Amland Properties Corp. v. Aluminum Co. of America,* 711 *F. Supp.* 784 (D. N.J. 1989). Because of the threat to human health and the environment that such situations pose, the Department was given the authority to spend public funds to cleanup and remove any hazardous substance in order to prevent an imminent discharge and to cleanup and remove hazardous substances which are not satisfactorily stored or contained. N.J.S.A. 58:10-23.11fb. It is sound public policy to act to prevent the uncontrolled release of such contaminants into the environment, rather than being forced to react once a discharge has occurred.

For a person to obtain the Department's approval for the remediation at a contaminated site, that person must conduct the same remediation which the Department would conduct if it were using public funds. This ensures that once the remediation is completed, whether by the Department or a third party, no additional remediation is necessary to meet the statutory requirements to adequately protect human health and the environment. A person performing remediation under an oversight document pursuant to this chapter must, therefore, cleanup and remove any such contaminants which pose an unacceptable threat as defined by the Department.

Third, structures, particularly buildings, present important concerns in the State's efforts to revitalize the inner cities consistent with the State Master Plan. This is readily apparent in the increasing number of conversion of former industrial facilities to residential and other uses.

This issue frequently arises when a developer seeks the Department's approval for the residential conversion of an abandoned building, that is, a structure, with contamination above the acceptable levels.

In addition, the Environmental Cleanup Responsibility Act, N.J.S.A. 13:1K-6 et seq., includes an indication of the position that the Legislature has taken on this public policy. The Environmental Cleanup Responsibility Act specifically addresses this issue and requires the Department to adopt regulations "for the detoxification of an industrial establishment, including buildings and equipment...." N.J.S.A. 13:1K-10a. This specific statutory reference to buildings and equipment is consistent with the sound public policy concerns articulated in the first two points above.

It is essential, therefore, in developing a set of rules which address the full gamut of statutory remediation programs for the Department to require the cleanup and removal of a contaminant on any structure which fits within the context of the discussion above. Any resolution of this issue by deleting structure from the definition, as the commenters suggest, would be a derogation of the Department's statutory obligation to perform or oversee the remediation of contaminated sites in order to protect human health and the environment.

The statements by Cohen, Shapiro, Polisher, Shiekman and Cohen that "[s]imply put, a structure is not an environmental medium[,]" and by Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company that " 'structures' is not within the ordinary common understanding of the phrase environmental medium[,]" underscore the need for the Department to provide sufficient detail in regulatory definitions, particularly when the Department intends, consistent with clearly articulated public policy, for certain definitions to vary from the otherwise ordinary meanings.

Furthermore, as the discussion above illustrates, there is absolutely no reason to limit "environmental medium" to naturally occurring components, as several of the commenters suggested. The Department's intent in defining environmental medium is not merely to list those aspects of the environment which need to be cleaned up in and of themselves, but also to identify those components of the environment which function as pathways from a source to a receptor.

The Department believes that this discussion, along with the treatment of this issue in the rules, is not focused on regulating work-place exposure. As a result, the public policies supporting the Department's treatment of structures here is consistent with, and not preempted by, the Occupational Health and Safety Act.

COMMENT 67: The New Jersey Builders Association, Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company questioned whether a full and operational underground storage tank which tested safe could be considered an "environmental media."

COMMENT 68: The New Jersey State Bar Association commented that since environmental medium is referenced in the definition of discharge, that the phrase should be defined as a function of the appropriate discharge definition.

RESPONSE TO COMMENTS 67 AND 68: Such a tank would be a potential source of contamination and not an environmental medium. Environmental medium is not referenced in the definition of "discharge." The Department does wish to note that environmental medium is used in the definition of contaminated site, which is defined as meaning all portions of the environment that contain one or more contaminants at a concentration which exceeds any applicable cleanup standard. The Department believes that these two definitions are consistent.

COMMENT 69: American Cyanamid Company commented that the definition of environmental medium should be consistent with the definition of contaminated site and both should be consistent with the language in the proposed Cleanup Standards and should therefore be revised to read as follows: environmental medium means any site component such as soil, air, groundwater or surface water.

RESPONSE: The Department does not believe it is necessary to refine the definition of environmental medium to reference "site components." The Department believes that the definition of contaminated site, which is used to define circumstances when the Procedures for Department Oversight of the Remediation of Contaminated Sites and Technical Requirements for Site Remediation will apply, adequately addresses the concept of on-site and off site contamination.

"Feasibility study"

COMMENT 70: The New Jersey State Bar Association commented that the proposed definition of "feasibility study" sets forth in some detail the rationale for requiring feasibility studies, as well as the interplay between a feasibility study and a remedial investigation. Because many of the concepts set forth in the definition could be subject to fairly broad interpretation, as, for instance, the following phrases: "the feasibility study involves an analysis for engineering, scientific, institutional, human health, environmental and cost factors . . . ," would it not be more useful and less confusing just to refer to the required contents of the feasibility study set forth in proposed N.J.A.C. 7:26E-5.1.

A "focused" feasibility study will reduce the number of alternatives evaluated during the initial screening process. A focused feasibility study will allow for a more efficient alternatives evaluation of remedial processes for common contaminants.

RESPONSE: The definition of feasibility study does reference the proposed Technical Requirements for Site Remediation.

"High priority site"

COMMENT 71: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company commented that the definition of a high priority site as used by the Department is at variance with the requirements of the Legislature to prioritize sites and establish an enforcement priority.

COMMENT 72: The New Jersey State Bar Association commented that the differential treatment accorded to high priority cases is exacerbated by the failure of the Department to define exactly what a "high priority site" is in the proposed regulations. The preamble to the proposed regulations notes simply that "high priority sites" are those which "may pose an immediate or acute risk" (24 N.J.R. 1282, second column). These sites, in turn, will be placed on a list and prioritized "in terms of the severity of the potential risk to human health or the environment posed by each site." *(Id.)*

COMMENT 73: The Chemical Industry Council of New Jersey commented that the Department should enunciate the factors which it will consider in deciding whether a site is a "high priority site" as opposed to a "low priority site."

COMMENT 74: Edwards & Angell commented that in light of the consequences of the designation of a site as "high priority," the Department should develop a procedure or matrix which controls such determinations.

COMMENT 75: Exxon Company U.S.A. commented that the Department has not provided a list of "high priority sites" or any methodology for ranking contaminated sites to determine which are "high priority sites." Further, the Department is making an Administrative Consent Order a requirement for high priority sites. Therefore, it is recommended that the Department publish procedures for classifying a site as "high priority" and revise the definition, as follows: "High priority site means a contaminated site that is scheduled to be remediated using public funds unless a responsible party agrees to remediate the site pursuant to this subchapter."

COMMENT 76: The New Jersey Business and Industry Association commented that the Department should provide the regulated community with a list of objective factors which will be used to decide which sites are "high priority."

COMMENT 77: Chevron U.S.A. Inc. commented that the term "high priority site" needs to be redefined to incorporate a quantifiable, objective scoring system.

Chevron U.S.A. Inc. also commented that the United States Environmental Protection Agency has already developed, promulgated and used a system to evaluate sites for this purpose. This system is promulgated under 40 CFR Part 300 of the National Contingency Plan, which has been revised in 1990. The system is used to rank sites for inclusion on the National Priority List as required by Comprehensive Environmental Response Compensation and Liability Act. Chevron is not proposing to use the United States Environmental Protection Agency ranking system; however, it can serve as a starting point for the development of a New Jersey system. The United States Environmental Protection Agency system is used to both rank facilities in relation to each other and score facilities to determine if they should be designated as National Priority List sites. As opposed to a ranking system, which is currently used by the United States Environmental Protection Agency under the National Contingency Plan, we believe that a scoring system would be preferable. Rank has little utility. Chevron is proposing that the Department create a committee to develop a quantifiable, objective system to designate high priority sites. The committee should be composed of representatives of the academic, public and regulated community in addition to Department representatives.

COMMENT 78: The Commerce and Industry Association of New Jersey commented that the definition of a high priority site is far too abbreviated to be of any use to the regulated community. Absolutely no criteria are identified which would be used to classify a site as a "high priority site." It is incumbent upon the Department to identify the objective standards which will be used to classify sites as high priority and, more importantly, to provide the regulated community with the basis upon which to object to the designation of a site as a "high priority site." In the absence of identified criteria, the Department will be allowed unfettered discretion in the designation of sites which, when considered in light of the different treatment accorded to "high priority sites", is entirely inappropriate.

The Commerce and Industry Association of New Jersey and the New Jersey Builders Association also commented that the absence of identified criteria differs, of course, from the Federal system. The hazard ranking system developed pursuant to the Comprehensive Environmental Response Compensation and Liability Act of 1980, 42 U.S.C. S9600, for example, specifies the criteria that must be evaluated in order to determine whether or not a site is a "superfund" site. This system provides adequate notice as to the elements necessary in order to denominate a site as a candidate for the expenditure of Federal funds. No equivalent system has been established in New Jersey for identifying the so-called "high priority sites." Accordingly, there is no basis upon which the owner or operator of a piece of property can even begin to determine whether or not it would qualify as a high priority site or, perhaps even more importantly, to contest that designation. This problem is exacerbated by the fact that "high priority sites" are treated differently from non-high priority sites. Sites which, for reasons unknown to the general public and to those associated with the property, may be designated as "high priority sites" will be limited to administrative consent orders. Not knowing the criteria which were evaluated to identify the site, the owner of such a site is prevented from being able to effectively dispute the designation which will cause his or her site to be subject to different, higher standards of management. The only clue provided in the proposed regulations as to what kind of sites may be "high priority" is provided in the preamble in which it is stated that sites "which may pose an immediate or acute risk are sites of particular concern." No further detail is provided as to what criteria are applied to determine how an immediate or acute risk may be posed. Moreover, the prioritization of these sites will be based on "severity of potential risk to human health or the environment posed by each site." (24 N.J.R. 1282, second column). Again, however, there is no identified standard upon which to prioritize such amorphously designated sites. In short, the proposed oversight regulations preserve to the Department unfettered discretion to segregate sites and impose additional burdens without any guidance or limitation. It is recommended that the Department formally establish explicit criteria for the designation of "high priority sites."

COMMENT 79: The New Jersey Builders Association commented that the definition of high priority site only clarifies how a site will be remediated without addressing at all the conditions for which a site would be so designated. Simply stated, there is no guidance whatsoever as to what qualifies a site as a "high priority site."

COMMENT 80: Cohen, Shapiro, Polisher, Shiekman and Cohen commented that the definition is unacceptably ambiguous, because it does not contain a time frame. Under the definition as it presently stands, the Department could schedule a site for clean up in five years, and that site would be a "high priority site." A "high priority site" should be a site which the Department will address within a finite and relatively short period of time. Otherwise, the entire impetus for the program underlying the Oversight Rules is lost. Sites should only fall within an enforcement mode once the Department has made a realistic commitment to address them within a reasonable period of time.

COMMENT 81: The Rutgers Environmental Law Clinic commented that it is impossible to determine from the definition of high priority site whether the prioritization of sites is to be based upon the harm to public health and the environment that the site might cause or whether the priority system is to be based upon the most appropriate sites for which public funds should be expended. These two goals might very well be in conflict. Public funds might be more efficiently used to clean up a large number of "less significant" environmental problems rather than a smaller number of "more serious" environmental problems even though some of the "more serious" problems are judged to be a greater threat to human health or the environment. Perhaps the Department only intends "high priority" to reflect the necessity of a greater commitment of public resources; that is, a site has become a high priority for the Department enforcement and the expenditure of public funds because there is an environmental threat and no private remediation funds are immediately forthcoming. If that is the intent, then it must be clarified. More importantly, under the proposed definition of "high priority site," a site which poses a serious threat to human health or the environment, but is being remediated with private funds, is not a "high priority site." Thus, the site would not be subject to the use of an administrative consent order and would not get the attention that it otherwise should, given the seriousness of the contamination and the threat posed by the site. "High priority sites" should be defined by the threat they pose to human health and the environment regardless of the source of funds available to undertake the cleanup. Priority must be based upon human health and environmental concerns alone. This approach would not compromise even for a moment the Department's legitimate concern regarding the use of public funds. Once the site priority is established based solely upon health and environmental concerns, the priority for the use of public funds could be independently established for those "high priority" sites for which no responsible party is currently available to undertake the cleanup. Thus, both of the Department's concerns would be addressed without any compromise on the priority of sites which will be cleaned up with private funds.

COMMENT 82: Colonial Pipeline Company commented that the process to nominate and insure that an identified site is truly of a "high" priority needs to be defined. Included should be a process to insure that the data used to determine such a finding is valid and defendable.

RESPONSE TO COMMENTS 71 TO 82: As discussed in the Summary of the rule proposal, the Department is developing a master list of contaminated sites. When completed, the Department will use the list, using a "worst first" strategy, in the order in which the Department intends to use public funds to cleanup sites. This means that when Department resources become available, the next site on the Comprehensive Site List with the highest rank is the Department's next priority and therefore will be the next site addressed by the Department.

In the absence of this list, however, the Department needs to have a basis to pursue its "worst first" priority system for remediating contaminated sites. For the limited purposes of this rule, therefore, the Department drafted a definition of priority sites to serve during this interim period. It should be noted that the Department has dropped the word "high" in its definition of the phrase. There is no substantive difference by this deletion. The Department believes the words "high" and "priority" are redundant and chose to drop the word "high." The Department believes that this approach is consistent with its legislative direction.

The Department uses a remedial priority ranking system to evaluate the threat that contaminated sites pose to human health and the environment. Through this system the Department evaluates the following contamination migration pathways: air; subsurface gas migration; ground water surface water; direct contact; biothreat; and fire and explosion. The Department is then able to assign a relative score to each of the contaminated sites. Once this is done, the Department then ranks the site relative to other known contaminated sites in New Jersey.

Simply put then, a priority site is a site which has been evaluated based on the Department's remedial priority ranking system and which is the next worse case to be addressed on the Department's list with public funds, if necessary.

Once the Department compiles the known contaminated sites in New Jersey onto the master list, the Department intends to make the list public. Prior to that time, if the Department has not already approached the responsible parties to remediate a contaminated site pursuant to an administrative consent order, then the site has not yet become a priority for the Department and may be eligible for a memorandum of agreement. Parties can come forward at any time and request a memorandum of agreement for a site that has not become a priority for the Department.

"Interim response action"

COMMENT 83: Chevron U.S.A. Inc. commented that the term "temporary evacuation and housing of threatened individuals and removal and care of wildlife" should be deleted from the definition of interim response action. They do acknowledge that temporary evacuation and housing of threatened individuals and removal and care of wildlife are potential response actions. However, they are not typical response actions and should therefore not be included as examples in the definition. If the term is not deleted the definition should be changed

to state that "in extreme cases it may also include temporary evacuation and housing of threatened individuals and removal and care of wildlife."

COMMENT 84: Exxon Company U.S.A. commented that the phrase "and removal and care of wildlife" should be deleted from the definition of interim response action. The words do not appear in the definition in the proposed Cleanup Standards.

COMMENT 85: Exxon Company U.S.A. commented that the definitions in this rule should be consistent with the language in the proposed Cleanup Standards. In Exxon's June, 1992 comments on proposed revisions to N.J.A.C. 7:26D, it was recommended that the wording "of a contaminated site or part of a contaminated site prior to final or complete remedial action for the remainder of the site, or the remainder of the contaminants of a site" be replaced with "of an operable unit." This change reflects the language in this rule and the proposed Technical Requirements which "will provide the substantive and procedural requirements for site remediation" (preamble, 24 N.J.R. 1282) and will be used to implement the Cleanup Standards.

RESPONSE TO COMMENTS 83 TO 85: The definitions used in the proposed rules which make up the package of regulations that will be used to implement the site remediation program, will be made consistent where definitions "overlap." The definition of "interim response action" will be removed from this rule. This is a result of a determination by the Department that all response actions can and often are recognized as remedial actions, regardless of when they occur or are required. For example, if a fence must be constructed to limit access to a contaminated area while the bulk of investigation is yet to be completed, the construction of the fence would be considered a remedial action as it limits exposure to contamination. Although, the fence might be removed once a more comprehensive plan for site remediation is developed, the construction of the fence produced some measure of remediation and the fact that the fence was not permanent would not affect that measure.

Regardless of terminology, the purpose of any remedial action is to protect human health and the environment. In the case of the Environmental Cleanup Responsibility Act, if there is a dangerous situation, or stabilization of an area is necessary to protect human health and the environment, a remedial action could be required by a directive or an administrative order under another statute. This would not be an efficient use of Department resources for actions at a site that already has a control document in place.

It is appropriate to indicate that a proper remedial action may be the "temporary evacuation and housing of threatened individuals and removal and care of wildlife." As is noted by one commenter, "... temporary evacuation and housing of threatened individuals and removal and care of wildlife are potential response actions," even though such actions may not be typical. The language is important to note so that a responsible party recognizes the extent of their obligations with respect to such actions. The Department's policy is that the responsible party pay its full share in the cleaning up of a contaminated site. If a responsible party has destroyed a habitat and displaced the wildlife that made its home there, that responsible party has an obligation to "right the wrong" it has created. The public should not lose the value of a natural resource due to the actions of a responsible party.

The Department does not concur that relocation is the equivalent of evacuation and housing. The language used by the Department more properly reflects the obligation of a responsible party to displaced individuals. Individuals whose homes have been affected by a responsible party have every right to a normal existence. The affected individuals should not have to "pay" for a responsible party's action. The language proposed by the Department clarifies the obligations of a responsible party.

"Multiple responsible parties"

COMMENT 86: Chevron U.S.A. Inc. commented that the definition of multiple responsible parties should be changed to "... means two or more unrelated responsible parties involved at a contaminated site." The number five used by the Department is apparently an arbitrary chosen number. Under these regulations multiple responsible parties will be given additional time to negotiate decision documents with the Department. The additional time is necessary due to the complexities associated with internal negotiations within the group. However, it takes time for even two responsible parties to complete internal negotiations. Additionally, the term "as determined by the Department" should be deleted from the definition. A responsible party must be determined by the factual evidence, providing appropriate due process, and not based on a belief by the Department.

RESPONSE: The Department is charged with the responsibility to remediate thousands of contaminated sites in the State of New Jersey. The Legislature, therefore, has given the Department the discretion to name responsible parties. The Department has determined, through many negotiations over the past years, that a manageable number of responsible parties is four. For this reason the Department has chosen to define multiple responsible parties as "five or more unrelated responsible parties."

The commenter has misinterpreted the Department's use of the phrase "as determined by the Department" as used in the definition. This phrase pertains to whether or not the responsible parties are related and does not describe their designation as responsible parties.

"Natural resources"

COMMENT 87: The Rutgers Environmental Law Clinic commented that for the purposes of these regulations, "natural resources" is defined as all land, wildlife, air, water, etc. which are "owned, managed, held in trust or otherwise controlled by the State." 24 N.J.R. 1291. State involvement in the protection of our natural resources should not be limited to merely those that are owned or managed by the State but should extend to all such resources found anywhere in the State regardless of the ownership or stewardship of those resources. The Department's mission is to protect all natural resources in the State, and this definition should be amended to reflect this clear Departmental duty.

RESPONSE: The Department did not intend, through the proposed language, to limit the natural resources that would fall within this regulatory definition. The Department agrees with the commenter that the Department's mission is to protect all natural resources in New Jersey. To clarify this definition and to ensure that the regulatory definition more clearly tracks the Department's intent in the proposal, the Department has deleted the potentially limiting language in the definition of "natural resources."

COMMENT 88: Exxon Company U.S.A. commented that the language "and other such resources" in the definition of natural resources is overly vague. Recommend that it be deleted and the Department list the other resources.

RESPONSE: The point the Department was trying to make was that to the extent that the Department has jurisdiction over the "other resource" it should be included in this definition.

"Operable unit"

COMMENT 89: Exxon Company U.S.A. commented that "Operable unit means part of a contaminated site for which a discrete action comprises an incremental step towards comprehensively addressing contaminated site problems ... operable units may address geographical portions of a site, specific site problems, or initial phase of an action, or may consist of any set of actions performed over time or any actions that are concurrent but located in different parts of a site." This should be a geographical and not a functional definition. "Operable unit" should only be defined in terms of the unit itself, not based on what kind of remedial action (interim or final) is being conducted. Further, the Interim Response Action need not be consistent with the final action. Interim Response Actions are for control of imminent risk and may simply involve fencing the area. The final remedial action of the operable unit may not require fencing and is an autonomous act. Therefore, it is recommended that the language "comprised an incremental step toward "comprehensively addressing contaminated site problems" be deleted from this definition and replaced with "may be taken." The definition will then read: "Operable unit means part of a contaminated site for which a discrete action may be taken ... operable units may address ...."

COMMENT 90: Chevron U.S.A. Inc. commented that "operable unit" should be revised to read "... means part of a contaminated site in which an interim or final response action is applied. Remediation of a site can be divided into a number of operable units depending on the complexity of the problems associated with the site. Operable units may address geographical ..." The proposed definition is imprecise for use in a consent document. The Department is attempting to define both area and action in the same term which could lead to misunderstandings. Additionally, the word "comprehensively" should be removed. Interim response actions may not be comprehensive, but could be conducted at an operable unit. We agree with the operable unit concept and urge the Department to use it to provide for flexibility in conducting remedial actions.

RESPONSE TO COMMENTS 89 TO 90: The definition of "operable unit" was developed using the definition of "operable unit" which appears in Comprehensive Environmental Response Compensation and Liability Act and the National Contingency Plan. In that definition, the Federal government recognizes that actions and not just geographical boundaries can define an operable unit. According to the National Contingency Plan, "Operable units may address geographical portions of a site, specific site problems, or initial phases of an action, or may consist of any set of actions performed over time or any actions that are concurrent but located in different parts of the site." The Department concurs with this evaluation of an operable unit and has kept the definition of an operable unit consistent with the National Contingency Plan.

The National Contingency Plan also requires that a responsible party look at the bigger picture when addressing various operable units at a site. The Department has drafted its definition to be consistent with this requirement of the National Contingency Plan. The language concerning 'comprehensive" actions is there specifically to assure that less than fully effective solutions are not substituted for complete cleanups.

"Operator"

COMMENT 91: Cohen, Shapiro, Polisher, Shiekman and Cohen commented that the definition of "operator" refers to the definition of "operator" in N.J.A.C. 7:26B. There is no such definition. It is extremely important that there be an adequate definition of the term "operator," because (according to the definition of "responsible party") an "operator" is a responsible party. This means that under the Oversight Rules, an operator will be the subject of enforcement activity by the Department. Is a tenant in a contaminated industrial complex who has not contributed to the contaminated condition of the complex an operator? Is a travel agent who leases a site which was contaminated prior to the travel agency's tenancy an operator for purposes of these regulations? Is the president of the company which owns the facility an operator? Is a bank which must approve any capital expenditures by a facility an operator? Is a tenant an operator where an underground tank within the tenancy which was never used by the tenant leaks? These and many more questions must be addressed in the definition of "operator."

RESPONSE: The definition of operator has not been adopted since the Department mistakenly believed that N.J.A.C. 7:26B contained the definition of operator as indicated in the proposal.

"Oversight document"

COMMENT 92: Exxon Company U.S.A. commented that "Oversight document means any document the Department issues pursuant to this chapter to define the role of a person conducting the remediation of a contaminated site, and may include, without limitation, an administrative order, administrative consent order, directive, memorandum of understanding, or memorandum of agreement." A New Jersey Pollutant Discharge Elimination System permit is not issued pursuant to this chapter. However, its inclusion here is appropriate. The remediation of a contaminated site should be allowed to operate under a valid New Jersey Pollutant Discharge Elimination System permit and should not require an additional oversight document and all its accompanying fees. The definition of "oversight document" should then read: "Oversight document means any document the Department issues pursuant to this chapter and N.J.A.C. 7:14A to define ... and may include, without limitation, an administrative order, administrative consent order, directive, memorandum of agreement, or NJPDES permit."

RESPONSE: The term "oversight document" is defined in this rule to identify a generic term for use in the discussion of the various documents presented in the appendices of the proposed rule. An administrative order is not presented in these rules due to the varied forms it can have; however, it is mentioned as an oversight document because it can be used as such. Order is defined in the Water Pollution Control Act (N.J.S.A. 58:10A) and it is unnecessary, with respect to the content of the proposed rules, to define the term. The term "memorandum of understanding" will be defined in this rule.

The Department does not consider a New Jersey Pollutant Discharge Elimination System permit an oversight document as defined by these rules.

The proposed oversight documents and directions can be issued pursuant to the Spill Compensation and Control Act. This ability to use one or both mechanisms (oversight documents, directives) to compel a responsible party to perform work is one the Department chooses to maintain in the site remediation program.

"Person"

COMMENT 93: The New Jersey State Bar Association commented that under the proposed definition of the term "person," several references are made to "agents." "Person" is normally considered a generic reference to a variety of legally recognized entities. The definition should not be used to impute liability from one of those entities to another. Is it the intention of the Department to use the definition of the term person to impute responsible party liability to consultants and attorneys assisting a "person" in the remediation process?

RESPONSE The Department agrees and has deleted the word agent from the definition.

"Pollutant"

COMMENT 94: Cohen, Shapiro, Polisher, Shiekman and Cohen commented that the word "hazardous" should be inserted before the word "pollutant" in the definition of "discharge." For the same reason, a definition should be added for "hazardous pollutant" referring to that term as defined in the New Jersey Water Pollution Control Act.

At the same time, Cohen, Shapiro, Polisher, Shiekman and Cohen commented that the definition of pollutant under the Water Pollution Control Act is far broader than ought to be used in these regulations. For example, pollutant includes sewage, garbage, refuse, dredged spoil, wrecked or discarded equipment, rocks, sand, cellar dirt and agricultural wastes. Given the purpose of these Oversight Rules, it is inappropriate to use the term pollutant. If any reference to the Water Polution Control Act is relevant, it should be a reference to the term "hazardous pollutant."

RESPONSE: The Water Pollution Control Act does not define "hazardous pollutant," as the commenter suggests, based upon a general statement of a pollutant's potential to be "hazardous" to human health and the environment, but rather on a listing of lists of pollutants which by legislative policy are determined as hazardous. This statutory list does not include all pollutants that may in fact be "hazardous" to human health and the environment. The actual contaminants which become the focus of a particular remediation will of course depend on the specific circumstances of the case.

"Preliminary assessment"

COMMENT 95: The New Jersey State Bar Association commented that the proposed definition of "preliminary assessment" should reference the purposes and requirements of a Preliminary Assessment set forth in proposed N.J.A.C. 7:26E-3.1. This will avoid the confusion which could be generated from the broad, generic statements set forth in the proposed definition.

COMMENT 96: Exxon Company U.S.A. commented that "Preliminary assessment or 'PA' means the initial search ... to determine if further investigation concerning the document, alleged, suspected or potential release of hazardous substances is required by the Department." There appears to be a typographical error in this definition. It is recmmended that "the document" be deleted.

COMMENT 97: The New Jersey Business and Industry Association commented that the definition of preliminary assessment is unclear. Reference is made to "document" in the fourth line of this definition. There is no indication as to what document this may be. This definition should be revised.

RESPONSE TO COMMENTS 95 TO 97: The definition of "preliminary assessment" will be consistent among the regulatory initiatives associated with the Site Remediation Program. The word "document" in the definition of "preliminary assessment" is a typographical error; it should be "documented." The error was corrected on adoption.

"Remedial action"

COMMENT 98: The New Jersey State Bar Association commented that the proposed definition of "remedial action" should reference the purposes and requirements set forth in proposed N.J.A.C. 7:26E-6.1.

RESPONSE: The Department has defined remedial action because it is an important term used in the Procedures for Department Oversight of the Remediation of Contaminated Sites as well as the Technical Requirements for Site Remediation. The purpose of a definition is to describe the term. The Department does not believe it is necessary or

appropriate to cross reference the regulatory requirements of a remedial action in the definition of that term. The requirements of a remedial action are set forth in great detail in N.J.A.C. 7:26E-6.

COMMENT 99: Exxon Company U.S.A. commented that "Remedial action means those actions taken at a contaminated site ... The term includes the restoration of natural resources." The ecology-based cleanup standards have not been appropriately developed, any regulatory action at this time would be based on speculation and not sound science. In Exxon Company U.S.A.'s June, 1992 comments on N.J.A.C. 7:26D, it was recommended that subchapter 5, Ecology-based Cleanup Standards, be deleted and held in reserve until more appropriate, scientifically sound standards could be developed. Therefore the sentence, "The term includes the restoration of natural resources" is inappropriate here and should be deleted. Further, natural resources may not be "restored," as the remediation is to a health-based standard.

COMMENT 100: Cohen, Shapiro, Polisher, Shiekman and Cohen objected to the definition of remedial action insofar as it includes relocation of residents, businesses and community facilities and the restoration of natural resources. These extraordinary activities have traditionally and appropriately been the subject of ad hoc negotiations between responsible parties and regulatory agencies. If these activities are part of the definition of "remedial action," any person or entity who executes an administrative consent order would have quite literally obligated itself to relocate an entire community at the whim of the Department or to restore natural resources, though such restoration has no impact whatsoever on human health. Oversight documents should be limited to the remedial investigation/feasibility study, preliminary assessment/site investigation, interior remedial actions, operation, maintenance and monitoring, remedial designs and remediation. They should not include natural resource restoration or any form of relocation.

COMMENT 101: Chevron U.S.A. Inc. commented that the entire last sentence of the definition, "The term includes ... resources." should be deleted. Additionally, the following should be added to the end of the definition, "Remedial actions are limited to those media or natural resources specified in the applicable regulatory program for the contaminated site." The term remedial action must be defined in the context of the applicable statutory program for each site. For example, by including restoration of all natural resources or structures the definition goes beyond the statutory authority of sites subject to regulation under the Water Pollution Control Act.

COMMENT 102: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company, and Chevron U.S.A. Inc. commented that the sentence "the term includes the restoration of natural resources" should be deleted from the definition of remedial action. The commenters suggested deleting this sentence because scientifically sound ecologically based cleanup standards have not yet been developed and because natural resources may not be restored as the remediation is to a health based standard. It was further commented that the Department did not have the authority to require natural resource restoration in a normal remedial action.

RESPONSE TO COMMENTS 99 TO 102: Among the Department's statutorily mandated duties are the formulation of policies for the conservation of natural resources, the promotion of environmental protection, and the prevention of pollution of the environment. See N.J.S.A. 13:1D-9. The threat of serious, and in some cases irreversible, environmental pollution caused by unremediated contaminated sites throughout the State prompted the Legislature to mandate a systematic and consistent approach to remediation of those sites. N.J.S.A. 58:10-23.20. The restoration of natural resources is an important component in any remediation effort and the Department has the authority to require it as appropriate.

The fact that generic ecological cleanup standards do not yet exist does not mean that the Department cannot require natural resource restoration on a case by case basis. The Department's mission is to protect both human health and the environment. Thus, the restoration of natural resources should not be to a human health based standard unless that standard is also protective of the natural resources.

The Department will not require the relocation of residents, businesses or community facilities in order to restore natural resources. However, appropriate restoration activities could include the removal of solid waste, debris, pavement or other structure of man-made origin in order to rehabilitate damaged or degraded resources. Relocation is only an appropriate remedy in cases where the site is causing acute health effects and other remedies would not be effective or would require too much time to implement. Even then, the Department only views relocation as a temporary action.

By executing an administrative consent order with the Department, a responsible party has obligated itself to conduct a Remedial Investigation/Feasibility Study and to make a recommendation concerning the selection of the appropriate remedy. In the rare instance where the Department insists upon the relocation of residents as the only appropriate remedial action, the responsible party, if it disagrees, has several options available to it. First, the responsible party can propose alternatives and explain to the Department why relocation of residents is not warranted under the circumstances. If the responsible party is unable to convince the Department, the responsible party may choose not to implement the relocation alternative. If the Department brings an enforcement proceeding against the responsible party, or if the Department implements the relocation and sues for cost recovery, the responsible party may avail itself of any "good cause defense" or otherwise show that the Department's insistence on relocation is arbitrary and capricious. Thus, by executing an Administrative Consent Order a party is not automatically obligated to relocate an entire community at the whim of the Department.

COMMENT 103: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company commented that to the extent that the state is the trustee of natural resources, it has ample authority by and through which it may pursue natural resource claims under substantive Federal or State law. Therefore, the commenters suggested that natural resource restoration should not be considered a remedial action.

RESPONSE: The Department disagrees with the commenter's suggestion that because the Department has the authority to pursue natural resource claims, the Department should separate environmental remediation from the rest of the remediation process at a site. It is logical and cost effective for the Department and the responsible party to deal with remediation in a coherent and holistic way at one time. If the site is a non-priority site, the responsible party may choose to postpone restoration of natural resources. However, if the site is a priority site, the Department will generally not allow the restoration of natural resources to be bifurcated from the rest of the remedial action.

COMMENT 104: Chevron U.S.A. Inc. commented that the term remedial action must be defined in the context of the applicable statutory program for each site. As an example, Chevron U.S.A. Inc. noted that the inclusion of the restoration of natural resources or structures goes beyond the statutory authority of sites subject to the Water Pollution Control Act.

RESPONSE: In the Procedures for Department Oversight of the Remediation of Contaminated Sites as well as in the Technical Requirements for Site Remediation, the Department devised one set of standards for the remediation of environmental contamination in New Jersey. The Department was granted the authority to devise one comprehensive rule on the subject. See N.J.S.A. 58:10-23.20. The Department has the authority to deal comprehensively in a set of regulations with the overlapping problems associated with the remediation of contaminated sites. The Department specifically objects to the commenter's contention that the Department does not have the authority to require the restoration of natural resources under the Water Pollution Control Act. As stated in N.J.S.A. 58:10A-2, "it is the policy of the State to restore, enhance and maintain the chemical, physical and biological integrity of its waters, to protect public health, to safeguard fish and aquatic life and scenic and ecological values, and to enhance the domestic, municipal, recreational, industrial and other uses of water." The Department has been charged with implementing that legislative policy. This is consistent with the Federal superfund law, Superfund Amendments and Reauthorization Act, which amended the Comprehensive Environmental Response, Compensation, and Liability Act to more clearly and explicitly address the issues of natural resource damages and assessment.

COMMENT 105: The New Jersey Business and Industry Association commented on the definition of remedial action by referring the Department to its comment on the definition of decision document in Comment 54 above.

RESPONSE: The Department refers the commenter to its response to commenter's comment on decision document.

"Remedial investigation"

COMMENT 106: The New Jersey State Bar Association commented that the proposed definition of "remedial investigation" should reference the purposes and requirements set forth in proposed N.J.A.C. 7:26E-4.1.

RESPONSE: The Department has ensured that the definitions of these terms are consistent between these rules and the Technical Requirements for Site Remediation and the substance of the Technical Requirements for Site Remediation are incorporated into the body of these rules.

"Remediation"

COMMENT 107: Exxon Company U.S.A. commented that "Remediation means all necessary actions to investigate and clean-up any known or suspected discharge or threatened discharge of contaminants . . ." The proposed Cleanup Standards (N.J.A.C. 7:26D-4.3) allow for "natural remediation . . . when no long-term adverse impact to a receptor is expected." (24 N.J.R. 380). The use of the language "clean up" in this definition of remediation implies active remediation, and is therefore inappropriate. It is recommended that the term "clean up" be deleted and replaced with "mitigate" to reflect the Natural Remediation Compliance Program (N.J.A.C. 7:26D-4.3) in the proposed Cleanup Standards.

RESPONSE: The Department's use of the phrase "clean up" is intended to include both active and natural remediation; therefore, this change in the rule is unnecessary.

COMMENT 108: The Chemical Industry Council of New Jersey recommended that the term "clean up" in the definition of remediation be deleted and replaced with the word "mitigate" since remediation may not involve active cleanup. Natural attenuation and other passive responses may be appropriate.

RESPONSE: The Department does not believe that Chemical Industry Council of New Jersey's suggested modification is necessary. The word cleanup is not defined in this rule and the Department will, in the appropriate cases, accept natural remediation as the remedial action.

"Responsible party"

COMMENT 109: Wheaton Industries, Inc. commented that N.J.A.C. 7:26C-1.3 defines "responsible party" to include each owner and operator; however, not every past or present owner/operator is per se responsible for contamination at a site. For example, an owner or operator may be able to invoke a statutory defense such as "Act of God," or may be able to demonstrate that the contamination is attributable to wholly unrelated third parties for which the owner or operator is not responsible. Thus, the phrase "each owner or operator" should be omitted from the proposed definition of "responsible party."

COMMENT 110: Cohen, Shapiro, Polisher, Shiekman and Cohen commented that for the first time the Department defines the term "responsible party" to include any owner or operator. This definition will have significant impact not only with respect to the Department's enforcement initiatives but also with respect to any civil litigation commenced by private parties pursuant to the recent contribution amendments to the Spill Compensation and Control Act. By owner, does the Department mean a present owner, a former owner, or both? Is the owner of a site which is contaminated by virtue of sheet flow from an off site source a responsible party? Is the owner of a site which is contaminated by virtue of a ground water plume from an off site source a responsible party? Is the owner of a site which was contaminated prior to purchase a responsible party? Is the owner of a site which is contaminated as a result of midnight dumping by a responsible party? Is the owner of a site which has contaminated the soil but not the ground water responsible for remediation of a ground water plume under its property caused by an off-site source? Is an owner who has contaminated the ground water with heating oil also responsible for dealing with TCE in the ground water from an off-site source?

Presumably to the extent that an owner is a responsible party under any of these circumstances, it will be unable to apply to the Spill Fund for reimbursement of its clean up costs. Similar questions arise with respect to operators. A far more detailed definition of responsible party is necessary, if the Department intends to create a definition over and above the statutory definition. Until such time as the Department is able to devote sufficient resources to developing such a definition and determining the impact which such a definition would have upon the existing statutory scheme and issues such a lender liability and the impact on capital formation, we suggest that the Department limit the definition of responsible party to the language of the Spill Compensation and Control Act.

COMMENT 111: The New Jersey State Bar Association commented that since the primary statutory authorizations for these regulations are set forth in the Spill Compensation and Control Act and the Environmental Cleanup Responsibility Act, the proposed definition of "responsible party" should be "persons in any way responsible for a discharge" under the Spill Compensation and Control Act, and "owners and operators of industrial establishments" under the Environmental Cleanup Responsibility Act. In addition, it should be made clear that persons who are a party to a memorandum of agreement are not necessarily responsible parties within the meaning of the regulations.

COMMENT 112: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company commented that the term is defined at variance with the term in the Spill Compensation and Control Act and is at variance with the case law. The definition is, therefore, impermissible. The Department may not impermissibly and inappropriately expand definitions from the underlying statutes. It has never been held in New Jersey that a responsible party includes an innocent owner or operator of contaminated property with no connection to the cause in fact of the contamination. The term does not need a definition in these documents and certainly should not be given one at variance and inconsistent with law. The proposed definition should be deleted.

RESPONSE TO COMMENTS 109 TO 112: The Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq., does not define the term responsible party. The Spill Compensation and Control Act provides that "Any person who has discharged a hazardous substance or is in any way responsible for any hazardous substance which the Department has removed or is removing pursuant to subsection b of section 7 of [this act] shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs." This includes both owner and operator if they are in any way responsible for any hazardous discharge at the site. The responsible party has the right to seek contribution and damages from third parties for costs attributable to any third party. The Department defines this term in the broadest sense to ensure that the public does not have to assume the cost of remediation. Additionally, the Department cannot limit itself in this definition to the language in the Spill Compensation and Control Act or the Environmental Cleanup Responsibility Act because this rule encompasses other enabling legislation. A responsible party may be a party to a memorandum of agreement if its site is a non—priority. Priority sites require Administrative Consent Orders. The additional language is not necessary as the Department will provide clarification to subchapter 3 of these rules.

"Site investigation"

COMMENT 113: The New Jersey State Bar Association commented that the proposed definition of "site investigation" should reference the purposes and requirements of proposed N.J.A.C. 7:26E-3.3.

RESPONSE: The definition of "site investigation" will be consistent among the regulatory initiatives associated with the Site Remediation Program.

N.J.A.C. 7:26C-1.4 Liberal construction

COMMENT 114: Exxon Company U.S.A. commented that as written, N.J.A.C. 7:26C-1.4 does not make sense, and recommends that it be revised to have the same language as the Cleanup Standards (N.J.A.C. 7:26D-1.8), as follows: "These rules, being necessary to promote the public health, safety and welfare, and the protection of the environment, shall be liberally construed in order to allow the commissioner and the Department to effectuate the purposes of the law."

RESPONSE: The Department agrees with this comment. The "Liberal Construction" subparagraph shall be revised to be consistent with proposed N.J.A.C. 7:26E.

Subchapter 2. Procedures for the Identification of an Appropriate Oversight Document

N.J.A.C. 7:26C-2.1 Scope

COMMENT 115: The United States Environmental Protection Agency reiterated their endorsement of the use of administrative consent orders at high priority sites and memoranda of agreement at lower priority sites. They anticipate that use of the memorandum of agreement will increase

the willingness of facilities to expedite cleanups, which is consistent with the national goals of the Resource Conservation and Recovery Act program.

RESPONSE: The Department appreciates the United States Environmental Protection Agency's endorsement of its strategy to remediate as many contaminated sites as possible through the use of administrative consent orders at priority sites and memoranda of agreement at other sites. In addition, endorsement by the United States Environmental Protection Agency should help to allay concerns that the Department's strategy is inconsistent with Federal requirements related to remediation.

COMMENT 116: Allied-Signal Inc., E.I. du Pont de Nemours and Company and The General Electric Company commented that the overwhelming majority of sites do not present the type and nature of risks associated with National Priority List sites, and do not necessarily require all of the deliberate steps associated with site remediation of a National Priority List site. At a minimum, the voluntary program under the memorandum of agreement and the Environmental Cleanup Responsibility Act program should not in all cases be modeled after the Comprehensive Environmental Response, Compensation and Liability Act. Such decisions should be made in the first instance by the Department and the parties with respect to the site, based upon site specific considerations and an assessment of economic factors.

RESPONSE: The Department's overriding concern is the protection of human health and the environment. Its strategy is intended to ensure that sites posing the greatest risk are remediated first and completely, and that voluntary remediation of other sites is encouraged. The economic concerns of the responsible party have been considered in developing this strategy.

In the Department's experience, the case by case approach has resulted in repeated negotiation of the same issues with each responsible party, consuming the time and other resources of both the Department and responsible parties. The Department's requirements for investigation and remediation, as set forth in the standard administrative consent order, will not vary from site to site. To the extent any particular aspect is not needed at a particular site, for example, where ground water has not been impacted, the responsible party should submit documentation to the Department, which will become a part of the Department's file for that site. The Department will not require unnecessary work.

The memorandum of agreement is inherently flexible, as the person responsible for conducting the remediation determines the pace and scope of the work. The other provisions would not be affected from site to site, or party to party.

COMMENT 117: Colonial Pipeline Company said that State oversight should be reserved for those situations in which human health has been or will be immediately harmed or when a responsible party has not pursued a site assessment or cleanup. The mere presence of a memorandum of agreement, which is legally binding, penalizes responsible parties that are willing to clean up a site because of the discretionary powers given to the State. Consequently, these regulations will not result in a responsible party voluntarily performing assessment and cleanup, rather the memorandum of agreement will create an adversarial relationship.

COMMENT 118: Allied-Signal Inc., E.I. du Pont de Nemours and Company and The General Electric Company commented that though there is a general necessity for oversight documents not every site requires Department oversight and approval. Statements, such as in the summary, that "anyone conducting cleanup activities will have to comply with the requirements established," are unecessary. Frequently, specific statutes and regulations require prompt response to releases without provision for Departmental oversight.

RESPONSE TO COMMENTS 117 TO 118: Any person may clean up environmental contamination but must coordinate and obtain Department approval for such actions. N.J.S.A. 58:10-23.11f. The memorandum of agreement is a response to the needs expressed by the regulated community for Department comment on and approval of voluntary remediations. The Department has already signed approximately 400 memoranda of agreement for voluntary remedial work so the Colonial Pipeline Company's concerns that such agreements will discourage volunteers seems to be unfounded. While the memorandum of agreement preserves the State's powers of enforcement, it does not add to those powers, nor does it give the Department discretion in addition to statutory and common law.

COMMENT 119: Exxon Company, U.S.A. commented that, from a historical perspective, the Department philosophy and approach to remediation has been to: 1. Enforce the laws and rules, 2. Set the performance standard and 3. Allow the responsible party to exercise the freedom to use their judgment, expertise and innovation to achieve the performance standards. Why does the Department now want to first "approve" remediation?

RESPONSE: As noted in the prior response, any person may cleanup environmental contamination but must coordinate and obtain Department approval for such actions. N.J.S.A. 58:10-23.11f. It is at the point when a person wishes to have Departmental approval that the person must sign a memorandum of agreement. The Department's approach to remediation under an administrative consent order, or the Environmental Cleanup Responsibility Act program, has been to establish the technical standard and require the responsible party to use its judgment and expertise to propose ways to meet those standards. The Department reviews and approves or disapproves the proposal. These rules are consistent with that approach.

COMMENT 120: Exxon Company, U.S.A. asked why a responsible party needs approval from the Department to conduct remediation and must pay oversight costs. Statutes and existing rules, other than the Environmental Cleanup Responsibility Act, do not require it. The Spill Compensation and Control Act authorizes the Department to clean up and remove a discharge of hazardous substances itself or order the responsible party to do so. The Underground Storage Tank Act and rules promulgated under that Act specify corrective action so there is no reason for a responsible party to request a memorandum of agreement.

RESPONSE: A memorandum of agreement is only required where a person needs or wants Department approval. Any responsible party may proceed with a voluntary remediation consistent with these statutory and regulatory provisions without Department oversight at any non-priority site.

COMMENT 121: Exxon Company, U.S.A. asked what the incentive would be for a responsible party to request and enter into a memorandum of agreement and pay an oversight fee? The Ground Water Quality Standards and Cleanup Standards set the performance standard to be achieved, the responsible party conducts remediation in accordance with N.J.A.C. 7:26E and 7:14B and meets the cleanup standards. What would a responsible party gain by requesting a memorandum of agreement?

RESPONSE: The incentive for the responsible party to sign a memorandum of agreement is to obtain Department review and approval of the work. Purchasers or lenders may require Department approval, or there may be other business reasons for Department oversight.

COMMENT 122: Allied-Signal Inc., E.I. du Pont de Nemours and Company and The General Electric Company suggested the following change to N.J.A.C. 7:26C-2.1(b): "Nothing in this subchapter shall require that a party execute an oversight document in order to take remedial steps otherwise necessitated by federal or state statutes, rules or regulations."

RESPONSE: The Department can defer to an existing regulatory mechanism at a priority site, pursuant to N.J.A.C. 7:26C-5.3. If a person triggers a specific remediation statute, such as the Environmental Cleanup Responsibility Act or Underground Storage of Hazardous Substances Act before the Department has identified the site as a priority, the Department will generally defer to those programs for the appropriate remediation. The Department generally will not defer to these programs if there is an oversight document already in place that addresses the entire remediation. No oversight agreement is required for a site that is not a Department priority unless specifically requested. Unless the suggested provision contradicts one of the purposes of an oversight document, to be sure remedial steps necessitated by Federal and State law are taken, a party may be required to sign an administrative consent order to be sure remedial steps required by Federal or State law are taken.

COMMENT 123: Rutgers Environmental Law Clinic requested that the Department provide a disclaimer with all memoranda of agreement and in the rules putting purchasers, lenders, and others on notice that the Department does not certify performance pursuant to the agreement. Rutgers Environmental Law Clinic believes a disclaimer is necessary because in reviewing submittals under a memorandum of agreement the Department relies upon the "unsubstantiated submissions" of the applicant without independent analysis. The disclaimer should state, as well, that the Department retains all of its authority to enforce environmental and public health laws.

RESPONSE: The purpose of a memorandum of agreement is to provide a person who voluntarily remediates contamination with oversight and approval by the Department, assuring the person responsible for conducting the remediation that the work meets Department requirements. Therefore, the first part of the requested disclaimer is contrary to the intent of a memorandum of agreement. The Department is committed to the same level of review under a memorandum of agreement as the review under an administrative consent order. The Department retains all of its authority to undertake independent analysis, where it is indicated.

The proposed rules, at N.J.A.C. 7:26C-2.1(c), and the standard form of the memorandum of agreement, Paragraph IV, at Appendix A, expressly reserve the Department's enforcement authority so no additional disclaimer to that effect is needed.

COMMENT 124: Chevron U.S.A. Inc. commented that "at risk" remedial actions should be encouraged, with a regulatory mechanism to certify compliance with applicable cleanup standards. The regulated community must have the option to conduct investigations and remedial actions without Department oversight. Requiring Departmental oversight and a regulatory document may result in slowing down the cleanup process. There are many instances where the responsible party will initiate investigations and/or cleanup actions at a site without Department oversight. For example, real estate transactions, though not subject to Environmental Cleanup Responsibility Act, typically involve an environmental audit required by lending institutions, insurers or prospective purchasers. Environmental Cleanup Responsibility Act applicable transactions may start with pre-Environmental Cleanup Responsibility Act investigations. Many smaller cleanups can be conducted in relatively short periods of time, for example, excavating soils from a limited product spill. The regulated community recognizes that Spill Compensation and Control Act reporting requirements, monitoring well permits and other applicable regulatory requirements will still have to be met. However, the Department should not put the additional regulatory impediments (that is, oversight document) which can potentially delay remedial action. Once a site has conducted its own (at-risk) investigation or cleanup it may be necessary or desirable to obtain regulatory certification that the site is in compliance with applicable cleanup standards, N.J.A.C. 7:26D. The regulations should provide a mechanism for a person to submit data obtained in conformance with N.J.A.C. 7:26E, Technical Requirements for Contaminated Sites, for this regulatory certification.

COMMENT 125: Allied-Signal Inc., E.I. du Pont de Nemours and Company and The General Electric Company also commented that the Department should acknowledge that "at risk" investigation or remediation is an appropriate, and indeed desirable, activity to be encouraged and not discouraged. One of the purposes of the oversight documents is to cut Departmental delay and staffing requirements. However, because of the onerous nature of these documents, voluntary remediations will actually be discouraged and cleanups will be delayed while parties are forced to rely on defensive postures to protect their legal rights.

RESPONSE TO COMMENTS 124 AND 125: "At risk" remedial actions are unaffected by these rules. If a person wants Department review and approval for a non-priority site, that person may enter into a memorandum of agreement for that oversight. Conceivably, if work has already been done, the person could obtain the equivalent of "regulatory certification" by entering into a memorandum of agreement for review and approval of the documents that were generated.

COMMENT 126: Cohen, Shapiro, Polisher, Shiekman and Cohen commented that the memorandum of agreement should be available for any phase of the investigation or cleanup. They suggested that N.J.A.C. 7:26C-2.2(a) be revised as follows: "(a) The Department may choose to enter into an agreement with any person through which that person agrees to conduct a Remedial Investigation, Feasibility Study, Interim Response Action, Preliminary Assessment, Remedial Action, Remedial Design or Site Investigation of certain known or suspected contaminated sites. Such agreement shall be a memorandum of agreement."

RESPONSE: The Summary to the rule proposal explains that the Department is offering the memorandum of agreement "for any portion or phase of a cleanup without any further commitment by those parties to conduct the entire remediation." The Department agrees that the rule could be clarified and has amended N.J.A.C. 7:26-2.2(a) to clarify this issue.

COMMENT 127: Colonial Pipeline Company commented that responsible parties would be hesitant to move forward at any point in the remediation process until Department approval is obtained. Funding for site assessments or remediation will be reduced because of increased legal costs needed to review and implement a memorandum of agreement or Administrative Order, rather than fund assessment or cleanup expenditures, and the additional consulting needs to implement various sections of the proposed technical procedures.

RESPONSE: A memorandum of agreement will only be used for non-priority sites where the person responsible for conducting the remediation requests it. Therefore, remediation can be done without incurring legal costs for reviewing the agreement. If a person wishes to have Department oversight, transaction costs should be minimized by the standard memorandum of agreement proposed in these rules, as well as the technical standards proposed at N.J.A.C. 7:26E.

An Administrative Order would be issued unilaterally so there will be no legal or technical consulting costs associated with negotiation. These rules do not, for the most part, alter the circumstances when the Department will issue an Administrative Order, so legal and technical consulting costs should not be affected.

COMMENT 128: Colonial Pipeline Company commented that the regulations, as proposed, will stop most voluntary assessment/remediation programs. No responsible party will move forward on any portion of an activity until Department approval is received, possibly resulting in the spread of contaminant plumes over large areas and increased costs for remediation. Sites will not be remediated to the fullest extent possible if an assessment could have been completed in a shorter, albeit voluntary, time frame.

RESPONSE: Department approval is not required by this rule for non-priority sites. These sites pose less of a danger to human health and the environment, and therefore are suitable for a memorandum of agreement. The Department will act on the application within 30 days of receipt (N.J.A.C. 7:26C-3.2) and will provide timelines for review upon receipt of each document. (Appendix A, Paragraph I.2). The person signing the memorandum of agreement sets the pace of the work and, by the submission of complete, high quality documents, will speed the Department's review.

Sites that are most dangerous to human health and the environment will be addressed on a priority basis, and will require Department approval under an administrative consent order in any event. The net effect of the Department's strategy will be to minimize the greatest risks first.

COMMENT 129: Colonial Pipeline Company said the Department could encourage the regulated community to conduct cleanups and eliminate the need for Department involvement in every step of the cleanup process by incorporating into these regulations those procedures discussed in the guidance documents developed by the U.S. Environmental Protection Agency.

RESPONSE: The Department's requirements for remediation are in some respects more stringent than those of the Federal government so the procedures in the Federal guidance documents are not always consistent with New Jersey standards. The Department has sought to reduce review requirements by proposing technical standards for remediation as rules, at N.J.A.C. 7:26E. To the extent work follows these standards and documents are submitted in complete, high quality form, review time will be limited.

N.J.A.C. 7:26C-2.2 Memorandum of agreement

COMMENT 130: Mobil Oil Corporation commented that the memorandum of agreement was not needed since the Department already has a vehicle in place to permit voluntary remediation of contaminated sites, specifically, the discharge to ground water (Discharge to Ground Water) permit. The permitting program allows voluntary remediation, fees are paid by the user and all parties are treated equally. Under the proposed oversight rules, parties will be treated differently based upon their ability to pay the government for services beyond that which taxes and Discharge to Ground Water fees allow. Those who can afford the services of the Department, can protect their property from further adverse environmental impacts by having the remediation program acted upon. Those who cannot afford the oversight fees, will have to wait until the Department processes the applications of "paying customers" and the small contamination problem may become a major concern.

The user fees under the discharge to Ground Water permitting program could be adjusted to a maximum/minimum amount based on remediation type and volume discharged. For example, service station remediation programs are similar and should carry similar costs. The

Department should be able to estimate costs for other categories of remediation projects. Firms would be able to more accurately estimate the total cost of remediation.

COMMENT 131: Tellus Environmental Consultants asked whether the Department would require additional oversight of the remediation through a memorandum of agreement where there is an existing mechanism such as a New Jersey Pollutant Discharge Elimination System permit.

RESPONSE TO COMMENTS 130 and 131: The Department is implementing through these rules a comprehensive strategy for the remediation of contaminated sites in New Jersey. The New Jersey Pollutant Discharge Elimination System Discharge to Groundwater permitting system addresses some but not all remediation issues as it is limited to ground water issues. Accordingly, the scope of a New Jersey Pollutant Discharge Elimination System Discharge to Ground Water permit may be too narrow to accomplish a full remediation.

Under the New Jersey Pollutant Discharge Elimination System program, remediation of a discharge is required by the New Jersey Pollutant Discharge Elimination System rules. It is not voluntary. Fees are mandatory. With the voluntary memorandum of agreement, a person can decide whether it can pay oversight costs, and if not, it need not sign a memorandum of agreement. That person can remedy its "small contamination problem" without Department oversight or New Jersey Pollutant Discharge Elimination System fees.

The Department has determined that it will charge on an hour for hour basis for oversight rather than a maximum/minimum basis based on remediation type. Many factors affect review time other than the type of remediation such as the quality of the documents submitted, and the amount of work to be done. The hourly charge will encourage the submission of complete, high quality documents because review time will be reduced.

Finally, the rule provides for deferral, in the Department's discretion, to an existing regulatory or enforcement mechanism such as a New Jersey Pollutant Discharge Elimination System permit, at N.J.A.C. 7:26C-5.3. If the scope of the permit adequately addresses the contamination, and the work is proceeding satisfactorily deferral is likely.

COMMENT 132: The Petroleum Council recommended that the Department continue to defer to other existing regulatory or enforcement mechanisms rather than impose the new formalized oversight requirements. The concepts of "institutionalized oversight and approval" and implementing an "oversight fee" are new in this State. At present an informed process generally results in agreement and approval of the appropriate remediation for underground storage tank sites. Over the past seven years, the Department has had in place a regulatory program, the Underground Storage Tank rules, and an enforcement mechanism, the New Jersey Pollutant Discharge Elimination System Discharge to Ground Water Permit. The Petroleum Council has cooperated in rule development regarding these two programs and emphasizes that these two programs are working well and have contributed to Underground Storage Tanks sites throughout the state. The new process may slow remediation and result in increased costs.

RESPONSE: The Department may defer to the underground storage tank program at a priority site after evaluating the scope of the remediation and status of the work pursuant to N.J.A.C. 7:26C-5.3. Non-priority sites will remain subject to existing Environmental Cleanup Responsibility Act and Underground Storage Tanks programs.

COMMENT 133: The United States Environmental Protection Agency commented that the memorandum of agreement could meet criticisms by administrative consent order candidates that they do not want to sign a blank check. Implementation of corrective action through a permit program, similar to the Environmental Protection Agency Hazardous and Solid Waste Amendments permit, could also be an effective mechanism to impose corrective action at high priority facilities, which are not appropriate candidates for memoranda of agreement. While some facilities have expressed an unwillingness to sign an enforcement document to conduct corrective action they may be more amenable to performing such activities under a permit. This type of permit program would also facilitate delegation of the Resource Conservation and Recovery Act corrective action program, which includes a permit component.

RESPONSE: The United States Environmental Protection Agency Hazardous and Solid Waste Amendments permit will be appropriate for some sites and in fact will be required by the Federal government. This program has not been delegated to New Jersey at this time. The Department will evaluate priority sites that have Hazardous and Solid Waste Amendments permits for deferral pursuant to N.J.A.C. 7:26C-5.3. If the work is proceeding and the scope of the permit addresses all contamination issues, deferral would be likely.

The Department has decided to conduct cleanups at priority sites under administrative consent orders to be sure the scope of the remediation is comprehensive. In the Department's experience, particularly with the New Jersey Pollutant Discharge Elimination System Discharge to Ground Water permit program, permits may not address all remediation issues. In addition, the administrative consent order includes an immediate enforcement mechanism, stipulated penalties, and immediate recourse to financial assurance.

COMMENT 134: The Commerce and Industry Association of New Jersey and the New Jersey Builders Association asked whether a memorandum of agreement is available to all sites on the priority list. Inclusion on this list does not seem to require any evaluation of risk. The preamble notes only that "contaminated" sites will be included. It is then unclear whether all sites on this list will be "high priority sites" precluding the availability of a memorandum of agreement. The Department's comment that a memorandum of agreement will allow responsible parties to avoid an administrative consent order by coming forward prior to the Department's reaching the contaminated site on its priority list, seems to suggest that some sites on the list will be non-high priority sites. The issue then becomes at what point a site on the priority list becomes a "high priority" simply as a matter of time by moving up the list. This highlights the need for objective standards by which to measure a site as a "high" or "low" priority relative to its position on the priority list—not as a result of the actual threat it may pose.

RESPONSE: Each priority site must be resolved either by the commencement of a remediation by the Department or the signing of an administrative consent order. The sites will be ranked based on risk factors. The Department anticipates the list will be continuously revised as it receives information about new and existing sites so that it will not be possible to accurately predict how quickly a site will move up the list. Parties are, in all cases, encouraged to voluntarily remediate contaminated sites before they become a priority.

COMMENT 135: Rutgers Environmental Law Clinic commented that a memorandum of agreement should not, under any circumstances, be available for use at high priority sites. Proposed N.J.A.C. 7:26C-2.7(b) appears to provide that a memorandum of agreement is unavailable for high priority sites, but the provision is unclear at best, and filled with loopholes at worst.

The regulation should further provide that the Department must affirmatively make the determination that the site is not a high priority site before it agrees to enter into a memorandum of agreement. Otherwise, a responsible party can avoid the alleged 'blank check' administrative consent order by coming forward prior to the Department reaching the contaminated site on its priority list and taking appropriate enforcement action for site remediation. Therefore, even for sites that the Department has determined are high priority sites, but upon which it has not yet acted, a responsible party can investigate/remediate using an unenforceable memorandum of agreement or a less stringent administrative consent order and avoid committing to do all necessary work at the site.

This is a terrible policy decision by the Department. Parties identified on the list will rush to file any memorandum of agreement or less stringent administrative consent order, whether or not they have any real interest in solving the problems on the site. They will then investigate and remediate only enough to lower their "priority" and be removed from the priority list. Once the Department has determined that a site is a high priority site, it must not allow a memorandum of agreement to be used to address the contamination at that site.

RESPONSE: Rutgers Environmental Law Clinic is correct that a memorandum of agreement is not available for a priority site. The Department does intend to check its identification of priority sites before entering into a memorandum of agreement and will require administrative consent orders for priority sites. For sites that are not priority sites, the responsible party can "avoid" an administrative consent order by voluntarily cleaning up the site under a memorandum of agreement. If a person wants to "rush" in to sign a memorandum of agreement for a non-priority site, the public interest is served by an earlier remediation of the site.

There is no such document as a "less stringent administration consent order." A person cannot do work at a priority site under a memorandum of agreement, whether or not that person's objective is to reduce the priority.

The following commenters suggested the opposite, that the memorandum of agreement should be available for priority sites.

COMMENT 136: The Commerce and Industry Association of New Jersey, the Chemical Industry Council of New Jersey, and the New Jersey Builders Association said that parties are reluctant to enter into an administrative consent order requiring a commitment to a "blank check" for unknown, unspecified, and unqualified remediation. The availability of a memorandum of agreement for a high priority site would encourage voluntary, expeditious remediation.

COMMENT 137: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company commented that use of the memorandum of agreement as a general rule for all sites would address more adequately the "blank check" issue created by the full commitment to complete remediation through an administrative consent order. The Department's insistence on the "blank check" approach ignores the fiscal concerns a company must have when deciding voluntarily to enter into an administrative consent order. The option to perform remedial actions in stages is consistent with the federal program and most other State programs and would encourage greater responsible party participation. Expanding the role of the memorandum of agreement would encourage voluntary cleanups and speed investigation and remediation through the State.

RESPONSE TO COMMENTS 136 and 137: The Department's strategy, implemented in these rules, is to ensure that the contaminated sites that present the greatest danger to human health and the environment will receive the priority in the allocation of the Department's resources. Once a site becomes a priority, the Department is committed to spend public funds to remediate the site. The responsible parties will first be given an opportunity to do the work but they must make a parallel commitment to fully address the contamination. Because of the threat to human health and the environment, the partial commitment to do work under a memorandum of agreement is unacceptable.

COMMENT 138: The Commerce and Industry Association of New Jersey, the Chemical Industry Council of New Jersey, the New Jersey State Bar Association, and the New Jersey Business and Industry Association commented that the conditions in an administrative consent order, such as stipulated penalties, financial assurance and unrealistic deadlines, are so onerous that they act as a disincentive and result in delay as parties negotiate the terms of the administrative consent order.

RESPONSE: Once the Department identifies a site as a priority, it must be remediated as quickly as possible. Stipulated penalties in the administrative consent order help to ensure that the work will be done. Financial assurance provides an immediately accessible source of private funds in the event the responsible party is unwilling or unable to complete the work. Deadlines require the work to be done within reasonable timeframes. Once an administrative consent order is signed, the Department can reallocate public funds to another priority site.

The memorandum of agreement is designed to allow the person responsible for conducting the remediation to set the pace of cleanup. If the person becomes financially unable or unwilling to continue, the person can stop work and terminate the agreement. If the memorandum of agreement were allowed for a priority site, the work would be delayed until public funds could again be allocated and the Department mobilizes its contractors. The memorandum of agreement is inadequate to protect human health and the environment where a priority site is concerned.

Delay in negotiating administrative consent orders should be minimized by the standarization of this agreement in these rules. The possibility of delay in negotiation is an insufficient reason to allow a memorandum of agreement for a priority site. Further, if agreement cannot be reached within the timeframe specified in this regulation, the Department will proceed with the work using public funds.

COMMENT 139: The Commerce and Industry Association of New Jersey, the Chemical Industry Council of New Jersey, Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company suggested that a memorandum of agreement be used to begin voluntary remediation while the parties negotiate an administrative consent order.

RESPONSE: If the Department were to agree to a memorandum of agreement while an administrative consent order was being negotiated, the responsible party would have little incentive to sign an administrative consent order. The responsible party would be receiving Department review, and would be able to make submittals based on its own timing and monetary concerns rather than the need to protect public health and the environment. The Department would have no financial assurance if the responsible party decided to terminate, no commitment to clean up, and no recourse to stipulated penalties. A responsible party can proceed "at risk" while the administrative consent order is being negotiated.

COMMENT 140: The Commerce and Industry Association of New Jersey, Allied-Signal Inc., E.I. du Pont de Nemours and Co., The General Electric Company, and the Chemical Industry Council of New Jersey commented that, if a memorandum of agreement were in place while an administrative consent order was being negotiated, the work under the memorandum of agreement could be evaluated under proposed N.J.A.C. 7:26C-5.3, for possible deferral to the memorandum of agreement.

RESPONSE: As stated in the Department's responses to the two previous comments, the memorandum of agreement does not guarantee protection of human health and the environment where a priority site is involved. A memorandum of agreement is a voluntary contract for Department oversight and approval, unlike the examples at N.J.A.C. 7:26C-5.3, of remediation under Comprehensive Environmental Response, Compensation, and Liability Act or Resource Conservation and Recovery Act, the underground storage tank program, Environmental Cleanup Responsibility Act, or a New Jersey Pollutant Discharge Elimination System permit. The memorandum of agreement is intended to be voluntary and is so structured. Priority sites require remediation under an enforceable regulatory program or mechanism which is not terminable at the discretion of the responsible party.

COMMENT 141: The Chemical Industry Council of New Jersey, the New Jersey State Bar Association, Chemical Waste Management of New Jersey and the New Jersey State Business Association commented that the Department risks little by agreeing to a memorandum of agreement at a high priority site because it retains the right to unilaterally terminate and bring an enforcement action.

RESPONSE: The commenters' suggestion is inconsistent with the current legislative scheme to remediate first and litigate later. From its experience, the Department has determined that the most efficient way to remediate a site is for either the Department to dedicate its resources to conduct the entire remediation or for another person to commit to conduct the entire remediation. Significant time could be lost if a party executed a memorandum of agreement and then requested termination of the agreement forcing the Department to divert resources away from the remediation toward the suggested enforcement litigation. Further, the ability to draw on financial assurance immediately serves the public interest far more efficiently than the delay and cost involved in litigating an enforcement action. The public would suffer the risk because work would stop at the priority site until the Department could reallocate public funds to do the work, or obtain and enforce a court judgment requiring remediation.

COMMENT 142: The Chemical Industry Council of New Jersey suggested that where a facility is classified high priority only because certain parts of the site are severely contaminated, an administrative consent order should be available for those severely contaminated parts of the property and a memorandum of agreement for the remainder of the property. The amount of financial assurance which must be maintained by the responsible party and oversight costs will be reduced. A partial memorandum of agreement program is recognized in the preamble although not adopted in the proposed regulations themselves as follows: The Department will offer a memorandum of agreement for any portion or phase of a cleanup without any further commitment by the parties to conduct the entire remediation.

RESPONSE: The Department classifies entire sites rather than areas of concern within a site for reasons of efficiency and cost savings. In the Department's experience it is more efficient, in terms of cost and time for all parties, to remediate an entire site rather than to repeatedly return to a site to clean it up in sections.

The excerpted language refers to a site which is not a priority site. A person may proceed in this phased manner where a site has not been determined to be a priority.

COMMENT 143: The New Jersey Builders Association commented that the administrative consent order, with provisions authorizing the Department to unilaterally order and enforce remediation with penalties, discourages a genuine exchange of ideas in regard to available remedies and the choice of a remedy.

RESPONSE: It is in the best interest of the responsible party to engage in a genuine exchange of ideas no matter what oversight document is executed. The person responsible for conducting the remediation should have an incentive to present the best alternatives for a remedy and to discuss them freely with the Department. Better and more complete information leads to better decisions. The Department will provide the same review, comment, and approval whether the oversight document is an administrative consent order, a memorandum of agreement, or an administrative order.

COMMENT 144: The Chemical Industry Council of New Jersey suggested that an administrative consent order should be converted to a memorandum of agreement if, for example, a site is found to be less severely contaminated than initially thought or as cleanup activities improve the condition of the site.

RESPONSE: An administrative consent order memorializes a commitment to complete the remediation of a site. Once an administrative consent order is signed, the Department moves to another priority site, reallocating funds for remediation. The objective of the site remediation program is to address the worst sites first, and as each site is addressed either by the Department or by a responsibility party through an administrative consent order, the Department moves on to another priority site. If it must repeatedly return to a site to reprioritize the site, the efficiency of the program will suffer and this is contrary to how the Department conducts publicly funded remediations.

COMMENT 145: Wheaton Industries, Inc. commented that a model or standard form for an oversight document might serve as a useful starting point for negotiation of a consent agreement for remediation. However, these regulations should afford the flexibility to modify standard provisions as appropriate under the facts of the case at hand to reach a final agreement. Such flexibility to negotiate site or case-specific terms is essential to give both the Department and the person responsible for conducting the remediation as much ability as possible to work out mutually acceptable terms to address the specific hazardous substances, site conditions, parties, environmental risks, and equitable considerations that may be present at any given site.

This flexibility will not compromise the Department's ability to implement statutory requirements or environmental protection objectives. Instead, the flexiblity will make it easier for the Department and the other parties to reach agreement, thereby promoting voluntary cleanups with Department oversight. If the program is too inflexible for private parties to enter these agreements, private parties will either forego voluntary cleanups if, for example, the extent of their obligation is too uncertain, or will proceed with a voluntary cleanup without oversight from the Department. Wheaton suggests that the Department is not open to negotiating modifications to the form memorandum of agreement the Department is presently using. Without appropriate changes to the form memorandum of agreement, Wheaton Industries, Inc. has declined to enter into these agreements. Wheaton Industries Inc.'s understanding is that other parties also have been unable to enter into memoranda of agreement with the Department for similar reasons. Wheaton Industries, Inc. therefore believes that it is important both for the oversight regulations to authorize flexibility in negotiating these agreements, and for the Department to be willing to implement that flexibility in pursuing these agreements.

Further, the model or standard agreements provided in these regulations must include certain additions and revisions to provide protections for persons parallel to protections already provided for the Department. For example, the model agreements should be consistent with applicable law in defining the rights and obligations of both the Department and Persons signing these agreements. As a matter of prudent business practice in entering any contractual relationship, a person will want to have certain protections or limitations stated explicitly. Drafting agreements this way helps avoid misunderstandings and ensures that recourse and remedies are understood if a breach or contingency occurs.

The need for flexibility and modification in the standard agreements is more important at sites where more than one party is involved in remediation, or where the party is not necessarily a responsible party, such as prospective purchaser, a lending institution, or an owner of property onto which off-site contamination has migrated. With multiple parties, the chances for incongruous facts or disproportionate equities to arise increases dramatically. Under these circumstances, flexibility and innovation are even more important to be able to arrive at terms under which one party or more will be willing to commence voluntary remediation with Department oversight.

RESPONSE: The memorandum of agreement is inherently flexible because the person responsible for conducting the remediation controls the scope and timing of the work. The standard memorandum of agreement is derived from more than 10 years of experience in negotiating oversight documents and the Department has considered the myriad issues that have arisen over the years in preparing the standard agreement. Although the facts may vary from site to site, the language of the memorandum of agreement is unaffected by those differences as the terms are essentially unrelated to the condition of a particular site. The standard form will reduce delays due to negotiation and provide the regulated community with predictability and consistency. It would be extremely inefficient for the Department to individually negotiate each memorandum of agreement and impossible to maintain consistency.

COMMENT 146: Mobil Oil Corporation was opposed to the concept of entering into a mandatory memorandum of agreement which does not provide the regulated community with sufficient guarantees of increased government efficiencies. A program such as the one proposed only increases the enormous cost of remediation and provides a disincentive for voluntary remediation.

RESPONSE: The phrase "mandatory memorandum of agreement" is a contradiction in terms. The memorandum of agreement is entirely voluntary, for the benefit of those persons who wish to obtain Department oversight and approval of remedial work. Anyone may do remedial work at a non-priority site without Department oversight and the accompanying memorandum of agreement. The Department has reorganized its site remediation program to improve efficiencies in overseeing remedial work as part of the strategy being implemented in these rules. Several initiatives have been instituted by the Site Remediation Program. The Department publishes the Site Remediation Newsletter, participates in the Site Remediation Advisory Group, and is actively codifying what has been Department policy through open and aggressive rulemaking. This is evidenced by this proposed rule and the proposed Technical Requirements for Site Remediation. Further, the Site Remediation Program continues to improve its integrated computer system which affords better communication and exchange of information throughout the Site Remediation Program.

COMMENT 147: Mobil Oil Corporation would be opposed to a program which provides the Department's services depending on a firm's willingness to pay for increased government services.

RESPONSE: The Department is uncertain what Mobil Oil Corporation means by increased government services as the memorandum of agreement is voluntary, not mandatory. A party could voluntarily remediate a non-priority site without Department oversight before these rules were proposed and can still do so after the rules are adopted. Funding for remediation comes from the Spill Fund and certain bond acts rather than the general treasury. The Spill Fund monies must be replaced to the extent possible, and bonds must be repaid, so those who receive services must pay for them. There is no intended nor anticipated increase in the Department's Site Remediation Program as a result of this program, merely, a shift of a portion of existing resources to address the expressed needs of the business and leading communities for Department oversight and review of work at sites that would not be a priority for the Department.

N.J.A.C. 7:26C-2.3 Administrative consent order

COMMENT 148: Chemical Waste Management of New Jersey commented that the proposed Responsible Party administrative consent order, by seeking to require a party to perform an entire site remediation (even before the extent of contamination and the parameters of the remedial action are defined), will impose substantial hardships on and discourage single party participation in the cleanup of high priority sites. Similarly, the Responsible Party administrative consent order does not protect adequately the interests of those responsible parties who do commit to entire site remediation.

COMMENT 149: Hackensack Water Company says that a party entering into an administrative consent order gives the Department carte blanche to direct any action at any cost, in any time frame, discouraging voluntary remediation.

RESPONSE TO COMMENTS 148 and 149: The administrative consent order provides a responsible party with an opportunity to avoid treble damages by making a full commitment to perform a remediation or pay for the Department to do the work. The administrative consent order is designed to ensure that the responsible party will complete the remediation that the Department would have done, if public funds are being expended. The need to protect human health and the environment

requires a full commitment at the outset to do all the work, whether the Department or the responsible party is conducting the remediation. The Department has modified the language in Appendix C to identify which rights the signatory retains as discussed in the *Department of Environmental Protection v. Mobil Oil Corporation,* 246 *N.J. Super.* 331 (App. Div. 1991) decision.

To address the commenters' concerns and to make clear what rights a party executing an Appendix C administrative consent order retains, the Department has included language in paragraph 7 of the Reservation of Rights from *Mobil.*

COMMENT 150: Cohen, Shapiro, Polisher, Shiekman and Cohen said that not all administrative consent orders should be entered into pursuant to the Solid Waste Management Act just as not all administrative consent orders should be entered into pursuant to the Water Pollution Control Act. The statutory authority pursuant to which the administrative consent order is entered should be a subject of negotiation based on site conditions and history.

RESPONSE: As set forth in the Summary of the proposal, the Department's authority to enter into an administrative consent order for remediation of contaminated sites is derived from its enabling statute, the Spill Compensation and Control Act, the Solid Waste Management Act, and the Water Pollution Control Act. The purpose of these rules is to provide consistency and predictability of oversight documents. There may be a rare instance where one of the statutes cited in the introductory paragraph does not apply. However, the standard administrative consent order expressly states that the responsible party does not admit to any fact or liability under any statute.

Further, the requirements of the various statutes applicable to any particular remediation are the same. Accordingly, the negotiation of the appropriate statute will make no appreciable difference in the work to be done or the other provisions under an administrative consent order. In light of the fact that few sites would call into play one statute but not another, the lack of any benefit from specifying the statute, and the probability of delay due to negotiation of this paragraph, the Department will retain the proposed introductory paragraph.

COMMENT 151: The New Jersey State Bar Association asked whether the reference in N.J.A.C. 7:26C-2.3(b) to "high priority site" is intended to preclude the use of administrative consent orders (even Environmental Cleanup Responsibility Act administrative consent orders) for sites other than high priority sites?

RESPONSE: Administrative consent orders will be available for non-priority sites upon the request of any person. Environmental Cleanup Responsibility Act administrative consent orders will continue to be available for priority sites and non-priority sites as provided at N.J.A.C. 7:26B-7.

When a site is subject to the Environmental Cleanup Responsibility Act under the criteria set forth in that Act, an Environmental Cleanup Responsibility Act administrative consent order is available whether the site is a priority site or not. As provided at N.J.A.C. 7:26B-7, the purpose of an Environmental Cleanup Responsibility Act administrative consent order is to allow a transaction to occur before cleanup is completed, as long as there is a commitment to perform the cleanup.

COMMENT 152: Exxon Company, U.S.A. requested a new subsection to be designated N.J.A.C. 7:26C-2.7(f) because the Department has not provided the regulated community a list of "high priority sites" or the procedures and methodology that will be used to rank sites to make that determination: "If the site is not subject to Environmental Cleanup Responsibility Act and is undergoing a remediation action under an existing regulatory program, the Department will allow you to continue remediation under the existing program if current actions do not cause an increased threat to human health."

RESPONSE: If remediation is proceeding under an existing regulatory program, the Department will, in its discretion, defer to the other regulatory or enforcement mechanism as provided in N.J.A.C. 7:26C-5.3. The Department must have the opportunity to evaluate whether the scope of the existing regulatory program addresses all remediation issues, as well as whether there is compliance with the existing regulatory program.

COMMENT 153: Edwards & Angell was disappointed that the proposed oversight program reflects a general lack of understanding of how businesses make decisions regarding whether to participate in the remediation of contaminated sites. In order to encourage businesses to participate in the site remediation process, the Department must be prepared to deal with settlers in a flexible and equitable manner. In addition, the Department must pursue and penalize recalcitrants. Unfortunately, the proposed rules appear to do nothing to alter the Department's present practice of selectively imposing obligations on target companies with the expectation that the targets will seek contribution from other responsible parties. The Department must recognize that the right to pursue other responsible parties (even with the potential of treble damages) is not an incentive to undertake remedial obligations which are either arbitrary or enforced in a capricious manner. Conversely, one of the strongest incentives to settlement is the universal desire to avoid future costs and litigation. The oversight program should recognize these realities.

RESPONSE: The Department's strategy is to focus its attention and available public funds on the worst sites. It is the site and the danger to human health and the environment that the Department is targeting, rather than any particular company.

The strategy implemented in these rules provides predictability to the business community by describing the steps the Department will take to achieve remediation of priority sites and the procedure for voluntary remediation, with Department oversight, for non-priority sites. The issuance of a directive gives a responsible party notice that the Department has facts indicating that party is responsible, of the work that must be done, and that the Department will proceed, using public funds, if the responsible party does not. All known responsible parties will be named in a directive.

The danger to human health and the environment requires a full commitment to do all the remedial work. Eliminating the risk to human health and the environment must take precedence over business considerations. These rules establish the parameters of a responsible party's obligations if it chooses to settle by paying all or part of the costs, or by doing the work.

The Department may pursue and penalize recalcitrants pursuant to its enforcement authority by means other than an oversight document, such as penalty assessments or directives and cost recovery actions. These rules primarily describe the Department's procedures for the oversight of remediation, rather than the pursuit of violators of environmental laws. As the commenter indicated, the Legislature also recently passed legislation that allows for the assignment of treble damages to a responsible party doing remediation under and agreement with the Department against any recalcitrants.

COMMENT 154: Chevron U.S.A. Inc. suggested that the second sentence of N.J.A.C. 7:26C-2.3(b) be revised to read, "Such agreements shall be administrative consent orders unless the site is already conducting remediation under an existing memorandum of agreement or other oversight document." A site which is already in compliance with an existing permit, administrative order, administrative consent order or directive should not be required to execute a new document. This will only lead to additional paperwork, time cost and confusion.

To prevent complications the Department should not score or designate sites subject to existing documents as high priority sites. The Department should conduct a review of the file to ensure that the existing document adequately addresses applicable environmental concerns and that the responsible party is acting in good faith to comply with requirements.

This change will also encourage responsible parties to come forward and enter into memoranda of agreement or other agreement documents prior to the time that the Department can issue an administrative consent order.

RESPONSE: As indicated in the prior responses, this rule provides for deferral to other regulatory mechanisms in the Department's discretion.

The Department is currently evaluating whether a person may continue work under a memorandum of agreement if the site becomes a priority. See comments and responses concerning Appendix A at Section I, memorandum of agreement for further discussion of this issue.

COMMENT 155: Chevron U.S.A. Inc. commented that the regulations should provide the Department and the regulated community with the flexibility to negotiate any of the provisions of the various decision documents included in the Appendices to the draft regulations. The regulated community understands that the Department's resources are limited; however, the Department must also recognize that a one-size-fits-all approach may lead to inefficient cleanups and increased costs to the regulated community with little or no increased environmental benefits.

RESPONSE: The Department has balanced the need for flexibility and the need for predictability and determined to propose standard agreements as part of these rules. It has incorporated over 10 years of

experience in negotiating oversight documents into these rules. During that time, any work performed with Department oversight was required to be conducted under an administrative consent order. The Department's development of the memorandum of agreement represents substantial departure from the previous policy. This approach allows significant flexibility for non-priority sites as the memorandum of agreement allows a voluntary remediation with the scope and at the pace chosen by the person entering into this agreement. Priority sites demand a comprehensive commitment by a responsible party, or by the Department. The basic requirements for a cleanup will be the same for all sites, remedial investigation followed by remediation. The details of these actions are subject to considerable variation based on case specifics. It is at this stage that the commenters concerns can be addressed rather than in the oversight documents. The Department has found that negotiation often consumes time and resources of both the responsible party and the Department that would be more productively spent on the remedial work itself.

COMMENT 156: Clapp & Eisenberg commented that, for other than high priority sites, a person who is not a potentially responsible party under the Spill Compensation and Control Act or Comprehensive Environmental Response, Compensation, and Liability Act may wish to conduct an investigation or cleanup. Examples include lending institutions prior to foreclosure, charitable institutions prior to accepting land as a donation, purchasers or developers of contaminated properties, prospective tenants, beneficiaries of estates or inter vivos gifts, or municipalities prior to the purchase of tax sale certificates. The Department's proposed regulations should be relaxed in any of these situations, or others where the person who is voluntarily performing investigatory or cleanup activities is not a potentially responsible party. For underground storage tank projects, the person who is neither a tank owner nor operator should not be compelled to comply with every single requirement of the Bureau of Underground Storage Tanks regulations (N.J.A.C. 7:14B-1). A volunteer should be able to perform whatever scope of work he chooses.

RESPONSE: These rules currently allow such persons as the commenter describes to perform any phase of remediation they choose at other than priority sites. Furthermore, a volunteer is free to perform an investigation or cleanup without Department oversight. The purpose of a memorandum of agreement is to provide the person responsible for conducting a remediation with an assurance that the work satisfies Department requirements. If a person chooses to do remedial work and obtain that assurance, that person can sign a memorandum of agreement. On the other hand, if that person does not want or need that assurance a memorandum of agreement is not required.

The suggestion that the Department should adjust requirements for work done under a memorandum of agreeement depending on who is performing the remediation is inconsistent with the Department's efforts to establish fair and predictable standards to ensure protection of human health and the environment through these and other rules.

N.J.A.C. 7:26C-2.4 Administrative order

COMMENT 157: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company objected to proposed N.J.A.C. 7:26C-2.4, which provides that administrative orders under the Solid Waste Management Act and the Water Pollution Control Act shall conform to the requirements for administrative consent orders in the proposal. The proposed language seems mandatory; the Department "will include" conforming provisions. An administrative consent order by definition is one which has the agreement of the responsible parties and its terms may not be imposed unilaterally. For example, while a party may be penalized for failing to honor an administrative order, one could not administratively order someone to pay stipulated penalties. Overall the proposal suggests a prejudgment of the issues in a particular administrative order context, which appears to be unlawful. N.J.A.C. 7:26C-2.4(b) should be deleted.

COMMENT 158: Cohen, Shapiro, Polisher, Shiekman and Cohen asked that N.J.A.C. 7:26C-2.4 be eliminated because the phrase "to the extent appropriate to the particular enforcement action" eliminates any certainty that might otherwise exist with respect to which administrative consent order terms will be included in an administrative order. The use of Appendices C or D as a model Administrative Order would be objectionable. An administrative order cannot be used to require payment of past costs, consistent with the position the Department has taken before a number of courts that it does not have the authority to demand past costs by means of a directive. An administrative order cannot require the recipient to undertake work which is not described in reasonable detail in the order. In *Matter of Kimber Petroleum,* 110 *N.J.* 69, 84, fn8 (1988), the New Jersey Supreme Court suggested that any directive issued by the Department should be a very specific document to avoid any good cause defense. In Appendix C, the Department would attempt to require the recipient to undertake unspecified additional work to the extent that the Department deems such work to be required. Such lack of specificity in an enforcement document in unacceptable.

RESPONSE TO COMMENTS 157 and 158: Administrative orders will not include provisions for the payment of past costs, stipulated penalties, or waiver of rights. Financial assurance may be required, pursuant to the Department's authority at N.J.S.A. 13:10-9(u).

Kimber suggests that the Department could avoid good cause defenses by itemizing the amounts required in its directives, not that a directive must be a specific document. The Department believes that the standard administrative order will sufficiently describe the work to be performed. If a recipient of an administrative order believes the work described is not sufficiently specific, that person can challenge the order.

COMMENT 159: Wheaton Industries, Inc. commented that the final regulations should make it clear that the Appendix C oversight document is an administrative consent order or explain what other kinds of orders are to be negotiated based on this standard document. Since N.J.A.C. 7:26C-5.4(a) refers to this document as a consent order, the title of the Appendix C document should be changed from Oversight Document to administrative consent order. Furthermore, if this document is meant to serve as a standard unilateral order, all agreement or waiver provisions, including stipulated penalties, should be deleted.

COMMENT 160: Mr. Nesheiwat questioned whether both parties have to be in agreement on an administrative consent order or can the State issue it unilaterally?

RESPONSE TO COMMENTS 159 and 160: The provisions of this order may be used for unilateral orders (administrative orders) in which the Department will delete all agreement or waiver provisions, including stipulated penalties.

N.J.A.C. 7:26C-2.5 Spill Compensation and Control Act directive

COMMENT 161: Exxon Company, U.S.A. commented that N.J.A.C. 7:26C-2.5(g), (h) and (i) are beyond the scope of this rule to identify the Department oversight documents and the procedures for such identification of the applicable oversight document for a particular rule. This rule is not the appropriate place for promulgating administrative procedures for instituting Spill Compensation and Control Act directives. It is recommended that N.J.A.C. 7:26C-2.5(g), (h) and (i) be deleted.

RESPONSE: Existing rules under the Spill Compensation and Control Act at N.J.A.C. 7:1E do not address procedures for issuing Spill Compensation and Control Act directives. Spill Compensation and Control Act directives are an essential component of the Department's strategy for site remediation being implemented in these rules and therefore are logically included in N.J.A.C. 7:26C. The Department's purpose in promulgating this procedure is to provide notice to the regulated community when it will use Spill Compensation and Control Act directives and the procedures for the person who receives the directive. In this way the regulated community will understand the circumstances when the Department will issue a directive, and the actions the responsible party may take along with the consequences of those actions.

COMMENT 162: Exxon Company, U.S.A. commented that N.J.A.C. 7:26C-2.5 should reference the Spill Compensation and Control Act definition of discharge. The definition of "discharge," as written, includes leaks, but under the Spill Compensation and Control Act, a discharge and a leak were defined separately and a discharge did not include a leak. Leaks are provided for in a Spill Containment Plan. Also, the Spill Compensation and Control Act excludes remediation of buildings. According to the N.J.S.A. 58:10A, the Department can only regulate discharges "onto the land or waters of the State." Therefore, it is recommended that N.J.A.C. 7:26C-2.5(a) be revised, to read: "Pursuant to the Spill Compensation and Control Act, the Department may direct persons who are in any way responsible for a discharge, as defined in N.J.S.A. 58:10A, of a hazardous substance to:"

RESPONSE: The Spill Compensation and Control Act defines discharge as "any intentional or unintentional action or omission resulting in the releasing, spilling, **leaking**, pumping, pouring, emitting, emptying or dumping of hazardous substances into the waters or onto the lands of the State . . ." (emphasis added). N.J.S.A. 58:10-23.11b(h).

Therefore, the Spill Compensation and Control Act definition of discharge does include leaks. The citation to N.J.S.A. 58:10A would be incorrect as N.J.A.C. 7:26C-2.5 relates to Spill Compensation and Control Act Directive and is promulgated under the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11. The Spill Compensation and Control Act does not expressly exclude remediation of buildings though arguments have been made that the definition of discharge does not include releases, etc. inside buildings. The Department is unaware of any court decision adopting those arguments.

COMMENT 163: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company as noted below commented that the Department's authority to issue directives and use public funds for cleanup varies depending on whether the discharge occurred before or after the effective date of the Spill Compensation and Control Act, April 1, 1977. Accordingly, the rules should distinguish between the two types of discharges.

Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company, the New Jersey Business and Industry Association and the Commerce and Industry Association of New Jersey believe the Spill Compensation and Control Act authorizes the issuance of a directive only for a post act discharge. Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company bases its contention on the history of the Spill Compensation and Control Act and Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The Electric Company's interpretation of amendments to the Act.

Allied-Signal Inc., E.I. du Pont de Nemours and Co., and the General Electric Company, the Chemical Industry Council of New Jersey, the Commerce and Industry Association of New Jersey, the New Jersey Business and Industry Association, and Kaye, Scholer, Fierman, Hays and Handler commented that public funds are available for pre-act discharges only upon the approval of the Spill Fund administrator and if another source of funds is not available. Allied Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company contend that, if a responsible party would do remediation work but does not wish to sign an administrative consent order, then other funds are available and the administration cannot approve the use of Spill Fund monies.

COMMENT 164: Kaye, Scholer, Fierman, Hays and Handler also noted there is a cap on spending for pre-act discharges.

COMMENT 165: The New Jersey Builders Association commented that the provisions governing Spill Compensation and Control Act directives fail to reflect the difference between pre and post act discharges. The Spill Compensation and Control Act states that the Department may issue a Spill Compensation and Control Act directive in regard to hazardous substances that are discharged, but the Department has different options regarding discharges prior to the effective day of the Act. Under N.J.S.A. 58:10-23.11f(b)(3) the Department may only remove or arrange for the removal of hazardous substances which have been discharged **prior to** the effective date of the Spill Compensation and Control Act. This distinction between pre and post act discharges must be recognized in these regulations, particularly in regard to the issuance of an administrative consent order as a condition of a directive.

COMMENT 166. Chemical Industry Council of New Jersey commented that, under N.J.S.A. 58:10-23.11f(a), the Department is only authorized to clean up spills which occur after the effective date of the Spill Compensation and Control Act, April 1, 1977. The Department cannot use public funds to remediate a site on its own initiative. The disbursement of public funds for cleanup activities is "subject to the approval of the administrator [of the Spill Fund] with regard to the availability of funds thereof." N.J.S.A. 58:10-23.11f(b). The administrator can only release those funds after "he determines that adequate funds from another source are not or will not be available." N.J.S.A. 58:10-23.111f(d). Thus, the Department cannot turn to public funding as soon as a responsible part rejects the Department's requirement to clean up.

RESPONSE TO COMMENTS 163 TO 166: Although the Department believes that it has the authority pursuant to the Spill Compensation and Control Act to issue directives for pre-act discharges, the Department will not respond further to these comments in light of the fact that the Department is currently involved in litigation regarding this issue with one of the commenters. The Department is satisfied that its longstanding interpretation of the Spill Compensation and Control Act is the correct one and has adopted this section as proposed.

COMMENT 167: Hoffman-La Roche Inc. said that the proposed regulatory language allowing directives to be issued to persons "in any way responsible" for a dischage exceeds Spill Compensation and Control Act authority. One's very presence in the State could be a reason to receive a directive. This is perhaps an overstatement, but they have felt at times that such a reason was the only logical explanation for certain directives received by Hoffman-La Roche Inc. They feel these regulations are the appropriate opportunity to return to the language of the statute for this critical judgment, which can have considerable impact on whether a company can continue to survive. They note the Spill Compensation and Control Act has been amended numerous times over the years, and the Legislature has never seen fit to broaden the directive language to the extent that the Department now seeks to do. The regulatory language should parallel the statutory language to avoid any confusion in the future.

RESPONSE: The Spill Compensation and Control Act provides, at N.J.S.A 58:10-23.11g(c)(i):

> Any person who has discharged a hazardous substance or is in any way responsible for any hazardous substance, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup costs no matter by whom incurred ...

The act authorizes the Department to:

> ... act to clean up and remove or arrange for the cleanup and removal of [a] discharge or may direct the discharger to clean up and remove, or arrange for the removal of, such discharge ... (N.J.S.A. 58:10-23.11(a))

A directive requires a responsible party to clean up or remove the discharge, or pay the Department's costs to do so. These two provisions quoted above, read together, authorize the issuance of a directive to a person "in any way responsible" for a hazardous substance that is discharged. In 1988 the New Jersey Supreme Court decided that the Department had the authority to issue a directive to a "responsible" party pursuant to N.J.S.A. 58:10-23.11(c) in *Kimber*, 110 *N.J.* at 73-75. Therefore, both the statutory language and its interpretation by New Jersey's highest court, undisturbed by Legislative amendment over the past five years, authorize the issuance of directives as proposed at N.J.A.C. 7:26C-2.5(a).

COMMENT 168: Chevron U.S.A. Inc. suggested that the terms "to the extent possible," should be deleted from N.J.A.C. 7:26C-2.5(c), which should then be split into two parts and a new subsection (d) added. The two new parts should read as follows (new language is in boldface):

(c) The Department will in the directive provide **detailed, comprehensive and complete** notice as to:

1. The site of the discharge or threatened discharge;
2. The identity of those responsible parties receiving the directive; and
3. The connection of the directive recipient to the discharge.

(d) **The Department will also in directive provide general notice as to:**

1. The nature of the necessary remediation of the estimated costs to be incurred;
2. The actions that the directive recipients are directed to accomplish;
3. The manner and timetable for undertaking of those activities; and
4. The identification of a period in which the recipients shall respond to the directive.

Prior to accusing a person of a discharge of pollution to the environment the Department should have completed an in-depth investigation as the potential liabilities could be overwhelming to a small or medium-sized facility. All of this information must be provided to the potentially responsible party. A complete and comprehensive notice will likely result in quicker action by potentially responsible parties.

COMMENT 169: Cohen, Shapiro, Polisher, Shiekman and Cohen requested a standard for determining whether sufficient information exists to issue a Spill Compensation and Control Act directive to a particular person or entity. Many in the regulated community believe that the Department utilizes directives as much for purposes of information gathering as for enforcement. Thus, persons and entities have been subject to potential daily penalties and treble damages in situations in which it is very doubtful that the Department could prevail in a litigated cost recovery or penalty proceeding. As a result, these persons and entities have had to incur very substantial transactional costs. Publicly traded entities have, in a number of instances, had to make reports to the Securities and Exchange Commission which have depressed their stock values. In other instances, persons and entities

identified in Spill Compensation and Control Act directives have found it difficult to secure loans and the capital formation necessary for the continuation of their businesses. Finally, many persons and entities have had to participate in settlements because the transactional cost of opposing a directive was so great that it could not be borne.

Because of the dire consequences of receiving a directive and the generally recognized coercive effect of this enforcement document, the Department should promulgate a standard upon which it will base its decision to issue a Spill Compensation and Control Act directive. It is suggested that the standard should be belief that "sufficient evidence exists, which would be admissible in a court of law, giving rise to the conclusion that the person or entity to whom the Spill Compensation and Control Act directive is issued is a person or entity in any way responsible pursuant to the Spill Compensation and Control Act." Moreover, the regulation should specifically provide that the individual who is to make this determination be the individual who signs the directive after consultation with legal counsel.

COMMENT 170: New Jersey Business and Industry Association commented that there is no need for N.J.A.C. 7:26C-2.5(e) which provides that the Department may require an administrative consent order to assure performance of remediation after a directive has been issued. A Spill Compensation and Control Act directive typically contains time limits itself and subjects those who fail to comply with its terms to substantial penalties including treble damages.

COMMENT 171: The Chemical Industry Council of New Jersey requested guidance as to the circumstances pursuant to which the Department will require the entry of an administrative consent order in the context of the Spill Compensation and Control Act directive. The Spill Compensation and Control Act directive itself typically imposes deadlines pursuant to which the directed actions must be taken. Moreover, the Spill Compensation and Control Act reserves to the Department the right to seek treble damages in the event a party fails to comply with a directive. Yet another layer of financial disincentives in a Spill Compensation and Control Act case in which a directive has been issued is inappropriate.

RESPONSE TO COMMENTS 168 TO 171: The purpose of a directive is to provide notice that the Department is aware of facts which indicate a person may be in any way responsible for a discharge of a hazardous substance, that remediation is necessary, and that the Department is planning to clean up and remove the discharge. The responsible party may either pay the Department or do the work, thereby avoiding the imposition of treble damage. The New Jersey Appellate Division has said, relying on *Kimber,* that "[d]ue process and fundamental fairness do not mandate findings of fact in [a] directive to assist the alleged discharger in making the decision whether it should comply with the directive." *Appeal of Manor Care, Inc.,* Docket No. A-1202-88T3 (App. Div. 1990). Slip opinion. p. 3.

The objective of the Spill Compensation and Control Act is to protect human health and the environment through the cleanup and removal of discharges of hazardous substances. The suggested standard would impose a greater burden on the Department's resources, directing those resources away from protecting human health and the environment. The person named in the directive should come forward with all information it has, and, if the Department is satisfied that person is not responsible the Department will rescind the directive. Directives are intended to give notice that cleanup is necessary and are issued to those parties the Department believes to be in any way responsible for the discharge. To the extent the parties named come forward with additional information, directives are information gathering tools; however, that is not their primary intent. Further, directives are intended to encourage settlements whereby the responsible parties either pay the costs of cleanup or do the work to avoid treble damages. If a party believes there is no liability that party need not enter into an administrative consent order or otherwise settle or comply with the directive, except to notify the Department of good cause defenses.

COMMENT 172: Wheaton Industries, Inc. requested that N.J.A.C. 7:26C-2.5(f) state that where consistent with protecting public health and environment, the Department will provide sufficient time for a response to a directive to provide the directive recipient with a reasonable opportunity to discuss the directive with the Department.

COMMENT 173: Cohen, Shapiro, Polisher, Shiekman and Cohen suggested that the regulations specify a time period of 60 days for a named party to respond to a directive, with an automatic 30 day extension upon request at least two weeks before the deadline. The named parties need time to address difficult factual and legal issues and investigation events that may have occurred twenty years ago.

RESPONSE TO COMMENTS 172 AND 173: The time for response to a directive may be dictated by the emergent nature of the danger to human health and the environment. While 60 days might be reasonable in some circumstances, the Department is not in a position to bind itself to this time frame for all cases. The Department will give adequate time to respond, taking into consideration the need to protect human health and the environment.

COMMENT 174: Cohen, Shapiro, Polisher, Shiekman and Cohen suggested that the regulations should provide that prior to issuing the directive, the Department should put together copies of all documents and information which representatives of the Department or its counsel reviewed in order to prepare the directive or identify responsible parties to receive the directive as well as all documents and information relating in any way to the site which is in possession of the Department, its counsel or the United States Environmental Protection Agency. These documents should be indexed. A copy of the index should be appended to the Directive, and the documents themselves should be made available to any Directive recipient promptly upon request.

RESPONSE: The Department is under no obligation to provide a responsible party with all the information that party might wish to have in order to decide whether to respond to a directive. See, *Manor Care.* Further, the compilation, copying, and indexing of documents suggested by Cohen, Shapiro, Polisher, Shiekman and Cohen would be an enormous task, draining Department resources which would more efficiently be spent in performing or overseeing remediations. The responsible party frequently has better access to information regarding discharges for which it is or may be responsible than the Department. Further, the Department will make its public files available for review upon request.

COMMENT 175: Exxon Company, U.S.A. commented that the Department should only issue notices to relevant insurers (that is, those who have potential liability) and not all insurers. Therefore, it is recommended that "who has potential liability" be inserted following "insurer."

COMMENT 176: Chevron U.S.A. Inc. suggested that N.J.A.C. 7:26C-2.5(d) be deleted. Notification to an insurer or bank that a facility may be responsible for a discharge will have a negative potential impact on the ability to do business. As currently worded the Department need only "believe" that a person is responsible. There must be reasonable burden of proof that person is actually responsible for a discharge. The Department should not assume a person is guilty until proven innocent. Rather, the Department should be required to have a high degree of certainty that a person is responsible for a discharge.

RESPONSE TO COMMENTS 175 AND 176: The Spill Compensation and Control Act, at N.J.S.A. 58:10-23.11g(c), provides that:

> "Any person who has discharged a hazardous substance or is in any way responsible for any hazardous substance which the Department has removed or is removing . . . shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal cost."

Consequently, if a responsible party holds policies for the site, the insurers may be liable to the Department for the cost of remediation as a third party beneficiary of insurance policies covering the contamination and therefore entitled to bring a declaratory judgment action against an insurer based on common law. N.J.S.A. 58:10-23.11s also authorizes the Department to bring an action for costs directly against an insurer.

The Department may notify the insurers of the directive simultaneously with issuance of the directive so that it is easier for the insurers to identify the problem and to the extent that they decide to participate, limit the amount of resources the Department expends. The Department follows a "polluter pays" strategy and so must make every effort to recover or avoid the expenditure of any monies from the Spill Fund at a site.

The Department bases its decision to issue a directive based upon its factual investigation of the matter. Recipients who can show they are not responsible should provide that evidence to the Department and the Department will rescind the directive if satisfied the person is not responsible.

COMMENT 177: Rutgers Environmental Law Clinic commented that where there has been a spill or discharge of sufficient concern to prompt

a Spill Compensation and Control Act directive, an administrative consent order should be required in order to ensure that timely and complete remediation is accomplished.

RESPONSE: Administrative consent orders will be required if the site is a priority site. The Department has the authority to issue a directive whenever a hazardous substance has been discharged, whether it is a priority site or not. There are circumstances other than at priority sites when it may be in the public interest to issue a directive. Accordingly, the Department has retained the discretion to determine whether it will require an administrative consent order when a responsible party will do the work.

COMMENT 178: Chevron U.S.A. Inc. suggested that an administrative consent order should only be required "upon a showing of reasonable cause." A decision by the Department to require the entry of an agreement in the form of an administrative consent order should be based upon known qualitative and/or quantitative criteria rather than the subjective discretion of the Department.

COMMENT 179: Wheaton Industries, Inc. said that it is a contradiction in terms for the Department to order entry into a consent order; such an order would exceed the Department's legal authority. N.J.A.C. 7:26C-2.5(e) should be revised to state that ". . . the Department may, in the exercise of its enforcement discretion, enter into an agreement in the form of an administrative consent order . . ."

COMMENT 180: Cohen, Shapiro, Polisher, Shiekman and Cohen interpreted N.J.A.C. 7:26C-2.5(e) to require the recipient of a Directive to enter into a form administrative consent order with the Department. An administrative consent order resulting from such a regulatory obligation, could hardly be considered to be "on consent." As presently proposed, this regulation would require a directive recipient to give up various rights by signing an administrative consent order including stipulated penalties, financial assurance, oversight costs, the definition of the site, the cleanup of all contaminants at the site, even if divisibility arguments might exist. The directive recipient would have to waive its rights to an administrative hearing concerning the entry of the order.

The statutory authority for issuance of a directive by the Department, N.J.S.A. 58:10-23.11f(a), provides only that the Department may "act to remove or arrange for the removal of such discharge or may direct the discharger to remove, or arrange for the removal of, such discharge." This is the limit of the Department's directive authority under the Spill Compensation and Control Act. What the Department proposes to do by this regulation is essentially to require directive recipients to give up various of their rights and agree to Departmental actions which are not specifically provided for in the Spill Compensation and Control Act. Obviously, this is unacceptable. If the Department desires the authority to require the obligations set out in the form administrative consent order, that authority should come from an amendment to the Spill Compensation and Control Act by the legislature.

COMMENT 181: The Chemical Industry Council of New Jersey commented that N.J.A.C. 7:26C-2.5(a)1 allows the Department to proceed with the cleanup itself and to collect treble damages whether or not the party agrees to comply with a cleanup directive. It is beyond the authority granted by the Spill Compensation and Control Act to obligate an ordered party to enter into an administrative consent order in response to a cleanup directive. This section should be deleted.

COMMENT 182: Allied-Signal Inc., E.I. du Pont de Nemours and Company and The General Electric Company disputed the Department's authority under the Spill Compensation and Control Act to propose regulations with respect to "directives." Proposed N.J.A.C. 7:26C-2.5(e) suggests that the Department can compel consent to an administrative order as the sole means of complying with the direction by the Department to perform remediation. A consent order by definition is one to which the responsible party consents in lieu of other actions which the Department might take unilaterally, including the expenditure of public funds. Where the Department does in fact act unilaterally, such as in the issuance of a directive, it cannot thereby compel "consent" as the means of memorializing performance. The terms of an administrative consent order require a waiver of certain rights on the part of the responsible party. In the negotiation context, the waiver of such rights may be appropriate as part of the bilateral nature of the document. Where the Department unilaterally directs conduct, it is in no position to require a waiver of rights as a condition of obedience.

RESPONSE TO COMMENTS 178 AND 182: A directive may be issued for a priority or a non-priority site. If a responsible party responds to a directive by agreeing to remediate the contamination at a priority site that party will be required to sign an administrative consent order for the reasons set forth in the summary and the Department's responses to these rules. No one will be ordered to sign an administrative consent order. The ability to choose whether to sign is the same for any priority site. The language suggested by Wheaton Industries, Inc. misses the intent of anyone who conducts a remediation at a priority site must sign an Administrative Consent Order.

COMMENT 183: The New Jersey State Bar Association asked whether the Department will attempt, when issuing multiple responsible party directives, to sever the liability of the directive recipients and accept partial payment in response to a directive, or will the only acceptable payment be an entire estimated cost of the work mandated under the directive?

Is payment intended as an alternate directive compliance mechanism which will mitigate the imposition of treble damages? If not, what potential benefit is there to directive recipient to make any payment in mitigation, if in fact it will continue to be potentially liable for treble damages?

COMMENT 184: Rutgers Environmental Law Clinic commented that where a directive recipient agrees to pay for certain portions of the remediation specified in the directive, the directive recipient should, under no circumstances, be relieved of liability for other payments with regard to the cleanup of the site. The responsible party should not have to pay for anything twice; however, the partial payment should not exclude liability for anything other site-related cost.

RESPONSE TO COMMENTS 183 AND 184: The Department will accept partial payment in response to a directive, and that payment will reduce that person's exposure to treble damage liability in the amount of the partial payment. Since the Department's strategy is to remediate first, and then litigate its cost recovery, a party's share of the costs may not be conclusively determined until the Department brings a cost recovery action. Therefore, though the Department does not sever liability, it will accept any unconditional payment in mitigation of treble damages.

COMMENT 185: Allied-Signal Inc., E.I. du Pont de Nemours and Company and The General Electric Company objected to the limitation of the responses which a party might make to a directive. The effectiveness of a directive, and the good cause defenses which the New Jersey Supreme Court has recognized, implicate due process principles. These due process principles take on special significance given the Department's strong adherence to the concept that there is no pre-enforcement review of a directive. Accordingly, the Department cannot prescribe any limitations on the extent or manner by which a party may raise "good cause" defenses.

COMMENT 186: The Chemical Industry Council of New Jersey requested clarification whether the defenses raised by the directive recipient in its written response will be the only defenses the directive recipient will be permitted to use in the future.

COMMENT 187: The New Jersey Builders Association asked whether a directive recipient can at a future date raise defenses other than those contained in the written responses. Obviously, a directive recipient cannot foresee all the possible defenses if it does not have all the facts at the time that the written response is prepared. Therefore, the Department should, in the interest of fairness, allow amendments to the written response as facts develop.

COMMENT 188: Cohen, Shapiro, Polisher, Shiekman and Cohen said that N.J.A.C. 7:26C-2.5 should specifically provide that the Directive recipient may amend its response to the directive based upon information not previously known to it.

COMMENT 189: Chevron U.S.A Inc. asks that N.J.A.C. 7:26C-2.5(h)2 be deleted because the statute does not limit the assertion of good faith defenses in time. In most cases information becomes available only as the investigation progresses. If the Department does not delete this limitation then the following should be added, "Notwithstanding, the directive recipient shall not be deemed to have waived any good cause defenses not raised in its written response to the directive."

COMMENT 190: Wheaton Industries, Inc. commented that the Department does not have the authority to mandate a written response raising good faith defenses to a Spill Compensation and Control Act directive. Furthermore, the Department has no authority to limit the defenses which a directive recipient may raise to treble damage claims in a proceeding to enforce the directive to those defenses which the recipient includes in its written response to the directive. This provision abridges principles of fundamental fairness by requiring a written response setting out any good cause defenses without establishing a connection between the time allowed for response and the time

reasonably needed by a directive recipient to assess the availability of any defenses. N.J.A.C. 7:26C-2.5(h) should be deleted in its entirety; if N.J.A.C. 7:26C-2.5(h) is retained, paragraphs (h)1 and 2 should be deleted.

COMMENT 191: Edwards & Angell commented that the limitation of good faith defenses to those raised in the directive recipient's written response ignores the constitutional limits of the Department's authority. Without good faith defenses, the entire Spill Compensation and Control Act enforcement scheme is suspect. These rules cannot be used to modify the existing New Jersey case law on administrative procedures and to curtail the rights of directive recipients. A directive recipient has no control over the issuance of the directive, the Department's production of critical public documents or the deadline imposed by the directive. Accordingly, the recipient should not be expected to be in a position to raise all factual and legal defenses until it has had a reasonable opportunity to understand all of the facts and the Department's claims.

RESPONSE TO COMMENTS 185 and 191: The limitation of the time when good cause defenses can be raised is consistent with the holding of *In the Matter of Kimber Petroleum*, 110 *N.J.* 69 (1988). The Supreme Court said, in that case:

> "We therefore hold that treble damages need not be assessed if the party opposing such damages *had* an objectively reasonable basis for believing that DEP's directive was either invalid or inapplicable to it, and that any decision by the DEP to seek treble damages in a recovery action be subject to judicial review as any other agency action". (emphasis added). (110 *N.J.* at 83.)

The responsible party must have an objectively reasonable basis for not complying with the directive at or near the time the directive is issued under that holding. It is the Department's intent, through these rules, to require the responsible party to raise its good cause defenses to treble damages at the time the directive is issued.

Principles of due process will be satisfied if there is "*some* forum where an order's validity can be challenged without penalty." The challenge need not precede the payment of costs or compliance with the order. *Kimber,* 110 *N.J.* at 79. The procedure whereby the directive recipient must raise defenses within a specified time frame after receiving the directive preserves due process rights. The recipient should be able to make a determination whether it has good cause defenses within a reasonable period of receiving the directive. The limitation of the period in which to raise such defenses is analogous to court rules which require certain defenses to be raised within a specified time after service of a complaint.

To the extent human health and the environment can be protected, the Department will provide adequate time for investigation of the findings in a directive, and will cooperate to provide access to the public documents in its files.

The Department believes the proposed regulation preserves a directive recipient's due process rights, but at the same time, this procedure will prevent responsible parties from unduly delaying the decision whether to undertake the remediation while they investigate their potential liability. The Department will also be aware of the challenges to its directive before it spends public funds to do the work.

COMMENT 192: Allied-Signal Inc., E.I. du Pont de Nemours and Company and The General Electric Company commented that the Department should be required to respond to good faith defenses raised by a directive recipient. Assuming that a directive recipient does choose to "explain" its position, the Department should be obligated to consider any response made, and to withdraw or modify the directive as appropriate, or to explain its reasons for not doing so. Elementary fairness demands that if the Department compels a written response to a directive, the directive recipient is entitled to know in a timely manner the Department's position after review and consideration of the response.

COMMENT 193: Cohen, Shapiro, Polisher, Shiekman and Cohen commented that the regulations should provide for a written response from the Department to any defenses raised by the directive recipient either accepting or rejecting those defenses and detailing the basis for any such rejection within 60 days from the date that the Department receives the response from the directive recipient.

RESPONSE TO COMMENTS 192 AND 193: For the most part, the Department will neither accept nor reject good cause defenses raised by a recipient of a directive. Often the legal basis for such defenses will be untested statutory interpretations or will require the determination of disputed factual issues by a court. In some, but not all cases, the Department may change its enforcement position based on good cause defenses raised in response to the directive. In those cases, the Department will so advise the directive recipient. However, since many good cause defenses will have to be addressed by a court, the Department will not routinely provide such a response, nor will it mandate a written response in these rules.

COMMENT 194: The Chemical Industry Council of New Jersey and the New Jersey Business and Industry Association asked whether the language "an objectively reasonable basis for failing to comply with the directive" in N.J.A.C. 7:26C-2.5(i) is a different standard from the good cause defense described by the New Jersey Supreme Court in *The Matter of Kimber Petroleum Corporation, et al.,* 110 *N.J.* 69 (1988). It would be more appropriate for the Department to keep the language consistent in regard to the types of defenses to treble damages which may be acceptable. The case law and the other regulations speak in terms of good cause defenses.

COMMENT 195: Similarly, the New Jersey State Bar Association asked, in the case of a directive recipient who fails to comply with a directive, what needs to be shown in order to defend a subsequent treble damages action by the Department. Is an "objectively reasonable basis" something other than, or in addition to, a good faith defense? If not, and in view of the holding in *Kimber Petroleum,* what is the basis for imposing the requirement?

RESPONSE TO COMMENTS 194 AND 195: The holding in *Kimber* was that:

> "treble damages need not be assessed if the party opposing such damages had an *objectively reasonable basis* for believing the DEP's directive was either invalid or inapplicable to it...." (emphasis added) (110 *N.J.* at 83).

The language in the proposed rule tracks the Supreme Court's holding. As discussed in *Kimber,* good cause defenses, if proven, would lead to the establishment of such an objectively reasonable basis for believing the Department's directive was invalid or inapplicable.

COMMENT 196: Chevron U.S.A. Inc. suggested a number of changes to N.J.A.C. 7:26-2.5(i), describing cost recovery procedures. Delete the phrase, "obtain a cause of action against the directive recipient" and replace with "seek to recover from the directive recipient in a cost recovery action." Also, delete "as an initial matter, its entitlement to a single-cost recovery action against the recipient" and replace with "by a preponderance of the evidence, its entitlement to a cost recovery against the directive recipient." Amend the last sentence to read "If the Department is able to establish, by a preponderance of the evidence, its entitlement to cost recovery against a directive recipient, it may be entitled to treble the cost recovery unless the directive recipient can establish that it had, at the time required to respond to the directive, a reasonable basis for failing to comply with the directive or has a good cause defense." The Department should have no less a standard than the regulated community to prove its entitlement to treble damages, that is, by a preponderance of the evidence.

RESPONSE: With respect to the first requested change, the Department agrees that the language "seek to recover from" more closely follows the statutory language and will make the change.

The standard of proof is a matter to be determined by a court and is therefore beyond the scope of these rules. The Department is governed by the standard of proof required by the courts.

The language in the proposed rule, "objectively reasonable basis," would result from proof of good cause defenses. The proposed language more precisely follows *Kimber* than the change suggested by Chevron U.S.A. Inc.

COMMENT 197: Edwards & Angell commented that proposed N.J.A.C. 7:26C-2.5(i) and 2.6 are merely self-serving statements of the Department's view of the law. They have no regulatory effect and should be deleted.

RESPONSE: These two provisions set forth the procedure the Department will follow when it issues directives and advise the regulated community that it retains its discretion to proceed with court actions under statutory and common law. These provisions are intended to provide a greater degree of predictability, not to usurp the functions of the courts. The rules as proposed are consistent with current precedent and statutory law and therefore the Department does not consider them "self serving."

COMMENT 198: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company, objected to N.J.A.C. 7:26C-2.5(i) because it purports to describe what proofs the Department is required to make in order to perfect a claim for treble recovery against a directive recipient. There is nothing particularly "regulatory" about the process. It is a uniquely judicial process. It is for the courts to determine

the burden of proof on the Department, and under what circumstances it may obtain compensation. It is not for the Department to tell the courts upon whom the burden of proof is placed or under what circumstances a refusal to honor a directive will justify treble damages. They propose that the subsection be deleted.

RESPONSE: N.J.A.C. 7:26C-2.5(i) sets forth the steps the Department will take after issuing a directive where the recipient chooses not to comply. The rules are consistent with *Kimber* and the Department considers it important that the registered community be aware of the risk of treble damages and the burdens that have been imposed by the New Jersey Supreme Court in *Kimber.*

COMMENT 199: Cohen, Shapiro, Polisher, Shiekman and Cohen commented that the Department should be limited to recovering three times the costs of the remediation conducted in accordance with a directive including penalties. Pursuant to N.J.A.C. 7:26C-2.5(i), if there are 25 responsible parties liable for remediation of a site, the Department would be permitted to recover 75 times its costs. This provision should specifically provide that with respect to the enforcement of any directive, the Department will not be permitted to recover more than three times its cost by means of penalties, a treble damage cost recovery proceeding or a combination of the two.

RESPONSE: The Spill Compensation and Control Act provides for recovery by the Department of three times the costs it expends in cleaning up and removing a discharge. The Act also provides for joint and several liability. Therefore the Department can recover three times its costs from a single responsible party. However, the interpretation of the rule by Cohen, Shapiro, Polisher, Shiekman and Cohen requires a strained reading of the proposed rule, is beyond the authority of the statute and is not what the Department intends. The Department will not attempt to recover more than the statute provides no matter how many parties there are.

Penalties are separate from and in addition to treble damages under the Spill Compensation and Control Act. The treble damages provision, N.J.S.A. 58:10-23.11f has been a part of the Spill Compensation and Control Act since enactment in 1976, while the penalty provision for violations of a directive was added in 1990. See N.J.S.A. 58:23.11u. Clearly, the Legislature intended to impose a penalty for violations of the Act separate from and in addition to treble damages. The Department also has the authority to assess penalties under other statutes, separate from and in addition to treble damages under the Spill Compensation and Control Act. Where necessary, the Department will impose such penalties, as well as seek recovery of treble damages.

COMMENT 200: Cohen, Shapiro, Polisher, Shiekman and Cohen commented that the Department should not be permitted to increase either penalties or costs subject to enforcement trebling by failing to move promptly to enforce a directive. This provision should provide that the Department shall not levy penalties more than 45 days after the Department knows or should have known of the act or failure to act which gives rise to the penalties. Similarly, the Department should be required to commence a treble damage cost recovery action against any responsible party within six months of the first date after issuance of a directive that the Department incurs costs for outside contractors with respect to the site.

RESPONSE: The Department's strategy is to remediate contamination first and litigate its cost recovery action after cleanup is complete. Many cleanups take longer than six months so it is unlikely the Department would have incurred all of its costs by that time, requiring successive litigation of cost recovery actions for a single site. A directive recipient who wishes to limit its exposure to treble damages must either await the completion of the remediation, do the work itself, or pay all or part of the costs in advance.

The statute places no limitation on the time when penalties may be assessed. Forty-five days could be far too short a time for the Department to be able to investigate, draft, and issue a penalty assessment. A violator is responsible to know the law and can limit its liability for penalties by complying with the law rather than through the imposition of limitations periods for enforcement.

N.J.A.C. 7:26C-2.7 Procedures to identify the appropriate oversight document for a particular case

COMMENT 201: Exxon Company, U.S.A. suggested that N.J.A.C. 7:26C-2.7(b) be clarified by adding "Memorandum of Agreement" at the end of the clause; that N.J.A.C. 7:26C-2.7(c) be clarified by adding "Environmental Cleanup Responsibility Act administrative consent order" at the end of the clause; and that N.J.A.C. 7:26C-2.7(d) be clarified by adding "Responsible Party administrative consent order" at the end of the clause.

RESPONSE: The Department agrees that the suggested changes would clarify the rule and has made the appropriate changes.

COMMENT 202: Exxon Company, U.S.A. suggested that N.J.A.C. 7:26C-2.7(e) be clarified by adding the underlined so the clause reads: If the Department has elected to conduct the remediation itself **at a site not subject to Environmental Cleanup Responsibility Act,** and any person elects to pay the Department for the Cost of the remediation, the appropriate oversight document is identified in N.J.A.C. 7:26C-5 Responsible Party administrative consent order.

RESPONSE: In the Department's experience the fact that a site is subject to the Environmental Cleanup Responsibility Act does not necessarily ensure that it is being remediated in a proper and timely manner. As a result, sites subject to the Environmental Cleanup Responsibility Act may require the expenditure of public funds. For example, a transaction may take place without Environmental Cleanup Responsibility Act compliance and there are no private funds available before cleanup. Accordingly, the Department must retain its authority to require an administrative consent order in the appropriate circumstances, if, for example, a third party chooses to remediate a priority site that is subject to Environmental Cleanup Responsibility Act.

Subchapter 3. Memorandum of Agreement

Title

COMMENT 203: Exxon Company, U.S.A. suggested that the Department change Memoranda to Memorandum (technical correction).

RESPONSE: The Department agrees with this suggestion and has made the correction.

N.J.A.C. 7:26C-3.2 Procedure to obtain a memorandum of agreement

COMMENT 205: The New Jersey Business and Industry Association asked the Department to clarify what it means by "completed application." Specifically, the Department should clarify if there will be a time period when the application will be initially reviewed for completeness before substantive review by the Department.

RESPONSE: The Department has committed itself in the rule to preparing a memorandum of agreement for a particular site within 30 days of its receipt of a completed application. All of the information the Department requires in the application is necessary for the Department to help initiate remediation at a site through the drafting of a memorandum of agreement.

A completed application is an application where all information requested in the application is provided. The Department's objective is to maximize the number of cleanups underway as quickly as possible. Since this is a voluntary program, the Department anticipates the need for an initial review for completeness will be minimal and no formalized procedure for the review of an application will be necessary.

N.J.A.C. 7:26C-3.3 Wording of memorandum of agreement

COMMENT 205: Allied-Signal, Inc., E.I. du Pont de Nemours and Co., and The General Electric Company suggested that N.J.A.C. 7:26C-3.3 be changed as follows to give the Department flexibility to address site specific concerns: "The Department shall prepare each memorandum of agreement based upon the standard memorandum of agreement in Appendix A as guidance, incorporated herein by reference, modified as appropriate for the specific remediation phase(s) the applicant intends to conduct and other site specific considerations."

COMMENT 206: Exxon Company, U.S.A. suggested that N.J.A.C. 7:26C-3.2(d) be changed to "An applicant for a memorandum of agreement may include in the application specific additions, deletions or changes to the wording of the standard memorandum of agreement in Appendix A for the Department's review and consideration." These changes simplify/clarify the procedure to obtain a memorandum of agreement.

Exxon Company, U.S.A. requested that N.J.A.C. 7:26C-3.3 provide that the Department include any additions, deletions or changes requested by the applicant to give the necessary flexibility and authority to deviate from a "standard form." Every site and situation is different and although standard wording may be desirable from an efficiency standpoint, it may not be acceptable from a legal and practical viewpoint. The Department would be free to reject the applicant's request and the applicant would have the option to enter into the memorandum of agreement without the requested changes.

RESPONSE TO COMMENTS 205 AND 206: The memorandum of agreement is being offered to businesses and individuals in the regulated community to meet their need or desire for Department oversight of voluntary cleanups. It is, in essence, a contract to pay the Department for the cost of overseeing the work in return for the Department's review and, if appropriate, approval of that work as consistent with applicable standards, rules, and statutes. The party responsible for the remediation chooses the phase of remediation to be performed, when to begin and may stop work at any time as long as the Department is reimbursed for its oversight costs to that date, any data generated is supplied to the Department, and there is no environmental hazard created. This simple agreement is being standardized to avoid the costs and delay attendant to negotiations of the terms of the agreement. The Department's objective is to devote available resources to cleanups, not to negotiation. The memorandum of agreement as drafted in the rules is inherently flexible because it is voluntary and the extent of the work is up to the person responsible for conducting the remediation.

The standard form of memorandum of agreement incorporates more than 10 years of Department experience in negotiating oversight documents. In promulgating the standard form as a rule, the Department has attempted to balance the need for flexibility with the need for predictability and certainty expressed by the regulated community over the years. The standard form also ensures consistency for all parties that will enter into these contracts with the Department.

COMMENT 207: Rutgers Environmental Law Clinic said that the Department must retain the authority to reject an application for a memorandum of agreement. The Department should not so drastically limit its ability to control its oversight of contaminated sites as to leave it to the remediator to decide which document is appropriate. The regulations should provide that the Department may reject an application for the use of a memorandum of agreement for any reason and should explicitly state that such a rejection may be based upon the necessity of using an administrative consent order on the site or upon the prior history of the applicant or other party implicated with respect to the site. The prior history could include violations of prior enforcement actions or permits or other actions which indicate that the party is or has been a "bad actor." Likewise, the Department should be permitted under the regulations to unilaterally terminate a memorandum of agreement for any of the reasons that it might have rejected the application for the memorandum of agreement or if human health or the environment are threatened by any of the activities associated with or performed pursuant to the memorandum of agreement.

RESPONSE: The criteria for selection of the appropriate oversight document are set forth in N.J.A.C. 7:26C-2 of these rules. Under N.J.A.C. 7:26C-2.2(a), the Department chooses whether to enter into a memorandum of agreement. An administrative consent order would be required based on the priority of the site (N.J.A.C. 7:26C-2.3(b)), and would be available for priority sites.

The voluntary cleanup program implemented in these rules is a remediation program, rather than an enforcement scheme. Enforcement considerations would interfere with the objective to benefit the public by allowing full or partial voluntary cleanups using private funds. Even a "bad actor" should be encouraged to remediate a site with Department oversight. The Department will apply the same standards in reviewing work under a memorandum of agreement as it will in reviewing work under an administrative consent order.

The Department does retain the right to terminate a memorandum of agreement for failure to comply with its terms, or if the site becomes a priority. In addition, a memorandum of agreement does not constitute a waiver or release of liability for contamination so the Department retains its authority to take enforcement action where necessary. See Section IV of the standard memorandum of agreement, Appendix A.

COMMENT 208: Exxon Company, U.S.A. suggested that N.J.A.C. 7:26C-3.2(c) be amended to provide that the Department either determine a preliminary assessment and/or site investigation is necessary or review the preliminary assessment and/or site investigation data that has been submitted.

Exxon Company, U.S.A. further commented that the words "for a preliminary assessment and site investigation" after "application" are not needed and should be deleted.

Exxon Company, U.S.A. suggested that N.J.A.C. 7:26C-3.2(c)2 be amended to change the reference to a preliminary assessment/site investigation to a reference to site remediation.

Exxon Company, U.S.A. also suggested that N.J.A.C. 7:26C-3.2(d) be deleted as the change from "preliminary assessment/site investigation" to "site remediation" suggested above renders N.J.A.C. 7:26C-3.2(d) superfluous.

COMMENT 209: Colonial Pipeline Company commented that the procedures, criteria and/or factors used to determine if a preliminary assessment or site investigation is necessary should be specified.

COMMENT 210: Atlantic Electric asked the Department to clarify N.J.A.C. 7:26C-3.2(c). This subsection could be interpreted to mean that a person wishing to avail itself of the memorandum of agreement procedure would apply for a preliminary assessment and site investigation. The Department should clarify that the application would be for the memorandum of agreement itself, in response to which the Department would determine whether a preliminary assessment and site investigation is appropriate.

COMMENT 211: Allied-Signal, Inc., E.I. du Pont de Nemours and Co., and The General Electric Company understood N.J.A.C. 7:26C-3.2 to require that, before issuing a memorandum of agreement for any work, the Department must determine whether a preliminary assessment and/or site investigation is necessary based upon the information submitted by the applicant for the memorandum of agreement. This procedure is a disincentive due to the uncertainty whether a memorandum of agreement will be issued. The preliminary assessment/site investigation proposal should be deleted.

RESPONSE TO COMMENTS 208 TO 211: It is apparent from the comments above that the purposes of N.J.A.C. 7:26C-3.2(c) and (d) are not clear and these subsections have been revised consistent with the discussion below.

N.J.A.C. 7:26C-3.2(c) applies only where the applicant chooses to perform a preliminary assessment and/or a site assessment and submits an application for a memorandum of agreement for that work. The language in the rule is intended to avoid a second preliminary assessment or site investigation when the Department has already conducted one or both of these evaluations. The Department is simply determining whether a preliminary assessment/site investigation has already been done so criteria and procedures are unnecessary. The proposed rules, Technical Requirements for Site Remediation, N.J.A.C. 7:26E, set forth the requirements for conducting a preliminary assessment and site investigation.

COMMENT 212: Brown Rudnick, Freed and Gesmer asked whether a memorandum of agreement is appropriate for a low priority site where actual remediation may be unnecessary.

RESPONSE: The memorandum of agreement is the appropriate oversight document for investigation and/or cleanup of non-priority sites whenever the party responsible for that work desires or needs oversight and approval of the work by the Department. From the Department's perspective, the word remediation includes both investigatory and cleanup work. Assuming the commenter was using "actual remediation" to mean cleanup (that is, remedial action), the memorandum of agreement would be appropriate for the applicant to obtain the Department's position in this regard.

COMMENT 213: Colonial Pipeline Company asked that a procedure be developed explaining how a person can investigate numerous sites on a facility, with each investigation commencing at different times. There are no provisions for a person to commence an investigation as an immediate response and continue to meet the requirements of either a memorandum of agreement or an administrative order.

RESPONSE: An applicant for a memorandum of agreement controls both the areas to be addressed pursuant to the memorandum of agreement and the scheduling of submissions to the Department for review. The applicant can use a memorandum of agreement to control the remediation of an entire facility based on a schedule the applicant develops, or the applicant can obtain a memorandum of agreement for a specific area of concern and limit the work to a single phase, or any level of work in between.

COMMENT 214: Atlantic Electric recommended that the periods for document review by the Department, as shown in N.J.A.C. 7:26C-3.2(c), be strengthened. The proposed regulations should be revised to indicate that all reporting time frames are in working days, not calendar days. Further, the Departmental review period often comes and goes with no word from the Department. If the Department does not respond within 30 calendar days after the Department's receipt of the completed application for preliminary assessment and/or site investigation, the applicant will be authorized to proceed under the assumption that no preliminary assessment or site investigation is required. An application

for a memorandum of agreement, which details the remediation work to be performed, completion schedule, etc., is to be reviewed by the Department for administrative completeness within 30 days. The proposed regulation should provide that the application will be deemed complete if the applicant does not receive notice of administrative completeness within 30 days. Further, if the Department gives notice that an application is deficient and the applicant satisfactorily responds to those deficiencies, the application will be deemed complete within 10 days of receipt of the response to deficiencies by the Department. The proposed regulations should be revised to include additional mandatory time schedules for Departmental comment/review for other submittals to speed up the cleanup of contaminated sites.

COMMENT 215: Mobil Oil Corporation commented that under the terms of the memorandum of agreement, the Department of Environmental Protection and Energy's only obligation is to respond to the applicant within 30 days as to the administrative completeness of the application. As is the case today, the Department is under no regulatory or "contractual" obligation to respond to the applicant in a timely manner. The Department attempted to address this concern in the preamble by stating that the final review should take 30 to 60 days. However, the Department gave no supporting facts as to why the process will be significantly reduced from the extended time frame we operate under today nor agreed to place such a restriction in the context of the agreement. In return for this unrestricted time contract, the applicant must pay all the Department's associated expenses, regardless of appropriateness, without independent audit and in addition to current Discharge to Ground Water or Discharge to Surface Water permit fees, taxes and all remediation costs.

COMMENT 216: The Commerce and Industry Association of New Jersey commented that the preamble suggests that documents submitted pursuant to memorandum of agreements will be reviewed for completeness on an expedited schedule and notice of any deficiencies will be relayed within 30 days. Thereafter a substantive review will be completed, within a period of time to be identified by the Department (24 N.J.R. 1286, second column). This language concerning the review of documents submitted pursuant to a memorandum of agreement should be included in the regulations themselves. Otherwise, the Department will not be bound by this representation.

RESPONSE TO COMMENTS 214 TO 216: The preceding comments address two separate issues. The first is the time for Department review of **applications** for memorandum of agreements at N.J.A.C. 7:26C-3.2(c) and (d). The second is the time for Department review of **documents** submitted for Department review pursuant to a memorandum of agreement, at Appendix A, standard memorandum of agreement Paragraph I.2. The Department is making a commitment to respond to application for a memorandum of agreement within 30 days either by: (1) advising the applicant that the remedial phase requested is unnecessary; (2) submitting a memorandum of agreement for the applicant's signature; or (3) informing applicant that the site is a priority. There is a formal review process for determining administrative completeness of an application. The Department is able to estimate that 30 days will be a reasonable time to review a memorandum of agreement application.

On the other hand, submissions under a memorandum of agreement could be extensive and complex, or they could be simple, depending on the extent of the work the person responsible for conducting the remediation chooses to do when entering into the memorandum of agreement. The quality of the submission affects the time for review. If the Department were to commit itself in a regulation to time lines that would fit all remediations or all aspects of a single remediation those time lines would be unnecessarily long for some documents and may be too short for others. The Department has attempted to accommodate the concerns of the regulated community by providing time lines after the submission of each document under a memorandum of agreement. See Appendix A, standard memorandum of agreement, Paragraph I.1.

A default provision allowing the person responsible for conducting the remediation to assume it has approval if it does not receive notice otherwise from the Department within a specified time would defeat the purpose of a memorandum of agreement, which is to obtain Department oversight and approval of work conducted. Any person is free to commence remediation without Department approval.

The Department is committed to cleaning up contaminated sites as quickly as possible. It will conduct the necessary reviews as quickly as its resources allow. If the party responsible for the remediation believes the Department is not timely that party should contact the case manager or appropriate management and discuss the situation.

COMMENT 217: Exxon Company, U.S.A. suggested, for clarity, that the phrase "at a site" be inserted after "remediation" at N.J.A.C. 7:26C-3.2(a).

RESPONSE: The Department agrees with the suggestion and has made the suggested revision to N.J.A.C. 7:26C-3.2(a) as proposed, which the Department has recodified at N.J.A.C. 7:26C-3.1(b).

COMMENT 218: Exxon Company, U.S.A. asked, referring to N.J.A.C. 7:26C-3.2(b), what are "discharges and contamination permits"? Should "available from the Department" be moved to after the word "application"? Technical corrections?

RESPONSE: These are "discharges" as defined in the statute. "Contamination permits" will be amended to "environmental permits" and "available from the Department" will be deleted from the rule.

COMMENT 219: Exxon Company, U.S.A. suggested that N.J.A.C. 7:26C-3.2(b) be amended to insert after ". . . compliance information . . ." "preliminary assessment and/or site investigation data (if available)." In some situations this information may be available and should be submitted with the memorandum of agreement application.

RESPONSE: The purpose of the memorandum of agreement is to provide a mechanism for a party to obtain the Department's review and/or oversight of a remedial phase at the convenience of that party. The proposed language would require the Department to perform a review of data associated with some phase of remediation. No data is reviewed in the application process because there is not yet an agreement on the part of the applicant to reimburse the Department for the cost of the review of such data.

COMMENT 220: Chevron U.S.A. Inc. asked that a new provision be added to read "Within fourteen (14) calendar days after the Department's receipt of the signed memorandum of agreement from the applicant, the Department will execute the memorandum of agreement." The Department should also be required to execute its part of the agreement in a timely manner. Fourteen days should be sufficient since the Department wrote the agreement.

RESPONSE: The Department agrees with this comment and has made the appropriate change as N.J.A.C. 7:26C-3.2(f).

Effect of Department Review Under a Memorandum of Agreement

COMMENT 221: Allied-Signal Inc., E.I. du Pont de Nemours and Company and The General Electric Company commented that, while a Potentially Responsible Party signing a memorandum of agreement must: (1) pay in full all of the Department's oversight costs; (2) submit all data generated pursuant to the memorandum of agreement; (3) submit annual expense summaries; (4) preserve all potential evidentiary documentation; and (5) submit all data developed regarding the site upon request, the process does not afford the Potentially Responsible Party entering into a memorandum of agreement any legal protection upon completion of remediation. If the Potentially Responsible Party does not obtain formal Departmental approval prior to undertaking any action, it is no better off than if it had undertaken an investigation or cleanup without Departmental oversight. The very least the Department can do for a Potentially Responsible Party voluntarily conducting a cleanup pursuant to a memorandum of agreement is to "approve" the remedial investigations or actions that are proposed to be undertaken. The Departmental comment currently provided for under a memorandum of agreement gains the Potentially Responsible Party nothing but additional cost and bureaucratic red tape. However, if the Potentially Responsible Party obtains Departmental "approval" it gains the assurance that its proposed remedial actions meet Departmental standards. This approval affords the Potentially Responsible Party a stronger guarantee of remedial finality than mere comments alone. Therefore, the Department should amend the memorandum of agreement to allow for Departmental review, comment and approval of the submissions made by a Potentially Responsible Party pursuant to a memorandum of agreement.

RESPONSE: One of the purposes of a memorandum of agreement is to provide the person responsible for the remediation with Department comment and approval for the work described in the memorandum of agreement. The person responsible for the work can be assured that proposed actions (that is, workplans prepared pursuant to the Technical Requirements for Site Remediation) meet the applicable standards if the Department issues an approval. The Department notes that, while a signatory to a memorandum of agreement could be a Potentially

Responsible Party, in many cases a party without liability may nevertheless wish to investigate and/or clean up under a memorandum of agreement.

COMMENT 222: Brown, Rudnick, Freed and Gesmer asks whether a no further action statement will be issued when environmental conditions at a site being "remediated" pursuant to the memorandum of agreement process have met with the Department's approval.

RESPONSE: The Department designed the memorandum of agreement to provide for such approval if appropriate. The Department will issue a "no further action" statement if a party conducts the whole cleanup at a site pursuant to a memorandum of agreement and it is in accordance with the Department's requirements. In addition, the Department will issue a "no further action" statement for a portion of the site pursuant to a memorandum of agreement if an applicant conducts a complete remediation of the area of concern.

Subchapter 4. Environmental Cleanup Responsibility Act Administrative Consent Orders

After the Department proposed these Procedures for Department Oversight of The Remediation Of Contaminated Sites on April 6, 1992, the Legislature began its deliberations on Senate Bill 1070. Among other issues, the Legislature is considering several statutory amendments which would impact upon how the Department handles administrative consent orders pursuant to the Environmental Cleanup Responsibility Act, N.J.S.A. 13:1K-6 et seq.

The Department has decided that it is most prudent to delay promulgating any portion of a rule concerning administrative consent orders until after a final decision is made on Senate Bill 1070. Therefore, the Department is adopting neither the proposed repeal and new rules at N.J.A.C. 7:26B-7, Administrative Consent Orders, nor the new rules concerning administrative consent orders pursuant to the Environmental Cleanup Responsibility Act proposed at N.J.A.C. 7:26C-4, Environmental Cleanup Responsibility Act Administrative Consent Orders, and Appendix B, Standard Environmental Cleanup Responsibility Act Administrative Consent Order.

In the interim, the Department will continue to respond to requests for administrative consent orders pursuant to the Environmental Cleanup Responsibility Act pursuant to N.J.A.C. 7:26B-7. The Department will promulgate the necessary amendments consistent with any new statutory requirements. The Department received the following comments concerning administrative consent orders pursuant to the Environmental Cleanup Responsibility Act.

COMMENT 223: Cohen, Shapiro, Polisher, Shiekman and Cohen commented that where a responsible party has come forward to deal with a site before it has become either an Environmental Cleanup Responsibility Act site or a high priority site, that party should not automatically be forced to execute an Environmental Cleanup Responsibility Act administrative consent order or an enforcement administrative consent order because of the information disclosed during the memorandum of agreement investigation or because of a subsequent Environmental Cleanup Responsibility Act trigger. A memorandum of agreement should be converted to an administrative consent order only where the Department is dissatisfied with the quality or pace of the work being conducted under the memorandum of agreement and where the Department has communicated these concerns in writing to the memorandum of agreement signatory and given the signatory a reasonable opportunity to assuage the Department's concerns.

COMMENT 224: The New Jersey State Bar Association asked whether a responsible party undertaking voluntary Environmental Cleanup and Responsibility Act compliance (as an "early filer") will be required to execute a Responsible Party administrative consent order if the site becomes a high priority site.

COMMENT 225: The New Jersey State Bar Association also asked what will determine whether or not a site is "subject to Environmental Cleanup and Responsibility Act" within the meaning of N.J.A.C. 7:26C-2.7(c) and(d). If an Environmental Cleanup and Responsibility Act-triggering event has not yet occurred, will an Environmental Cleanup and Responsibility Act administrative consent order, or Responsible Party administrative consent order, be the appropriate oversight document?

COMMENT 226: Rutgers Environmental Law Clinic commented that the use of the memorandum of agreement should depend upon whether the site is a high priority site not when or whether it is triggered under Environmental Cleanup Responsibility Act. The proposed regulations provide that a memorandum of agreement can only be used when "the site is not subject to Environmental Cleanup Responsibility Act." N.J.A.C. 7:26C-2.7(b). It is not clear whether "subject to Environmental Cleanup Responsibility Act" refers to any site which falls within the SIC codes to which Environmental Cleanup Responsibility Act applies or whether this phrase only applies to those sites for which Environmental Cleanup Responsibility Act has been triggered under the provisions of that law. The regulations should unequivocally state that a memorandum of agreement may not be used on a high priority site which merely falls within the Environmental Cleanup Responsibility Act SIC codes but whose cleanup has not been triggered under Environmental Cleanup Responsibility Act. Simply because Environmental Cleanup Responsibility Act may be triggered on a site at some future indeterminate time, should not be the basis for authorizing the use of a memorandum of agreement on a high priority site.

COMMENT 227: Chevron U.S.A. Inc. suggested that the phrase "site is not subject to Environmental Cleanup Responsibility Act" in both N.J.A.C. 7:26C-2.7(b) and (d) be replaced with "site is not currently subject to Environmental Cleanup Responsibility Act compliance activities." Many sites are subject to Environmental Cleanup Responsibility Act. However, there needs to be a distinction between sites subject to Environmental Cleanup Responsibility Act and sites which have triggered Environmental Cleanup Responsibility Act. Only those Environmental Cleanup Responsibility Act applicable sites which have triggered Environmental Cleanup Responsibility Act are the concern of these requirements.

N.J.A.C. 7:26C-2.7(c) should be changed to read "If the site has triggered Environmental Cleanup Responsibility Act due to a real estate transaction, the appropriate oversight document is identified in N.J.A.C. 7:26C-4." An administrative consent order is usually only required for sites which have triggered Environmental Cleanup Responsibility Act resulting from a real estate transaction. The administrative consent order is issued to allow the transaction to occur in a reasonable time frame. However, in other types of Environmental Cleanup Responsibility Act triggering events, such as internal reorganizations time may not be as critical. Other mechanisms such as memoranda of agreement may be more desirable to the regulated community.

Consistent with Chevron's comments with respect to N.J.A.C. 7:26C-5.3, N.J.A.C. 7:26C-2.7(d) should be amended to read, "... Environmental Cleanup Responsibility Act then the appropriate oversight document is identified in N.J.A.C. 7:26C-5 unless N.J.A.C. 7:26C-2.3(b) or 2.7(f) applies."

COMMENT 228: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company commented that the Environmental Cleanup Responsibility Act administrative consent order incorporates many of the more objectionable features of administrative consent orders used previously by the Department in the case of high priority sites under the Spill Compensation and Control Act. The Department sets forth in the preamble that the Environmental Cleanup Responsibility Act administrative consent order is "slightly different" than that previously used. In fact, however, it is substantially different, and the notice should have highlighted in more detail the substantial changes which have been proposed. Environmental Cleanup Responsibility Act administrative consent orders have functioned or performed their purpose well in the past and have been effective as an oversight document. The changes made to the Environmental Cleanup Responsibility Act administrative consent order are designed to make them more burdensome, onerous and arbitrary. This does not foster cooperation, delays remediation, and impairs property transfer.

COMMENT 229: Exxon Company, U.S.A. commented that "The Department may, in its discretion, enter into an Environmental Cleanup Responsibility Act administrative consent order if the applicant presents sufficient information to support a Department determination that one of the following applies: 1. If there is a stock tender offer, either friendly or hostile: 2. If there is a public offering securities traded or to be traded on Federally regulated stock exchanges..." According to the Scope section (N.J.A.C 7:26C-1.1), this rule "identifies the Department oversight documents" and "presents the procedures to determine the applicable oversight document for a particular rule." This rule is not the appropriate place for promulgating administrative procedures for instituting Environmental Cleanup Responsibility Act eligibility criteria. It is recommended the (b)1 through (b)10 be deleted. The eligibility criteria are already contained in the Environmental Cleanup Responsibility Act statute and the introduction of additional criteria here

is inappropriate and inconsistent with the amended scope (comment 19). N.J.A.C. 7:26C-4.2(b) should reference the criteria in the statute, as follows: "The Department may, in its discretion, enter into an Environmental Cleanup Responsibility Act administrative consent order if the applicant meets the eligibility criteria for an Environmental Cleanup Responsibility Act trigger pursuant to N.J.A.C. 7:26B:7-7.1."

COMMENT 230: Chevron U.S.A. Inc. commented that N.J.A.C. 7:26C-4.6(b) is an Environmental Cleanup Responsibility Act compliance issue and should be dealt with under N.J.A.C. 7:26B, the Environmental Cleanup Responsibility Act regulations, and therefore, deleted from this rule.

COMMENT 231: Chevron U.S.A. Inc. commented that N.J.A.C. 7:26C-4.4(b)4 is an Environmental Cleanup Responsibility Act compliance issue and should be dealt with under N.J.A.C. 7:26B, the Environmental Cleanup Responsibility Act regulations, and therefore, deleted from this rule. It is inappropriate to include these specific types of Environmental Cleanup Responsibility Act applicability and compliance issues in N.J.A.C. 7:26C. As written, N.J.A.C. 7:26C-4.4(b)4 also has the potential impact of discouraging future speculative real estate transactions. This same comment is also true for N.J.A.C. 7:26C-4.2(b).

COMMENT 232: The New Jersey State Bar Association commented that the agency should also consider permitting subsequent transactions to be completed without making a subsequent filing as long as the administrative consent order work is continuing and the financial assurance remains in effect. These interim filings provide the agency with no more useful information than the names and addresses of the parties which could be provided by a simple (unilateral) letter notice from the Ordered Party. This would save the agency useless administrative effort and make the timing of the subsequent transactions much easier for the ordered parties.

COMMENT 233: Wheaton Industries, Inc. commented that it strongly supports broadened use of Environmental Cleanup Responsibility Act administrative consent orders as a mechanism for defining remediation roles and responsibilities at an industrial establishment while allowing the closing, termination or transfer of operations at the establishment to proceed without delay. Indeed, Wheaton believes that the Department should have substantial discretion to enter into Environmental Cleanup Responsibility Act administrative consent orders whenever circumstances are appropriate so as to address numerous possible situations which may arise and may not easily be defined in advance. To ensure that flexibility, Wheaton recommends amending proposed N.J.A.C. 7:26C-4.2(b) by adding the following at the end of that section: "(11) If such other circumstances exist such that the Department determines that entering an Environmental Cleanup Responsibility Act administrative consent order would be consistent with the objectives of the Environmental Cleanup Responsibility Act program, would comply with applicable law, and would present no significant risk of harm or degradation to public health, safety, or the environment."

COMMENT 234: Edwards & Angell commented that proposed N.J.A.C. 7:26C-4.2(b)3 proposes a compound test for use of Environmental Cleanup Responsibility Act administrative consent orders, that is, the need for a sampling or cleanup plan and a determination that a Negative Declaration will not be granted within four months. Our experience indicates that even when there is no need for a sampling or cleanup plan, there are many circumstances (that is, multiple tenants or tenants which vacate without the landlord's knowledge) when a Negative Declaration is unlikely to be issued within four months. Therefore, we believe proposed N.J.A.C. 7:26C-4.2(b)3 should establish an either/or test.

COMMENT 235: Chevron U.S.A. Inc. commented that a new N.J.A.C. 7:26C-4.3(c) should be added to read, "Within fourteen (14) calendar days after the receipt of a signed Environmental Cleanup Responsibility Act administrative consent order by the applicant, the Department shall execute the order unless the person responsible for the cleanup requests a longer period or withdraws the order." Due to the potential impact on real estate transactions, the Department must be held to reasonable response periods.

COMMENT 236: Rutgers Environmental Law Clinic commented that after the party submits the Environmental Cleanup Responsibility Act administrative consent order application, Department of Environmental Protection and Energy has 14 days to mail an Environmental Cleanup Responsibility Act administrative consent order. N.J.A.C. 7:26C-4.3, 24 N.J.R. 1294. It appears that the administrative consent order must be accompanied by a Department of Environmental Protection and Energy demand for financial assurance, which must be estimated during the 14 days based upon the information contained in the application. Given the short time frame and the preliminary nature of the information submitted in applications, it seems likely that the financial assurance estimate will be little more than a guess. Department of Environmental Protection and Energy should give itself more time to make these estimates and should require the party to submit the data which N.J.A.C. 7:26C-4.5(b) says the party "may" submit, so that adequate financial assurance is provided. Although there are later opportunities for the Department to increase financial assurance, the first assessment should be more than a guess.

COMMENT 237: Chevron U.S.A. Inc. commented that the term "areas of concern" contained in N.J.A.C. 7:26C-4.5(a) is not defined. A proposed definition would be "an area or unit which has a documented known or suspected discharge resulting in contamination of an environmental media above a cleanup standard as defined in N.J.A.C. 7:26D." This definition helps clarify the regulation.

COMMENT 238: Wheaton Industries, Inc. commented that as with memoranda of agreement, it also believes that considerable flexibility should be available to arrive at final language in an Environmental Cleanup Responsibility Act administrative consent order, where the standard Environmental Cleanup Responsibility Act administrative consent order or a defined variation has served as the starting point for negotiations. Again, this flexibility will facilitate a wider use of Environmental Cleanup Responsibility Act administrative consent orders by allowing them to address appropriately specific circumstances that arise in the context of a given closing, termination or transfer of an industrial establishment.

COMMENT 239: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company commented that proposed N.J.A.C. 7:26C-4.4(c). This section makes clear that the form Environmental Cleanup Responsibility Act administrative consent order is applicable only "to the greatest extent practical." This represents desirable flexibility. The commenters suggest that the language be amended similarly to that suggested with respect to proposed N.J.A.C. 7:26C-3.3.

COMMENT 240: The Commerce and Industry Association of New Jersey commented that there is a typographical error: the word "assurance" is missing after "financial" and before "determined" in N.J.A.C. 7:26C-4.5(c).

COMMENT 241: Chevron U.S.A. Inc. suggested that N.J.A.C. 7:26C-4.5(c) be changed so the Department may, in its discretion, adjust the amount of financial (delete -determined-) assurance required pursuant to (a) above, based on any information submitted pursuant to (b) above.

COMMENT 242: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company commented that the proposal at N.J.A.C. 7:26C-4.5(b) sets forth several factors which a party may submit for evaluation with respect to the financial assurance amount to provide as much flexibility as possible. The commenters suggest the addition of the following: "4. Any other information relevant to justify or support a different financial assurance amount or type."

COMMENT 243: The Commerce and Industry Association of New Jersey commented that the requirement for records substantiating financial responsibility is entirely inappropriate. By signing an administrative consent order an ordered party has undertaken to provide financial assurance. A bank will not issue financial assurance, in the terms of a letter of credit for example, unless an applicant can demonstrate financial capability acceptable to the bank and presumably consistent with the bank's rules. It is inappropriate for the Department to put itself in the place of a bank and to require a showing of financial assurance particularly in the absence of the identification of any criteria upon which to base that assessment. The provision of tax returns is wholly inappropriate. The Department should rely solely on the undertaking in the administrative consent order and the ultimate provision of financial assurance. This requirement, then, is unnecessary and should be deleted.

COMMENT 244: The New Jersey Business and Industry Association commented that the Department should not require another layer of administrative compliance in the form of submission of records substantiating financial responsibility. The Department does not need to act like a bank: a bank will not issue financial assurance unless an applicant demonstrates sufficient financial liability consistent with the bank's own guidelines. The administrative consent order itself provides sufficient enforcement capability and assurance for the Department without additionally requiring records of financial responsibility.

COMMENT 245: New Jersey Bar Association commented that under proposed N.J.A.C. 7:26C-4.6(a)2, the Department seems to reserve the authority to make persons other than the owner or operator liable for Environmental Cleanup Responsibility Act compliance pursuant to the terms of an Environmental Cleanup Responsibility Act administrative consent order. While in the past a party other than an owner or operator could agree to become an ordered party under an Environmental Cleanup Responsibility Act administrative consent order, the Department did not have the right, in its discretion, to require that a party other than the owner or operator become the ordered party on an Environmental Cleanup Responsibility Act administrative consent order. Is it the Department's intention to condition issuance of an Environmental Cleanup Responsibility Act administrative consent order upon agreement by other parties to comply with the provisions of the Environmental Cleanup Responsibility Act?

COMMENT 246: Hackensack Water Company commented that the Department may direct any person to sign the administrative consent order (including a purchaser or mortgagee) and that person will be strictly liable for compliance with the Order. There are no limits on the number of individuals or entities the Department may require be a signatory and no checks on the potential for arbitrary exercise of this power. The Environmental Cleanup Responsibility Act administrative consent orders are supposed to allow a transaction to proceed prior to completion of the Environmental Cleanup Responsibility Act process and therefore, should expedite the Environmental Cleanup Responsibility Act process and assist in the transfer of land. However, this provision could ultimately have the opposite affect. Willing purchasers may be hesitant to purchase and lending institutions may be unwilling to give mortgages if they could be subject to these types of obligations. The comments state that the Environmental Cleanup Responsibility Act administrative consent order "is available at the option of the party triggering compliance." Why should this party (or parties) alone not bear the burden of compliance with the administrative consent order? Otherwise, the Environmental Cleanup Responsibility Act administrative consent order, meant to avail responsible parties with a mechanism which could expedite the remediation process, may not be used.

COMMENT 247: The Commerce and Industry Association of New Jersey commented that Environmental Cleanup Responsibility Act ACO's are supposed to allow a transaction to proceed prior to posting Environmental Cleanup Responsibility Act cleanup requirements. By requiring a large number of entities to sign the administrative consent order, this will probably delay the completion of the transaction especially since lenders may be unwilling to sign a document if they could be subject to potentially significant responsibilities under the administrative consent order's terms.

COMMENT 248: Chevron U.S.A. Inc. commented that a new N.J.A.C. 7:26C-4.6(c) should be added to read "The Environmental Cleanup Responsibility Act administrative consent order shall automatically terminate upon the Department's approval that all work has been completed in accordance with the Environmental Cleanup Responsibility Act cleanup for the site." The language provides for termination of the order. The regulated community needs to be assured that there is an end point to the administrative consent order process, especially when it comes to Environmental Cleanup Responsibility Act issues.

COMMENT 249: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company commented that paragraph 5 is inconsistent with N.J.A.C. 7:26C-4.5. For any number of reasons, including the financial condition of the responsible party, financial assurance may be approved in an amount less than the estimated cost to comply with the administrative consent order. Paragraph 5 requires that automatically the financial assurance be equal to the estimated cost of implementation without regard to the factors that induced a different amount of financial assurance at the outset. By this provision, the Department unnecessarily ties up capital and credit that may not be necessary to assure performance and, as such, may prevent parties from moving forward with the cleanup because they essentially need to "double fund" it.

COMMENT 250: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company commented that as discussed above, under N.J.A.C. 7:26C-4.5, financial assurance may not equal the actual anticipated cost of compliance. Similary, there should not be any automatic increment to the financial assurance required after the first annual review of costs. The language should be changed to add the phrase "Unless the reasons under N.J.A.C. 7:26C-4.5 are no longer applicable."

Subchapter 5. Responsible Party Administrative Consent Order

N.J.A.C. 7:26C-5.1 Scope

COMMENT 251: Exxon Company, U.S.A. recommended deleting this whole subchapter. Administrative consent orders are negotiated contracts; as such, contract law will apply and thus render this clause unnecessary. Also, there is no need to lock in specific negotiation time periods.

RESPONSE: Exxon Company, U.S.A. appears to be unaware of the New Jersey Supreme Court's direction to the Department to "provide to the affected parties the opportunity for notice and comment in compliance with N.J.S.A. 52:14B-4 prior to determining the scope of the affected public's participation" in the remediation of contaminated sites. *Woodland Private Study Group et al. v. Dept. of Environmental Protection,* 109 *N.J.* 62, 76 (1987). The Department discussed in the proposal Summary that this is precisely what the Department was doing in this regulation. See 24 N.J.R. 1283, second column. The Department, therefore, will not delete this subchapter.

COMMENT 252: Exxon Company, U.S.A. commented that in an effort to clarify and ensure that existing and future underground storage tanks sites with active, pending or future Discharge to Ground Water permits are preserved or deferred to, we recommend the following changes in N.J.A.C. 7:26C-5.1 through 5.3. After "site," insert "or to issue a permit for a new high priority or non-priority site."

RESPONSE: In N.J.A.C. 7:26C-5.2, the Department provides for the commenter's concern relative to the Department's consideration of existing mechanisms to oversee priority sites. As a result, there is no need to make the suggested changes.

COMMENT 253: Chevron U.S.A. Inc. commented that N.J.A.C. 7:26C-5.1(b), which states that high priority sites must have administrative consent orders, should be deleted. The Department should as a matter of policy allow any responsible party acting in good faith, to participate in the remediation of a site. The expenditure of public funds should only occur as a last resort. The language proposed in the rule implies that the Department has some internal guideline or mechanism for choosing which responsible parties may or may not participate in the remediation of a site. If such a system exists it should be duly promulgated.

RESPONSE: The Department has responded to Chevron U.S.A. Inc.'s concern regarding the use of administrative consent orders in the responses to comments on subchapter 2. Chevron U.S.A. Inc. is incorrect in its allegation that the Department has "some internal guideline or mechanism for choosing which responsible parties may or may not participate in the remediation of a site." As the Department discussed in the proposal Summary, the Department is making every effort to encourage all responsible parties to step forward and remediate contaminated sites.

COMMENT 254: Exxon Company, U.S.A. commented that N.J.A.C. 7:26C-5.1(b) states: "If the Department, in its discretion, elects to allow a person to participate in the remediation of a high priority contaminated site, such participation shall be governed by an administrative consent order pursuant to this subchapter," and recommends deleting "... in its discretion ..." since the person responsible for the site is paying for the remediation and thus should be actively involved to assure a cost effective cleanup is conducted.

RESPONSE: The Department is charged with the responsibility of ensuring that contaminated sites in New Jersey are remediated. If the responsible party has not yet stepped forward to remediate a contaminated site for which it is responsible by the time the site gets to be a priority for the Department, it is appropriate for the Department to consider whether or not it is in the public interest that the Department conduct the remediation to ensure protection of human health and the environment. For these reasons, the Department maintains its discretion in this paragraph.

COMMENT 255: Exxon Company, U.S.A. commented that in N.J.A.C. 7:26C-5.1(b), after "site," insert "pursuant to N.J.S.A. 58:10-23.11."

RESPONSE: The Department has promulgated these rules pursuant to a number of different statutes. The commenter has not presented any compelling reason why the Department should single out one of those statutes for reference here.

COMMENT 256: Exxon Company, U.S.A. commented that in N.J.A.C. 7:26C-5.1(c) "the degree, manner and scope of that participation will be based on ..." should be deleted since it is vague, arbitrary, and capricious.

Exxon Company, U.S.A. also commented that the Department should delete "(c)" and include "The ... subchapter" as a second sentence in N.J.A.C. 7:26C-5.1(b).

RESPONSE: The language to which the commenter refers is a general statement of scope as the title of the section informs the reader. Further language in the subchapter discusses this issue in more detail. Exxon Company, U.S.A. offered this comment without any further discussion, so the Department is unable to evaluate the basis of Exxon Company, U.S.A.'s concerns. As a result, the Department sees no justifications to delete the language.

N.J.A.C. 7:26C-5.2 Notification of priority site

COMMENT 257: Chevron U.S.A Inc. commented that N.J.A.C. 7:26C-5.2, which deals with notification of a high priority site, should be held in reserve until a method for scoring high priority sites is promulgated. Additionally, the regulation must provide a method for adjudication of the Department's determination to designate a site as a high priority site.

RESPONSE: As discussed in the response to the comments on the Summary, while the Department continues to work on both the compilation of and the procedure for scoring the contaminated sites in New Jersey, the Department cannot delay the remediation of contaminated sites. The Department has decided, therefore, to move ahead and to make these decisions on a case-by-case basis in the interim. When the Department promulgates those regulations, the Department will consider the commenters' concerns relative to adjudication.

COMMENT 258: The New Jersey State Bar Association commented that under proposed N.J.A.C. 7:26C-5.2(a)1, the Department has agreed to identify contaminated sites of high priority. However, there is no hazard ranking or similar system upon which this high priority is based, nor is there any public notice procedure similar to that provided under the Federal Superfund law. These elements should be incorporated into the agency's site listing procedures.

RESPONSE: The Department will consider all of these issues when it promulgates rules concerning scoring and the master list. The Department believes that these issues are beyond the scope of this present rule.

COMMENT 259: Hoffman-La Roche Inc. commented that the new provisions of N.J.A.C. 7:26C-5.3(d) should be more forthright in advising the regulated community of the process of determining whether a site is a high priority. They feel the lack of disclosure on this point invites abuses of discretion by the Agency, which is not in the best interest of anybody. Additionally the owner of a high priority site should have the opportunity to contest this designation since substantial rights and costs are involved in this decision. Indeed proper administrative procedures would dictate the property owner should have significant input, and even appellate rights, in such a circumstance.

RESPONSE: The Department employs a "worst case first" approach to site remediation. If a site is a priority site, the Department has developed these rules in order that the public is ensured that such next worse site is remediated whether private or public funds are used to do so. The use of the "priority site" strategy does not run counter to the Department's statutory mandates, rather it provides the regulated community with more predictability on the part of the Department and its goals.

N.J.A.C. 7:26C-5.3 Deferral to an existing regulatory or enforcement mechanism

COMMENT 260: Exxon Company, U.S.A. commented that, as proposed, the regulation is somewhat indecisive as to whether or not deferral to an existing regulatory or enforcement mechanism is effected.

COMMENT 261: Shell Oil Company commented that, as proposed, it is unclear as to whether the Department will defer to an existing regulatory or enforcement mechanism. Shell Oil Company would like to see the current enforcement mechanism, the Category 7 discharge to Ground Water Permit, stay in place for discharges at Underground Storage Tank sites. The Discharge to Ground Water Permit has provided a consistent format by which the Department sets clean-up requirements and standards, yet allows the responsible party the opportunity to address any issues it is in disagreement with. From an enforcement viewpoint, the permit contains the same discretionary authority and power the Department desires and contains the same penalty provisions as an administrative consent order. The Discharge to Ground Water Permit has worked effectively for over seven years and Shell would like to see its continued implementation.

COMMENT 262: Chevron U.S.A. Inc. suggested that the provisions at N.J.A.C. 7:26C-5.3(a), (b), (c) and (d) of the proposed rule be moved and placed at a new N.J.A.C. 7:26C-2.7(f). Additionally, N.J.A.C. 7:26C-5.4(d) should be modified to read "... activities at any time based on significant non-compliance with the regulatory or enforcement mechanism." These changes help clarify the regulation by placing requirements and applicable exclusions in the same section.

RESPONSE TO COMMENTS 260 TO 262: N.J.A.C. 7:26C-5 addresses responsible party administrative consent orders, the oversight documents for priority sites. N.J.A.C. 7:26C-5.3 establishes the procedure the Department will follow when a priority site is being remediated under another State or Federal program. The Department believes this section should logically remain in subchapter 5.

N.J.A.C. 7:26C-5.3(d) provides notice to the regulated community and the public that the Department retains discretion to reconsider its decision to defer to an existing program. The suggested change limits that discretion to those situations where the responsible party is out of compliance with the existing program. There may be circumstances where the protection of human health and the environment might require remedial measures outside the scope of the existing program. Therefore, the Department must be able to act even where there is compliance with an existing regulatory or enforcement mechanism.

COMMENT 263: Edwards & Angell commented that the deferral mechanism at proposed N.J.A.C. 7:26C-5.3(a) should not be limited to high priority sites.

COMMENT 264: Tellus Environmental Consultants commented that after review of the proposed rules, an important issue the Department failed to address relates to situations where remediation is already in progress and the Department is overseeing the remediation through mechanisms such as a New Jersey Pollutant Discharge Elimination System permit. How does the Department plan to handle the above situation?

RESPONSE TO COMMENTS 263 AND 264: It is the Department's policy that any site remediation be conducted through an oversight document and not through permits. The justification of this is twofold. First, the scope of any Discharge to Ground Water permit is often not broad enough to encompass all of the environmental concerns at a site. Second, the Department is attempting to respond to concerns raised by the regulated community to develop a more efficient remediation process. The Department has determined in this regard that it is more efficient not to have vastly different approaches attempting to perform the same general role. The Department seeks to maximize the effectiveness of each mechanism available for particular aspects of the remediation process. The Department believes that Discharge to Ground Water permits are most appropriately and efficiently used to monitor ongoing discharges and discharges related to long-term ground water remedial alternatives.

COMMENT 265: Tellus Environmental Consultants questioned how the oversight fees would work if there was a deferral to an existing oversight mechanism.

RESPONSE: In such a situation, no oversight fees would be collected pursuant to this subchapter, and the protocols established by the existing enforcement mechanism or permit (that is, if it is a permit, permit fees would be collected) would control.

COMMENT 266: The United States Environmental Protection Agency commented that in subchapter 5 of the rules, there are provisions for the New Jersey Department of Environmental Protection and Energy to implement additional regulatory or enforcement mechanisms if the New Jersey Department of Environmental Protection and Energy determines that existing Resource Conservation and Recovery Act or Superfund mechanisms are not sufficient. For Federal corrective actions that do not address all media or areas of concern, it is reasonable for the New Jersey Department of Environmental Protection and Energy to reserve its rights to pursue further remediation. However, subchapter 5 should be modified to recognize the New Jersey Department of Environmental Protection and Energy's acceptance of Federal cleanups to the extent that they address the same media, clean-up levels and areas of concern. Otherwise, this provision will discourage facilities from cooperating with the Federal programs.

RESPONSE: The Department agrees with the United States Environmental Protection Agency's comment. However, there will be no changes made as the Department believes that the current language in subchapter 5 provides the latitude to continue the very successful cooperative effort between the Department and the United States Environmental Protection Agency.

COMMENT 267: The Commerce and Industry Association of New Jersey commented that it would appear that the intention of the Department in passing the technical, procedural, and cleanup guidelines is to insure uniformity among the various environmental programs, at the very least on the State level. Accordingly, a reservation of rights to the Department to require activities in addition to those approved in other programs, particularly other State programs, is entirely contrary to the purported purpose of these various proposals and to the proposal being commented upon herein. Moreover, the question arises at what point the Department can require such additional activities—after the other cleanup has been conducted, when it is at a point of finality, after it has been approved but before it has been implemented. Similarly, the question arises as to whether this proposed provision pertains to remediations under other programs that have already been completed, are ongoing, or may be undertaken in the future. It is respectfully submitted that it is entirely inappropriate for the Department to reserve the right to require additional activities for programs being performed pursuant to an existing regulatory or enforcement mechanism.

RESPONSE: The purpose of proposing technical and oversight regulations is to ensure uniformity and consistency among cleanups. Further, the purpose of consolidating all of the Department's remedial activities under one program is to provide that very same consistency. It matters not that a cleanup is being conducted under the Environmental Cleanup Responsibility Act, Resource Conservation and Recovery Act, Spill Compensation and Control Act or the Water Pollution Control Act authority because they will all follow a similar process and meet the same standards. The purpose of this section is to allow the Department to determine which oversight mechanism is the most appropriate to oversee remediation activities. This will be determined by evaluating the priority of the site, the work needed to be accomplished, the progress of the remediation thus far, and whether any existing oversight document or New Jersey Pollutant Discharge Elimination System permit is adequate to address any outstanding technical requirements of the Site Remediation Program.

COMMENT 268: Exxon Company, U.S.A. commented that in N.J.A.C. 7:26C-5.3(b) and (c)1 and 2, after "regulatory" insert: permit.

RESPONSE: The proposed language change is inappropriate because the regulatory mechanism to which the Department is referring may not always be a permit; for example, remediations conducted pursuant to the Environmental Cleanup Responsibility Act or Underground Storage Tanks programs.

COMMENT 269: Exxon Company, U.S.A. commented that N.J.A.C. 7:26C-5.3(d) states "The Department may reconsider its decision whether or not to defer to ongoing remediation activities at any time." Exxon Company, U.S.A. recommended deleting this subsection, since the Department already has this authority and does not have to repeat it in this regulation.

RESPONSE: The Department has determined N.J.A.C. 7:26C-5.3(d) is necessary to emphasize to the regulated community the Department's authority to determine whether or not to defer to ongoing remediation at any time.

N.J.A.C. 7:26C-5.4 Types and language of responsible party administrative consent orders

COMMENT 270: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company commented that the Department, in its Summary at 24 N.J.R. 1284, offers a self-serving statement on the highly contentious issue of why it believes a potentially responsible party must be required to sign an administrative consent order embodying the equivalent of a "blank check." A primary concern of the commenters in this regard is the requirement that binds a signatory potentially responsible party to undertake implementation of an unknown remedy even before the contamination at a site is fully delineated. In effect, if it is committing to conduct a cleanup that will cost $1 million or $1 billion. The Department states that requiring potentially responsible parties to commit to perform all phases of remediation as a condition of participation in the cleanup process facilitates the performance of remediation. The Department cites no statistics to support this counterintuitive contention.

The effectiveness of a step-by-step approach to remediation is employed by the United States Environmental Protection Agency to divide site remediation of federal Superfund sites into at least two stages, and often more than two operable units. The Department of Environmental Protection and Energy should follow the United States Environmental Protection Agency policy and also not require that potentially responsible party's commit to undertake the total cleanup at a site until after a Remedial Investigation/Feasibility Study is completed.

The New Jersey Department of Environmental Protection and Energy's proposal, which would codify the New Jersey Department of Environmental Protection and Energy's existing policy, would require New Jersey businesses to waive important statutory and constitutional rights and also would provide the New Jersey Department of Environmental Protection and Energy with "blank checks" to require whatever remediation the New Jersey Department of Environmental Protection and Energy later decides is appropriate. The Department's existing policy and proposed regulation is completely at odds with virtually every other cleanup program in this country and it will constitute a severe impediment to the orderly running of businesses in this State.

Smaller companies in the State will be unable to sign a "blank check" from a financial perspective without the potential for major fiscal discord. Indeed, it is an act of fiscal irresponsibility for a small company to sign the Department's proposed form of administrative consent order, and thereby to waive critical rights and subject itself to a cleanup plan, the scope and dimensions of which are unknown and economically uncertain. If the investigation and remediation of sites within this State were permitted to proceed by phases, the smaller company would be able to commit money to investigation and remediation, while still remaining viable. This promotes the goal of efficient and cost-effective remediation, as it allows work to go forward with the greatest amount of potentially responsible party funding and participation.

Signing a "blank check" administrative consent order is also an act of fiscal irresponsibility for large companies, and larger companies and corporations also will find it difficult, or impossible, to enter into the form of administrative consent order proposed by the Department. The financial uncertainty for these larger companies is equally severe, particularly as the individuals administering environmental issues in major corporations must generally report through various corporate officers and ultimately to a Board of Directors and to shareholders. Corporate officers and Board members making decisions in these areas have significant fiduciary duties to consider. It is unlikely that anyone with the authority to bind a major corporation would, consistent with his or her fiduciary duties, be permitted to waive important rights to undertake a major and material obligation without any knowledge whatsoever of the costs involved or the technical and legal decisions that may have to be made in the future. The realities of corporate governance, in many cases, may make it legally impossible for large corporations to enter into the type of "blank check" contemplated by the Department and to undertake the kind of commitment implicit in the oversight documents as proposed.

Both logic and experience reveal that cleanup of contaminated sites would occur more readily if potentially responsible parties are allowed to commit to the cleanup process in a step-by-step manner. A potentially responsible party is far more likely to bind itself to perform a known remedy, than to expose itself to liability of unknown magnitude. Often, during the Remedial Investigation/Feasibility Study process, information is obtained on additional potentially responsible parties that makes it more likely that known potentially responsible parties will be able to commit to funding and/or performing the remedy selected, since a larger potentially responsible party group will be able to share costs. As a business and practical matter a company must have some understanding of the risks and benefits of any business decision before committing to perform and bind itself over the long term. Potentially responsible parties are justifiably hesitant to sign an administrative consent order that may jeopardize their financial integrity. If the Department allowed, under appropriate circumstances, for a step-by-step approach to the administrative consent order process (similar to its proposed memorandum of agreement undertaking), more progress would ultimately be made in the long run toward efficiently and effectively remediating sites in the State of New Jersey because remediation would begin sooner, with maximum participation. The Remedial Investigation/ Feasibility Study process would get underway earlier and all parties would gain necessary knowledge of a site sooner.

N.J.A.C. 7:26C-5.4(b) proposes to allow multiple responsible parties signing an administrative consent order to conduct a Remedial Investigation/Feasibility Study without committing to conduct remedial design, remedial action and operation, maintenance and monitoring. N.J.A.C. 7:26C-1.3 defines "multiple responsible parties" as five or more unrelated responsible parties involved at a contaminated site. As pointed out in the Summary at 24 N.J.R. 1288, this exception to the Department's otherwise "all or nothing" approach recognizes the difficulties in

obtaining a commitment from a group of potentially responsible parties to perform an entire remediation before conducting a Remedial Investigation/Feasibility Study. By allowing potentially responsible party groups to commit to conduct only an Remedial Investigation/Feasibility Study, the Department gives them access to information needed to make an informed decision. The distinction of five potentially responsible parties as the cut off is arbitrary. The same reasoning should apply to sites with less than five potentially responsible parties as well.

If a site has only one potentially responsible party willing to conduct remediation, that individual potentially responsible party must bear the full cost of cleanup. This makes any information gathered by the Remedial Investigation/Feasibility Study process even more crucial to an individual potentially responsible parties decision-making process. When there are fewer than five parties to share the cost of remediation, the stakes for each potentially responsible party are higher. Potentially responsible parties are reluctant to enter into unknown and unquantified risks. The Department should allow potentially responsible parties in all situations to enter into an administrative consent order to complete the Remedial Investigation/Feasibility Study.

The commenters suggest that Appendix C be guidance only and that language as suggested above with respect to proposed N.J.A.C. 7:26C-4.2 be incorporated. In addition, Remedial Investigation/Feasibility Study only administrative consent orders should be available whenever it will advance the goal without limiting it to multiple party cases.

COMMENT 271: Chemical Waste Management of New Jersey commented that Appendix C, with few exceptions, requires a commitment by a party to perform an entire site cleanup. The Department should permit a phased remedial approach for high priority sites pursuant to which parties may perform one part of a remediation without committing to an entire cleanup.

The Department itself recognizes in its proposal that parties will be reluctant to commit to a Responsible Party administrative consent order because to do so would be equivalent to signing a "blank check" for remediation at a given site. Several factors may prevent parties from committing to performing entire site remediation. First and foremost, parties will not be inclined to agree to perform a cleanup without a basic understanding of the extent of contamination at a site, the remedy to be provided and the costs involved. Moreover, parties may not have sufficient resources (financial or otherwise) available to them to perform the entire remediation of a site. By enabling parties to perform a portion of site remediation, the Department would encourage parties with limited resources to participate in site remediation while at the same time moving forward with the cleanup of high priority sites without depleting public resources.

Enabling a party to perform one phase of remediation is consistent with the Department's own rationale for permitting a phased approach for multiple responsible parties, participation at high priority sites. When recognizing a limited exception to the Department's requirement that a party perform an entire site cleanup for high priority sites based upon multiple responsible parties, participation (to perform a Remedial Investigation/Feasibility Study only), the Department apparently was motivated by a concern that it would be extremely difficult to obtain a commitment from multiple parties to perform more than a single phase of a remedy at a time. This logic should similarly be exercised to accommodate individual responsible parties who would find it difficult or financially impossible to commit to an entire site-cleanup, yet wish to participate in one phase of a site remediation.

COMMENT 272: The Chemical Industry Council of New Jersey commented that N.J.A.C. 7:26C-5.4(b) the Department's logic in allowing multiple responsible parties to engage in a remedial investigation and feasibility study before committing themselves to the level of cleanup is that the parties are generally unwilling to enter into a "blank check" cleanup. This logic is, of course, applicable with equal or even greater force to individual responsible parties. No one is willing to blindly enter into an agreement wherein their liability could range anywhere from the thousands of dollars to the billions of dollars. Surely, fewer parties are even less likely to assume unquantified risks. Again, delay will result while a responsible party tries to limit its liability as much as possible in negotiating the terms of the administrative consent order. This will be done only through prolonged negotiation. In any event, the Department loses nothing by allowing a responsible party to initially enter into an administrative consent order which only involves remedial investigation and feasibility study. If the site is found to be highly contaminated, the Department can require a cleanup and mandate that the responsibile party commit to an administrative consent order. If the property is not heavily contaminated, the responsible party will enter into a memorandum of agreement and commence immediate cleanup. In either event, the Department will have the necessary leverage to ensure that the property is adequately cleaned up.

COMMENT 273: The Commerce and Industry Association of New Jersey commented that the Department has implicitly recognized in N.J.A.C. 7:26C-5.4(b)1 that parties are reluctant to enter into administrative consent orders where the Department wants them to sign a "blank check." Indeed, in the Summary to the proposed regulation, at 24 N.J.R. 1284 the Department explicitly recognizes this responsible party concern. The Summary also recognizes in the context of sites involving multiple responsible parties that responsible party "blank check" concerns can be alleviated if the responsible party is provided with an opportunity to engage in a remedial investigation and feasibility study before deciding the level of cleanup for which the responsible party wants to be responsible. N.J.A.C. 7:26C-5.4(b)1, however, allows only multiple responsible parties the option of entering into a step-wise remediation process by initially conducting only a Remedial Investigation/Feasibility Study. Multiple parties are defined as five or more unrelated responsible parties, as determined by the Department, involved in a contaminated site. N.J.A.C. 7:26C-1.3.

The Department should recognize that its logic which allows multiple responsible parties to engage in a step-wise remediation process applies with equal force to individual responsible parties. An individual responsible party is far more likely to enter into an administrative consent order if it has knowledge of the extent of contamination before entering the cleanup. Indeed, groups of fewer than five, because the liability is split among fewer parties, would presumably have a greater interest in quantifying the risk. There would appear to be no rational reason to limit this option to sites in which there are five or more ("multiple") parties. Indeed, the sites at which our members would most likely be involved would probably involve fewer than five parties.

Similarly, the problems inherent in signing the "blank check" represented by a full administrative consent order which obtains surrender of all rights to contest the remediation, the extent of which the parties can only guess at when the administrative order must be signed, are even more onerous for sites in which fewer parties will be assuming an undefined and potentially crippling burden. It is simply unreasonable to expect parties to agree to commit to a full program of investigation and remediation prior to having any opportunity to calculate even the order of magnitude of the undertaking. Many other states give all parties in cleanup situations the opportunity to conduct Remedial Investigations and Feasibility Studies before requiring them to commit to the cleanup. The interests of the environment, government, public, and private parties who will be held liable are all better served by such a reasonable approach.

The insistence on allowing an evaluation of the scope of the remediation that will be required in advance of committing to an unknown and undefined "fix" should not be confused with an attempt to avoid liability. The responsible parties do not seek such definition with the intention of abandoning liability once the Remedial Investigation/Feasibility Study has been completed. What they do seek is a quantification of the risk, an opportunity to participate in the process of risk evaluation and remediation selection, and the chance to then make an informed decision as to how to proceed. It is respectfully submitted that by proceeding in such a commercially acceptable manner, the Department of Environmental Protection and Energy will have fewer cases in which enforcement actions will be necessary since all the parties will be better informed of the risk and more fully committed to the chosen remediation. The continued use of "blank check" administrative consent orders, particularly for sites with fewer than five responsible parties, is objectionable and should be deleted.

COMMENT 274: The New Jersey Business and Industry Association commented that individual responsible parties, and not just multiple responsible parties (defined as a group with greater than five members) should be allowed to engage in phased cleanup activities. The Department recognizes that responsible parties are reluctant to enter "blank check" administrative consent orders where the extent of their liability is unknown. 24 N.J.R. 1284 second column. By allowing all responsible parties (individual or multiple party) to engage in a remedial investigation and/or feasibility study before entering an administrative consent order, administrative consent orders will be entered into more quickly as parties will know the extent of their liability before signing an administrative consent order. This will be particularly true at highly contaminated sites (where quick cleanup is of a special priority) since

the responsible party will know the full extent of its liability and the treble damages to which it will be subject if it does not commence remediation at the site. Moreover, such "blank check" administrative consent orders will be particularly objectionable for smaller groups since the liability is assumed by fewer members.

COMMENT 275: Kaye, Scholer, Fierman, Hays and Handler suggested that the Department should allow a responsible party to enter an administrative consent order which provides an obligation to conduct the Remedial Investigation/Feasibility Study only. Other states such as New York, and the Environmental Protection Agency as well, have permitted with much success such limited orders. Indeed, Department of Environmental Protection and Energy itself provides for a limited administrative consent order by permitting responsible parties to conduct an Interim Remedial Measure only. See proposed N.J.A.C. 7:26C-5.4(b)4. The Spill Compensation and Control Act provides expressly that, "... removal of hazardous substances and actions to minimize damage from discharges shall, to the greatest extent possible, be in accordance with the National Contingency Plan." N.J.S.A. 58:10-23.11f.a. The National Contingency Plan specifically allows a potentially responsible party to bifurcate the Remedial Investigation/ Feasibility Study from the remedy. See 40 C.F.R. 300.700. Thus, any attempt by the Department to categorically disallow an administrative consent order only for the Remedial Investigation/Feasibility Study is inconsistent with the National Contingency Plan and is thus contrary to the Spill Compensation and Control Act.

COMMENT 276: The New Jersey State Bar Association commented that the proposed rule leaves unresolved the challenge to an administrative consent order by parties who are unwilling to sign an administrative consent order which commits them to an unspecified, unquantified cleanup. As the Department recognizes in the preamble, parties have been resistant to sign the standard administrative consent orders as they represent a "blank check"—a commitment to a remedial alternative that has not been defined even in terms of order of magnitude. While the regulations do offer a "stepped" approach to the investigation and remediation of a high priority site they do so only for instances in which there are multiple responsible parties. The term "multiple responsible parties" is defined as five or more. What this means, then, is that for those sites in which there are fewer than five respondents, these few respondents must assume all of the overwhelming obligations associated with an administrative consent order. The fewer the number of parties, however, the less likely it is that they will agree to sign an administrative consent order that requires them to commit to an unknown risk.

COMMENT 277: Rutgers Environmental Law Clinic commented that "Multiple Responsible Parties" should not be treated differently than any other Responsible Party. The New Jersey Department of Environmental Protection and Energy's rationale for this rule, in the Summary, is that it cannot get all the parties to agree when there are five or more involved. This is not a reason to avoid enforcement. The New Jersey Department of Environmental Protection and Energy is given broad enforcement authority to address situations such as these. If the New Jersey Department of Environmental Protection and Energy only intends to permit the initial order to require investigation, and the Department reserves the right to require the multiple parties to remediate based on the investigation results, then the language should be clarified to make this clear. If the New Jersey Department of Environmental Protection and Energy intends to only make multiple parties investigate, this is a serious retreat by the New Jersey Department of Environmental Protection and Energy from its clear duty to make all polluters pay.

COMMENT 278: The New Jersey Builders Association urged that the cleanup of high and low priority sites be permitted in stepped fashion rather than requiring a global administrative consent order. Other jurisdictions allow this. Although the proposed regulations do at least contemplate such an approach for "high priority sites", they continue to insist upon the use of administrative consent orders, limit it to "multiple responsible parties", and maintain provisions for stipulated penalties and financial assurance. N.J.A.C. 7:26C-5.4(b). There would appear to be no objective basis to limit this option to sites in which there are five or more ("multiple") parties. Indeed, the sites at which our member developers would most likely be involved would probably involve fewer than five parties. Similarly, the problems inherent in signing the "blank check" represented by a full administrative consent order which obtains surrender of all rights to contest the remediation, the extent of which the parties can only guess at when the administrative order must be signed, are even more onerous for sites in which fewer parties will be assuming an undefined and potentially crippling burden. It is simply unreasonable to expect parties to agree to commit to a full program of investigation and remediation prior to having any opportunity to conduct Remedial Investigations and Feasibility Studies before requiring them to commit to the cleanup. The interests of the environment, government, public, and private parties who will be held liable are all better served by such an approach. The insistence on allowing an evaluation of the scope of the remediation that would be required in advance of committing to an unknown and undefined "fix" should not be confused with an attempt to avoid liability. The responsible parties do not seek such definition with the intention of abandoning liability once the Remedial Investigation/Feasibility Study has been completed. What they do seek is a qualification of the risk, an opportunity to participate in the process of risk evaluation and remediation selection, and the chance to then make an informed decision as to how to proceed. It is respectfully submitted that by proceeding in such a commercially acceptable manner, the Department of Environmental Protection and Energy will have fewer cases in which enforcement actions will be necessary since all the parties will be better informed of the risk and more fully committed to the chosen remediation. The continued use of "blank check" administrative consent orders, particularly for sites with fewer than five responsible parties should be deleted.

RESPONSE TO COMMENTS 270 TO 278: The Legislature has given the Department the responsibility to ensure that the contaminated sites in New Jersey are remediated in a timely manner in a way that is protective of human health and the environment. While responsible parties have no right to participate in the remediation of contaminated site (see, *Woodland Private Study Group, et al v. Dept. of Environmental Protection,* 109 *N.J.* 62 (1987), the Department has determined that it is in the public interest to encourage members of the public to participate in the remediation process in certain circumstances and subject to certain conditions.

Based upon the two overriding principles of addressing the worst sites first and that the polluter must pay for the contamination it is liable for, the Department has developed a site remediation program that is second to none in the country. An important cornerstone of this highly successful program has been that when the Department identifies a site as a priority, any person that wishes to perform the remediation must agree to perform the same remediation as if the Department were conducting the remediation itself. The Department has found that the most efficient way to accomplish this is for the party to execute an administrative consent order to both pay for and conduct all of the remediation necessary at the site.

Contrary to the inaccurate statements by the Commerce and Industry Association of New Jersey and others, many parties have elected to sign this type of an administrative consent order. During the last 10 years, the Department has executed over 1,600 administrative consent orders in which parties have agreed upfront to conduct all necessary remediation. This includes the three companies that commented above. While several of the commenters have suggested that this approach is different from the approach employed by the United States Environmental Protection Agency and some other states, the Department has achieved more cleanups than nearly all of those other jurisdictions combined. The overwhelming majority of these cases involve one or two signatories, typically the owner or operator. It is clear, therefore, that the Department's approach here not only results in a highly successful site remediation program, but also one that has been readily accepted by the regulated community as well.

When both the number and the identity of the parties change, however, the dynamics of the negotiations also frequently change, necessitating a change in approach by the Department. The Department has, through its experience, identified one group of cases in which the dynamics are such that a different approach is required. These cases involve multiple responsible parties, frequently more than 20 or 30, and sometimes as many as 200.

A typical case exemplifying this approach is a landfill where a large number of generators and haulers are involved. Rather than dealing with just the owner or operator of the site, there can be as many as 200 to 300 other responsible parties involved. The numbers of parties impact the dynamics of the negotiations in at least two important ways. The first is that since the group is no longer exclusively limited to the owner and operator, liability for the contamination becomes a much larger issue of concern. The nexus of each responsible party to the site is no longer

based upon a party's use or ownership of the site, but rather upon an evidentiary link with a foundation in the business records of not only the generators but also the haulers involved. Despite the black letter law of joint and several liability in this area, the parties frequently raise the issue of proportionate liability.

This leads into the second issue of concern here, the dynamics of negotiating with often large, disparate groups. Most of these sites were neither owned nor operated by a majority of the parties involved. In addition, there are frequently significant differences amongst the parties in such factors as the size and corresponding resources available to each participant, the relative contribution to the contamination, and the corporate willingness to participate in the remediation. As a result, these negotiations are frequently fraught with distrust and finger pointing, with a majority of the time consumed not by how the remediation should be conducted, but rather with peripheral matters which distract the negotiations from the goal of remediating a contaminated site.

It was for these reasons that the Department elected to modify its standard approach to have the signatory commit to perform the entire remediation. This modified approach has been successful in helping to nullify the myriad issues discussed above. In the absence of those issues, however, the Department sees no benefit in deviating from the standard approach, and the Department's success in this area supports this determination.

Several of the commenters criticize the Department's approach here with the allegation that the Department requires the signatories to surrender certain statutory and constitutional rights. Not only have the commenters failed to specifically identify any such rights allegedly so affected, but any attempt by the Department to do this would be evaluated closely by the courts. See, for example, *Department of Environmental Protection v. Mobil Oil Corporation,* 246 *N.J. Super* 331 (App. Div. 1991). The Department has, in an attempt to remove this issue as a point of contention between the Department and the parties negotiating an administrative consent order, modified the rule to include language that the signatory retains whatever defenses "which the [Spill] Act, *Kimber,* or their amendments, supplements and progeny allow." *Mobil,* at 337.

In addition, several of the commenters stated that not all responsible parties in fact have the resources, financial or otherwise, to conduct the entire remediation at a priority site. The Department has determined that rather than conduct protracted and often fruitless negotiation in such cases where the responsible parties are unwilling or unable to execute the administrative consent order within the stipulated negotiation period, it is more protective of human health and the environment for the Department to conduct the remediation using public funds. Responsible parties may establish their good cause defenses at that time. These parties still have the option of participating in the process by paying for the Department's costs of the individual remediation phases and may reduce their potential treble damage exposure accordingly. These parties would also be given the opportunity to implement the Department's selected remedy after it completes the Remedial Investigation/Feasibility Study.

COMMENT 279: Wheaton Industries, Inc. commented that it is appropriate to clarify what the Department means by "all situations pursuant to Subchapter 5." For example, that phrase may mean for all high priority sites as suggested by N.J.A.C. 7:26-5.1(b), or it may mean any site described in N.J.A.C. 7:26C-5.3.

COMMENT 280: Exxon Company, U.S.A. commented on N.J.A.C. 7:26C-5.4(a). "The standard responsible party administrative consent order in Appendix C, incorporated herein by reference, is applicable in all situations pursuant to this subchapter, except as modified in (b) below," and recommended adding to the end of this sentence: "... and as provided in (f)."

COMMENT 281: Chevron U.S.A. Inc. commented that N.J.A.C. 7:26C-5.4(a) should be changed to read, "... as modified in (b) and (f) below." This will provide additional flexibility to the administrative consent order negotiating process.

RESPONSE TO COMMENTS 279 TO 281: The section as proposed operates in the manner in which the Department believes the commenters are suggesting. That is, subsection (f) modifies subsection (a) for those situations in which the Department is already involved in negotiations at the time of adoption of this subchapter. There is no need, therefore, to make the proposed changes.

COMMENT 282: Rutgers Environmental Law Clinic commented that public entities should not be completely excused from financial assurance or payment of penalties. N.J.A.C. 7:26C-5.4(b)3, 24 N.J.R. 1295, permits public entities to investigate or remediate without posting financial assurance and without the threat of any penalties being assessed. Public entities should not be completely excused from the financial assurance provisions. Public entities should be required, at a minimum, to budget or bond for anticipated investigation and cleanup costs for sites where the entity is a responsible party. Furthermore, there should be some penalty provisions included in administrative consent orders with public entities, to ensure compliance. This section eliminates any penalties where the responsible party on a high priority site is a public entity. Where a public entity is a responsible party at a site, especially a high priority site, which threatens human health or environmental quality, that entity should be held financially accountable for the problem it has created. There are many sites in New Jersey which may qualify under this section, and it is a serious breach of the New Jersey Department of Environmental Protection and Energy's enforcement responsibilities to let public entities off the hook in this manner.

COMMENT 283: The Commerce and Industry Association of New Jersey commented that the deletion of the financial assurance penalty section for public entities is questioned. It would seem inequitable to establish different rules for public entities.

COMMENT 284: The New Jersey Business and Industry Association commented that it is inappropriate for the Department to establish different rules for public entities and to exempt them from the requirements of financial assurance. The Department should focus on the nature of the site not on the nature of the entity performing the cleanup since the ultimate goal is to protect the environment and health of those exposed to the sites.

COMMENT 285: Chemical Waste Management of New Jersey commented that the Proposed Department Oversight rules pertaining to Responsible Party administrative consent orders appear to provide administrative consent order standards more favorable for public entities conducting entire site remediation than those standards applied to private parties. In particular, pursuant to this section of the proposed rules, financial assurance by a public entity is not required. Nor are penalty provisions incorporated into the administrative consent order. This differential treatment accorded to public entities is neither explained nor justified by the proposed rules and, to the extent such treatment dispenses with onerous requirements otherwise imposed on private parties, is fundamentally unfair and in violation of private parties, equal protection interests.

COMMENT 286: Colonial Pipeline Company commented that the proposed regulations assume that all corporate parties have the financial resources or incentives to remediate a site; incentives for public agencies need to also be developed. It is not without precedence, for example, Congress has impelled the Departments of Defense and Energy to follow the rules and regulations of Comprehensive Environmental Response, Compensation and Liability Act. Similar requirements need to be imposed on public entities, otherwise private entities will be required to remediate a public entities spills (for example, a public entity discharges pollutants upgradient of a private entity's discharge into Class I waters).

RESPONSE TO COMMENTS 282 TO 286: The commenters are apparently not aware of N.J.S.A. 13:1D-9u which prohibits the Department from requiring financial assurance from "any public body, agency, or authority." It was not the Department, but rather the Legislature, which established this public policy. Consistent with this policy, the Department has elected not to require public entities to agree to stipulated penalties. However, this does not mean that public entities cannot be assessed statutory penalties.

COMMENT 287: Chevron U.S.A. Inc. commented that the following should be added at the end of N.J.A.C. 7:26C-5.4(b)4, "The Department recognizes that many interim response actions will be conducted to abate an actual or potential imminent threat which will necessitate immediate actions on the part of the responsible party. As such the Department realizes that interim remedial actions may be conducted at risk, without the execution of an oversight document." The added test recognizes the reality of the situation.

RESPONSE: The Department has amended this language to reflect the type of administrative consent order the Department will offer a responsible party who has to address an immediate environmental concern.

COMMENT 288: Kaye, Scholer, Fierman, Hays and Handler commented that proposed N.J.A.C. 7:26C-5.4(c) appears to permit the Department unfettered authority to vary the language and requirements of an administrative consent order in a particular case. However recent

statements from Department staff suggest that this may not be the case. The commenter requested that the Department clarify whether subsection (c) permits the Department on a case-by-case basis to vary any terms of the standard administrative consent order. Kaye, Scholer, Fierman, Hays and Handler commented that subsection (c) appears to permit the Department to use its discretion and issue an administrative consent order only for the Remedial Investigation/Feasibility Study. However, proposed N.J.A.C. 7:26C-5.4(a) does not expressly contemplate this situation.

COMMENT 289: Rutgers Environmental Law Clinic commented that the standard responsible party admnistrative consent order should be used unless the N.J.A.C. 7:26C-5.4(b) criteria are present. N.J.A.C. 7:26C-5.4(c) seems to state that the Department of Environmental Protection and Energy will select an administrative consent order form based on the characteristics of an individual party/site, even when those characteristics do not meet the criteria for one of the approved alternative administrative consent order forms in N.J.A.C. 7:26C-5.4(b). To this extent, this subsection undercuts the consistency and standardization intended by adopting a standard administrative consent order. Like the alternate cleanups standards proposed by the Department, this section may be the exception which will swallow the rule. The regulation should state that the standard administrative consent order must be used unless all of the characteristics in N.J.A.C. 7:26C-5.4(b) are present, and the existing administrative consent orders in the regulations are inadequate to address the needs of the site.

RESPONSE TO COMMENTS 288 AND 289: Although the Department believes that the vast majority of its cases will fit into the descriptions provided in N.J.A.C. 7:26C-5.4(b), there will no doubt be a small number of cases which do not. For those limited exceptions, and only in those limited exceptions, the Department needs to have the flexibility to generate an oversight document consistent with the sound regulatory policies outlined in this rule.

COMMENT 290: Wheaton Industries, Inc. commented that proposed N.J.A.C. 7:26C-5.4(d) states that an administrative consent order shall be consistent with Appendix D when any person agrees to pay the Department for all of its costs of remediation. The administrative consent order in Appendix D, however, is limited to payment for the costs of remedial investigation and feasibility study work. N.J.A.C. 7:26C-5.4(d) should be clarified to confirm that administrative consent orders to pay the Department's costs may extend to portions of the work other than the Remedial Investigation/Feasibility Study activity. Moreover, in the interests of maintaining flexibility to make as many settlement tools as possible available to encourage private participation in cleanups, this provision also should allow the Department to enter settlements for payment of parts of remediation costs to obtain reimbursement from some parties under so-called "mixed-funding" settlements.

RESPONSE: The Department intended to use the Appendix D administrative consent order for a part of the remediation process. The Department, therefore, has amended the language to clarify this point by replacing "RI/FS" throughout Appendix D with "remedial phase". The Department will accept any unconditioned payment from a responsible party in mitigation of that party's liability up to the amount of the payment. The Department has generally not elected to use mixed-funding settlements due to the difficulty involved in determining cost allocations prior to the completion of the entire remediation project. This is consistent with the legislative policy expressed in the strict, joint and several liability scheme of the relevant statutes.

COMMENT 291: Rutgers Environmental Law Clinic commented that the New Jersey Department of Environmental Protection and Energy should limit the grandfathering of current draft administrative consent orders. N.J.A.C. 7:26C-5.4(f), 24 N.J.R. 1295, allows the use of still further alternate administrative consent orders, depending on the "current status of negotiations at the time of the adoption of this chapter." First, the New Jersey Department of Environmental Protection and Energy should clarify that this paragraph only applies to sites where a draft administrative consent order has been circulated and negotiations are continuing. Second, there should be a deadline for the adoption of such pending administrative consent orders, whereby failure of the parties to reach agreement by a certain date would require implementation of the standard document included in these regulations. Third, upon adoption of these regulations, the New Jersey Department of Environmental Protection and Energy should publish a list of all sites which are under negotiation at that time, and only those sites shall be eligible for grandfathering under this section.

RESPONSE: As to the commenter's first point, the Department believes that the proposed language clearly states this point. A certain amount of flexibility is required here to allow the Department to make the appropriate decision to protect human health and the environment. As to the second issue, if the Department elects to defer to an administrative consent order that it is negotiating at the time of the adoption of this rule, the schedule for negotiating an administrative consent order in this chapter shall apply. As to the third issue, it is not the Department's practice to publicly disclose information concerning cases involved in on-going negotiations. In the exercise of its enforcement discretion, therefore, the Department will not make such a list available.

COMMENT 292: Exxon Company, U.S.A. commented that the Department should, in order to provide adequate flexibility, add the following in N.J.A.C. 7:26C-5.4(f) after ". . . subchapter . . .," "or elect to modify specific conditions or requirements in existing administrative consent orders, based on site specific conditions . . . ."

COMMENT 293: Chevron U.S.A. Inc. commented that N.J.A.C. 7:26C-5.4(f) should be revised to read as follows, "The Department may select an administrative consent order different from that provided for in this subchapter, or elect to modify specific conditions or requirements of the order based on site specific conditions." The modified language will allow for needed flexibility.

RESPONSE TO COMMENTS 292 AND 293: The Department is in general agreement with the substance of these comments, but sees no merit in modifying the rule. The Department believes that the language as proposed clearly articulates the Department's intention.

COMMENT 294: Wheaton Industries, Inc. commented that proposed N.J.A.C. 7:26C-5.4(f) should be revised by adding to the end of the sentence ". . . or when the Department determines such an administrative consent order to be consistent with the objectives and requirements of applicable law, protective of human health and the environment, and appropriate based upon pertinent facts and circumstances relating to the administrative consent order." Wheaton Industries, Inc. believes this revision will confirm existing discretion the Department has presently and under the proposed regulations to reach settlements meeting the objectives of New Jersey's site remediation programs. Such flexibility may be particularly helpful, for example, where one or more (but not all) potentially responsible parties are prepared to perform or pay for a discrete portion of appropriate remediation to resolve their respective liabilities.

RESPONSE: Promulgating this kind of "discretion" would completely defeat the Department's purpose of promulgating oversight documents in this rule. If the change were made, the Department would expect, based on over a decade of negotiating remediation agreements, that clearly the majority of persons would plead their cases, trying to convince the Department that it should make an exception from the rule language. The Department would be back to where it was prior to the promulgation of these rules, with the Department negotiating each agreement on a case-by-case basis.

N.J.A.C. 7:26C-5.5 Negotiation procedures

COMMENT 295: Allied-Signal Inc., E.I. du Pont de Nemours and Company and The General Electric Company commented that the time-frames set forth for negotiation are arbitrarily short, and greater latitude should be given to the Department to extend the negotiation period while progress is being made. There is no need for artificial deadlines binding the agency under circumstances in which the presumed time periods are simply inadequate to the task at hand.

Potentially responsible parties will be hesitant to sign the administrative consent order set out at Appendix C because, once signed, it acts to strip the potentially responsible party of all its rights to a fair and timely hearing. Once a potentially responsible party capitulates to the terms of the administrative consent order, it is at the mercy of the Department. All decisions made under the administrative consent order are made unilaterally by the Department without opportunity for any impartial review. Yet these decisions are implemented, performed and paid for by the signatory potentially responsible party.

The two alternative courses of action available to a party once an administrative consent order has been signed are presented by the Department in its summary under the heading "dispute resolution." These alternatives are not a fair or reasonable process for dispute resolution. The first option available to a signatory potentially responsible party is to capitulate to the Department's unilateral decision. This is not a means of settling a dispute. There is no mechanism for both sides to be heard.

The second option is for the signatory party to refuse to continue remediation under the administrative consent order and to subject itself to the possibility of stipulated penalties and treble damages. Neither option is reasonable, nor does it afford a potentially responsible party due process. A more reasonable and fair approach would be to allow a hearing or some form of alternative dispute resolution, at least as to the crucial decision on selection of remedy. The Department's proposed administrative consent order should contain a paragraph providing for alternative dispute resolution on disputed issues. The time table could be swift to avoid any delay in cleanup.

RESPONSE: If, as the commenters suggest, the responsible parties will not execute an Appendix C administrative consent order because of the terms of that particular oversight document, then no extension of the negotiating time periods will rectify this situation. The Department disagrees both that some form of alternate dispute resolution beyond that which the Department has already built into the orders is necessary, and that any such handoff of the Department's responsibility to remediate contaminated sites in a timely manner to protect human health and the environment is not in the public interest. The Department's own internal dispute resolution has always been available to a person that has a conflict with the Department. Initially, any dispute should be worked out with the case manager. If it can not be resolved, the dispute can be raised to the case manager's Supervisor. Any person can continue to raise a dispute up the Department's chain of command, up to and including the Commissioner, or his or her designee, in an effort to get it resolved. The Department's track record of negotiating more than 1,600 administrative consent orders and achieving nearly half of all the cleanups performed nationwide suggests that the Department and the parties are able to work out most of the differences as they develop, and before they impede the continued implementation of the remediation. U.S. General Accounting Office, Hazardous Waste Sites, GAO/RCED—89—164.

COMMENT 296: The New Jersey State Bar Association commented that the time periods specified under proposed N.J.A.C. 7:26C-5.5 seem to be unduly restrictive on the Department's ability to determine whether or not the parties are negotiating in good faith. Since it is in fact the allocation of public funds which is at stake in making these determinations, it would seem to be in the Department's interest to incorporate greater flexibility into its ability to further extend the negotiation period.

COMMENT 297: Edwards & Angell commented that the negotiation procedures and timetables at N.J.A.C. 7:26C-5.5 should contain additional flexibility if the Department determines that sufficient cause exists. If both the responsible parties and the Department are proceeding in good faith, the deadlines at N.J.A.C. 7:26C-5.5(a) should not limit this process.

COMMENT 298: Chevron U.S.A. Inc. commented that N.J.A.C. 7:26C-5.5 should be revised to read "... the Department in the exercise of its enforcement discretion shall extend the negotiation period if the responsible party is proceeding in good faith." The 45 day time period for an extension will probably be acceptable for the majority of sites comprising small to medium sized facilities. However, negotiating orders for larger sites where remediation costs could reach 10 to 100 million dollars is more complicated and may need additional time. If the Department is truly interested in encouraging responsible party actions as opposed to private funds, then added flexibility is warranted. Flexibility is also needed for former owners or operators who may have left the site years ago (even decades ago) and are now being asked to sign a decision document. In these cases additional time may be necessary to establish or confirm linkage with the site.

COMMENT 299: Wheaton Industries, Inc. commented that proposed N.J.A.C. 7:26C-5.5 appears to limit the Department's discretion to agree to administrative consent orders for remediation after certain defined negotiation periods expire. Wheaton believes these limits are unnecessary, and can interfere with the effective administration of New Jersey's site remediation program. Even without these limits in the regulations, the Department would still retain the discretion to halt negotiations and proceed without an administrative consent order if negotiations did not proceed quickly enough; however, the Department also should retain the flexibility to reopen those negotiations if the Department believed such action to be justified based on site-specific circumstances.

COMMENT 300: Hackensack Water Company commented that negotiation time frames are short and do not appear flexible. A statement addressing deadline extensions, for reasonable cause, should be considered.

RESPONSE TO COMMENTS 296 TO 300: There are thousands of contaminated sites in the State of New Jersey and the Department cannot spend an unlimited amount of time in negotiating the terms of remediation for each site. Based upon its experience, the Department has concluded that a 90-day negotiation period is sufficient. Upon promulgation of this rule, all parties know the conditions which will form the basis of their agreement to participate in the remediation of a contaminated site. The only real decision that is necessary is by the party contemplating participating, and that is whether or not the party wishes to consent to the terms of an agreement. The Department has, however, included language at N.J.A.C. 7:26C-5.5(a) which allows the Department to extend negotiations for a period up to 45 days in the exercise of its enforcement discretion.

The Department is charged with ensuring the remediation of thousands of contaminated sites. Therefore, the Department cannot expend its limited resources on protracted document negotiations on all of the individual sites that require remediation. Protracted document negotiations delay cleanups.

Many of these "good faith" negotiations in the past have resulted in negotiations lasting two years and more. This practice cannot be allowed to continue in the future if the Department is going to maximize its limited resources for site remediation. One of the Department's main objectives in promulgating this rule was to decrease the number of issues and the corresponding wording which needed to be addressed in these negotiations. An intended result, therefore, should be for the parties to complete their "good faith" negotiations in a significantly shorter time frame.

COMMENT 301: Exxon Company, U.S.A. commented that in N.J.A.C. 7:26C-5.5(a)2, change "may" to "shall." In cases involving multiple responsible parties, a reasonable period of time must be given for the parties to meet and discuss the situation. It is unreasonable not to grant an initial period for this to occur.

COMMENT 302: Chevron U.S.A. Inc. commented that delete "may establish" from line three of N.J.A.C. 7:26C-5.5(a)2 and replace it with "shall establish." Additionally, change the "60 day" organizational meeting time period to a range of 90 to 120 days. To prevent the potential expenditure of public funds, the Department should encourage multiple responsible party groups to be formed. When it comes to multiple responsible party sites the Department "must" allow sufficient time for organizational meetings. It is our experience that 60 days is an insufficient time period for these meetings. Additionally older, larger and/or more complex sites take longer than smaller less complicated sites.

RESPONSE TO COMMENTS 301 AND 302: The Department maintains discretion in determining if an organizational period is necessary and the 60 days provided for does not need to be extended as this would delay action on the part of the responsible parties to do remediation. The Department is attempting, with this proposed rule, to streamline the oversight document process. The suggested language is inconsistent with this objective and would only prolong this period.

COMMENT 303: Chemical Waste Management of New Jersey commented that the Department should not be permitted to deny a responsible party the opportunity to negotiate and execute an administrative consent order simply because the Department has begun the process of issuing solicitation documents. It is unreasonable and counterproductive for the Department to impose any cutoff on the time frame when a party can volunteer to conduct the remediation. Unless contractually bound or otherwise, the Department should be obligated to consider such an offer. Voluntary remediation of a site by a responsible party, regardless of the stage of the remediation process, may best serve the public interest by conserving public resources and providing for site cleanup.

RESPONSE: Contrary to the assertions of this commenter, this provision does not "deny a responsible party the opportunity to negotiate and execute an administrative consent order." Rather, this provision merely serves to define the end point of this period based upon other competing public policy concerns which the commenter may not fully appreciate. In order for the Department to hire a private contractor to perform remediation at a particular contaminated site, the Department must go through the public bidding process. As the technical complexity of this work increases, more of these bids are made in the range of tens of millions of dollars. This requires the bidders to spend thousands of dollars to prepare a bid for just a single project. Bidders are generally willing to do this because they have a chance to have their bid selected. The Department has learned through its conversation with prospective bidders that if, as the commenter suggests, the Department were to

successfully negotiate an administrative consent order after the bid process has begun, that this would significantly discourage the bidders from bidding on future projects. Without the assurance of a large group of qualified bidders from which to select from, the Department cannot ensure that it will be able to conduct the remediations as mandated by the Legislature.

COMMENT 304: Exxon Company, U.S.A. suggested that the Department add the following language to N.J.A.C. 7:26C-5.5(b): The Department will notify the responsible party in writing at least 10 days in advance of the date that the Department will issue a solicitation document for the required Remedial Investigation/Feasibility Study.

RESPONSE: Outlined in N.J.A.C. 7:26C-5 are the timeframes for negotiating administrative consent orders. The Department believes that the 10 day advance notice requested by Exxon Company, U.S.A. is not necessary. At any time after the 90 days (or 135 days, if a 45 day extension is granted) expire, the solicitation document may be issued.

COMMENT 305: Chevron U.S.A. Inc. suggested changing the phrase "shall execute" to "may execute" in both N.J.A.C. 7:26C-5.5(b) and (c). A responsible party can not be forced to execute an administrative consent order. Additionally, a [person] should have the oportunity to enter a memorandum of agreement as opposed to an administrative consent order.

RESPONSE: In N.J.A.C. 7:26C-5.5(c) the Department is identifying that there is a timeframe associated with all negotiations since the Department cannot afford to let the initiation of the remediation be delayed for an indefinite period of time. Further, the Department believes that an administrative consent order is the appropriate mechanism for the remediation of priority sites since the Department must guarantee a complete and timely cleanup of the site. For this reason, the Department has not made the suggested change.

COMMENT 306: Chemical Waste Management of New Jersey commented that N.J.A.C. 7:26C-5.5(d) provides that a responsible party may participate in the required remediation of a contaminated site without having executed a Responsible Party administrative consent order providing for such by paying all or part of the cost of the remediation. According to the proposed rules, any partial payment by a responsible party will mitigate, but not satisfy, the liability of the party for the Department's cleanup and removal costs, statutory penalties and treble damages. This provision fails to address those circumstances pursuant to which a partial payment made by a party towards site remediation in fact constitutes the full amount the party would ultimately be liable to pay for the remediation of a particular site. With this scenario in mind, this provision should be revised to state that if the amount of the partial payment by a party constitutes the full amount that would otherwise be due and owing by the responsible party, no penalties or damages shall accrue.

RESPONSE: The commenter neglects to exlain how it is that the Department is to know at the time of a partial payment that the payment constitutes the extent of a person's liability—a determination which only a court of competent jurisdiction can make. As a matter of law, if a court determines that the person's payment has in fact been in the full amount of that person's liability, then no penalties or damages will accrue.

COMMENT 307: Hackensack Water Company commented that the provisions of N.J.A.C. 7:26C-5.5(d) governs negotiations held prior to entering into a responsible party administrative consent order. It states that if the time for negotiation has expired and an administrative consent order has not been executed, the responsible party may nevertheless participate in remediation by paying all or part of the remediation costs. The rule further states that "partial payment by the responsible party will mitigate, but not satisfy the liability of the responsible party for the Department's cleanup and removal costs, statutory penalties and treble damages." The responsible party may have a good faith reason for not agreeing with the Department directive. It should be able to assert all defenses it may otherwise have had, if it had not come forth to voluntarily clean up the site.

RESPONSE: Consistent with the discussion in response to the comments on subchapter 2, above, the Department will evaluate all good cause defenses which a party communicates to the Department according to the time frames in the rule. Caution is necessary here to distinguish "good cause" defenses to treble damages and defenses to the underlying liability. The person raising the good cause defenses may decide whether or not to participate in the remediation pursuant to this subchapter or reserve all of its defenses should the Department initiate a cost recovery action against it.

COMMENT 308: Chevron U.S.A. Inc. commented that on line 6 of N.J.A.C. 7:26C-5.5(d) the Department should delete "will not satisfy" and replace with "may not satisfy". This change will provide the Department of Environmental Protection and Energy with needed flexibility. Additionally, this may be an issue for the courts to decide.

RESPONSE: By its very defintion, a "partial" payment is not a full payment and therefore a partial payment cannot completely satisfy outstanding liability as far as the Department is concerned.

N.J.A.C. 7:26C-5.6 Determination of financial assurance amount

COMMENT 309: Chevron U.S.A Inc. commented that in its discussion comments, the Department indicates that the cost of obtaining financial assurance is generally one to three percent of the cost of the clean-up. While this appears to be a "small amount" in percentage, it can represent significant amounts which in many cases provides little or no additional assurance to the state. In many circumstances, the New Jersey Department of Environmental Protection and Energy's requirements cause companies to incur additional expense. This effectively places New Jersey companies at a competitive disadvantage, while providing little associated benefit to the state.

In order to prevent burdening New Jersey companies with unnecessary costs and administrative activities the New Jersey Department of Environmental Protection and Energy should specifically allow for the demonstration of "Financial Assurance" through the use of a financial test. The State already recognizes the usefulness of this method in that it presently allows companies to demonstrate financial assurance for environmental liability requirements related to sudden accidental occurrences (N.J.A.C. 7:26-9.13(a)1i-v) In recognition of the often wasteful burden that trust funds, letters of credit, or surety bonds place on companies that clearly have financial resources to pay for a specific environmental clean up, the United States Enviromental Protection Agency permits credit worthy companies to use a financial test to demonstrate financial assurance for liability requirements and for closure and post-closure remediation. To further enhance this concept, the United States Environmental Protection Agency recently conducted a large study of financial test criteria and found the basic concept to have substantial merit (see Federal Register for Monday July 1, 1991 pages 30201-30227). The United States Environmental Protection Agency's analysis concluded that although the risk and potential public cost was greater in closure and post-closure situations (than in direct liability exposure), the six times coverage multiples "provided an adequate cushion to ensure that even rapidly deteriorating firms have adequate resources to cover the costs of closure, post-closure case and third party liability judgments (Federal Register July 1, 1992 page 30204). We also believe that the use of such a financial test represents a prudent and well documented approach for ensuring adequate financial assurance appropriately balancing all the potential public costs.

In its discussion on financial assurance requirements the New Jersey Department of Environmental Protection and Energy indicates that the three purposes for its present financial assurance requirements are: 1) to provide assurance that the responsible party has adequate financial resources, 2) to put the responsible party's standing in the financial community "at risk," and 3) to provide the New Jersey Department of Environmental Protection and Energy with the ability to quickly obtain funds from the responsible party to perform the actual work and thus limit the use of public funds. The commenter believes the financial test as presently used by the New Jersey Department of Environmental Protection and Energy for liability requirements and the United States Enviromental Protection Agency adequately provide for the first purpose. Since a company's standing in the financial community is put at risk by its actual non-compliance with the law and any related deterioration of its credit rating, little additional impact occurs as a result of the use of letters of credit or surety bonds. Similarly, since remediation the New Jersey Department of Environmental Protection and Energy can easily pursue credit worthy companies which refuse to pay or take appropriate action, the New Jersey Department of Environmental Protection and Energy's ability to directly draw funds doesn't significantly increase the Department's basic flexibility or bargaining power. It is possible that the New Jersey Department of Environmental Protection and Energy already intends to give some value to credit worthy companies (N.J.A.C. 7:26C-4.5(b) and (c)); however, if this is the New Jersey Department of Environmental Protection and Energy's intent, it should be clearly stated. Assuming use of a financial test is permitted, the United States Environmental Protection Agency's concept of allowing other (parent or third party) companies to guarantee the peformance of the responsible party should also be made available.

Chevron U.S.A. Inc. also commented that although they feel it is reasonable and prudent of the New Jersey Department of Environmental Protection and Energy to permit use of the financial test for 100 percent of the requirement, a lesser amount could also be considered if the New Jersey Department of Environmental Protection and Energy feels it must have some immediate access to private funds in order to take immediate action while pursuing legal recourse in court. For example, if the remediation costs are expected to exceed $5 million, but are less than $50 million, a credit worthy company could be requested to put up a letter of credit for only $5 million and use the financial test to demonstrate adequate resources for the remainder of its liability. If the remediation costs were expected to exceed $50 million, the letter of credit could be 20 percent of the amount of required financial assurance. This compromise position would still save companies significant amounts of actual expenses while providing the New Jersey Department of Environmental Protection and Energy with the ability to take immediate action without committing state funds. In addition, potential disagreements over the ultimate amount of expected remediation (and thus the size of the letter of credit) would be reduced since the adverse economic impact to the company would be less. Once utilized by the state, the company could be required to establish a new letter of credit to restore the original amount provided.

Chevron U.S.A. Inc. further commented that "Any other additional information required by the Department" is not defined. It appears from this section that the Department may intend to reduce the amount of financial assurance required by credit worthy companies. They suggest that if this is the Department's intent, then the Department should explicitly make self-insurance an alternative under Appendix B or C and require financial viability tests. The State's liability financial assurance requirements under subchapter 9 of the Requirements for Hazardous Facilities would be appropriate for such an alternative. Other examples of financial assurance tests can be found in the United States Environmental Protection Agency's most recently proposed requirements.

COMMENT 310: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company commented that proposed N.J.A.C. 7:26C-5.6 deals with the determination of financial assurance amount. Financial assurance necessarily ties up credit which affects the ability of a company to borrow money. In the case of a party that performs throughout, financial assurance represents an unnecessary expenditure for a credit line and a restriction on the ability of the person to conduct its business. For major corporations, the financial ability of a company to respond is never in doubt, and therefore the need to tie up large amounts in financial assurance is disproportionate to the additional incentive to perform represented by financial assurance. The Department should reserve the right to adjust the amount under any circumstances in which financial assurances are not necessary to advance the purposes of the administrative consent order. The commenters suggest the addition of language similar to that proposed above as N.J.A.C. 7:26C-4.5(b)4, assurance. The Department should reserve the right to adjust the amount under any circumstances in which financial assurances are not necessary to advance the purposes of the administrative consent order. The commenters suggest the addition of language similar to that proposed above as N.J.A.C. 7:26C-4.5(b)4.

COMMENT 311: Colonial Pipeline Company suggests that the regulations be modified to include evidence of self-insurance as a means of providing financial assurances.

COMMENT 312: New Jersey State Bar Association commented that pursuant to proposed N.J.A.C. 7:26C-5.6(a), it seems that the Department is obligated only to provide a bottom line figure for financial assurance without any justification for that figure. Unfortunately, this is just a perpetuation of existing practice. Presumably, there has been and will continue to be some objective basis for arriving at the financial assurance amount set forth in the oversight document, similar to the information which can be submitted pursuant to N.J.A.C. 7:26C-5.6(b)1. In order for the responsible party to appropriately respond to the Department's proposed financial assurance amount, this information should be provided at the outset of the negotiation of the oversight document.

RESPONSE TO COMMENTS 309 TO 312: The purpose of posting financial assurance by a responsible party is to ensure that the Department has not only the satisfactory amount of money to fund the cleanup but also the immediate access to and availability of the funds. As stated in the Summary of this rule, the Department needs: (1) the assurance that the responsible party has at its disposal the financial resources to perform the work; (2) the responsible party guarantees to perform the work by risking its available credit; and (3) the Department has the ability to draw on those funds thereby preserving public funds for projects where no private funds are available.

The financial test referenced (N.J.A.C. 7:26-9.13(a)1i-v) is used to determine insurance amounts for sudden accidental occurrences at Resource Conservation and Recovery Act facilities. Further, self insurance does not provide the Department readily available access to those funds. The judicial process involved in the Department, not to mention the insured, attempting to gain control of those funds would be time consuming, thereby delaying the cleanup of priority sites.

Initially, the Department determines the amount of financial assurance for a site based upon past experience. As the full costs for remediation become known to the Department, the responsible party is required to post that amount in a form that is readily available to the Department. Any amount less than the full amount leaves the Department vulnerable to having to use public funds or to expend considerable time and effort to pursue additional private funds from responsible parties, thereby, delaying necessary remediation.

In response to the New Jersey State Bar Association's comment regarding the Department's determination of the appropriate amount of financial assurance to be posted, one needs to review in whole the three criteria listed in N.J.A.C. 7:26C-5.6 under Subsections (a), (b) and (c). The Department shall determine the correct amount of financial assurance by estimating costs for each area of concern and adding them together. The responsible party may submit, for Department review, information which it feels is relevant to estimating those costs. That information can relate both to work that was previously performed or work expected to be completed. The Department reserves the right to adjust the amount of financial assurance required based upon any relevant information submitted by the responsible party. The Legislature is currently considering legislation (Senate Bill 1070) that would specify a responsible party's financial assurance requirements. If that legislation is enacted, appropriate changes to this rule will be promulgated.

COMMENT 313: New Jersey State Bar Association commented that with respect to proposed N.J.A.C. 7:26C-5.6(b)3, it does not seem that the amount of the financial assurance should necessarily be determined by a party's ability to provide that assurance. Either public funds are allocated or they are not. If a responsible party's ability to provide financial assurance is going to be taken into consideration in determining the financial assurance amount, some formula should be available to the regulated community so that a party can determine its own capacity for providing the financial assurance.

RESPONSE: The language in N.J.A.C. 7:26C-5.6(b)3 is intended to indicate to the Department whether or not a cleanup could be conducted with the responsible party's financial assurance. If a responsible party can provide only limited financial assurance, the Department must plan and allocate public funds accordingly to be able to fund the cleanup if a responsible party is unwilling or unable to do so.

COMMENT 314: Chevron U.S.A. Inc. commented that N.J.A.C. 7:26C-5.6(b)3 be changed to read "for the past three years and any other reasonable information required by the Department." The change provides for the submittal of "reasonable information" as opposed to any information. Although the intent is to facilitate a favorable decision on a financial assurance reduction, the Department's document requests should be reasonable.

RESPONSE: The Department agrees that it has to be reasonable in its request.

COMMENT 315: Exxon Company, U.S.A. commented that the term "tax returns" be changed to "financial data" in N.J.A.C. 7:26C-5.6(b)3. In some cases, particularly for large corporations, tax returns are too voluminous. Other documents, financial data, summaries, etc. are more readily available and appropriate.

RESPONSE: The Department, in order to make the most accurate decision is requesting from the responsible party, information in the form of tax returns and other pertinent documentation which will support that decision. The decision to submit any data is entirely up to the responsible party.

COMMENT 316: Chevron U.S.A. Inc. commented that the term, "in its discretion," should be deleted from N.J.A.C. 7:26C-5.6(c). The following language should be added to N.J.A.C. 7:26C-5.6(c), "The person responsible may petition the Department for a decrease in financial assurance at any time. The Department will respond to the petition within 45 calendar days." The Department should make every effort to respond to requests for reduction in financial assurance to

minimize this potentially burdensome requirement. Also, see comments under Financial Assurance Requirements of this document.

RESPONSE: The Department will evaluate annually the appropriate amount of financial assurance to be posted by the responsible party if requested by the responsible party. As stated previously, the Department will adjust the amount of financial assurance necessary based upon the cost of work to be completed. It is not in the best interests of either the Department or the taxpayers to require inappropriate amounts of financial assurance. The Department agrees to make every effort to expeditiously respond to any request for reduction in financial assurance.

COMMENT 317: Chevron U.S.A. Inc. commented to change to: The Department may, in its discretion, adjust the amount of financial (delete—determined) *assurance required* pursuant to (a) above, based on any information submitted pursuant to (b) above.

COMMENT 318: The Commerce and Industry Association of New Jersey commented that there is a typographical error: the word "assurance" should appear between "financial" and "determined" in N.J.A.C. 7:26C-5.6(c).

COMMENT 319: The New Jersey Business and Industry Association commented that the word "assurance" should appear between "financial" and "determined" in N.J.A.C. 7:26C-5.6(c).

RESPONSE TO COMMENTS 317 TO 319: The Department agrees that the words "assurance required" were omitted from the necessary correction.

Appendix A: Standard Memorandum of Agreement

General Comments

COMMENT 320: Rutgers Environmental Law Clinic would like the Department to require financial assurance for cleanups under memoranda of agreement. Otherwise, a remediating party could start a cleanup and terminate the memorandum of agreement before the cleanup is completed, leaving the site in worse condition without incurring liability. The proposed regulations do not specify what information the Department will require to determine whether there is an environmental hazard or the criteria it will apply to determine if a hazard exists. It will be extremely difficult for the Department to pinpoint what portion of the damage to a site occurred as a result of actions taken pursuant to the memorandum of agreement, especially because of proof problems related to determining when a particular discharge occurred. Moreover, if the Department concludes that there are hazards on the site as a result of the responsible party's actions under the memorandum of agreement, it is at best unclear that the Department of Environmental Protection and Energy will have a remedy under a memorandum of agreement. For all of the foregoing reasons, the Department of Environmental Protection and Energy should require financial assurance for cleanup under a memorandum of agreement.

RESPONSE: A person agreeing to do remedial work under a memorandum of agreement is obligated to leave the site in no worse condition as a result of the work. If the person responsible for conducting the work has created an environmental hazard and does not eliminate it upon termination the Department can sue to enforce the agreement or take enforcement action independent of the agreement. A requirement that the person responsible for conducting the remediation provide financial assurance would discourage voluntary remediation under a memorandum of agreement. The Department's ability to sue to enforce the memorandum of agreement and to use other enforcement mechanisms are sufficient protections against the risks presented by a non-priority site.

COMMENT 321: Hoffmann-La Roche Inc. objected to a requirement of financial assurance for a memorandum of agreement.

RESPONSE: The memorandum of agreement does not require financial assurance.

COMMENT 322: American National Can recommended that the introductory language state that the memorandum of agreement is "entered into" rather than "issued."

RESPONSE: The Department agrees that the phrase "entered into" reflects the voluntary nature of the agreement and has made the recommended change.

COMMENT 323: First Fidelity Environmental requested that the following language be inserted into the memorandum of agreement: "The State agrees that neither this agreement or any work performed pursuant to this agreement constitutes operation or control over the site and the State agrees that it will neither use this agreement nor work completed pursuant to this agreement as evidence of [Person's] ownership or control of the site."

RESPONSE: The Department wants to encourage people to step forward and clean up contaminated sites. As a policy matter, the Department does not intend to pursue liability of a lender or other party(ies) not responsible for the discharge based upon execution of a memorandum of agreement. That liability is controlled by United States Environmental Protection Agency regulations at 40 C.F.R. Part 300, Sub L, and the Spill Compensation and Control Act and is currently the subject of a bill before the New Jersey Legislature, S-577.

COMMENT 324: Chemical Waste Management of New Jersey referred to and incorporated by reference its comments to the responsible party administrative consent order insofar as such comments pertain to alternative dispute resolution, oversight costs, covenant not to sue and contribution protection provisions. Such provisions should be provided in the proposed memorandum of agreement to assure and enhance participation by responsible parties in site cleanup.

RESPONSE: Please see responses to these comments in the responsible party administrative consent order section.

In addition, the Department makes the following responses specific to the memorandum of agreement.

Alternate dispute resolution: In the case of a voluntary memorandum of agreement, if the Department and the person conducting the remediation cannot agree, the person does have the option of terminating the agreement without the same risk of enforcement as in the case of a responsible party administrative consent order. Further, unlike an administrative consent order, a memorandum of agreement does not require a full commitment to clean up. The Department does, however, agree that a means of resolving disputes is essential to obtaining the voluntary remediation of a contaminated site.

In the event a conflict arises between a party and the Department, the party may institute the Department's internal process for resolving disputes. The initial step requires that the party notify the assigned case manager of the issue(s) that is in dispute. If the party and the Department cannot resolve the dispute, the party has the option to contact the assigned case manager's supervisor. If the dispute cannot be resolved at that level it will continue up the chain of command to the Bureau Chief, Assistant Director, Director, Assistant Commissioner, and Commissioner or his/her designee as necessary.

Covenant not to sue: The Department is developing a letter it will issue advising the person responsible for conducting the remediation that the Department intends to take no further action, once the remediation has been completed to the Department's satisfaction. The Department has been reluctant to provide covenants not to sue because many remedies leave contaminants at a site. There is always the possibility that conditions may change, resulting in a release for which persons "in any way responsible" would be liable. Further, as science advances, technical standards for cleanup may change, requiring a reevaluation of the need for additional remediation at the site. The Department is willing to continue to discuss the possibility of covenants not to sue and how such provisions could be drafted to address the concerns raised here, but a covenant not to sue will not be added to these rules at this time.

Contribution protection: Neither the New Jersey Spill Compensation and Control Act nor any other New Jersey statutes authorize the State to provide contribution protection to those who settle the State's claims for the remediation of contaminated sites. Therefore, in contrast to settlements under the Federal cleanup law, Comprehensive Environmental Response, Compensation, and Liability Act, settlements under the Spill Compensation and Control Act cannot include contribution protection. See, 42 U.S.C. Section 9613(f).

Findings, Paragraph 3—Description of memorandum of agreement activities

COMMENT 325: Colonial Pipeline Company suggested that the scope of work and activities to be conducted be summarized in the memorandum of agreement. However the summary should be of a general nature thereby allowing for a certain amount of flexibility as work progresses. Colonial Pipeline Company believes that it would be counterproductive and would slow the remediation process considerably if every change in the scope of work had to be submitted in writing to the Department for review and approval.

COMMENT 326: Chevron U.S.A. Inc. suggested the addition, after the word "herein" in Paragraph 3, of the following bracketed language: "or agreed to by the Department after [Person]'s execution of this memorandum of agreement," to add flexibility. The scope of work will be dictated by events or findings possibly unknown at time of execution of this agreement.

COMMENT 327: New Jersey State Bar Association suggested that the description of the activities to be conducted which is proposed at Paragraph 3 of the Findings section could usefully be incorporated as a "scope of work" at Paragraph I.1, rather than merely listing the names of the expected reports in that section.

RESPONSE TO COMMENTS 325 TO 327: The activities to be performed for each phase are controlled by the technical requirements at N.J.A.C. 7:26E. The agreement will then list at Paragraph I.1 the documents the person conducting the remediation will submit for the Department to review. The Department needs to be able to estimate the personnel resources that will be required for oversight under a memorandum of agreement so there must be some delineation of the work to be performed and reviewed. The Department's preference is for a memorandum of agreement to cover all phases for the entire site to avoid any extra costs and inefficiencies associated with developing, and executing successive agreements. However, the standardization of the memorandum of agreement should reduce this amount of effort so the person responsible for conducting the remediation who wants to do the work in phases or by area of concern can sign successive memoranda of agreement.

COMMENT 328: Colonial Pipeline Company suggested that if all the Department's files are to be incorporated into the Order, the regulations provide that the person responsible for conducting the remediation is entitled to review, copy and comment on such files prior to their incorporation.

RESPONSE: Although the standard responsible party administrative consent order does incorporate the Department's files, the standard memorandum of agreement does not. Any person may review, copy and comment on the Department's public files at any time by arranging for a file review through the Department.

COMMENT 329: Rutgers Environmental Law Clinic commented that there should be strict timetables created for activities being conducted under a memorandum of agreement and the Department should have oversight of those activities. In discussing the administrative consent order used for private cleanups of high priority sites, the Department notes that "unless the party performs the work pursuant to a legally enforceable document guaranteeing the work, the Department is not able to ensure that the responsible party will conduct the remediation in a timely manner." 24 N.J.R. 1287. The enforceability and timeliness of actions taken pursuant to a memorandum of agreement is just as valid for sites where memoranda of agreement are proposed as those where an administrative consent order is used. Environmental protection cannot be ensured without enforceability.

RESPONSE: A memorandum of agreement is a voluntary commitment to do remedial work at a contaminated site. The person signing the agreement decides on the scope of the work that person will do, and the timing of the submissions. The Department believes this will encourage business decisions to do remediation voluntarily because the person signing the agreement can plan ahead for the expenditures it will make and can limit those expenditures. The Department believes it can offer this flexibility where non-priority sites are involved because there is a lower risk to human health and the environment and because these are sites the Department would not otherwise be addressing at that time due to their priority relative to other sites. The ability to control the timing of the work is an important incentive for voluntary remediations.

There is a major difference between administrative consent orders and memoranda of agreement. Administrative consent orders are for priority sites where the Department must ensure that remediation occurs in a timely manner thus creating the need to oversee an enforceable schedule for remediation. If the site were not remediated, the Department would be prepared to spend public funds to do so. Memoranda of agreement, on the other hand, are for non-priority sites that the Department will not be addressing in the near future; therefore, timeliness of the remediation is not a factor, and neither is enforcement by the Department. The only reason remediation may be underway is that a person has decided to initiate a site cleanup of its own volition due to their agenda, and desires Department oversight and approval.

COMMENT 330: Al Nesheiwat questioned whether there is a cleanup schedule associated with the memorandum of agreement and if so whether it is at the generator's wish.

COMMENT 331: Blair Dominiak asked how a cleanup schedule would be developed in a memorandum of agreement. He expressed concern that the cleanup could end up taking years.

RESPONSE TO COMMENTS 330 AND 331: The cleanup schedule under a memorandum of agreement will be developed and, for the most part, controlled by the person responsible for the remediation. The only aspect of the cleanup out of the control of that person will be the timing of the Department's reviews. The Department will provide timelines for its review of documents under Paragraph I.2 of the standard memorandum of agreement. Even if a cleanup does take "years," the public receives a benefit because remediation is being performed during the period before the Department would remediate that site. If the site becomes a priority during those "years," the Department may require an administrative consent order or utilize public funds to conduct the remediation.

COMMENT 332: The New Jersey Business and Industry Association commented that the Department should adopt the language in the preamble relating to review of documents for completeness on an expedited schedule with notice of deficiencies being issued within 30 days of the memorandum of agreement completion as stated in the preamble. Unless the schedule is included in the regulations, the Department will not be bound by it.

RESPONSE: The standard memorandum of agreement, at Paragraph I.2, establishes this obligation on the part of the Department. The standard memorandum of agreement is a part of the rule proposal and the Department will be bound.

COMMENT 333: American National Can asked that the following additional language be added to the end of the sentence after "the Department": "... to ensure that remedial activities are carried out consistent with the Department guidelines."

RESPONSE: The Department will review the documents submitted to determine whether the work complies with the technical requirements at N.J.A.C. 7:26E and provide the person responsible for conducting the remediation with its determination. The suggested language would create an impression that the Department intends to enforce the technical requirements under the memorandum of agreement. Since the memorandum of agreement is voluntary, the Department will review and approve or disapprove of the work rather than "ensure" compliance with "Department Guidelines." The Department has added language to Paragraph I.2 to address American National Can's concerns.

Findings, Paragraph 4—No Admission of Liability

COMMENT 334: Chevron U.S.A. Inc. suggested the addition of the following language at the end of Paragraph 4: "nor shall it be construed as a waiver of any right or defense [Person] may have with regard to the Site." The purpose of this amendment is to broaden the protection afforded the person responsible for conducting the remediation by entering into the memorandum of agreement.

RESPONSE: The Department agrees with the concept of this comment and has added appropriate language.

COMMENT 335: The New Jersey State Bar Association suggested that Paragraph 4 under "Findings" be moved to the body of the agreement (perhaps under the general conditions or in the reservation of rights section).

RESPONSE: The Department does not feel it is necessary to move this paragraph from this section.

Findings, Paragraph 5—Additional Provisions

COMMENT 336: Chevron U.S.A. Inc. asked that the phrase "with the concurrence of [Person]" be added after "at the Department's discretion."

RESPONSE: The Department agrees with the concept of this comment and has made the appropriate changes in the rule.

Agreement, Remediation—Paragraph I.1

COMMENT 337: Wheaton Industries, Inc. suggested the documentation required to be submitted to the Department pursuant to the memorandum of agreement should be limited specifically to data or other documentation that is generated as a result of activities governed by the memorandum of agreement. A party will be more inclined to engage in a voluntary cleanup if the agreement precisely defines and limits the party's documentation responsibilities.

RESPONSE: The commenter has misunderstood this term of the memorandum of agreement. At Paragraph I.1, the person responsible for conducting the remediation specifies the documents it will submit for review by the Department in connection with its activities under the memorandum of agreement. Through the memorandum of agreement the person responsible for conducting the remediation "defines" its obligations and the remedial activities.

COMMENT 338: First Fidelity Environmental suggested the following revisions: "By executing this memorandum of agreement, [Person] agrees to conduct [add: investigatory] activities including, Preliminary Assessment/Site Investigation [add: and] Remedial Investigation (delete: Feasibility Study and Remedial Action if applicable) at the site required pursuant to this memorandum of agreement and the Department agrees to review and comment on documents submitted. [Person] agrees to conduct all activities in accordance with the Department's applicable technical standards, Administrative Codes and the Appendices which are attached hereto and made a part hereof."

RESPONSE: This is a site specific comment which cannot be applied to all sites eligible for a memorandum of agreement, since a party may enter into a memorandum of agreement for a single phase or for the full cleanup. The provision regarding the standards for the remediation is included in the standard memorandum of agreement in the General Conditions Section, Paragraph V.3. Also, appendices will no longer be attached to oversight documents because the Department has proposed technical requirements for the remediation of contaminated sites as rules which incorporate the appendices formerly attached to the document.

COMMENT 339: American National Can commented that Paragraphs 3(a), (b), (f), and (h) refer to performing activities in accordance with "Department guidelines." However, nowhere are the guidelines specifically identified. The commenter understands that the guidelines are contained in New Jersey Administrative Code 7:26C, 7:26D, and 7:26E. A specific reference to which guidelines are to be met should be included.

COMMENT 340: Hoffmann-La Roche Inc. suggested that any requirements in this proposal referring to proposed regulation N.J.A.C. 7:26E Technical Requirements for Site Remediation should be reserved until those rules have been commented on by the regulated community and adopted.

RESPONSE TO COMMENTS 339 AND 340: There is no reference to Department guidelines in the standard memorandum of agreement as proposed. American National Can's reference to Paragraphs 3(a), (b), (f) and (h) relates to a specific memorandum of agreement it was negotiating with the Department. The memorandum of agreement does refer at Paragraph I.2 to proposed N.J.A.C. 7:26E, technical requirements, which has not yet been adopted. Pending the adoption, the Department will rely upon the proposed rule as a guideline.

Proposed N.J.A.C. 7:26E contains the minimum remedial requirements necessary to protect human health and the environment. The Department will make this chapter operative simultaneously with N.J.A.C. 7:26E.

Paragraph V.3 also requires the person signing the memorandum of agreement to conform all actions under the agreement to applicable Federal, State, and local laws and regulations.

Agreement, Remediation—Paragraph I.2

COMMENT 341: Exxon Company, U.S.A. suggested that the Department provide notice when a submission is administratively complete.

RESPONSE: Paragraph I.2 does provide, in the second sentence, for notice by the Department to the person responsible for conducting the remediation when the submission is administratively complete.

COMMENT 342: Wheaton Industries, Inc. suggested the following change: "When the Department determines that the submission is administratively complete, the Department will notify [Person] in writing of a reasonable time frame required for the Department to complete the review and provide any comments. The Department will use its best efforts to complete its review and provide any comments as soon as possible, but no later than thirty (30) days of notifying [Person] that the submission is administratively complete." Rather than having an unlimited amount of time to complete its review of submissions under the memorandum of agreement, the Department should be required to operate under a standard of reasonableness by providing timely and specific written comments relating to the substance of the submission. Thirty days should be a sufficient amount of time for the Department to review and comment on the submission. Parties will be more inclined to view memoranda of agreement as useful, and thus to engage in voluntary cleanups under such memoranda of agreement, if the parties know in advance for business planning purposes of an expeditious timetable on which remediation issues will be clarified. Indeed, timely response from the Department typically would be the principal reason for a person to enter a memorandum of agreement and agree to pay the Department's oversight costs. To retain some flexibility for the Department, the regulation might also authorize the Department to invoke a 30-day review extension if completion within the initial 30 days is infeasible.

COMMENT 343: Chevron U.S.A. Inc. requested that the memorandum of agreement provide: "The Department will complete its review of all documents within 60 calendar days of receipt."

COMMENT 344: American National Can requested a timeline be included from the time an application is determined to be complete to notification date.

COMMENT 345: Edwards & Angell said that, without timelines, the site remediation process is highly unpredictable. The Appellate Division decisions in *Chemos Corp. v. State, DEP,* 237 *N.J. Super.* 359 (App. Div. 1989), *Avon Products v. New Jersey DEP,* 243 *N.J. Super* 375 (App. Div. 1990) and *Farley-Northwest Industries, Inc. v. New Jersey Department of Environmental Protection,* Dkt. No. A-2037-89T2 (App. Div. June 5, 1991) "beseeched" the Department to promulgate predictable site remediation procedures. Moreover, the Department should be reasonably responsive because the potentially responsible party is paying oversight costs. If the Department has sufficient experience and data to support its estimate of a 30 to 60 day review period in the preamble, it should be willing to include such a provision in either its proposed rules or the standard administrative consent orders.

COMMENT 346: Colonial Pipeline Company suggested the regulations provide that the Department be required to complete its review of any documents submitted pursuant to the memorandum of agreement within 30 days of submission.

COMMENT 347: Mr. Dominiak commented on the lack of timetables associated with the voluntary cleanup program and was concerned with the timeliness of cleanups.

RESPONSE TO COMMENTS 342 TO 347: Under Paragraph I.2, when the Department determines a submission is administratively complete, it will give the person responsible for conducting the remediation a timeline for the Department's review. Based on past experience, the documents submitted will vary widely in their complexity, length, and quality. The Department has balanced the needs of the business community for predictable timelines against these uncertainties which depend on the phase and extent of the work and the capabilities of the person responsible for conducting the remediation. Once the Department has received the submission, it can estimate the time for review. Moreover, as a government agency is charged with the responsibility to act in the public interest, the Department must retain the flexibility to allocate its resources consistent with that mandate.

The three cases cited by Edwards & Angell, *Chemos, Avon,* and *Farley-Northwest,* all address the statutory requirement under Environmental Cleanup and Responsibility Act that the Department promulgate cleanup standards. They do not discuss the imposition of timelines for Department review of documents related to the remediation of a site.

COMMENT 348: Wheaton Industries, Inc. requested that the proposed standard memorandum of agreement be revised to include the following language: "The Department will provide comments consistent with applicable law and within the scope of review authorized by applicable law." This will provide some certainty to parties as to the scope of the comments the Department will provide, and thereby will make parties more likely to agree to voluntary remediation under a memoranda of agreement. Parties who sign memoranda of agreement with the Department are likely to base decisions to enter into any future memorandum of agreement on the perceived reasonableness of the Department's comments on their initial memorandum of agreement.

RESPONSE: The Department understands this concern and has amended Appendix A, section I.2 to provide that all applicable rules, standards, and guidelines will guide the Department's substantive review of any submission.

Agreement, Remediation—Paragraph I.3

COMMENT 349: Chevron U.S.A. Inc. suggested Paragraph I.3 be amended to read: "the name, and address of the individual who will be the contact for [Person] for the purpose of receiving any notice concerning this memorandum of agreement." The language proposed by the Department, "designated agent", suggests that the individual named by [Person] would be the proper party to effect service upon, on behalf of [Person] in a legal proceeding brought by the Department.

RESPONSE: Part (a) of Paragraph I.3 separately provides for notice to the Department of the name and address of the contact person for technical matters. The use of the term "designated agent" is intended to mean the person who is authorized to receive notice under the

memorandum of agreement, including service in a legal proceeding. Therefore, Paragraph I.3 will remain as it appears.

COMMENT 350: New Jersey State Bar Association asked whether the timeframe at Paragraph I.3 is seven business days, or seven calendar days.

RESPONSE: The timeframes required throughout these proposed rules will be clarified to specify calendar days.

Agreement, Remediation—Paragraph I.4

COMMENT 351: Wheaton Industries, Inc. said that the language of Paragraph I.4 allowing termination if "it is determined" that it is no longer feasible or desirable to continue with the memorandum of agreement should be revised to say: "[Person] may terminate this memorandum of agreement if [Person] **determines** that it is no longer feasible or desirable to continue this memorandum of agreement ..." The proposed new language is necessary to eliminate any confusion over who is entitled to terminate the agreement under this paragraph. Parties will be much more reluctant to sign a memorandum of agreement if they must abrogate their ability to cease operating under the agreement after fulfilling all obligations which have accrued to that point in time.

RESPONSE: The Department agrees and has made the appropriate clarification.

Agreement, Remediation—Paragraph I.4a

COMMENT 352: Chevron U.S.A. Inc. was concerned that the language proposed by the Department would make it difficult to determine the effective date of termination and leaves open the possibility for accrual of significant additional oversight costs after notice of termination has been given.

COMMENT 353: First Fidelity Environmental commented that it should be clear that, as of the date the Department receives the termination letter from the respondent, no further oversight costs will be charged on the case. The Department should timely submit a final bill to the respondent outlining the exact amount of oversight costs it seeks. Under the boilerplate language, this agreement is not terminated until such time as the Department believes full payment of oversight costs. Oversight costs could be incurred during the period of time between billing and eventual payment by the respondent. In such a case, the Department would have to rebill the respondent several times until the point where the administrative costs in billing exceeded the bill itself.

The introductory portion of Paragraph I.4 should be revised as follows: "[Person] may terminate this memorandum of agreement [insert: at any time] with no continuing responsibilities hereunder except for payment of the Department's oversight costs, if it is determined that it is no longer feasible or desirable to continue with this memorandum of agreement" and, that the Department agrees to bill its oversight costs up to the date of termination within 10 days of the notice of termination.

COMMENT 354: Colonial Pipeline Company suggested as well that the regulations preclude the Department from incurring costs after termination and that the Department submit a final invoice 30 days after termination.

RESPONSE TO COMMENTS 352 TO 354: The date of termination is the date when the Department determines that all conditions in Paragraph I.4 have been met. Oversight costs will cease to accrue on the date the Department makes that determination. The Department has clarified the rule by revising Paragraph I.4(e) to state that the agreement does not terminate until the Department receives full payment of its costs and all of the required data.

In order for oversight costs to be incurred, a member of the case management team, as defined in Appendix I of N.J.A.C. 7:26C, must code time to the respective site using the site specific project activity code. At the time the Department receives a letter terminating the memorandum of agreement, the Department will discontinue review of any documents associated with the agreement, perform a review of the site to determine any existing hazards, and will prepare a summary of unpaid oversight costs. The cost associated with the time required for the Department to prepare cost summaries and other billings is included in the oversight cost factors explained at Appendix I of these rules.

Agreement, Remediation—Paragraph I.4d

COMMENT 355: American National Can commented that the term "environmental hazard" engenders much debate and should be defined in the agreement or elsewhere in the regulation.

COMMENT 356: The New Jersey State Bar Association was concerned about the scope of a party's obligation to remedy environmental hazards upon termination. It would be troubling, for example, if the Department were to condition a party's ability to terminate the memorandum of agreement on stabilizing material discovered in test pits, or on bringing in clean fill to bring those pits to grade, etc. These actions are examples of work that might make a site safer, but which should not be imposed on a signer of a memorandum of agreement, especially if the signer is a lender, or a potential purchaser or developer. Perhaps this could be clarified by adding the word "solely" so the phrase would read "exist at the Site solely as a result ...."

COMMENT 357: Chevron U.S.A. Inc. commented that the Department should specify that the word "actions" refers only to those new actions taken to investigate or remediate the site as part of the memorandum of agreement.

COMMENT 358: Atlantic Electric suggested that Paragraph I.4d should be revised to read "immediate" environmental hazard.

COMMENT 359: Wheaton Industries, Inc. commented that it is unnecessary for the agreement to remain in effect only because there is some possibility that an environmental hazard exists as a result of a person's actions pursuant to the agreement where either or both parties believe it is inappropriate or they are unable to continue. Moreover, such a provision could pose enough of an unknown risk to dissuade parties from engaging in voluntary cleanup under memoranda of agreement. A Paragraph I.5 could be added stating, "Upon termination of this memorandum of agreement, [Person] shall not leave any **significant** environmental hazard existing at the Site **attributable specifically** to [Person's] actions pursuant to this memorandum of agreement." (emphasis added.)

RESPONSE TO COMMENTS 355 TO 359: The memorandum of agreement is voluntary. The Department is offering this agreement to the regulated community in response to an expressed business need for Department oversight and approval for the cleanup of contaminated sites that are not priority sites. The Department's objective is to protect human health and the environment by remediating as many sites as possible. In view of that objective the Department cannot allow a site to be left in any worse condition than before the memorandum of agreement was signed.

The phrase "environmental hazard" refers to the creation of hazardous conditions as a result of remedial actions. For example, if a responsible party closes a lagoon under a memorandum of agreement, and fails to secure contaminated sediments that were removed from the lagoon, an environmental hazard might be created by the unsecured contaminated sediments. Such a condition would not be allowed to persist and before the memorandum of agreement could be terminated, the sediments would have to be addressed.

The language of the standard memorandum of agreement "... actions pursuant to this memorandum of agreement" leaves no doubt that the environmental hazard must result from remedial work under the agreement. However, environmental hazards may be present in part because of prior events and in part because work under the memorandum of agreement. The use of the word "solely" may allow a person who wishes to terminate a memorandum of agreement to argue the hazard was pre-existing even though the work performed increased the hazard.

Any deterioration of the condition of the site as the result of a memorandum of agreement is unacceptable whether or not it is "significant" or "attributable specifically" to work under the memorandum of agreement, or whether it is an "immediate hazard." The Department will not so limit the obligation at Paragraph I.4d.

COMMENT 360: Atlantic Electric requested that a section be added to Paragraph I, Remediation, stating that "[Person] shall have no further obligations pursuant to the memorandum of agreement, provided that [Person] has paid the Department's oversight costs and has complied with all requirements as set forth in Paragraph four above."

RESPONSE: Paragraph I.4 sets forth the requirements for termination. This commenter's provision simply restates Paragraph I.4 and is not necessary.

Agreement, Financial Obligations—Paragraph III.1

COMMENT 361: First Fidelity Environmental suggested a change in the release language in Paragraph III.1 of the Standard memorandum of agreement: delete "[Person] can not be released from its obligation under this memorandum of agreement" and insert: "[Person's] responsibilities under this memorandum of agreement will not be deemed completed" until all oversight costs, for work performed by the Department, are paid.

RESPONSE: The Department is satisfied that the language "can not be released from its obligations" expresses its intent that the final payment of oversight costs is an essential term of the agreement.

COMMENT 362: Wheaton Industries, Inc. commented that oversight costs should not be due until the Department provides the comments associated with the work for which the Department is billing.

RESPONSE: The Department will endeavor to do this unless the signatory intends to terminate the agreement. The Department suggests that the person responsible for conducting the remediation discuss the termination in advance with the Department case manager so that the person can receive the comments before it gives notice of intent to terminate. Another alternative would be for the person to give the notice after it receives the Department's comments.

COMMENT 363: The New Jersey State Bar Association requested clarification regarding prior costs under Paragraph III.1. The imposition of prior costs seems to run counter to the Department's intent to provide review without assessing fault, or operating in an enforcement context. This phrase should be deleted from this section, especially if its inclusion would bring prior costs into Paragraph I.4a and if necessary, the agency should reserve its rights to collect past costs under Paragraph IV. For example, the Department could add "including, without limitation, the Department's collection of any prior costs" at the end of Paragraph IV.2.

COMMENT 364: Wheaton Industries, Inc., First Fidelity Environmental and Chevron U.S.A. Inc. likewise objected to the payment of prior costs. Wheaton Industries, Inc. said that "all prior costs" is an ambiguous and potentially open-ended phrase. These costs could extend back for an unlimited number of years, could relate to an unlimited and unqualified amount of directly related, marginally related, and unrelated work and could very well be costs for which other persons not party to the agreement ultimately would be responsible. Confusion would result because it would be difficult for both the Department and the signatory to determine which past oversight costs were reasonable and justified, and also to determine whether or not they were sufficiently related to the memorandum of agreement. Additionally, if the site is not contaminated, the signatory, who has probably already expended a significant amount of money to establish that the site is not contaminated, should not also be required to pay the Department's past oversight costs. The Department can, if it chooses, bring a cost recovery action for past oversight costs. This language could deter many from signing a memorandum of agreement.

RESPONSE TO COMMENTS 363 AND 364: The Department often spends time negotiating with responsible parties, responding to a discharge of hazardous substances, or investigating a contaminated site. The Department is entitled to recover its costs from a person in any way responsible for contamination pursuant to N.J.S.A. 58:10-23.11f(a). In many cases, the person who comes forward to sign a memorandum of agreement will also be a responsible party and thus the Department will attempt to recover any past costs from that responsible party. The Department does not expect to assess its prior costs against a party who is clearly not responsible for the contamination, such as may generally be the case for a lender or a developer.

The purpose of a memorandum of agreement is to provide a service to the regulated community in response to an expressed business need for Department approval of remedial work. The Department will seek to have its past costs paid as part of the memorandum of agreement. However, this is not a condition to signing the agreement, and the Department will proceed with a cost recovery action if it is not part of the memorandum of agreement.

COMMENT 365: Exxon Company U.S.A. believed a cashiers' or certified check is unnecessary because a "responsible person will submit a valid check."

RESPONSE: The Department has for many years required payment of oversight costs by cashiers' or certified checks to avoid administrative costs associated with checks returned for insufficient funds. The relative burden on the regulated community to submit a cashiers' or certified check is minimal.

COMMENT 366: Colonial Pipeline Company recommended that the Department create a budget in advance for the oversight costs they expect to incur pursuant to the memorandum of agreement and notify the person responsible for conducting the remediation. In the event the Department later becomes aware that the actual oversight costs will exceed the budget, the Department should notify the person responsible for conducting the remediation, give the justification for the cost overrun, and propose a revised budget for oversight costs.

RESPONSE: It would be extremely difficult for the Department to create a budget for each project because a significant factor in the review time is the quality of the documents received. Moreover, it would be an additional administrative task which would consume the personnel resources of the Department without a corresponding contribution to the agency goal to clean up contaminated sites. Further, the time spent creating a budget and revising it would become an oversight cost billed to the person responsible for conducting the remediation. Therefore, the Department believes this suggestion would not be helpful to either party. Unlike a private business, the Department does not operate on a "profit motive." Instead, the Department's "bottom line" is measured by the quantity and quality of contaminated site remediations. Therefore, the Department has no incentive to allocate more than the absolutely required resources to any oversight event since this would reduce the resources available to oversee other remediations.

Agreement, Financial Obligations—Paragraph III.2

COMMENT 367: Chevron U.S.A. Inc. requested that the obligation to provide remediation or cost summaries be deleted as it appears to have no bearing on the performance of the activities outlined under Findings, Paragraph 3 and puts an unnecessary administrative burden on the person responsible for conducting the remediation.

COMMENT 368: Wheaton Industries, Inc. objected to the requirement to provide cost summaries. The Department has not given a reason for requiring this information, and, in the absence of any identified benefit, it is unduly burdensome for the person responsible for conducting the remediation to prepare the cost summaries and estimates of future expenditures. Since a memorandum of agreement requires no financial assurance this information is not needed to determine the amount of the financial assurance.

COMMENT 369: Exxon Company, U.S.A. recommended deleting the requirement that the signing party submit summaries of its remediation costs. A memorandum of agreement is discretionary by the Department and voluntary by a responsible party and Exxon Company, U.S.A. sees no valid reason to require information on the amount of money spent on remediation. The memorandum of agreement will include the activities to be performed and the cleanup performance standard to be achieved. The cost or monies spent is not relevant.

RESPONSE TO COMMENTS 367 TO 369: The Department reports to the Legislature the amount of private and public funds spent to clean up sites in New Jersey. This information can be evaluated to ascertain the true cost of cleanups and improve the accuracy of cost expenditure projections and to ascertain the economic impacts of the remediation of improper discharges of hazardous substances. The Department has initiated a process through several rules, including this proposal, to achieve the efficient use of public and private resources for remediation. It needs this cost information to accurately project the economic impact of its strategy as implemented by these rules and also to advise the public and the Legislature of the full cost of the site remediation program.

COMMENT 370: First Fidelity Environmental suggested the following language changes: Beginning three hundred and sixty five (365) calendar days after the effective date of this memorandum of agreement, and annually thereafter on that same calendar day, [person] shall submit to the Department a detailed summary of all monies spent to date [insert: as a result of its investigation of the Site,] (delete: pursuant to this memorandum of agreement), the estimated cost of all future expenditures (delete: required to comply) [insert: associated] with this memorandum of agreement (delete: including any operation and maintenance costs) and the reason for any changes from the previous cost review [person] submitted.

RESPONSE: A memorandum of agreement may be signed for any phase of a cleanup so the standard form cannot be limited to the investigation. The change from "required to comply" to "associated with the memorandum of agreement" would reflect the voluntary nature of the memorandum of agreement and would give the same cost information. The Department agrees with the concept and has changed this language. Operation and maintenance are part of the remediation and the costs should be included in the cost data submitted to the Department.

Agreement, Reservation of Rights—Paragraph IV.1

COMMENT 371: Atlantic Electric objected to the Department's reservation of the right to terminate the memorandum of agreement if the site becomes a high priority for the Department. Since there is no standard for determining the priority of a site, the issue is subjective.

The Department should know whether a site is considered high priority prior to entering into a memorandum of agreement. Furthermore, if the Company is complying with its obligations and has pursued or is pursuing remediation, there is no reason why the site should ever shift to one of "high priority."

COMMENT 372: Chevron U.S.A. Inc. commented that a remediating party should be entitled to continue under the memorandum of agreement even if the site becomes a high priority. A new paragraph should be added to read, "A [Person] who has not triggered Environmental Cleanup and Responsibility Act and is acting in good faith to comply with the provisions of this memorandum of agreement shall not have their site designated as a high priority site or be required to sign an administrative consent order by the Department."

COMMENT 373: Chemical Waste Management of New Jersey objected to the reservation of the right to terminate the memorandum of agreement unilaterally in the event that a site becomes a high priority. Where a party has agreed to perform a phase of remediation at a given site and demonstrates its intent and ability to perform its obligations pursuant to the memorandum of agreement in accordance with prevailing professional standards and applicable law, the party should be permitted to complete performance of the work in accordance with the agreement. To provide the Department with a unilateral right to terminate the memorandum of agreement because of a change of priority status in a site is counterproductive; it may disrupt the work being performed pursuant to the memorandum of agreement and result in work and cost inefficiencies. In addition, unilateral termination of a memorandum of agreement will have a chilling effect on the Department's efforts to encourage parties to participate voluntarily in site remediation.

COMMENT 374: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company objected to the unilateral right to withdraw from the agreement on the part of the Department, on the ground that the site is a "high priority" site. As long as the party is satisfactorily performing under the memorandum of agreement, the priority of the site ought to be irrelevant. Since memorandums of agreement are generally for phases of the work, there will be ample time for the Department to determine its next course of action upon the completion of any phase. It is arbitrary and unreasonable for the Department to allow a party to begin under a memorandum of agreement and reserve the right unilaterally to terminate for reasons connected solely to the Department's subsequent internal prioritization of the matter. Such actions will delay remediation by stopping work in progress during any shift to "high priority" status.

COMMENT 375: The New Jersey State Bar Association was troubled by the concept that in the middle of the performance under a memorandum of agreement, the agency could re-evaluate the priority of the site (presumably based on information provided by the complying party) and require execution of a Responsible Party administrative consent order and the posting of financial assurance. This provision could operate as a significant disincentive to owners to allow work to be done under a memorandum of agreement on their properties. New Jersey State Bar Association suggested the addition of language along the following lines: "For so long as performance in accordance with the memorandum of agreement is continuing and the Scope of Work defined in section I.1. above has not been completed, the Department will neither terminate this memorandum of agreement, nor require the execution of a Responsible Party administrative consent order for the Site, notwithstanding that the Site becomes a high priority for the Department."

RESPONSE TO COMMENTS 371 TO 375: The Department will make a determination whether a site is a priority before it enters into a memorandum of agreement. However, the priority of a site could change as more information becomes available or as remediation is initiated at priority sites. A priority site should be addressed in the manner that ensures the timely protection of human health and the environment. The Department is currently evaluating whether work can continue under a memorandum of agreement when the priority of a site changes. However, pending that evaluation, the terms of the memorandum of agreement must reserve the Department's right to terminate the memorandum of agreement if the site becomes a priority. This provision would seem to provide incentive for volunteers to perform timely site remediations which will likely result in the lowering of a site's relative priority ranking. Please also see comments and responses at N.J.A.C. 7:26C-2, addressing issues related to the conversion of a site to a priority while a memorandum of agreement is in effect.

COMMENT 376: First Fidelity Environmental requested the deletion of the language "or fails to meet the obligations of" the memorandum of agreement.

RESPONSE: The reason for the requested deletion is unclear. Paragraph IV.1 allows the Department to terminate if the person responsible for conducting the remediation "violates any terms or fails to meet the obligations of the agreement." While the two phrases may overlap to some extent, the former generally describes an affirmative violation and the latter generally describes a failure to perform under the agreement. As either would be a reason to terminate, the Department will retain both phrases.

COMMENT 377: The New Jersey State Bar Association commented that Paragraph IV.1 should include the concept that violations or failures to perform which give rise to a right to terminate the memorandum of agreement must be material or substantial defaults. The agency should not be entitled to terminate the memorandum of agreement for ministerial violations, like late submission of a report.

RESPONSE: The person responsible for conducting the remediation has the right to terminate without cause. Paragraph IV.1 reserves the right to terminate to the Department in three circumstances, where the person violates the terms of the agreement, fails to meet the obligations of the agreement, or the site becomes a priority. The Department's right to terminate is therefore already limited compared to the other party to the agreement and the Department does not believe it is appropriate to further limit its right to terminate. However, since the Department's goal is the remediation of as many sites as possible, it does not intend to terminate a memorandum of agreement if the work is proceeding in a manner protective of human health and the environment. Further, the example given by the New Jersey State Bar Association, a "ministerial" failure to meet a deadline, would not be a violation under a memorandum of agreement, since the agreement imposes no deadlines on the person responsible for conducting the remediation.

COMMENT 378: Atlantic Electric suggested that Paragraph IV.2, of the Reservation of Rights section, be clarified to indicate that the Department will not initiate any subsequent enforcement actions so long as the terms of the memorandum of agreement are being carried out, or have been satisfactorily completed.

RESPONSE: The Department expressly reserves its right to take enforcement action at Paragraph IV.2. Enforcement may be necessary against a person other than the person who is conducting the remediation, or for violations unrelated to the work being performed under the memorandum of agreement. The Department has no intention of penalizing a person who is voluntarily remediating for activities being satisfactorily performed under a memorandum of agreement. On the other hand, the Department must retain its discretion to take enforcement action where it is warranted.

COMMENT 379: American National Can believed the reservation should be reworded so that it protects the interests of the Department without seeming to render a company's good faith efforts meaningless.

RESPONSE: See Response to the New Jersey State Bar Association comment in this section. In addition, a company's good faith efforts will be rewarded by the Department's approval of the work that is completed under the memorandum of agreement.

Agreement, General Conditions—Part V

COMMENT 380: Wheaton Industries, Inc. commented that the obligation to give notice of any condition posing an immediate threat to human health and/or the environment should be limited to conditions relating to or arising out of activities under the memorandum of agreement. The language in the proposed Standard memorandum of agreement is unclear and overly broad. The signatory should not be required, as a condition of the memorandum of agreement, to disclose all conceivable environmentally threatening conditions, particularly since specified disclosure requirements would already apply under applicable law. The signatory's obligations under the agreement should be confined to matters falling within the scope of the remediation conducted under the agreement; otherwise, parties will be less inclined to participate in these agreements. There are both Federal and State reporting requirements that would adequately address any additional concerns of the Department regarding threats to human health and/or the environment.

COMMENT 381: Atlantic Electric suggested that notice to the Department be required only where there is "immediate and material harm to human health" and that "the environment" be omitted from the notice requirement at Paragraph V.1.

RESPONSE TO COMMENTS 380 AND 381: If the remediating party is aware of a condition that poses an immediate threat to human health or the environment, the Department should be aware of it as the agency charged with protecting human health and the environment, whether the condition arises out of the remedial work or not. Since there are already extensive reporting obligations under various statutes and regulations, this provision imposes no significant additional burden. Further, this agreement imposes an obligation to report conditions posing an "immediate threat" to human health and the environment, not "any conceivable threat."

COMMENT 382: Atlantic Electric requested that General Conditions Paragraph V.2 be revised to read "professional standards **then prevailing**" so that the remediation will be judged according to the standards available at the time remediation takes place rather than at some date in the future.

RESPONSE: The Department will amend the rule to indicate that the applicable prevailing standards will be those in place at the time of the submittal.

COMMENT 383: The New Jersey State Bar Association suggested adding a provision to Paragraph V.4 as follows: "Nothing in this memorandum of agreement shall be deemed to impose on [Person] any additional liabilities or obligations, other than those specifically stated herein."

RESPONSE: The Department agrees with the concept of the comment and has made a revision to the proposed rule in section V.

COMMENT 384: Atlantic Electric and New Jersey State Bar Association commented that the second time "person" appears in Paragraph V.5 it was probably not intended to refer to the signatory of the memorandum of agreement and the standard form should be corrected.

RESPONSE: Paragraph V.5 of the General Conditions section of the Standard memorandum of agreement will be clarified so that the second time the term "person" appears it will not refer to the signatory of the memorandum of agreement.

COMMENT 385: Atlantic Electric and Chevron U.S.A. Inc. commented that there was no standard for what might constitute potential evidentiary documentation under Paragraph V.5. The requirement that such documentation and materials be retained on site could result in additional costs and delays to the person responsible for conducting the remediation.

RESPONSE: The Department believes parties conducting a remediation are capable of determining whatever materials might be evidentiary but if there is any question the party should consult the Department case manager, and/or request approval to move the materials off the site pursuant to Paragraph V.5.

COMMENT 386: Exxon Company, U.S.A. commented that Paragraph V.5 might require the storage of hazardous material and there is a 90 day limitation on storing hazardous material.

COMMENT 387: Chevron U.S.A. Inc. commented that potentially evidentiary material may be subject to on-site storage limitations (that is, 90 day storage for hazardous waste) or regulatory storage prohibitions. This creates additional and unreasonable expenses. If the provision is not deleted the Department should limit the storage period to a maximum of five years after which the person responsible for conducting the remediation should be able to automatically dispose of any and all documents and materials.

COMMENT 388: Wheaton Industries, Inc. proposed that written documentation be retained for up to three years, when it could be released without Department approval. The memorandum of agreement should not require that physical evidence such as drums and other containers, which may contain hazardous waste subject to requirements of timely treatment or disposal, to be preserved on site for an unspecified period of time. Storage of these materials could give rise to unnecessary risks to health, safety, and the environment and may violate regulations relating to waste storage. The obligation to preserve documentation and physical evidence should have an automatic expiration period to avoid the unnecessary expenditure of resources by both the Department and the person signing the memorandum of agreement to make case-by-case expiration determinations.

COMMENT 389: American National Can said the preservation of potential evidentiary documentation for an indefinite period of time would unfairly burden the person responsible for conducting the remediation. The "evidence" may well be the object of the cleanup. The focus should be on other parties, so American National can recommended that the word "other" be placed between "any" and "person" on the fourth line. A timeline should be added for the Department to issue its written approval.

COMMENT 390: The New Jersey State Bar Association commented that the range of materials to be preserved is too broad. Some of the "... drums, bottles, ... containers and/or other physical materials ..." with evidentiary value may be subject to Resource Conservation and Recovery Act requirements and disposal of some of the waste may require overpacking under the technical guidance rather than re-containerizing. In order to permit the party which is acting on site to comply with the applicable disposal and response requirements, physical "evidence" should be treated differently from documentary evidence with respect to preservation and prior written approval to dispose.

COMMENT 391: Allied-Signal Inc., E.I. du Pont de Nemours and Company and The General Electric Company said the requirement to preserve all potential evidence, including such things as bottles and boxes, is impractical, unwarranted, and could be illegal. Is the party to keep old bottles and labels lying around, even if they are mandated for hazardous waste disposal? What if the written approval from the Department takes longer than the time permitted to remove the material? Suppose the evidentiary material poses a safety risk? Instead of the obligation as written, they suggested that the signatory party be required to advise the Department of the existence of any potential evidentiary documentation found at the site in the course of work that could lead to the establishment of the identity of any person, other than the signatory party, as the responsible person. The burden should be upon the Department to take necessary investigatory actions.

RESPONSE TO COMMENTS 386 TO 391: Paragraph V.5 does not require preservation of potential evidentiary materials for an indefinite period. Rather, it requires written approval from the Department before moving them off the site. If there are limitations on the storing or handling of such materials, the person responsible for conducting the remediation should promptly request the Department's written approval so that person can comply with the applicable requirements. Written approval will not be unreasonably withheld and will be provided within a reasonable time.

A time period for retention of these materials could place a greater burden on the person responsible for conducting the remediation to store them for three years or five years as suggested. An automatic release at the end of a specified retention period would not be acceptable since the Department would not necessarily be aware the materials existed. Written approval assures that the Department has received notice of potential evidentiary documentation or materials and has had an opportunity to investigate.

COMMENT 392: First Fidelity Environmental requested that privileged documents be excluded from the documents to be preserved.

RESPONSE: The determination whether documentation is protected from disclosure by a privilege may have to be made by a court, unless the Department and the person conducting the remediation agree that the documentation is or is not privileged. Therefore, even documentation the person responsible for conducting the remediation believes is privileged should be preserved so that determination can be made when the Department requests the information.

COMMENT 393: Colonial Pipeline Company suggested that this provision provide that written approval shall not be unreasonably withheld.

RESPONSE: As the Department is required to act reasonably the language change is unnecessary.

COMMENT 394: Cohen, Shapiro, Polisher, Shiekman and Cohen said that the obligation to maintain all potential evidentiary documentation should terminate with the memorandum of agreement. The memorandum of agreement should make it clear that the signatory will not be required to provide to the Department pursuant to the memorandum of agreement information subject to an attorney client privilege, the work product doctrine or any other protective privilege or doctrine.

COMMENT 395: Allied-Signal Inc., E.I. du Pont de Nemours and Company and The General Electric Company, First Fidelity Environmental and Wheaton Industries, Inc. also objected to the submission, upon request, of privileged materials.

RESPONSE TO COMMENTS 394 AND 395: Documentation must be maintained until a determination can be made whether enforcement action will be taken against those responsible for the contaminants. It is unlikely this determination can be made by the time a memorandum of agreement is terminated, particularly where the person responsible for conducting the remediation unilaterally terminates the agreement

before the work is completed. The Department agrees that a person should not be required to waive privileges otherwise available and has amended Paragraph V.6.

COMMENT 396: Hoffman-La Roche Inc. objected to the submission of all data (even raw data) either at termination or upon request of the Department. This is an attempt to use the voluntary nature of this program to obtain a more favorable enforcement position and should have no place in the document. The Department would have access to all sorts of information not ordinarily available to it. Moreover, the obligation to turn over raw invalidated data may give an erroneous impression of the condition of a site, and is totally contradictory of other agency policies of insisting on validated data.

COMMENT 397: First Fidelity Environmental, the New Jesey State Bar Association, Atlantic Electric, and Wheaton Industries, Inc. also commented that only data generated by the person responsible for conducting the remediation or its contractors should be subject to submission to the Department upon request.

COMMENT 398: Allied-Signal Inc., E.I. du Pont de Nemours and Company and The General Electric Company said that the requirement that all data, not just that developed pursuant to the memorandum of agreement, be submitted upon Departmental request is unreasonable and contrary to the rules of evidence. The obligation represents a significant discovery burden which normally exists only in the context of litigation under circumstances in which there are provisions for protective orders from the courts. These commenters suggested that the obligation be limited to information developed pursuant to the memoranda of agreement only and exclude privileged information.

RESPONSE TO COMMENTS 396 TO 398: The purpose of a memorandum of agreement is to maximize the number of cleanups and to provide Department oversight to those who have business or other reasons for that oversight and approval. Where data about a site is available, those data and information will assist the Department to evaluate and approve the work under the memorandum of agreement, and, more generally, to carry out its mission to protect human health and the environment. The primary objective of a memorandum of agreement is not enforcement. If a person has information that he fears will lead to enforcement action, then that person can choose whether or not to sign a memorandum of agreement.

COMMENT 399: Chevron U.S.A. Inc. requested that the data required to be submitted be limited to data which was developed pursuant to this memorandum of agreement and contractual documents be deleted. As proposed by the Department a person would be required to keep all records of any sampling conducted at a site even if the results revealed that the samples were clean. The requirement is burdensome and serves no useful purpose. The Spill Compensation and Control Act requires that a person notify the Department of a discharge. The Department will be immediately notified if any data indicates a discharge. The Spill Compensation and Control Act provides penalties for noncompliance. There is therefore no need for a facility to be required to provide all data and information concerning contamination, "whether or not such data and information was developed pursuant to this memorandum of agreement." Additionally, some of the documents are likely to be confidential contractual agreements. This language only serves as a disincentive to obtaining an agreement.

RESPONSE: Please see prior response regarding the Department's need to have all available data, even clean samples, to evaluate the work under the agreement, and to carry out its mission to protect human health and the environment. In addition, the Department is unaware of a privilege preserving the confidentiality of a contractual agreement. If a person believes the attorney client privilege or another privilege applies, he should advise the Department of the nature of the document and the privilege, consistent with the Department's adopted clarification of Paragraph V.6.

COMMENT 400: Wheaton Industries, Inc. requested the following confidentiality provision: "The Department will treat as confidential pursuant to applicable law, all information submitted under this memorandum of agreement which qualifies as confidential business information or trade secrets under applicable law and for which [Person] requests such confidential treatment." Language should be included in the Standard memorandum of agreement which protects the confidentiality of business information and trade secrets, consistent with the protection typically afforded under applicable environmental laws.

RESPONSE: The Department is willing to keep business and trade secrets confidential. It has amended Paragraph V.6 upon adoption to allow a party to request confidentiality consistent with the provisions of the New Jersey Pollutuion Discharge Elimination System regulations, at N.J.A.C. 7:14A-11.

COMMENT 401: Allied-Signal Inc., E.I. du Pont de Nemours and Company and The General Electric Company said that even though the memorandum of agreement is binding on successors and assigns, regardless of changes in ownership or corporate status, the party who signs the agreement is entitled to discontinue work at any time. The memorandum of agreement should be binding on successors, etc., subject to the right of termination in Paragraph I.4.

RESPONSE: The Department agrees and has amended Paragraph V.8.

COMMENT 402: The New Jersey State Bar Association said the word "signatory" is used twice in Paragraph V.8, but it would be clearer if the word "party" were used. The clause does not appear to intend to bind the signing officer as a principal, but the language is susceptible of that interpretation, especially since the word "parties" does appear in the following clause.

RESPONSE: The Department agrees and has amended Paragraph V.8.

COMMENT 403: American National Can said that a corporate official who is signing the document is doing so solely in his capacity as an officer of the Company. Thus, it recommended that after the individual's name the following language be included: "in his capacity as _____ for _____".

RESPONSE: The signature form is clear that the company is the party to the agreement and that the person who signs, signs in a representative capacity. The Department believes the suggested change is not needed.

Appendix B. Standard Environmental Cleanup Responsibility Act Administrative Consent Order

After the Department proposed these Procedures for Department Oversight of the Remediation of Contaminated Sites on April 6, 1992, the Legislature began its deliberations on Senate Bill 1070. Among other issues, the Legislature is considering several statutory amendments which would impact upon how the Department handles administrative consent orders pursuant to the Environmental Cleanup Responsibility Act, N.J.S.A. 13:1K-6 et seq.

The Department has decided that it is most prudent to delay promulgating any portion of a rule concerning administrative consent orders until after a final decision is made on Senate Bill 1070. Therefore, the Department is adopting neither the proposed amendments to N.J.A.C. 7:26B-7, administrative consent orders, nor the new rules concerning administrative consent orders pursuant to the Environmental Cleanup Responsibility Act proposed at N.J.A.C. 7:26C-4, Environmental Cleanup Responsibility Act administrative consent orders and Appendix B, Standard Environmental Cleanup Responsibility Act administrative consent order.

In the interim, the Department will continue to respond to requests for administrative consent orders pursuant to the Environmental Cleanup Responsibility Act pursuant to N.J.A.C. 7:26B-7. The Department will promulgate the necessary amendments consistent with any new statutory requirements. The Department received the following comments concerning administrative consent orders pursuant to the Environmental Cleanup Responsibility Act.

COMMENT 404: Cohen, Shapiro, Polisher, Shiekman and Cohen commented that the form Environmental Cleanup Responsibility Act administrative consent order is issued pursuant to statutory authority over and beyond the Environmental Cleanup Responsibility Act. Certainly no one would suggest that an administrative consent order issued pursuant to the statutory authority of the Water Pollution Control Act automatically include the Environmental Cleanup Responsibility Act as a statutory basis for issuing the administrative consent order. By the same token, an Environmental Cleanup Responsibility Act administrative consent order should not automatically include the Water Pollution Control Act, Spill Compensation and Control Act or any other statute as the statutory basis for the administrative consent order. The administrative consent order is being entered into solely to satisfy certain legal obligations under the Environmental Cleanup Responsibility Act. Therefore, the Environmental Cleanup Responsibility Act should be the sole statutory basis set out in the administrative consent order.

COMMENT 405: Allied-Signal Inc., E.I. du Pont de Nemours and Company and The General Electric Company commented that invocation of statutory authority of the Environmental Cleanup Responsibility Act is the statutory authority applicable to an

Environmental Cleanup Responsibility Act administrative consent order. The citation to any other statutory basis in the preamble ought to be subject to a site specific consideration.

COMMENT 406: Wheaton Industries, Inc. commented that it is unclear why the proposed standard form calls for a statement that the "Transaction" is in fact covered by the Environmental Cleanup Responsibility Act. Flexibility should be available to allow omission of this statement at least in cases in which there is disagreement over whether the Environmental Cleanup Responsibility Act applies but in which a Person is prepared to proceed with investigation and possible cleanup under an Environmental Cleanup Responsibility Act administrative consent order to avoid delaying the Transaction. In such a case, flexibility to omit this provision would help expedite any necessary remediation as well as the completion of the Transaction at issue. The following paragraph of the proposed standard Environmental Cleanup Responsibility Act administrative consent order actually is helpful in this regard by avoiding any admissions in the administrative consent order.

COMMENT 407: Chevron U.S.A. Inc. suggested that the following language be added at the end of the paragraph: "nor shall it be construed as a waiver of any right or defense [Person] may have with regard to the Site." Purpose of this amendment is to broaden the protection afforded [Person] by entering into the memorandum of agreement.

COMMENT 408: Cohen, Shapiro, Polisher, Shiekman and Cohen commented that the statement that the administrative consent order incorporates all the Department's files is inappropriate. There is no necessity for this requirement. Rather, it unnecessarily complicates the administrative consent order and negotiations between the Department and the private sector. If the Department or the respondent wants a particular document incorporated into the administrative consent order, it can be incorporated by specific reference. Here, the Department is requiring that documents which the respondent has never seen be incorporated into the administrative consent order. Therefore, if the Department is going to require this provision, it must be in a position very promptly to provide all of its files to the respondent. It will, of course, in many cases have to decide exactly what files "concern" the industrial establishment. Some of these files are certain to be privileged or enforcement sensitive, but by this provision the Department has made them and everything contained in them into publicly available documents. Finally, in most cases, at least some of the documents in the Department's files will contradict each other or may even contradict the administrative consent order. It makes no sense from anyone's perspective to incorporate wholesale all of the Department's files into an enforcement or oversight document. Where incorporation of documents is appropriate, it should be accomplished on an ad hoc basis. Such incorporation should never take place on a generic basis. It serves no useful purpose and creates virtually insurmountable problems for all parties.

COMMENT 409: Allied-Signal Inc., E.I. du Pont de Nemours and Company and The General Electric Company commented that the Department purports to incorporate all of its files as if a part of the order. It is by no means clear what consequence such a cross reference has to the findings. Specific documents should be identified, shown to the signatories (or made available) and then specifically retained and incorported, if necessary. Signatories may not have any knowledge as to the contents of the Department's files. The provision is itself vague, as there is no identification of the files which are going to be incorporated by reference. The Commenters suggest its deletion.

COMMENT 410: The New Jersey State Bar Association commented that the inclusion by reference of all of the Department's files into the order (Findings, section 4) appears odd, especially since it would be unreasonable to expect the Department's staff to have reviewed the files prior to issuance of the administrative consent order. Since the administrative consent order is not intended to resolve or address any issues that a file review might reveal, the inclusion would seem to be irrelevant to the subject of the order.

COMMENT 411: The New Jersey State Bar Association commented that it seems somewhat strange to incorporate the administrative consent order application into the terms of the Order, by reference. An explanation of the rationale for this inclusion would be helpful to the members of the Bar.

COMMENT 412: The Chemical Industry Council of New Jersey believes the Department's wording in paragraph 5, Appendix B "all contaminants which are emanating from or which have emanated from the Industrial Establishment" includes "off-site" locations. If Chemical Industry Council's understanding of the intent of the wording in this paragraph is correct, it is obvious that this proposal is directly contrary to the Superior Court, Appellate Division's decision in *Re N.J.A.C. 7:26B*, 250 *N.J. Super* 189, 245-46 (App. Div. 1991) wherein the Court stated: "we find that portion of N.J.A.C. 7:26B-1.3, which requires that a cleanup plan include procedures for remediating contamination from the industrial establishment which exists off-site, on properties not owned by the operator of the establishment, beyond the scope of the enabling legislation and invalid. We find no evidence from the language of the Environmental Cleanup Responsibility Act or the meager legislative history available of any intent to impose cleanup obligations under the Act on off-site pollution." It is Chemical Industry Council of New Jersey's position that any "Person" or company who may sign the administrative consent order, as portayed in this proposal, will give up all relief, regarding off-site issues, afforded them in the Court's Decision. As such, Chemical Industry Council of New Jersey recommends that the Department modify 7:26C—Appendix B, Paragraph 5 to conform to the findings of the Court.

COMMENT 413: Allied-Signal Inc., E.I. du Pont de Nemours and Company and The General Electric Company commented that in agreeing that the Environmental Cleanup Responsibility Act cleanup should include "all contaminants" which are "emanating from or which have emanated from the industrial establishment" a party is agreeing to consider off site contamination, a matter now being addressed by the New Jersey Supreme Court. Under this provision, the party must consider contamination from substances other than hazardous substances within the meaning of the Environmental Cleanup Responsibility Act. The party is agreeing to consider past discharges which may have nothing to do with the legal responsibility of the current owner/operator of the facility. This is an overreaching provision and should be deleted.

COMMENT 414: The New Jersey State Bar Association commented that despite the prefatory language referring to other statutes, it seems singularly inappropriate for the agency to include off-site issues in an Environmental Cleanup Responsibility Act administrative consent order, given the court's decision in *Re N.J.A.C. 7:26.*

COMMENT 415: Chevron U.S.A. Inc. commented that Finding 5 of the standard Environmental Cleanup Responsibility Act administrative consent order should be revised to read, "The Department and [Person] agree that the scope of the investigation and potential cleanup required by this administrative consent order will include all contaminants at the above referenced Industrial Establishment pursuant to the enabling statute." The wording change recognizes the fact that the cleanup will be limited to those contaminants, and source areas as specified in the enabling legislation. Additionally, adding the word "potential" in front of "cleanup" recognizes the fact that the investigation may reveal that no cleanup is required. Scope of this provision is too broad with reference to "all contaminants" assuming not all contaminants require remedial action.

COMMENT 416: Cohen, Shapiro, Polisher, Shiekman and Cohen commented that by entering into this administrative consent order, the respondent apparently agrees to address the off site contamination emanating from the sites. By agreeing to this provision, the respondent, if an innocent landowner, may be agreeing to an obligation which does not exist for it under the Spill Compensation and Control Act and which presently does not exist for it under the Environmental Cleanup Responsibility Act. By executing an Environmental Cleanup Responsibility Act administrative consent order, a respondent should not undertake substantive legal obligations for which there is no statutory basis.

COMMENT 417: Wheaton Industries, Inc. commented that this section is overbroad in that it requires cleanup to address contaminants other than hazardous substances or wastes and contaminants which have emanated from an industrial establishment. The Environmental Cleanup Responsibility Act conditions the closing, termination, or transfer of an industrial establishment on the Department's approval of a negative declaration or certification of execution of a cleanup plan. See N.J.S.A. 13:1K-10b and c. A negative declaration means a statement that no hazardous substances or waste remain at the site of the industrial establishment. See N.J.S.A. 13:1K-8g. A cleanup plan means a plan for the cleanup of industrial establishments which includes a description of hazardous substances and wastes that will remain on the premises. See N.J.S.A. 13:1K-8a. The Department may have authorities apart from the Environmental Cleanup Responsibility Act to require owners or operators to clean up hazardous substances or wastes emanating off site from the industrial establishment. Those non-Environmental Cleanup Responsibility Act authorities do not, however, condition transfer of an

industrial establishment on completion of that cleanup under the Environmental Cleanup Responsibility Act procedures. The standard Environmental Cleanup Responsibility Act administrative consent order should not contain a standard provision which in effect conditions closure termination or transfer on addressing contaminants which emanated from the industrial establishment.

COMMENT 418: The New Jersey State Bar Association commented that the bracketed language included as paragraph 6 in the Findings section would seem to give the Department a unilateral right to amend the administrative consent order form by addition of language. This should reflect that any such language additions would be "as appropriate" or "upon the mutual agreement of the parties."

COMMENT 419: Chevron U.S.A. Inc. suggested that the following language be added: "with the concurrence of [Person]." Both parties to the document must agree on the proposed language.

COMMENT 420: The New Jersey State Bar Association commented that since the Environmental Cleanup Responsibility Act administrative consent order is not intended to resolve outstanding site issues and the issuance of such an Order should not be delayed by the negotiation of pre-existing matters with the Department, the implication of section I.1. is that penalties will normally be connected with an Environmental Cleanup Responsibility Act administrative consent order. This does not appear to be the case in most transaction related administrative consent orders. This paragraph should be deleted.

COMMENT 421: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company commented that the Department seems to tie payment of penalties to the granting of an Environmental Cleanup Responsibility Act administrative consent order. Assuming that some penalties are sought because of alleged past violations, it is inappropriate for the Department to use the leverage of an administrative consent order, which may be compelled by very important financial and business considerations, to require the payment of penalties which have not been previously adjudicated and thereby force a party to waive meritorious defenses. This provision should be deleted.

COMMENT 422: Chevron U.S.A. Inc. commented that the inclusion of this paragraph should be noted as optional since some sites may not be subject to penalties. The Department should promulgate its criteria for penalty assessment and the formula for penalty calculation.

COMMENT 423: The New Jersey State Bar Association commented that similarly, the issuance of the Order should not be delayed to allow the Department to collect costs (except the application fee for the Order), especially since the reference to the Findings section as currently drafted could be construed to include environmental matters in other areas of the Department, some of which may legitimately be contested. It would be a radical departure from practice and from due process if the Department is intending to require that all disputes be settled by payment of all assessed penalties (I.1) and costs (I.2) before the Department is willing to permit an Environmental Cleanup Responsibility Act covered transaction to occur. If this is not the intent of this language, the clauses should be revised to apply to "Environmental Cleanup Responsibility Act costs" or "penalties related to the proposed transaction which are not currently being contested."

COMMENT 424: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company commented that although the Department purports to state that the Environmental Cleanup Responsibility Act fees will cover the cost of administration, and not the oversight cost formula, in fact this paragraph requires payment of costs associated with the site prior to the consent order on a basis other than the Environmental Cleanup Responsibility Act fee schedule. There does not seem to be any basis for requiring such a payment in the statute or other regulations under the Environmental Cleanup Responsibility Act, nor any warrant for including such costs as part of the consent order outside of the fee structure of the Environmental Cleanup Responsibility Act.

COMMENT 425: Wheaton Industries, Inc. commented that for the same reasons as were noted with respect to reimbursement of the Department's prior costs under the standard memorandum of agreement in Paragraph II(C)(5) of Wheaton's comments, there are many circumstances under which it is inappropriate for the Department to require reimbursement of past costs under an Environmental Cleanup Responsibility Act administrative consent order.

COMMENT 426: Colonial Pipeline Company commented that to impose such financial obligations is unwarranted. The New Jersey Department of Environmental Protection and Energy is taxpayer supported, consequently all taxpayers should share this cost of oversight. If the New Jersey Department of Environmental Protection and Energy continues to require corporations to pay then other areas of government, such as Fish and Game, should likewise be 100 percent user subsidized.

COMMENT 427: Chevron U.S.A. Inc. commented that this provision should be amended to provide [Person] with the option to request a meeting with the Department to review these costs and, if necessary, establish a procedure for resolving any disputes regarding the amount of same.

COMMENT 428: The New Jersey State Bar Association commented that the section on interim response actions would add a significant amount of site-specific information to the administrative consent order, but it is not clear that the information would be helpful to the parties. The requirements for interim response will be evaluated by the case manager and the ordered party as the matter progresses, whether or not a provision for restating them is included in the administrative consent order. If the administrative consent order stipulated that the ordered party would undertake interim response actions, if necessary to protect human health or the environment, that might be helpful, but requiring the administrative staff to describe those actions or to sign off on a form that states that none are required would go beyond what should be expected of them. In most cases, the need for these actions only becomes clear later in the progress of the matter, in any event. This should be deleted from the Environmental Cleanup Responsibility Act administrative consent order.

COMMENT 429: Allied-Signal Inc., E.I. du Pont de Nemours Co., and The General Electric Company commented that the Department provides for interim response action. There is no authority in the Environmental Cleanup Responsibility Act for such requirements. Interim Remedial Actions add extra steps to the administrative proceeding, and delay the overall performance of the remedial work. If there is a site condition requiring remediation immediately, the Department certainly has reserved all of its rights under other statutes by which to compel that activity. Interim Remedial Actions should not be a part of the Environmental Cleanup Responsibility Act consent order.

COMMENT 430: The New Jersey State Bar Association commented that in section III.2, should "submit" read "subject"?

COMMENT 431: Chevron U.S.A. Inc. commented that typo on line 2 (submit should be subject).

COMMENT 432: Chevron U.S.A. Inc. commented that language should be added to require the Department to review and comment on the submittal within 45 calendar days of its receipt. See specific comment 6 above. [Paragraph 2 should be amended to include a requirement that the Department review and comment on or approve the plan within 45 calendar days of its receipt. No time frame is established for Department review of Interim Remedial Action Work Plan in the proposed rule. The regulated community must be assured that the Department will review all submittals in a prompt and efficient manner.]

COMMENT 433: Chevron U.S.A. Inc. commented that Paragraph 2 should be amended to include a requirement that the Department review and comment or or approve the plan within 45 calendar days of its receipt. No time frame is established for Department review of Interim Remedial Action Work Plan in the proposed rule. The regulated community must be assured that the Department will review all submittals in a prompt and efficient manner.

COMMENT 434: Colonial Pipeline Company commented that insert the following: "... in accordance with N.J.A.C. 7:26E. The Department shall complete its review and submit its comments to [Person] of this plan within 45 days of receipt of the plan."

COMMENT 435: Colonial Pipeline Company commented that insert the following: "... or a supplemental Interim Remedial Action Work Plan. The Department shall complete its review and submit its comments to [Person] of this plan within 90 days of receipt of the plan."

COMMENT 436: Colonial Pipeline Company commented that Appendix B, Order, III. 3. Comment: Insert the following: "... or a supplemental Remedial Investigation Workplan. The Department shall complete its review and submit its comments on the plan within 90 days of receipt."

COMMENT 437: Edwards & Angell commented that we strongly encourage the Department to agree to review and comment upon major technical submissions in accordance with an established schedule. The Appellate Division decisions in *Chemos Corp. v. State DEP,* 237 *N.J. Super.* 359 (App. Div. 1989), *Avon Products v. New Jersey DEP,* 243 *N.J. Super.* 375 (App. Div. 1990) and *Farley-Northwest Industries, Inc. v. New*

Jersey Department of Environmental Protection, Dkt. No. A-2037-89T2 (App. Div. June 5, 1991) beseeched the Department to promulgate predictable site remediation procedures. Unless the Department establishes internal deadlines for the review of key decision-making documents, the entire site remediation process is highly unpredictable. Moreover, the Department expects the potentially responsible party to pay oversight costs in accordance with proposed N.J.A.C. 7:26C, Appendix I. Therefore, it is incumbent upon the Department to be reasonably responsive once the ordered party satisfies its obligations by submitting technical reports. Finally, the preamble to the proposed rule states that it is anticipated that the Department's review of key submissions will take between 30 and 60 days depending on the level of the complexity of the submission. If the Department has sufficient experience and data to support this statement, it should be willing to include such a provision in either its proposed rules or the standard administrative consent orders.

COMMENT 438: Wheaton Industries, Inc. commented that flexibility is essential to allow a time frame other than 90 days for implementing a Remedial Investigation Work Plan, depending upon the complexity of the industrial establishment and any contamination in question.

COMMENT 439: The New Jersey State Bar Association commented that if a submission is deemed by the Department to have been inadequate pursuant to III.7, 30 days will be too short a time within which to retake samples or rerun analysis. Perhaps a distinction should be made between a rejection that requires reformatting existing data, or obtaining additional paperwork and one that would require additional sampling or analysis.

COMMENT 440: Allied-Signal Inc., E.I. du Pont de Nemours Co., and The General Electric Company commented that the Department requires that a party agree to conduct any additional interim response action as may be required by the Department. This is party of the "blank check" over reaching approach that runs throughout many of the provisions of the oversight documents. The Department essentially is asking a part that is motivated to enter an administrative consent order by important business and financial conditions to give up its normal rights to act and react to a situation. The Department requires the party to do the bidding of the Department whenever required by the Department. Paragraph 8 ought to be deleted.

COMMENT 441: Chevron U.S.A. Inc. commented that the following sentence should be added to Condition 8: "Additional Interim Response Actions will be required only if it can be demonstrated that there is an actual imminent threat to human health or the environment." As proposed Condition 8 does not include any criteria which the Department must use to determine if additional interim response actions are needed. The additional wording assures the regulated community that the Department will not be arbitrary when requiring additional interim response actions.

COMMENT 442: Chevron U.S.A. Inc. commented that the following sentence should be added to Condition 8: "Additional Remedial Investigations will be required only if it can be demonstrated that there is a substantial source area on-site which has not been previously identified and investigated." As proposed Condition III.8 does not include any criteria which the Department must use to determine if additional investigations are needed. The regulated community needs to be assured that there is finality to the remedial investigation process. The additional wording helps to assure the regulated community that the Department will not be arbitrary in requiring additional remedial investigations.

COMMENT 443: The New Jersey State Bar Association commented that the concept that the Department would choose the remedial alternative (V.1) appears to be imported into the Environmental Cleanup Responsibility Act administrative consent order from other statutory frameworks. There is no provision in the Environmental Cleanup Responsibility Act directing the Department to perform such a function. This entire section should be deleted or revised to conform to the Environmental Cleanup Responsibility Act setting. If the Environmental Cleanup Responsibility Act regulations are to be revised to conform to this design, those regulations and the form of the Environmental Cleanup Responsibility Act administrative consent order should be reviewed in tandem.

COMMENT 444: Hoffman-La Roche Inc. commented that any requirements in this proposal referring to proposed new rule N.J.A.C. 7:26E, Technical Requirements for Site Remediation, should be reserved until those such requirements have been appropriately commented on by the regulated community and finalized.

COMMENT 445: Allied-Signal Inc., E.I. du Pont de Nemours Co., and The General Electric Company commented that, in effect, the Department reserves the right at any time under the administrative consent order to require the submission of a feasibility study report. There is no provision in the Environmental Cleanup Responsibility Act for a feasibility study and the Department can not require one as part of an Environmental Cleanup Responsibility Act administrative consent order. This provision of the administrative consent order is typical of the "superfund" model incorporated throughout the oversight documents that tend to prolong the process without necessarily resulting in a better or more cost effective cleanup.

COMMENT 446: The New Jersey State Bar Association commented that the word "complete" should be deleted from V.4. Completeness may be very hard to determine without the department's assistance upon submission of the application. It would be better to require the ordered party "to apply for and obtain" . . . all federal, state and local permits. . . .

COMMENT 447: Wheaton Industries, Inc. commented that the Department has provided no explanation as to why it would be appropriate in the standard Environmental Cleanup Responsibility Act administrative consent order to call for a person to waive any rights it may have to contest permit terms relating to activities arising under the administrative order. A person's rights and obligations with respect to environmental permits, including its due process rights to an opportunity to be heard, are wholly separate from its rights and obligations under the Environmental Cleanup Responsibility Act. This paragraph should be deleted.

COMMENT 448: The New Jersey State Bar Association commented that it is inappropriate to request a waiver of the right to contest the terms and conditions which may be imposed in a yet-to-be-drafted permit as a condition of obtaining an Environmental Cleanup Responsibility Act administrative consent order. The terms of this paragraph (V.7) are much too general to be acceptable to the prospective ordered party. In fact, it would seem that the agency is attempting to make the administrative consent order unattractive to the regulated community by including so many conditions that the person who signs an administrative consent order will waive so many due process rights that he or she will be in a very difficult position if any issues of interpretation arise in the course of the cleanup. Further, there is no reason that the ordered party should agree to the terms of a local or county permit, even if it is "substantially equivalent" to the requirements of the administrative consent order, if the issuing authority is without authority, or if the authority asserted would make compliance more difficult by adding a second level of review. This clause should be deleted.

COMMENT 449: Allied-Signal Inc., E.I. du Pont de Nemours Co., and The General Electric Company commented that it is understandable that the Department would want to assure that the ordered party obtains in a timely manner all requisite permits. However, Paragraph 5 goes well beyond that concern and requires in effect that the ordered party accept the agency's comments about the permit in derogation of its rights as a prospective permittee to contest the terms and conditions of the permit. This is inconsistent with permitting procedures and, as such, unauthorized. The Commenters urge the deletion of this paragraph.

COMMENT 450: Allied-Signal Inc., E.I. du Pont de Nemours Co., and The General Electric Company commented that this paragraph, like Paragraph 5, specifies that the perspective permittee may not contest a permit if it is otherwise substantially equivalent to the requirements of the consent order. There may be substantially different rights of administrative review and hearing with respect to contested permit terms and conditions not available with respect to disputes arising under the consent order. A party that has a legitimate dispute as to the terms and conditions required under a prospective permit should not be required to waive those rights in favor of the administrative consent order. Statutory rights are not granted lightly and ought not to be discarded without good cause. It is flatly unfair to require a party to waive permit contest rights. They are not granted lightly and ought not to be discarded without good cause. It is flatly unfair to require a party to waive permit contest rights.

COMMENT 451: The New Jersey Business and Industry Association commented that See comments to N.J.A.C. 7:26C-1.3 (definitions for "decision document" and "interim response action"). Additionally, the following objections are offered to the proposed Environmental Cleanup Responsibility Act administrative consent order in Appendix B: 1. The need for Progress Reports set forth in Subsection VI. is repetitive and unnecessary in view of the other reports submitted in the Environmental Cleanup Responsibility Act process.

COMMENT 452: The New Jersey State Bar Association commented that the quarterly progress reports discussed in Section VI. would not seem to be warranted before a cleanup plan is approved. Since the permit schedule is required as a separate document, and because the administrative consent order provides only 90 days for preparation of the Remedial Investigation, quarterly reports would not seem to benefit the agency. Further, there are no conditions stated under which the agency would elect to require the reports.

COMMENT 453: The New Jersey State Bar Association commented that the reports as described also require submission of an inordinate amount of information in a format different from the results reporting required for other purposes under the program. The conditions at the property should be addressed in the Feasibility Study phase of the project, rather than in the periodic status reports. Further, this sets up a requirement for administrative consent order parties which is different from the requirements imposed on parties in the standard Environmental Cleanup Responsibility Act compliance process, and it would be a substantial burden for large sites without any obvious benefit to the agency.

COMMENT 454: Chevron U.S.A. Inc. Marketing recommended that the quarterly reporting requirement be changed to semi-annual. Also, specify the minimum requirements of the quarterly reports. The application of this provision is discretionary with the Department; therefore, it would be helpful for [Person] to know the criteria Department will use in implementing same.

COMMENT 455: Chevron U.S.A. Inc. commented that the phrase "or in the absence thereof, any data which indicate potential human health concerns" should be deleted from Paragraph 2.viii. The Department has not provided any criteria or methods to determine if data indicates potential human health concerns. Without actual criteria it will be impossible to determine if a person is in compliance with this requirement. Additionally, there is no real need for this requirement to be included in this section. Actions taken during the feasibility study will adequately address this issue.

COMMENT 456: Chevron U.S.A. Inc. commented that (paragraph VII., 2 ... Appendix B.) should read: "the name, and address of the individual who will be the contact for [Person] for the purpose of receiving any notice concerning this memorandum of agreement." The language proposed by the Department, "designated agent," suggests that the individual named by [Person] would be the proper party to effect service upon, on behalf of [Person] in a legal proceeding brought by the Department.

COMMENT 457: Wheaton Industries, Inc. commented that the administrative consent order also should identify a contact person for each Person entering the administrative consent order.

COMMENT 458: Colonial Pipeline Company commented that delete "verbally" as it may be difficult to document that contact was made; whereas notification in writing creates documentation.

COMMENT 459: The New Jersey State Bar Association commented that section VII on project coordination appears to indicate that the agency will sign a receipt for every piece of correspondence received. Aside from the administrative burden that this would represent, it would be impossible for the party submitting the report or correspondence to know when the receipt would be signed. It would seem that a certified mail receipt would be adequate to judge timeliness.

COMMENT 460: Chevron U.S.A. Inc. recommended amending this provision to provide that the date the Department receives [Person]'s submission of documents as the date to be used by Department in determining [Person]'s compliance with the terms of the administrative consent order. Concern is with the possibility that Department does not timely execute the acknowledgement after receipt if [Person]'s submission of documents. Certified mail or courier receipts will serve as documentation of Department receipt.

COMMENT 461: Chevron U.S.A. Inc. commented that this section appears to be missing the alternative methods for financial assurance as shown in Appendix C. We suggest that the alternatives include a method of self-insurance. The method of testing for financial viability in the New Jersey Subchapter 9 of the Requirements for Hazardous Waste Facilities or the United States Environmental Protection Agency tests are recommended.

COMMENT 462: Cohen, Shapiro, Polisher, Shiekman and Cohen commented that the Environmental Cleanup Responsibility Act administrative consent order should make it clear that financial assurance will not include operation, maintenance and monitoring costs. Once the construction aspect of an Environmental Cleanup Responsibility Act project is completed, the site is taken out of the Environmental Cleanup Responsibility Act program. Even if operation, maintenance and monitoring is still required, the site is out of the Environmental Cleanup Responsibility Act program. Usually, it goes into the New Jersey Pollutant Discharge Elimination System program. New Jersey Pollutant Discharge Elimination System has no Operation and Maintenance financial assurance requirements. Because of this and because of the difficulty in estimating Operational and Maintenance costs over many years, the Environmental Cleanup Responsibility Act administrative consent order should explicitly recognize that there is no Operational and Maintenance financial assurance obligation.

COMMENT 463: The New Jersey State Bar Association commented that the "obligations" referred to in section VIII.3 should exclude the payment of penalties.

COMMENT 464: Chevron U.S.A. Inc. commented that take the subjective element out of this provision. In short, upon a showing by [Person] that the cost of the remaining work to be performed under the administrative consent order is less than the current amount of the financial assurances the Department "will" approve the appropriate reduction. Financial assurance is a costly and burdensome requirement. The regulated community needs assurances that the Department will reduce the financial assurance in a timely manner.

COMMENT 465: The New Jersey State Bar Association commented that section VIII.6(b) pertains to the submission of cost reviews and requests to reduce the amount of financial assurance. The last sentence of this provision provides: "If the Department grants written approval of such a request ...". No criteria for accepting or rejecting such a request are specified. Accordingly, this statement seems to suggest that the Department would have unfettered discretion in deciding whether or not to reduce the financial assurance. This would be inappropriate. Further, as long as adequate financial estimates are provided (that is, cost estimates prepared in compliance with Department deadlines), the Department should be required to reduce the financial assurance.

COMMENT 466: Allied-Signal Inc., E.I. du Pont de Nemours Co., and The General Electric Company commented that this paragraph is inconsistent with established case law and statutory authority. N.J.S.A. 13:1D-9(u) specifically limits the Department's resort to financial assurances as follows: "In the event of a failure to meet the schedule prescribed by the department [in an order], the sum named in the [financial assurance] shall be forfeited unless the department shall find that the failure is excusable in whole or in part for good cause shown, in which case the department shall determine what amount of said [financial assurance], if any, is a reasonable forfeiture under the circumstances." The administrative consent order must provide an opportunity to present "good cause" and "excusable" failure prior to resort to financial assurance.

COMMENT 467: Hackensack Water Company commented that finally, stipulated penalty provisions should specifically reference Force Majeure provision (discussed below) such that there is a statement that penalties will not accrue when non-compliance is due to circumstances beyond party control.

COMMENT 468: The New Jersey Business and Industry Association commented that the automatic 60-day period assigned for the calculation of stipulated penalties for the submittal of reports of "insufficient quality" is inappropriate and unfair. Parties should be notified of the deficiencies and given an opportunity to cure.

COMMENT 469: Chevron U.S.A. Inc. recommended that reference to the Force Majeure provision of the administrative consent order be made in this paragraph and that a deficiency in quality of information submitted not be considered a per se violation of this provision unless it is determined that said submittal was not made in good faith. Concern here is with a submission of information which [Person] believes is in compliance with administrative consent order requirements but which through innocent inadvertence or honest mistake technically is not i.e., good faith defense. Alternatively, recommend that [Person] be afforded one mistake before the application of this provision would go into effect.

COMMENT 470: Wheaton Industries, Inc. commented that it is inappropriate in a consent order to give the Department authority to determine conclusively and unilaterally the occurrence of a violation of the administrative consent order. For the Department to obtain relief, applicable law requires the New Jersey Department of Environmental Protection and Energy to demonstrate the presence of violations of environmental laws or regulations based on objective requirements rather

than upon the Department's unilateral, inherently subjective determinations. The third sentence of this paragraph should be deleted entirely.

COMMENT 471: Hackensack Water Company commented that the Stipulated Penalty Section provides for penalties to the Department upon failure to comply with any deadline, schedule or requirement of the administrative consent order. These penalties are accrued per violation, per day. The regulations provide no checks on what the remediator might consider arbitrary imposition of stipulated penalties. The comments state that any party who believes it is not liable for penalties assessed against it by the Department may attempt to settle the matter with the Department or may choose not to pay, in which case the Department might be forced to bring an enforcement action where the party could raise all of its defenses. It might be better if there was at least some measure of control against arbitrary agency action in the rule itself or in the administrative consent order.

COMMENT 472: The New Jersey State Bar Association commented that the penalties stipulated in section IX should follow the penalty schedule established in the Environmental Cleanup Responsibility Act regulations. Also, the failure to make timely submissions (described in IX. 3 (a)) should not be major violations. Further, Section IX.2 of the Stipulated Penalties portion of the memorandum of agreement specifies how and when stipulated penalties begin to accrue. The Department clarifies that the submission of reports, deemed to be of "insufficient quality," may constitute non-compliance and, in such cases, states that stipulated penalties will accrue from the date of the submission for 60 days unless notice is provided that the stipulated penalty for such violations will accrue beyond the 60 day period. This is objectionable for several reasons. First, the stipulated penalty should not begin to run until the ordered party is provided with notice that the report is of "insufficient quality." Second, this paragraph sets up an automatic 60 day stipulated penalty run which could cost, assuming that this would be a "minor" violation, $10,000. In addition, starting a penalty period running without notice is a violation of due process.

COMMENT 473: Chevron U.S.A. Inc. recommended adding at the end of the first sentence: "provided, however that Department must give notice within 10 days after the performance is due or the noncompliance occurs failing which accrual of all stipulated penalties shall be stayed until [Person] receives said notice from the Department." Concern is that the Department for whatever reason does not notify [Person] of a deficiency within a reasonable time frame. Also, delete last sentence of IX.2.

COMMENT 474: Chevron U.S.A. Inc. commented that this condition should be deleted from the administrative consent order. There is no requirement in the current Environmental Cleanup Responsibility Act administrative consent order to reimburse the Department for oversight costs. The Environmental Cleanup Responsibility Act program is currently a fee based program. Alternative language could be added to state that a major violation would be the failure to pay applicable duly promulgated fees.

COMMENT 475: Colonial Pipeline Company commented that the term "site" appears to have been used interchangeably; consequently this sentence should be rewritten to read "... access to the contaminated site..."

COMMENT 476: Colonial Pipeline Company commented that here are provisions for penalty payments; however there are no provisions to reduce or waive these penalties if a determination can be supported that they are inappropriate.

COMMENT 477: Wheaton Industries, Inc. commented that the stipulated penalty amounts provided in the standard Environmental Cleanup Responsibility Act administrative consent order, if they are included at all, should be noted as ranges or as being adjustable based on the facts and equities of an individual case.

COMMENT 478: Cohen, Shapiro, Polisher, Shiekman and Cohen commented that "the parties shall make reasonable efforts to informally and in good faith resolve all disputes or differences of opinions provided, however, that the Department retains all of its rights to determine the sufficiency and acceptability of all work conducted pursuant to this administrative consent order and [person] reserves whatever rights it has except as modified by this administrative consent order."

COMMENT 479: Allied-Signal Inc., E.I. du Pont de Nemours Co., and The General Electric Company commented that paragraph 3 permits a party to obtain review only in defense of Department initiated action. This, too, is a form of overreaching which seems especially unwarranted in the Environmental Cleanup Responsibility Act context.

COMMENT 480: Kaye, Scholer, Fierman, Hays and Handler commented that as the Court *In re Kimber Petroleum Corporation,* 539 *A.2d.* 1181, (1988), stated, "... If a challenging party has reasonable grounds for contesting the validity or applicability of an administrative order, it must be able to do so without penalty." *Id.* at 1184. The New Jersey Courts have always cautioned that the need for quick enforcement of environmental cleanup orders must still acknowledge some rationale respect for property rights. The approach taken by the New Jersey Department of Environmental Protection and Energy in the proposed administrative consent order contradicts the spirit of the Courts, pronouncement, as the New Jersey Department of Environmental Protection and Energy may stand back and let stipulated penalties accrue to a substantial level without the ability of the respondent to seek judicial review. Such a construct is unfair and unduly coercive. We believe that a more reasonable approach is either to allow a respondent to seek judicial review in a timely fashion without a stay of the requirements of the administrative consent order, or to require the Department to stay the imposition of stipulated penalties once written notice is received from the respondent notifying the Agency that a material disagreement regarding a requirement, action, or deadline exists.

COMMENT 481: The New Jersey State Bar Association commented that several provisions of the Reservation of Rights section are problematic from the perspective of the ordered parties. Specifically, the last sentence of paragraph 2 of Section X provides that: "The Department reserves the right to conduct any remediation itself at any time." This is too broad a reservation of rights and should be deleted. Moreover, it is inconsistent with the enabling statute. Further, the implication that by signing the administrative consent order an ordered party may not seek review of any agency action and may only get adjudication of whether an agency action is arbitrary, capricious or unreasonable by asserting these claims as defenses should the agency initiate an action (paragraph X.3) violates due process by precluding any right to a hearing and fly directly in the face of the court's analysis in Avon Products. Similarly, precluding the ordered party from seeking review of the agency's threatened use of the financial assurance money to perform a specific task until that task is complete (paragraph X.6) would prevent any effective review of whether the agency's requirement that the ordered party perform the underlying action is unreasonable. It may also result in long term harm to the site, if the agency's action is unwise, that could not be addressed by merely refunding the financial assurance. (see, paragraph X.3) The Department should also be liable for costs and fees incurred by [Person] due to the agency's action. The attempt to prevent or limit a party's exercise of its right to seek review should be eliminated from the document.

COMMENT 482: Wheaton Industries, Inc. commented that it is further inappropriate for the standard Environmental Cleanup Responsibility Act administrative consent order to require parties to waive rights to challenge a Department determination under the administrative consent order until the Department brings an action to enforce the administrative consent order. No such limitation on actions exists regarding challenges to Department determinations under the Environmental Cleanup Responsibility Act. Such a waiver substantially prejudices a party to the administrative consent order by forcing the party to bear the risk of possible sanctions in order to preserve its claim and have it fairly heard. Such a provision makes administrative consent orders much less viable as a settlement tool to help balance environmental and economic development interests. A party to a transfer often will not be willing to assume the heightened risks of relinquishing all its real-time rights to affect remediation decisions. The last sentence of this Paragraph therefore should be deleted.

COMMENT 483: Wheaton Industries, Inc. commented that for the same reasons articulated in the paragraph above, a party should not be required under an Environmental Cleanup Responsibility Act administrative consent order to delay challenges to the Department's draw on financial assurance provided under the administrative consent order. The second clause of the first sentence of this Paragraph therefore should be deleted.

COMMENT 484: The New Jersey Business and Industry Association commented that the Department continues to require parties to waive the right to a hearing concerning remedial actions before having to implement them in Subsection X.3. We object to this denial of due process rights. Moreover, it would appear that the Department's understanding of its right to draw upon financial assurance appears to be at odds with the case law which requires court approval prior to the withdrawal of funds, not after.

COMMENT 485: Chevron U.S.A. Inc. commented that the last sentence of this paragraph should be deleted. Concern is that by waiving the right to seek review or initiate any legal action to challenge any decision made by the Department, [Person] is denied due process and effectively gives the Department a blank check for remediation.

COMMENT 486: Chevron U.S.A. Inc. commented that this paragraph should be deleted. As proposed, paragraph 25 would effectively deny the regulated community of reasonable due process. See also General Comment 2 of the Appendices.

COMMENT 487: New Jersey State Bar Association commented that paragraph XII.25 again requires too great a waiver of the party's right to appeal. There is no reason why Environmental Cleanup Responsibility Act compliance under an administrative consent order ought to be conditioned on a waiver of the right to seek review of agency actions in accordance with the Administrative Procedures Act and other applicable law. The courts and the legislature have been seeking for years to achieve a balance between due process and governmental efficiency and this document completely abrogates that balance. Further, there is no statutory or regulatory authority for the Department to select a remedy under the Environmental Cleanup Responsibility Act so that the final sentence is completely inappropriate in this instrument. This entire clause should be deleted.

COMMENT 488: Rutgers Environmental Law Clinic commented that the Department should reserve its right to void the transaction until the New Jersey Department of Environmental Protection and Energy approves the negative declaration or the remedial action has been completed and approved. It appears from this section that the New Jersey Department of Environmental Protection and Energy's rights would be terminated upon the approval of the submission by the party, not the completion of the work. The New Jersey Department of Environmental Protection and Energy's right to void is a significant incentive for the party to do the job correctly, and this right should not be waived.

COMMENT 489: Allied-Signal Inc., E.I. du Pont de Nemours Co., and The General Electric Company commented that the reservation of rights of paragraph 2 is inappropriate in the context of an Environmental Cleanup Responsibility Act administrative consent order. The Department reserves the right to seek legal relief including penalties "for matters not set forth in the findings." Environmental Cleanup Responsibility Act administrative consent orders are intended to resolve the necessity of closing a business transaction prior to completing the Environmental Cleanup Responsibility Act process. The reservation of rights section is more appropriate to a true enforcement proceeding in which the Department is seeking to compel remediation of a civil or civil administrative "wrong." Not have the right to conduct remediation, and the reservation of right to that effect should be deleted from the Environmental Cleanup Responsibility Act administrative consent order.

COMMENT 490: Wheaton Industries, Inc. commented that the Department's reservation of rights to seek civil or administrative penalties beyond stipulated penalties for administrative consent order violations conflicts directly with the basis for including stipulated penalties in a settlement document. The stipulated penalties serve as an up-front agreement on appropriate penalty amounts for administrative consent order violations. Environmental Cleanup Responsibility Act administrative consent orders will be much more limited in acceptability and usefulness if parties are subject to "double jeopardy" for administrative consent order violations.

COMMENT 491: Cohen, Shapiro, Polisher, Shiekman and Cohen commented that (proposed) "If any event specified in the following paragraph occurs which [person] believes or should believe will or may cause delay in the compliance or cause non-compliance with any provision of this administrative consent order, [person] shall notify the Department in writing within seven (7) calendar days of the start of delay or knowledge of the anticipated delay, as appropriate, referencing this paragraph and describing the anticipated length of the delay, the precise cause or causes of the delay, any measures taken or to be taken to minimize the delay, and the time required to take any such measures to minimize the delay. [Person] shall take all reasonable action to prevent or minimize any such delay."

COMMENT 492: Cohen, Shapiro, Polisher, Shiekman and Cohen suggested that the following be (to Appendix B): "The Department will extend in writing the time for performance for a period no longer than the delay resulting from such circumstances as determined by the Department or as may be reasonably necessary only if: (a) [Person] has complied with the notice requirements of the preceding paragraph; (b) Any delay or anticipated delay has been or will be caused by fire, flood, riot, strike or other circumstances beyond the control of [person]; and (c) [Person] has taken all reasonable actions that are necessary under the circumstances to prevent or minimize any such delay."

COMMENT 493: Wheaton Industries, Inc. commented that the final regulations should delete the phrase "as determined by the Department." It is preferable for Persons to have questions regarding extensions based on force majeure claims evaluated independently based on objective criteria rather than under the Department's unilateral judgment.

COMMENT 494: Chevron U.S.A. Inc. commented that change the word "necessary" (Appendix B) to "reasonable" in the last sentence. A degree of reasonableness needs to be incorporated.

COMMENT 495: The New Jersey State Bar Association commented that the definition of "force majeure" (section XI.4) has two troublesome clauses. Clause (a) implies that the progress of the Environmental Cleanup Responsibility Act work is not dependent on an orderly series of events. The contrary is true. For example, if a permit is not issued, the work to be permitted cannot be started. In many cases, this does mean that subsequent work is also delayed (for example, the site can not be backfilled until the sample results are obtained, the sample results cannot be obtained until the excavation is completed, the excavation cannot be started until a new Resource Conservation and Recovery Act storage unit is installed and the drums moved, the drums cannot be moved to the new unit until it is permitted). Clause (d) implies that a private party has a good cause of action against a third party to compel access to an off-site location. This is not at all clear and seems particularly inappropriate under the Environmental Cleanup Responsibility Act in view of the court's holding that the Environmental Cleanup Responsibility Act's jurisdiction is limited to the site boundaries.

COMMENT 496: Hackensack Water Company commented that Force Majeure pertains to justifiable party non-compliance due to circumstances beyond its control. This section states that failure to obtain access required to implement an administrative consent order will not constitute Force Majeure unless access has been denied by a court of competent jurisdiction. The Department must be notified within seven calendar days of any delay. In certain situations, it would be unreasonable to expect that a court would rule on access within seven days of the time the remediator learns it will not be given access. Penalties will accrue while court intervention is sought and received. Therefore, this provision should be qualified.

COMMENT 497: Chevron U.S.A. Inc. recommended that the following be added: "or the Department has not provided reasonable assistance to [Person] in its efforts to obtain said access." The process of gaining access from a reluctant party can be greatly assisted if the Department takes part in the process. Also, the Department should not create provision in the administrative consent order that encourages excessive or unnecessary court/legal proceedings.

COMMENT 498: Rutgers Environmental Law Clinic commented that typographical errors in the standard administrative consent orders should be corrected. The standard Environmental Cleanup Responsibility Act administrative consent order and the standard responsible party administrative consent order include some paragraphs with what appear to be typographical errors. Section IX, paragraphs 7 and 8, of the Environmental Cleanup Responsibility Act administrative consent order, 24 N.J.R. 1299, are identical, as are Section X, paragraphs 7 and 8 of the Responsible party administrative consent order, 24 N.J.R. 1305. This is probably a typographical error and should be corrected. Section XII, para. 22(b), of the Environmental Cleanup Responsibility Act administrative consent order, 24 N.J.R. 1301 and Section XII, paragraph 21(b) of the Responsible party administrative consent order have typographical errors because it appears that a phrase has been inadvertently omitted.

COMMENT 499: Chemical Waste Management of New Jersey commented that with respect to comments it has to the Environmental Cleanup Responsibility Act administrative consent order, Chemical Waste Management of New Jersey refers to and incorporates by reference its comments to the Responsible Party administrative consent order, insofar as such comments pertain to alternative dispute resolution, oversight costs, stipulated penalties, reservation of rights, covenant not to sue and contribution protection provisions.

COMMENT 500: Cohen, Shapiro, Polisher, Shiekman and Cohen suggested that the following be inserted into section XII: "Whenever under this administrative consent order approval by the Department is required, such approval shall not be unreasonably withheld."

COMMENT 501: Cohen, Shapiro, Polisher, Shiekman and Cohen suggested that the following be (added to Appendix B): "Neither the

entering into, nor anything contained in this administrative consent order, shall be deemed an admission of any issue of law or fact or of any liability on the part of [person], other than its obligations to comply with this administrative consent and it is not intended that this administrative consent order may be used in any proceeding as evidence that [person] has any liability whatsoever under statutory or common law for the condition of the site or any damage alleged to have been caused or to be caused in the future by the site."

COMMENT 502: Wheaton Industries, Inc. commented that the standard Environmental Cleanup Responsibility Act administrative consent order should add as two new paragraphs substantially similar to the language proposed in paragraph II(E)(1)(b) to provide a Person with (1) a covenant not to bring further actions against Person for remediation or repayment of costs under the Environmental Cleanup Responsibility Act, the Water Pollution Control Act, and the Spill Compensation and Control Act, and (2) an agreement that the standard Environmental Cleanup Responsibility Act administrative consent order provides protection against contribution claims of third parties to the full extent allowed by applicable law.

COMMENT 503: Cohen, Shapiro, Polisher, Shiekman and Cohen suggested that adding "In the event that the Department determines that a meeting concerning the remediation of the site is necessary at any time and provides reasonable notice to [person], [person] shall ensure that the [person's] appropriate representative is prepared and available for, and participates in such a meeting upon written notification from the Department of the date, time and place of such meeting."

COMMENT 504: Colonial Pipeline Company commented that a reasonable time frame needs to be established Appendix B for the [Person] to attend a meeting. As currently stated, the Department could demand a meeting at any time.

COMMENT 505: Chevron U.S.A. Inc. commented that add the word "reasonable" after the word "upon" on line 4 of Appendix B. A degree of reasonableness needs to be incorporated.

COMMENT 506: The New Jersey State Bar Association commented that the first sentence of section XII.2 should be amended to read: "In the event that the Department agrees a meeting concerning the remediation of the site,". The implication that the agency can merely schedule a meeting on a stated date and require persons to attend is to ignore the difficulty of scheduling and the reality that ordered parties are more likely to request meetings than the agency is to agree to attend.

COMMENT 507: The New Jersey State Bar Association commented that section XII.3 affords the Department access "at all times." Access should, however, except in instances of emergencies be limited to normal business hours.

COMMENT 508: Cohen, Shaprio, Polisher, Shiekman and Cohen commented that "In addition to the Department's statutory and regulatory rights to enter and inspect, [person] shall allow the Department and its authorized representatives access to the site at all times for the purpose of monitoring [person's] compliance with this administrative consent order and/or to perform any remedial activities [person] fails to perform as required by this administrative consent order; provided, however, that all authorized representatives of the Department who enter the site shall comply with all applicable health and safe laws, rules and regulations and the Health and Safety Plan for the site. This administrative consent order does not grant to [person] any rights of ownership or operation of facilities at the site. The Department agrees that it will not contend that any actions taken by [person] in satisfaction of the requirements of this administrative consent order shall cause [person] to be deemed an onwer or operator of the site, including, but not limited to actions by [person] to obtain and maintain any necessary permits, licenses and/or approvals."

COMMENT 509: Cohen, Shapiro, Polisher, Shiekman and Cohen suggested the insertion of the following into Section XII, paragraph 4. "[Person] shall not construe any informal advice, guidance, suggestions, or comments by the Department, or by [person] acting on behalf of the Department, as relieving [person] of its obligations to obtain written approvals as required herein, unless the Department specifically relieves [person] of such obligations in writing."

COMMENT 510: The New Jersey State Bar Association commented that the first sentence of paragraph XII.6 should be deleted. There are terms in the order that [Person] should not be required to share with the contractors. A more appropriate requirement would be require all contracts to acknowledge that the work is in compliance with the requirements of an Environmental Cleanup Responsibility Act administrative consent order.

COMMENT 511: Cohen, Shapiro, Polisher, Shiekman and Cohen suggested that the following language should be inserted in Section XII, paragraph 6: "[Person] shall provide a copy of this administrative consent order to each chief contractor and chief subcontractor retained to perform the work required by this administrative consent order. Chief contractor or subcontractor shall be those whose contracts hereunder have a total planned or actual value of $50,000.00 or more. [Person] shall be responsible to the Department for ensuring that its contractors and subcontractors perform the work herein in accordance with the administrative consent order."

COMMENT 512: The New Jersey State Bar Association commented that the same comments with respect to retention of physical materials which is made at paragraph 7 in the comments regarding Appendix A be incorporated in paragraph XII.10.

COMMENT 513: Chevron U.S.A. Inc. commented that paragraph 5 of the General Provisions of Appendix B should be deleted. As proposed this provision requires that a [Person] determine which documentation is or is likely to become potential evidence. This puts an unreasonable burden on the regulated community. Additionally, some of the material may be subject to on-site storage limitations (that is, 90 storage for hazardous waste) or other and unreasonable expense regulatory storage prohibitions. This creates additional and unreasonable expenses. If the provision is not deleted the Department should specify a storage time period to a reasonable maximum of five years. After five years the [Person] should be able to automatically dispose of any and all documents and materials.

COMMENT 514: Colonial Pipeline Company suggested that inserting the following: " . . . preserve all potentially evidentiary documentation found at the Site for three years or until written approval . . ."

COMMENT 515: Wheaton Industries, Inc. commented that the Paragraph regarding preservation of potential evidentiary documentation should be revised as recommended above in paragraph II(C)(8) of Wheaton's comments for the same reasons stated therein.

COMMENT 516: Wheaton Industries, Inc. commented that for the same reasons stated above in paragraphs II(C)(9) and (11) of Wheaton's comments, the Paragraph should confine the Department's ability to obtain information to non-privileged information only, and should afford appropriate protections to trade secrets and confidential business information.

COMMENT 517: Cohen, Shapiro, Polisher, Shiekman and Cohen suggested that inserting the following language in Section XII, Paragraph 11: "Upon the receipt of a written request from the Department, [Person] shall submit to the Department all non-privileged data and information, including technical records and contractual documents, concerning contamination at the site, including raw sampling and monitor data, whether or not such data and information including technical records and contractual documents, was developed pursuant to this administrative consent order. The Department shall hold confidential the commercial terms, including rates and payment terms, of any contractual documents made available pursuant to this administrative consent order."

COMMENT 518: Chevron U.S.A. Inc. suggested that paragraph 6 should be changed to read, ". . . and raw sampling and monitoring data which was developed pursuant to this memorandum of agreement." Also, delete " . . . contractual documents . . ." As proposed by the Department a person would be required to keep all records of any sampling conducted at a site. It would be a violation not to keep this data, even if the results revealed that the samples were clean. The requirement is burdensome and serves no useful purpose. The New Jersey Spill Compensation and Control Act requires that a person notify the Department of a discharge. The Department will be immediately notified if any data indicates a discharge. The Spill Compensation and Control Act provides penalties for noncompliance. There is therefore no need for a facility to be required to provide all data and information concerning contamination, "whether or not such data and information was developed pursuant to this memorandum of agreement." Additionally, some of the documents are likely to be confidential contractual agreements between the [Person] and a contractor. This language only serves as a disincentive to obtaining an agreement.

COMMENT 519: The New Jersey State Bar Association commented that all of the data referred to in item XII.11 is already required to be submitted with the Site Evaluation Submission. To enable the Department to require it to be reproduced is inefficient and potentially costly.

COMMENT 520: The New Jersey State Bar Association commented that the inclusion of penalties in section XII.12 exceeds the statutory

authority and flies in the face of the court's decisions in *Heldor* and *Torwico*. Consequently, this language should be deleted.

COMMENT 521: The New Jersey Business and Industry Association commented that subsection XII.12 concerning bankruptcy should be deleted and left to the courts for resolution. It is beyond the authority of the Department to regulate in this area.

COMMENT 522: Allied-Signal Inc., E.I. du Pont de Nemours Co., and The General Electric Company commented that this provision requires different and apparently additional notice of certain corporate acts which presumably have been authorized by the entry of the administrative consent order. As such, they are inconsistent with the requirements of the statute and should be deleted. Moreover, there is no requirement in the statute that an additional cost review should be incurred simply because of dissolution of corporate or partnership identity or liquidation of the assets. Cost reviews are already part of other sections of the administrative consent order. Once again the Department purports to impose conditions on the exercise of rights in bankruptcy at variance with the Bankruptcy Act. Provisions dealing with corporate dissolution in bankruptcy are well beyond the requirements of the Environmental Cleanup Responsibility Act, and it is improper to impose additional requirements in the administration and oversight of the Environmental Cleanup Responsibility Act administrative consent order.

COMMENT 523: Chevron U.S.A. Inc. suggested deleting the reference to "Environmental Cleanup Responsibility Act and the rules" in the last sentence of General Provision Paragraph 15 so that only outstanding violations of the administrative consent order may be subject to resolution by [Person] before the Department executes an amendment. Compliance with the administrative consent order should be the prevailing factor in making these determinations.

COMMENT 524: The New Jersey State Bar Association commented that the new requirement to record the administrative consent order does not have any particular benefit to the agency, and it can be a significant issue for the industrial establishment. There is no mechanism provided for cancellation of the instrument upon completion, and no attempt appears to have been made to put the document in recordable form. This requirement appears to be excessive. Further, if some record notice is viewed to be necessary, it would be more appropriate for the Order to be filed in the county than recorded. The filing is designed for things like permits, or interests in personalty which have a shorter life (for example, the filing which perfects an interest in personality has a five year life, subject to extension).

COMMENT 525: Edwards & Angell commented that the proposed requirement that administrative consent orders be filed with the county clerk is unduly burdensome and cumbersome. It is not clear that the ordered party can cause the clerk to file and return such documents. County clerks may resist filing administrative consent orders. At a minimum, parties should have an option to file a simple statement which summarizes the terms of the administrative consent order and discloses the availability of a complete document from the Department's files.

COMMENT 526: The New Jersey Business and Industry Association commented that subsection XII.21 imposes personal liability on individual employees. This section should be deleted. The Department has no authority to mandate personal liability in the administrative consent order and to require the ordered parties to assume such liability. This issue should be left to common law resolution in the courts depending upon the facts of each particular case.

COMMENT 527: The New Jersey State Bar Association commented that the attempted extension of personal liability for penalties to officers and management officials in section XII.21 is completely unauthorized by either of the referenced statutes. The officer is not necessarily an owner or operator of the industrial establishment under the Environmental Cleanup Responsibility Act, nor is he or she necessarily personally liable as a discharger or a person in any way responsible for a discharge under the Spill Compensation and Control Act. Again, the administrative consent order should not subject the signer, or its principals to different obligations and risks than non-administrative consent order Environmental Cleanup Responsibility Act compliance.

COMMENT 528: Allied-Signal Inc., E.I. du Pont de Nemours Co., and The General Electric Company commented that General Provisions Paragraph 21 purports to impose personal liability under both the Environmental Cleanup Responsibility Act and the Spill Compensation and Control Act on persons who direct or authorize a violation of the Environmental Cleanup Responsibility Act. It is difficult to perceive how anyone could be subject to the Spill Compensation and Control Act penalties for violating an Environmental Cleanup Responsibility Act administrative consent order, even less personally liable. There are circumstances under which a person may be personally liable under the Environmental Cleanup Responsibility Act or the Spill Compensation and Control Act, but those would have to be established based on conduct independent of the terms and conditions of the Consent Order. This paragraph should be deleted.

COMMENT 529: Allied-Signal Inc., E.I. du Pont de Nemours Co., and The General Electric Company commented that General Provisions Paragraph 21 deals with alienation of the site. One of the purposes behind an Environmental Cleanup Responsibility Act administrative consent order is to permit alienation of property. The conditions for alienation are well established in the statute, and are rather limited. It is inappropriate and beyond statutory authority for the Department to impose additional requirements for alienation in the context of an administrative consent order, the primary purpose of which is to permit a specific transaction to occur, which frequently results in alienation. To the extent that a facility is a covered facility under the Environmental Cleanup Responsibility Act, any alienation not approved as part of the administrative consent order would have to undergo separate notification pursuant to the regular rules and procedures of the Environmental Cleanup Responsibility Act. To establish a different and inconsistent alienation notice requirement with different time tables runs directly contrary to the statute and should be deleted.

COMMENT 530: The New Jersey State Bar Association commented that Paragraph XII.22 should be clarified to state that it applies only to subsequent transactions—not the one for which the administrative consent order is originally issued. The mechanism set forth to deal with these later transactions is necessary, but the proposal is somewhat cumbersome. The 90 day prior notice required in (a) is unrealistic in the business setting. Clause (b) reads as though a phrase has been left out. This should be corrected, or, if the entire concept is included in the current wording, the language should be revised to be clearer. Section (d) requires the parties to create a cloud on the title to cover implementation of a process that should have some (relatively) short duration. If the design of the current administrative consent order requiring recordation of the Order itself is maintained (contrary to our recommendation), there would be absolutely no need for a deed notice. The Order would already be in the record and the later instrument would be subject to it, consequently this notice would be superfluous. A mechanism for cancellation would be required to record the completion of the work. It would be sufficient (and preferable) for the parties to be required to deal with the administrative consent order by contract.

COMMENT 531: Chevron U.S.A. Inc. commented that the Department needs to delete or rewrite General Provisions Paragraph 22(b) and General Provisions Paragraph 24. It appears that some language is missing from this paragraph.

COMMENT 532: Chevron U.S.A. Inc. suggested changing "ten (10) years" to "five (5) years" in General Provision Paragraph 24. Additionally, state that "After five years the [Person] may unilaterally dispose of all materials without requiring Departmental approval." Maintaining these records is burdensome. Ten years is too long a time period. Additionally, the [Person] should automatically be allowed to dispose of this material after five years. There is no need to add additional regulatory steps.

COMMENT 533: Cohen, Shapiro, Polisher, Shiekman and Cohen suggested inserting the following language into Section XII, paragraph 24. "[Person] shall preserve, during the pendency of this administrative consent order and for a minimum of three (3) years after its termination, all data and information, including technical records, potential evidentiary documentation and contractual documents, in its possession or the possession of their divisions, employees, agents, accountants, contractors, or attorneys which relate in any way to the contamination at the site, despite any document retention policy to the contrary. After this three year period [person] may make a written request to the Department to discard any such documents. Such a request shall be accompanied by a description of the documents involved, including the name of each document, date, name and title of the sender and receiver and a statement of contents. Upon receipt of written approval by the Department [person] may discard only those documents that the Department does not require to be preserved for a longer period. Upon receipt of a written request by the Department, the [person] shall submit to the Department all data and information, including technical records and contractual documents or copies of the same. [Person] reserves whatever rights it may have, if any, to assert any privilege or a privilege

regarding such data or information, however, [person] agrees not to assert confidentiality claims with respect to any data related to site conditions, sampling or monitoring." Insert: "After this three (3) year period, [person] may discard any such documents; provided, however, that [person] notify the Department, in writing, of its intent to destroy such documents; provided, however, that [person] notify the Department, in writing, of its intent to destroy such documents at least sixty (60) days prior to such destruction. If within the sixty (60) days the Department requests in writing that some or all of the documents be preserved, [person] shall comply with this request and may deliver to the Department any or all records required to be maintained beyond a three (3) year period, notwithstanding the provisions of this paragraph, [persons] may, in the interim, request permission to destroy documents prior to termination of the three (3) year period and the Department, in its discretion, may grant such a request."

COMMENT 534: Colonial Pipeline Company commented that a reasonable time period to hold evidence is for seven years not 10.

COMMENT 535: The New Jersey State Bar Association commented that requiring a party to a consent order to retain documentation for 10 years is troublesome from several aspects. First, there is no similar policy for Environmental Cleanup Responsibility Act compliance generally so this makes compliance under an order more onerous than compliance without an administrative consent order. Secondly, it would obligate the ordered party to require persons not under its control to retain records for a very long period of time (many record retention policies would require four or five years) and for a period of time that cannot be specified upon execution of the administrative consent order (the period of time runs from completion of the work, which is not a date certain). The paragraph purports to cover attorneys, ignoring the fact that many of these documents would be subject to a claim of attorney-client privilege and so even the preparation of the list and requesting permission to dispose would be problematic. Further, this would seem to interfere with the New Jersey Constitution's express grant to the Supreme Court of exclusive jurisdiction over the practice of law (see, *American Trial Lawyers v. N.J. Supreme Court,* 66 *N.J.* 258 (1966)). It is not clear why the agency would need access to any information which was not already submitted under the Environmental Cleanup Responsibility Act compliance requirements, and if the agency has determined that these records must be available for 10 years after the work is completed, they are in a position to make the necessary arrangements themselves. Requiring the parties to retain, apply for permission to destroy and possibly to resubmit information already in the State's possession is simply too onerous.

COMMENT 536: The New Jersey State Bar Association commented that paragraph XII. 26 also imposes requirements on the administrative consent order signatory which do not apply to all industrial establishments. This clause refers to a cost review (without a paragraph number) without a definition of the contents of the review. The 30 days prior notice is so long as to be infeasible, and the suggestion that the filing of bankruptcy would entitle the Department to seek additional security is certainly voidable as a preference under the Bankruptcy Code. This paragraph is doubly peculiar because all of these "transactions" would appear to constitute subsequent Environmental Cleanup Responsibility Act triggers and so the requirement listed would be in addition to the statutory requirement to file a new Initial Notice. This clause seems to be both unnecessary and unenforceable, and so it should be deleted.

COMMENT 537: The New Jersey State Bar Association commented that paragraph XII. 27 contains language which, if appropriate in any context, should appear in the regulations and not in the administrative consent order. The access and use restrictions will clearly need to be negotiated between the parties and the second sentence makes it appear that the Department's initial draft of the restrictions creates an imperative. This is inappropriate and should be rephrased to reflect that the agreed upon language will be filed within 30 days of completion of the project or the agreement, whichever is later. The reference to the impact and causes of action which may be created by a use restriction are inappropriate in the administrative consent order. The right of "any citizen" to enforce the restriction has been eliminated from the most recent drafts of the restriction and this language should be deleted from this clause as well. The second sentence of this paragraph should be revised as indicated above and the balance deleted.

COMMENT 538: Rutgers Environmental Law Clinic commented that if the Environmental Cleanup Responsibility Act triggering event does not occur, then, of course, the Environmental Cleanup Responsibility Act administrative consent order should be null and void. However, there should be sufficient intra-departmental communication at the New Jersey Department of Environmental Protection and Energy so that the formerly Environmental Cleanup Responsibility Act-regulated site is prioritized for other New Jersey Department of Environmental Protection and Energy action based on the environmental conditions on the site.

COMMENT 539: Rutgers Environmental Law Clinic commented that there are no criteria in section XII to regulate when an extension of time should be granted. As it stands, this paragraph renders almost meaningless the strict timeliness provisions and the force majeure provisions found elsewhere in the administrative consent order and the regulations. These same concerns apply with equal force to the standard responsible party administrative consent order, Section XII, para 30, 24 N.J.R. 1307.

COMMENT 540: Hackensack Water Company commented that this provision XII allows the Department to consider a request for an extension of time to perform any requirement under the administrative consent order if the request is submitted to the Department two weeks prior to any applicable deadline. No provision is made for emergent circumstances and Force Majeure provisions are not incorporated.

COMMENT 541: Wheaton Industries, Inc. commented that the Department has provided no explanation of any basis for requiring two weeks advance notice for any extension request for any applicable deadline. It is often the case that a party will neither know nor reasonably be expected to know of the need for an extension more than two weeks in advance of the deadline. Paragraph 31 should be amended to read "... provided that any extension request is submitted to the Department within a reasonable time once the need for an extension is identified."

COMMENT 542: Wheaton Industries, Inc. commented that the phrase in paragraph 32 of section XII "as determined by the Department" should be deleted. Determination of violations of an Environmental Cleanup Responsibility Act administrative consent order should be based on an objective standard, as are determinations of violation of the Environmental Cleanup Responsibility Act itself. Environmental Cleanup Responsibility Act administrative consent orders will be less useful as a tool for implementing the objectives of the Environmental Cleanup Responsibility Act if Persons must agree to allowing the Department complete discretion to determine administrative consent order violations with no recourse to have objective decisions makers independently assess the facts if disputes arise.

COMMENT 543: The New Jersey State Bar Association commented that they assume that paragraph XII. 33 is intended for use in transactions involving a tender offer followed by a merger. It is not clear why the Department has any interest in having the merger completed within 45 days, and what benefit is derived from an additional filing on the 46th day. In this instance, the entire transaction is fully described in the initial filing and the parties merely need more time to complete the transaction. No additional filing is needed at all in that instance. This paragraph should never be needed and therefore should be eliminated even as optional language.

COMMENT 544: Chevron U.S.A. Inc. commented that additional wording should be added to Paragraph 34. They recommend that a provision be incorporated in this paragraph which permits the [Person] to formally request a Department sign-off on the administrative consent order based upon its belief of full compliance with same. Also, the Department should be given a specific time frame to respond to [Person]'s request with an opportunity for a hearing should the Department deny [Person]'s request.

COMMENT 545: Hackensack Water Company commented that paragraph 34 states that the requirements of the administrative consent order shall be deemed satisfied upon receipt of written notice that all obligations, pursuant to the Order have been satisfied. This paragraph exempts the six preceding paragraphs, one of which pertains to use restrictions, from termination of obligations. There are no qualifications. If the Department is satisfied with remediation, and if use restrictions are no longer necessary, they should be lifted. If they are stringent or cumbersome, they might unduly burden the transfer of the land in question.

COMMENT 546: The New Jersey State Bar Association commented that paragraph XII.34 raises questions about whether an additional approval is contemplated beyond approval of a negative declaration or cleanup plan. If not, this sentence should be revised. The financial obligations should be referenced as being imposed by the Environmental Cleanup Responsibility Act rather than the administrative consent order.

The provision that certain paragraphs would survive termination of the administrative consent order is curious because it does not appear to the Department's agreement not to sue (14), but it does apply to extensions of time to perform work required under the order (31). It would be better if the clause were eliminated and the determination of which clauses, if any, survive were left to the parties.

COMMENT 547: The New Jersey Business and Industry Association commented that the standard Environmental Cleanup Responsibility Act administrative consent order set forth in Appendix B requires interim response actions. No guidance is provided in regard to such actions in Environmental Cleanup Responsibility Act cases. It appears that such actions will be contemplated after the submission of only the administrative consent order application. It is submitted that the Department will not be in a position to adequately evaluate the need for such actions at that point. The fear is that in the absence of a thorough understanding of the particulars of each case, interim actions will be routinely required, regardless of need. Moreover, there is no indication as to whether the issuance of the administrative consent order will be delayed pending the interim response action. Finally, this requirement to agree to such actions is yet another "blank check" which ordered parties will be coerced into signing.

Appendix C. Standard Responsible Party Oversight Document

General Comments

COMMENT 548: Wheaton Industries, Inc. said that the final regulations should make it clear that the Appendix C oversight document is an administrative consent order or explain what other kinds of orders are to be negotiated based on this standard document. Since N.J.A.C. 7:26C-5.4(a) refers to this document as a consent order, Wheaton Industries, Inc. suggests the title of the Appendix C document should be changed from Oversight Document to administrative consent order. Furthermore, if this document is meant to serve as a standard unilateral order, all agreement or waiver provisions, including stipulated penalties, should be deleted.

COMMENT 549: Cohen, Shapiro, Polisher, Shiekman and Cohen asserted that the Department cannot issue the Appendix C oversight document as an administrative order, requiring the recipient to undertake any Department approved remedial action. The commenter believes it is inappropriate for an administrative order to require the recipient to undertake work which is neither described nor defined in the administrative order. Rather, the recipient may only be required to undertake projects which will be only identified upon completion of a Remedial Investigation/Feasibility Study. Thus, an administrative order may require a recipient to undertake a Remedial Investigation/Feasibility Study with respect to a specific site. It may require the recipient to undertake the design of a specified remedy. It may require the recipient to implement a specified remedy. However, an administrative order cannot and should not require a recipient to undertake work which cannot be specifically described in the administrative order.

RESPONSE TO COMMENTS 548 AND 549: The Department believes it may include in an administrative order all phases of remediation. To the extent that an ordered party disagrees with this position, it may raise this as a defense to the administrative order.

Appendix C sets forth the wording for the administrative consent order oversight document for all situations except those in N.J.A.C. 7:26C-5.4(b). When necessary, the Department also intends to use portions of the Appendix C document as a unilateral order. A unilateral order, which is a non-consensual enforcement document the Department may choose to issue to a person who is responsible for a discharge, would not contain stipulated penalties. Rather a violator of a unilateral order would be subject to civil or civil administrative penalties. See N.J.S.A. 58:10-23.11u, N.J.A.C. 7:14-8, 7:1E-1, and 7:26-5.1.

COMMENT 550: Cohen, Shapiro, Polisher, Shiekman and Cohen suggested adding, to the Findings section of those administrative consent orders which address a National Priority List site, a paragraph stating that the United States Environmental Protection Agency concurs with and has approved the work to be performed pursuant to the administrative consent order. No responsible party should ever be required by the Department to perform work which has not been approved by another regulatory agency with responsibility for remediating the site.

RESPONSE: There are over 1,250 National Priority List sites in the country and over 100 of these in New Jersey. The Department has established a successful relationship with the United States Environmental Protection Agency Region II for sharing the responsibilities for remediating National Priority List sites in New Jersey. Through this shared responsibility, which includes "allocating" some of the sites to the United States Environmental Protection Agency and the other sites to New Jersey, each agency is able to meet its responsibilities in this time of limited public budgets and the corresponding restraints on staffing. The Department has already successfully negotiated a number of administrative consent orders for National Priority List sites. As agreed to in those orders, the person signing the order is encouraged to contact the United States Environmental Protection Agency to solicit whatever assurances they elect. The Department's experience with the United States Environmental Protection Agency in this area has been that remediation which meets the Department's requirements is generally acceptable to the United States Environmental Protection Agency.

Findings

COMMENT 551: Cohen, Shapiro, Polisher, Shiekman and Cohen suggested the administrative consent order should include a paragraph of the statutory obligation governing the Department's remedial activities under N.J.S.A. 58:10-23.11 as follows: "This administrative consent order shall be administered to the greatest extent possible by the Department in a manner consistent with the National Contingency Plan."

RESPONSE: The Department does not believe that it is necessary to restate every statutory provision in oversight documents. Because the commenter did not make any compelling reasons to include this particular provision, the Department has decided not to make the suggested change.

COMMENT 552: Colonial Pipeline Company suggested that if all of Department's files concerning the contaminated site are incorporated into the administrative consent order, the regulations should provide that a person executing the administrative consent order shall be entitled to review, copy, and have the ability to disagree with the information in the Department's files prior to incorporation into the administrative consent order.

COMMENT 553: Cohen, Shapiro, Polisher, Shiekman and Cohen believed it is unnecessary and inappropriate for an administrative consent order to incorporate wholesale the Department's files because it would complicate administrative consent order negotiations, the files may contain privileged and enforcement sensitive information, and the information in the files may be contradictory. If the Department is going to require this provision, it should agree to promptly provide such files to the signatory.

RESPONSE TO COMMENTS 552 AND 553: Any person negotiating an administrative consent order with the Department may request to review and copy documents subject to public review in the Department files pursuant to the Public Records Law, N.J.S.A. 47:1A-1 et seq., by arranging for a file review with the Department's record custodians. Also, by incorporating by reference the Department's files in the administrative consent order, negotiating time will be saved because there will not be any need to debate the language to be included in the Findings. Furthermore, pursuant to Paragraph 4 of the Findings section of the Appendix C administrative consent order, by executing the oversight document, the signatory would not be admitting to any fact in any Department files incorporated by reference into the administrative consent order. The Department has amended the language in Paragraph 5 to reflect that only the public files maintained by the Department will be incorporated into the Findings.

COMMENT 554: Chevron U.S.A. Inc. pointed out that Paragraph 4 of the Appendix C administrative consent order would acknowledge that entry into the administrative consent order is not an admission of any fact, fault or liability. Chevron U.S.A. Inc. suggested broadening the scope of that paragraph by adding the following language: "nor shall it be construed as a waiver of any right or defense [Person] may have with regard to the site except as specifically provided for in Paragraph _____ below."

RESPONSE: The Department agrees with this comment and has amended the rule accordingly.

COMMENT 555: Colonial Pipeline Company pointed out that as proposed, Paragraph 6 of the Findings section of the administrative consent order contemplates that for every site, the investigation and remediation of contamination would address all contaminants which are emanating from or which have emanated from the site. Colonial Pipeline Company suggests that the administrative consent order should contemplate situations where the scope of the work under the

administrative consent order may be limited and therefore language such as "unless otherwise provided below" be added to proposed paragraph 6.

RESPONSE: The administrative consent orders in Appendix C are for priority sites, those with the greatest potential threat to human health and the environment. For such sites it would be impractical for the Department to allow only a partial remediation as the commenter suggests, since it is most efficient from both a resource and timeliness standpoint to address all the contamination once at such a site. The Department is then able to shift the resources of its publicly conducted site remediation program to another priority site. The form of a responsible party's commitment in this situation must guarantee the complete remediation of a contaminated site since limited public resources are being shifted to another priority site.

COMMENT 556: Colonial Pipeline Company stated that Paragraph 7 of the Appendix C administrative consent order indicates that additional provisions may be added to the Findings section of the administrative consent order. Commenter requested that Paragraph 7 include language that any such additional provisions be added with the concurrence of the signatory.

RESPONSE: It is the Department's intent of the proposed rule to limit the time it takes to negotiate administrative consent orders by limiting rather than expanding, the number of paragraphs to the Findings section to the administrative consent order. However, the Department will agree to add finding paragraphs with the concurrence of all parties. Therefore, the Department will amend Paragraph 7 of the Appendix C administrative consent order accordingly.

Penalty, Damages and Reimbursement of Prior Costs [Optional]

COMMENT 557: Chevron U.S.A. Inc. suggested that it should be noted that Paragraph 1 of the order section providing for the payment of penalties be optional since not all administrative consent orders will involve signatories subject to penalties. Chevron U.S.A Inc. also requests that the Department promulgate its criteria for assessing penalties.

RESPONSE: The Department agrees that not all administrative consent orders will involve signatories subject to penalties for violations which predate the administrative consent order. The heading to the order section of the Appendix C administrative consent order indicates that the Paragraphs setting penalty, damages and reimbursement of prior costs are optional.

The Department has promulgated criteria for assessing penalties for violations of the State's environmental laws, including the Water Pollution Control Act at N.J.A.C. 7:14-8, the Spill Compensation and Control Act at N.J.A.C. 7:1E-1, and the Solid Waste Management Act at N.J.A.C. 7:26-5.1. However, the payment of penalties at the entry of an administrative consent order would be for a settlement agreed to by the Department and the signatory. If an amount could not be agreed upon, the Department would bifurcate the penalty matter, allowing the person to execute the administrative consent order and proceed with the remediation without settling the penalty. The Department then can pursue a collection of maximum statutory penalties in a separate action pursuant to the applicable statutes.

COMMENT 558: Chevron U.S.A. Inc. stated that pursuant to paragraph 2 of the Penalty, Damages and Reimbursement of Prior Cost section of the administrative consent order, the person responsible for conducting the remediation pays the Department costs concerning its investigation and response to matters described in the administrative consent order Findings, and preparing the administrative consent order. Chevron U.S.A. Inc. suggested amending the paragraph to allow the administrative consent order signatory to meet with the Department to review these costs and establish a procedure for resolving disputed cost amounts.

RESPONSE: During the administrative consent order negotiations, if requested, the Department will provide any person involved in the negotiations with a summary of all prior Department costs the Department is requesting that person to pay. The Department makes this effort to give the signatory an accurate account and the general activities associated with prior costs. In those situations where the person cannot agree to reimburse the Department for its prior costs, the Department would bifurcate the matter and allow the person to proceed with the remediation under the administrative consent order and pursue the prior costs separately, including the assessment of treble damages if appropriate.

Remedial Investigation and Action Requirements

COMMENT 559: Cohen, Shapiro, Polisher, Shiekman and Cohen stated that it makes no sense to place a 90 day time limit specified in Paragraph 2 of the Remedial Investigation and Action Requirements Section of the Appendix C administrative consent order to implement and submit the results of the Department approved Remedial Investigation Work Plan. In some cases the Remedial Investigation Work Plan can be completed within this time frame. In other cases it may take six months or more to complete a Remedial Investigation Work Plan. This provision should be revised as follows: "Upon receipt of the Department's written approval of a Remedial Investigation Work Plan, [person] shall implement the Remedial Investigation Work Plan in accordance with the approved schedule".

COMMENT 560: Wheaton Industries, Inc. requested flexibility by the Department, based on site conditions, in allowing a timeframe other than 90 days for implementing a Remedial Investigation Work Plan.

COMMENT 561: Chevron U.S.A Inc. stated its concern with the short response time required for certain actions. While many companies may be technically capable of responding on such short notice, such requirements will often place an unnecessary burden on the companies with no meaningful benefit being received by the State.

COMMENT 562: Allied-Signal Inc., E.I. du Pont de Nemours Co., and The General Electric Company believe that because mandatory timeframes for submittals generally creates an unacceptable risk of uncertainty to parties that would otherwise be signatories to an administrative consent order, it will discourage settlement and thereby impair property transactions unnecessarily. While in practice, the Department has been willing to give extensions of time, in the context of a strict oversight document, it is impossible to prescribe time periods that may be appropriate to every particular site. The time periods described are arbitrary. It is especially inappropriate to establish such time periods in the oversight documents if at the time it is known they are unreasonable. Some general language should be included in the preamble section stating that the time periods prescribed in the model oversight document may be modified for good cause shown by the applicant at the time of the application and agreed time frames should be incorporated in the administrative consent order or by administrative consent order amendment whenever possible. Also, the arbitrary time periods proposed in the consent order may not work in the case of "high priority" sites. By definition, these sites are usually complicated sites and thus, time periods should be negotiated based upon site-specific conditions.

COMMENT 563: Hoffman-LaRoche Inc. stated that the standardized time frames established by the Department with respect to actions undertaken pursuant to the responsible party administrative consent order are not sufficient for most sites. As a general matter, the time frames proposed by the Department do not provide a party with sufficient time to complete these tasks and should be extended. In particular, a party should have 45 to 60 days to submit work plans and permit applications. Reimbursement of past and oversight costs should be similarly extended. In addition, a party should be afforded up to 30 days after the effective date of the administrative consent order to obtain such assurance in conformity with the requirements of the administrative consent order. The Department recognizes in its proposed rules that it retains discretion to extend any time frames for those situations where additional time is needed. 24 N.J.R. 1287. The proposed responsible party administrative consent order should expressly provide that actions to be undertaken pursuant to the administrative consent order should be completed within the standardized time frames listed, or within such additional time as the Department deems appropriate.

The time frames and deadlines for submittals and compliance specified in the administrative consent orders need to be flexible. A range of time frames and deadlines should be provided. Deadlines should be based on site specific features including; size of the site, number and complexity of the areas of concern, age of the facility and other site specific features. Alternatively, the time frames and deadlines should be left blank and negotiated on a site specific basis. The Department must recognize that sites range in size from facilities comprising an area of less than one acre with only one area of concern to large complex facilities comprising hundreds of acres with many areas of concern. A workplan for a small site may only require 30 to 60 days to prepare, however larger sites may require additional time. The Department must recognize that compliance dates, report submission dates and other time critical response deadlines

must be based on site specific features. The inclusion of unreasonable time frames will serve as a disincentive to the regulated community to execute an agreement.

RESPONSE TO COMMENTS 559 TO 563: The Department agrees with the concept of allowing flexibility with the timeframes for technical submittals. The Department has amended this section for submitting workplans and reports to allow for the negotiation of timeframes on a case-by-case basis. Paragraph 30 of the General Provisions section of the Appendix C administrative consent order addresses the commenters' concerns by providing the signatory an opportunity to request an extension of time to perform any requirement under the administrative consent order.

COMMENT 564: Cohen, Shapiro, Polisher, Shiekman and Cohen stated while the Department sets out time limits for responsible parties, it places no time limits on itself. The commenter also believes as a result, very often, it is the Department's failure to act in a timely manner which delays remediation. If the Department truly wishes to expedite remedial projects, expecially considering the fact that it is to be reimbursed for all of its oversight costs, it should place regulatory time limits on itself. These limits could be enforced by a daily reduction in oversight costs otherwise to be paid by the responsible party so long as the Department fails to meet a deadline. Such a program would expedite remedial action and would reduce the unnecessarily large number of individuals which the Department presently requires to review and/or approve each submission of a responsible party.

COMMENT 565: Edwards & Angell stated it strongly encourages the Department to agree to review and comment upon major technical submissions in accordance with an established schedule. The commenter believes the Appellate Division in several cases has beseeched the Department to promulgate predictable site remediation procedures. Edwards & Angell believed that unless the Department establishes internal deadlines for the review of key decision-making documents, that the entire site remediation process will be highly unpredictable. Moreover, since the Department expects the potentially responsible party to pay oversight costs in accordance with proposed N.J.A.C. 7:26C, Appendix I, the commenter asks the Department to be reasonably responsive once the Ordered Party satisfies its obligations by submitting technical reports. If the Department has sufficient experience and data to support its statement in the preamble to the proposed rules states that it is anticipated that the Department's review of key submissions will take between 30 and 60 days depending on the level of the complexity of the submission, such a provision should be included in either its proposed rules or the standard administrative consent orders.

COMMENT 566: Colonial Pipeline Company made the general comment that it has been very frustrating, from industry's viewpoint, that Departmental reviews of plans and reports can take longer than the proposed action, especially for investigations. Colonial Pipeline Company recommends that the Department establish time periods for review, especially since the Department proposes that the responsible party pay the Department for the cost incurred in reviewing documents.

RESPONSE TO COMMENTS 564 TO 566: The issue raised in these comments is really one of how to best use the Department's limited resources in reviewing submittals. The Department is striving to conduct reviews as rapidly as possible. Complexities of the site and the quality of submittals will effect the time it takes to review documents and therefore the establishment of regulatory time periods for review is not appropriate. However, it is in the Department's best interest to complete these reviews as expeditiously as possible so that the necessary remedial actions are implemented at a site and so that more cleanups can be overseen in any given time period.

COMMENT 567: Wheaton Industries, Inc. commented that Paragraphs 6 and 7 in the Remedial Investigation and Action Requirements Section of the Appendix C administrative consent order pertaining to the Department's determination of the adequacy of submittals could be read to give the Department complete discretion to determine the inadequacy of a submitted Interim Remedial Action or Remedial Investigation work plan for any reason or no reason. The Commenter suggests these paragraphs should be revised to begin, "If any submittal made under this section is inadequate or incomplete based upon applicable law, then the Department shall..." The Commenter believes its suggested language would give potentially responsible parties reasonable protection that obligations imposed by the Department under the administrative consent order would be controlled by applicable law as interpreted by an impartial decision maker, if necessary, rather than through the Department's unilateral judgment.

RESPONSE: As discussed above, the Department is timing the operative date of this rule to coincide with the operative date of the Technical Requirements for Site Remediation. The Department will review any submittal in the context of those Technical Requirements for Site Remediation. As far as the commenter's suggestion for impartial review, the courts have already established that cleanups must come before litigation and that a responsible party does not have the right to pre-enforcement review of any such determination the Deparment makes. The Department has been given the responsibility to oversee cleanups conducted in the State. Therefore, the Department must retain the sole decision making authority on any remedial activity at a site. If the Department allows any party to conduct a cleanup, the party is "standing in the shoes of the Department." In that capacity, the Department must ensure that the work that is being performed, is the work that the Department would have performed to ensure the protection of human health and the environment.

COMMENT 568: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company stated the language of Paragraph 7 suggests that the Department may approve a remedial action plan different and more comprehensive than the one submitted in response to that submitted by the Ordered Party after completion of the remedial investigation work plan. The open-ended nature of this commitment is the classic "blank check" problem which is not addressed in the administrative consent order. The Department should limit its options to—approval, rejection, or conditional modification of plans submitted by the Ordered Party and explain why rejection or modification is required.

RESPONSE: The Department may require additional remedial investigation at any time for a number of reasons, including, if new information becomes available on the extent and nature of the contamination or the signatory's original remedial investigation was inadequate. The Department agrees with the commenter for the necessity to explain to the signatory why the proposed remedial investigation work plan modifications are being required.

COMMENT 569: Chevron U.S.A. Inc. suggested the following statement should be added to the final paragraph of the Remedial Investigation and Action Requirements section of the Appendix C administrative consent order, which obligates the signatory to conduct additional remedial investigation as required by the Department: "Additional Remedial Investigations will be required only if it can be demonstrated that there is a substantial source area on-site which has not been previously identified and investigated." The commenter believes that its proposed provision is necessary because the obligation of the signatory to conduct any additional remediation does not include any criteria which the Department must use to determine if additional investigations are needed, and the regulated community needs to be assured that there is finality to the remediation investigation process. Also, Chevron U.S.A. Inc. asserts its additional wording helps to assure the regulated community that the Department will not be arbitrary in requiring additional remedial investigations.

RESPONSE: A person who decides to execute an Appendix C administrative consent order to remediate a contaminated site agrees to conduct the same remediation that the Department would conduct at the site. In other words, the remedial investigation must be at least equivalent to that which the Department would perform if the Department was conducting the remedial investigation itself. In such circumstances, the Department would conduct additional work until the remedial investigation addressed all the contamination at or emanating from the site. The person executing the administrative consent order therefore must also conduct the additional remediation. Additionally, whether the contamination which originated from the Site is "on-site" as the commenter suggests, is not determinative. See, for example, *In re: Adoption of N.J.A.C. 7:26B,* 128 *N.J.* 442 (1992).

Feasibility Study

COMMENT 570: Chevron U.S.A. Inc. requested that the Department be required to review and comment on the Feasibility Study Report submitted under Section IV of the Appendix C administrative consent order within 45 days after receipt by the Department.

RESPONSE: As noted above in the section concerning remedial investigation and action requirements, the issue is really one of how to best use the Department's resources. (See response to Colonial Pipeline Company on review time periods above.)

COMMENT 571: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company stated that simply because a

site is a high priority site does not mean that a feasibility study report is necessary. Some guidance should be incorporated in the consent order setting forth the conditions under which a feasibility study may be required.

RESPONSE: The Department agrees and notes that the Technical Requirements for Site Remediation stipulate when a feasibility study is required. See N.J.A.C. 7:26E-5.

Permit Application Process for Remedial Activities

COMMENT 572: Colonial Pipeline Company suggested that the regulations need to address the situation in which a signatory to an administrative consent order is denied an agency permit. In the event the signatory exercises good faith to obtain a permit but is denied by an agency, it should not be penalized and should be relieved of any obligations under the administrative consent order which required the denied permit.

RESPONSE: The Department encourages schedules for work to be based on when a permit is received. Thereby, the signatory would not be penalized if a permit is denied by an agency. However, the denial of a permit may necessitate additional activities by the signatory to obtain Departmental approval of an implementable remedy.

COMMENT 573: Cohen, Shapiro, Polisher, Shiekman and Cohen stated that the permit application process for remedial activities section of the Appendix C administrative consent order will be inappropriate for certain sites. That section requires submittal of a detailed draft permit application submission schedule to implement the selected remedial action. For example, the Comprehensive Environmental Response, Compensation, and Liability Act specifically provides at Section 121(e) that no federal, state or local permits are required for on-site activities. The commenter believes this concept of permit equivalence is also an important aspect of the National Contingency Plan at 40 C.F.R. 300.5 (on-site) and 40 C.F.R. 300.400(e). The Spill Compensation and Control Act specifically requires compliance with the National Contingency Plan "to the greatest extent possible". N.J.S.A. 58:10-23.11. Therefore, requiring permits for a site which is on the National Priority List would be a violation of the Comprehensive Environmental Response, Compensation, and Liability Act and the Spill Compensation and Control Act as well as a potential violation of any agreements that the Department has with the United States Environmental Protection Agency. The commenter suggested if the site addressed by the administrative consent order is a National Priorty Listing site, the following language must be included in the administrative consent order. "No federal, state or local permits are required for on-site response actions. On-site means the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action." This language is taken directly from the National Contingency Plan. 40 C.F.R. 300.400(e).

RESPONSE: The permit application process for remedial activities section of the Appendix C administrative consent order refers to whatever permits are applicable to the remediation activity. Off-site permits are required for National Priority List sites. The Department is involved in an appeal of the United States Environmental Protection Agency's position on this issue as indicated by the quoted National Contingency Plan language. As a result, the Department believes that the existing language on permits is appropriate.

COMMENT 574: Cohen, Shapiro, Polisher, Shiekman and Cohen requested that the administrative consent order should make it clear that by entering into the administrative consent order the respondent does not give up any of its rights to comment on and contest permits.

RESPONSE: As provided in Paragraph 7 of the Permit Application process for Remedial Activities Section of the Appendix C administrative consent order, a signatory consents to a waiver of their rights only when the permit conditions are essentially the same as the requirements of the administrative consent order. Whatever a signatory agrees to under the administrative consent order, it agrees to put it in a permit. The administrative consent order does not afford any additional rights beyond what is provided for under any particular permit. The Department wishes to avoid processing a hearing request which would expend resources to argue issues that a signatory has already agreed to pursuant to an administrative consent order.

Progress Reports

COMMENT 575: The New Jersey Business and Industry Association recommended that the quarterly progress reporting requirement set forth in Section VI of the Appendix C administrative consent order be changed to semi-annual. Also, the commenter requests the Department specify the minimum criteria of what is to be included in the quarterly reports.

RESPONSE: The commenter's suggestion to have semi-annual instead of quarterly progress reports may be appropriate in some cases and Paragraph 1 in this section of the Appendix C administrative consent order has been amended to provide the Department with flexibility to require progress reports on a less frequent basis. The minimum criteria of what would be acceptable for progress report submittals is set forth in subparagraphs i through ix of Paragraph 2 in the Progress Report section of the administrative consent order. The complexity of the site and the length of time necessary to undertake the remediation will impact the depth and breath of the progress reports.

COMMENT 576: Chevron U.S.A. Inc. suggested that signatories to administrative consent orders should not be required to report to the Department data found during the course of an investigation and it is unknown whether or not the data indicates a potential human health concern. The phrase "or in the absence thereof, any data which indicates potential human health concerns" should be deleted from Paragraph 2.viii of the Progress Report Requirements. Furthermore, the Department has not provided any criteria or methods to determine if data indicates potential human health concerns. Without actual criteria it will be impossible to determine if a person is in compliance with this requirement. Additionally, there is no real need for this requirement to be included in this section. Actions taken during the feasibility study will adequately address this issue.

RESPONSE: The language in question "or in the absence thereof, any data which indicates potential human health concerns," is included in the progress report to ensure that the Department receives in a timely fashion any information generated in an investigation that suggests that the Department may have to take or require the responsible party to take immediate action. Simply because there may not yet be promulgated health based standards or criteria for a particular contaminant does not eliminate its potential human health concern that may be documented elsewhere. That the commenter is not able to determine whether or not the data indicates a potential human health concern is all the more reason that all data be submitted so that the Department can make the determination. By Chevron U.S.A. Inc. making the comment that "actions taken during the Feasibility Study will adequately address this issue" the commenter may not appreciate that the Department may need to receive the information prior to the completion of the Feasibility Study for the purpose of taking action to protect human health and the environment. In addition, feasibility studies are not required in all situations. See N.J.A.C. 7:26E-5.

Project Coordination

COMMENT 577: Chevron U.S.A. Inc. objected to the language in Paragraph 2 in the Project Coordination section of the Appendix C administrative consent order that the signatory designate a person as a technical contact for the Department. The commenter suggested the following amendment: the name, and address of the individual who will be the contact for [Person] for the purpose of receiving any notice concerning this [document]."

RESPONSE: This paragraph is intended to provide the Department with the name of the "hands on" person responsible for a cleanup at a site. Coordination between technical representatives of the signatory party and the Department has proven an effective means to expediting the remediation of contaminated sites.

COMMENT 578: Colonial Pipeline Company suggested that the requirement in Paragraph 4 of the project coordination section of the Appendix C administrative consent order for verbal notification 14 calendar days prior to the initiation of any field activities be deleted. The Commenter believes there is no apparent reason why both verbal and written notification is necessary. It may be difficult to document that contact was made verbally; whereas notification in writing provides documentation.

RESPONSE: The requirement to verbally inform the Department of the initiation of field activities is valid and necessary to confirm that there has not been any change in scheduling the field activities that occurred since the receipt of the written notification. Furthermore, the commenter has not articulated any burden to the party conducting the remediation such communication would present.

Financial Assurance and Project Cost Review

After the Department proposed these procedures for Department oversight of the Remediation of Contaminated Sites on April 6, 1992, the Legislature began its deliberations on Senate Bill 1070. Among other

issues, the Legislature is considering several statutory amendments which would impact upon the form and substance of financial assurance as the Department had proposed in these rules. The Department has decided that it is most prudent to delay promulgating any portion of a rule concerning financial assurance until after a final decision is made on to Senate Bill 1070. In the interim, the Department will continue to require financial assurance in its remediation administrative consent orders and will regulate such provisions on a case-by-case basis. The Department intends to promulgate amendments concerning financial assurance consistent with any applicable statutory requirements. The Department received the following comments concerning financial assurance as it was proposed in Appendix C.

COMMENT 579: Cohen, Shapiro, Polisher, Shiekman and Cohen believes there is no basis for requiring financial assurance, which requirements are set forth in the Financial Assurances and Project Cost Review section of the administrative consent order, in connection with an Appendix C administrative consent order. The Commenter acknowledges that the Legislature has provided the Department with a remedy in the form of daily penalties and/or treble damages should the recipient of a Directive or other enforcement document fail to comply with its obligations. The Commenter concludes there is no statutory authority for the Department to secure financial assurance in addition to its rights to secure these penalties.

COMMENT 580: Chevron U.S.A. Inc. stated that the five calendar days required under the Financial Assurances and Project Cost is extremely short period to reasonably expect a signatory to a Appendix C administrative consent order to obtain and provide to the Department financial assurance in the form acceptable to the Department. This short time frame would cause unnecessary process complication and charges while providing no real benefit. We suggest that ten business days is more reasonable.

COMMENT 581: Chevron U.S.A. Inc. suggested the following clarification to Paragraph 3 in the Financial Assurances and Project Cost Review section of the Appendix C administrative consent order: "The financial assurance shall meet the requirements of either a, b, or c as follows:"

COMMENT 582: Cohen, Shapiro, Polisher, Shiekman and Cohen asserted that if the Department insists on financial assurance, it should permit some form of self bonding as it does under Environmental Cleanup Responsibility Act. If self bonding is a sufficient guarantee under the Environmental Cleanup Responsibility Act program, it should be a sufficient guarantee under the Spill Compensation and Control Act and other remedial statutes.

COMMENT 583: Chevron U.S.A. Inc. suggested the following clarification to subparagraph 3(a)(ii) in the Financial Assurances and Project Cost Review section of the Appendix C administrative consent order: "The irrevocable letter of credit shall be issued by a New Jersey State or federally chartered bank, savings bank, or savings and loan association, which is approved by the Department and," The commenter also suggests financial assurance alternatives including a method of self-insurance and recommends the method of testing for financial viability in the New Jersey subchapter 9 for the Requirements for Hazardous Waste Facilities or the United States Environmental Protection Agency tests.

COMMENT 584: Allied-Signal Inc., E.I. du Pont de Nemours Co., and The General Electric Company suggested that the Department reconsider the use of alternative financial assurances and provide greater latitude for different types of financial assurances. The commenters state that financial assurance necessarily ties up credit which affects the ability of a company to borrow money. In the case of a party that performs throughout, financial assurance represents an unnecessary expenditure for a credit line and a restriction on the ability of the person to conduct its business. For major corporations, the financial ability of a company to respond is never in doubt, and therefore the need to tie up large amounts in financial assurance is disproportionate to the additional incentive to perform represented by financial assurance. The Department should reserve the right to adjust the amount under any circumstances in which financial assurances are not necessary to advance the purposes of the administrative consent order. The commenters suggest allowing financial assurance in an amount less than the estimated cost to comply with the administrative consent order.

COMMENT 585: The Commerce and Industry Association of New Jersey objected to the language in Paragraph 4 of the Financial Assurance and Project Cost Review section of the Appendix C administrative consent order, that in the event the Department determines that the signatory has failed to perform any of the obligations under the administrative consent order the Department may proceed to draw on that amount of the financial assurance necessary to complete the performance of the obligation. The Department can, on its own initiative, withdraw funds from the financial assurance funds upon a determination that the ordered party has failed to satisfy its obligations under the order. The Department is only required to provide 30-day notice to the affected party in which "to remedy the failure to perform such obligation." The ordered party cannot, however, contest or challenge the draw-down before it is accomplished. The administrative consent order allows the person providing the financial assurance an opportunity to contest the draw-down only after it has occurred. In the interest of fundamental fairness the affected party should be allowed the opportunity to contest the draw-down of funds before it occurs, not after. Pre-draw-down, independent review by an entity, such as the Superior Court, will provide assurances to the affected party that the draw-down is in fact warranted. This will enhance public confidence in the Department's handling of remediation activities.

COMMENT 586: Allied-Signal Inc., E.I. du Pont de Nemours Co., and The General Electric Company stated that with respect to a contested issue as to the Department's draw down of financial assurance, the administrative consent order requires that the ordered party agree not to seek to enjoin the Department from drawing down or using the funds. The burden on a party establishing just cause for an injunction is usually heavy indeed, requiring among other things that it show probability of success on the merits. Potentially responsible parties are entitled to seek an injunction if they can meet these elements of proof. It is improper to require that a party give up such a valuable right, leaving it with the uncertain remedy of judicial review of monies already expended, possibly for unnecessary cleanup, illegal acts on the part of the agency, and other arbitrary and capricious behavior.

COMMENT 587: Chevron U.S.A. Inc. objected to the language in Paragraph 4 of the Financial Assurances and Project Cost Review section that during the pendency of such an action, the signatory will not seek to enjoin the Department from the drawing down of funds or the expenditure of funds drawn down pursuant to this provision." The commenter believes this statement effectively removes the basic right to argue against any Department actions that may appear to be unjustified. Penalties could be assessed per this statement, even if the signatory is justified in seeking to enjoin the Department from the drawing down of funds.

COMMENT 588: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company objected to the language in Paragraph 4 of the Financial Assurances and Project Cost Review Section, believing it violates Constitutional guarantees of due process and directly contradicts recent case law. The commenters also object because the administrative consent order only allows the signatory potentially responsible party to contest a monetary draw-down after the fact. Furthermore, the affected party is required to waive its right to "seek to enjoin the Department from the drawing down of funds" during the pendency of an action contesting the draw-down. These requirements contradict the holding in *Avon Prods. v. New Jersey Department of Environmental Protection,* 243 *N.J. Super.* 375 (App. Div. 1990), and violate principles of constitutional due process. The Avon court scrutinized an administrative consent order provision similar to subsection VIII, Paragraph 4, and held that due process interests prevent the Department from drawing upon a letter of credit posted pursuant to an administrative consent order without first affording plaintiff an opportunity to demonstrate before a court that the Department's actions were arbitrary, capricious and unreasonable. Constitutional guarantees of due process require that before the Department unilaterally decides to draw on an affected party's financial assurances it must allow for judicial review of that decision. The administrative consent order's limitation, at Subsection VIII, Paragraph 4, of the signatory potentially responsible party's challenge to any draw-down is not sufficient to safeguard due process interests. Further, requiring the signatory potentially responsible party to waive its recourse to injunctive relief is also unconstitutional because Avon requires judicial review prior to a draw-down. The Department is already enjoined by the due process clause from a draw-down prior to court approval, and the Department cannot, by regulation, require parties signing an administrative consent order to waive their due process rights. See *Avon, supra,* at 380.

COMMENT 589: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company objected to Paragraph 6 in the Reservation of Rights section of the Appendix C administrative consent

order since it restricts a person's challenge to the Department's draw on financial assurance to the period after the Department has spent the money. The commenter believes this is in and of itself an arbitrary, capricious and unreasonable limitation on the exercise of judicial rights to prevent an unfair expenditure and the deprivation of property. Requiring a person to "consent" to such a deprivation of property is contrary to fundamental notions of due process and fair dealing.

COMMENT 590: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company state that the Department's promise to remit funds drawn on financial assurance is limited to acts of the Department that were arbitrary, capricious or unreasonable. This does not necessarily exhaust the grounds under which a court can and should order a refund. The commenters suggest adding the phrase "or for any other lawful reason." The commenters also suggest a reasonable time period (45 days) after an appropriate determination or request for the Department to make any such refund.

COMMENT 591: The New Jersey State Bar Association notes that under Paragraph 8 of the financial assurances and Project Cost Review section of the Appendix C administrative consent order, financial assurance may only be adjusted every 365 days. There are many situations in which the project work, once initiated, proceeds at a quick pace, and interim reductions of the financial assurance would be appropriate. The commenter suggests that this option be available to the parties at least every six months.

COMMENT 592: The New Jersey Business and Industry Association stated that the regulations should define the circumstances under which a request for reduction in the amount of financial assurance would be declined since the proposed regulations leave the decision as to reduction to the "discretion" of the Department.

COMMENT 593: Chevron U.S.A. Inc. believes where the signatory shows that the cost of the remaining work to be performed under the administrative consent order is less then the current amount of the financial assurances, the Department must approve the appropriate reduction. The Commenter adds that financial assurance is a costly and burdensome requirement. The regulated community needs assurances that the Department will reduce the financial assurance in a timely manner.

Stipulated Penalties

COMMENT 594: Wheaton Industries, Inc. and numerous commenters noted that Paragraphs 7 and 8 under the Stipulated Penalties section of the Appendix C administrative consent order are duplicative and therefore one of the paragraphs should be deleted.

RESPONSE: The Department believes that the concepts are substantially the same and will retain only one.

COMMENT 595: Cohen, Shapiro, Polisher, Shiekman and Cohen noted that an administrative order is not a negotiated or agreed to document. It should contain no stipulated penalty provisions. There is no stipulation by the parties to an agreed upon penalty amount or procedure.

RESPONSE: The Department agrees with the commenter and when the Department issues a unilateral administrative order, it will not contain stipulated penalties.

COMMENT 596: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company raised several issues in regard to stipulated penalties. There is no statutory authorization for stipulated penalties. Without such authorization, it is inappropriate to require a party to "consent" to them. The Department provides in the administrative consent order that a submittal of "insufficient quality" may constitute non-compliance for purposes of stipulated penalties. Such a provision is subjective and unquantifiable, and, as such, unduly vague. A person making a submission would only in a very rare case know that the submission was of insufficient quality and therefore that it was beginning to accrue stipulated penalties. Accordingly, the commenters urge deletion of this section. At a minimum, the Department should provide that a good faith submittal of insufficent quality does not begin to accrue stipulated penalties until notice and an opportunity to cure has been provided.

There is no provision in the consent order for resolving disputes over stipulated penalties. The Department should provide a dispute resolution mechanism, which would provide at a minimum a general opportunity to meet with senior officials if necessary and resolve, if possible, any claim for stipulated penalties.

Under the currently proposed system of stipulated penalties, if a signatory potentially responsible party disagrees with a requirement unilaterally imposed by the Department it has two options: 1) capitulate to the Department's demand or 2) refuse to submit and be subject to daily stipulated penalties as high as $25,000 per day. The stipulated penalty ceiling is unreasonably excessive. According to Appendix C, Subsection X, Paragraph 2 of the administrative consent order, there is no requirement that the signatory potentially responsible party be notified of its failure to comply before penalties accrue. Therefore, a signatory potentially responsible party may be subject to hundreds of thousands of dollars in penalties without fault or knowledge. Under the terms of the administrative consent order, the signatory potentially responsible party cannot challenge the reasonableness of these penalties until the Department moves to enforce their payment. See Appendix C, Subsection XI, Paragraph 3. However, there is no provision in the administrative consent order requiring prompt enforcement action by the Department. In the meantime the stipulated penalties accumulate daily. This provision clearly violates due process because, at a minimum, a citizen is entitled to notice before he or she can be deprived of property.

RESPONSE: N.J.S.A. 13:1D-9, which provides broad-implied Departmental powers (See *Matter of Kimber Petroleum Corp.*, 110 *N.J.* 69, 74-75) establishes the authority for the Department to enter into contracts for performing any function under the act (N.J.S.A. 13:1D-9q.), which includes enforcing the State environmental laws and regulations (N.J.S.A. 13:1D-9n.), by requiring adherence to Department prescribed schedules to correct violations (N.J.S.A. 13:1D-9u). Essential to any contract with a responsible party for the performance of remediation of contaminated sites is the liquidated damage clause. Stipulated penalties serves a similar purpose to provide an effective monetary incentive for strict compliance with the administrative consent order. The Department believes that there is more timely compliance with administrative consent orders which include stipulated penalties than with those that do not.

The United States Environmental Protection Agency's "Model Administrative Order on Consent for CERCLA" (OSWER Directive Number 9835.3-1A, dated January 30, 1990), provides for the payment of stipulated penalties, as does its "Interim Model CERCLA, RD/RA Consent Decree," published on July 8, 1991 in the Federal Register (56 FR 30996, 31008-31009). Furthermore, since the Department under its statutory authority has the authority to assess and collect penalties, the Department and the signatories to administrative consent orders can agree for the signatory to pay stipulated penalties for violations of agreements.

The Department has not defined "insufficient quality" as it intends to rely on the plain meaning of the term.

The Department has discussed the issue of dispute resolution with the Site Remediation Advisory Group. This group was established by the Department and a group of individuals representing all stakeholders in the remediation of contaminated sites in New Jersey for the purposes of communicating, discussing and developing policies and practices to improve the quality, quantity and timeliness of site remediation in New Jersey. As a result, the Department has developed language to describe within an administrative consent order how the parties can proceed to resolve any dispute which may arise. The Department has amended Appendix C, Subsection XV, to include this language. The process is outlined below.

The signatory may request a meeting with the Department to determine the basis for the penalty and to explain why, in the specific case at hand, it believes the penalty is excessive. If the signatory still disagrees, the signatory may have an opportunity to present a defense to a suit brought by the Department to collect stipulated penalties.

The commenter believes that the stipulated penalty ceiling is unreasonably excessive. The Department believes the amounts set forth in the stipulated penalty schedules encourage timely compliance and discourage noncompliance. The specified penalty amounts are well below the maximum penalties the Legislature has provided for violations. Furthermore, the Department agrees that the signatory would not be liable for penalties if the signatory is successful in its defense that the Department was arbitrary, capricious or unreasonable. See Paragraph 3 in the Reservation of Rights Section of the administrative consent order.

The commenter is correct that stipulated penalties accrue on the first calendar day after the performance is due or noncompliance occurs and not at the time the Department gives notice of the violation or non-compliance to the signatory or issues a written demand for stipulated penalties. The Department does not understand what the commenter means by the statement that the signatory may be subject to penalties "without fault," since it is the signatory's responsibility to comply with

the administrative consent order and "fault" is not relevant to whether a signatory has violated the administrative consent order.

Additionally, the Department disagrees with the commenter that stipulated penalties will accrue without the signatory's knowledge. For example, the signatory will be aware of the schedules to be met since it is their schedule, as approved by the Department, that the signatory is to meet. Noncompliance includes untimely performance as well as submissions of unacceptable quality. If a deliverable is of such poor quality so as to not even qualify as submission, then the Department may seek stipulated penalties as if the signatory had not made any submission. However, when the violation asserted relates to the quality of the deliverable, stipulated penalties cease to accrue after a specified number of days unless the Department notifies the violator that stipulated penalties continue to accrue.

The Department disagrees with the commenter's statement that the signatory is being deprived of property without notice and therefore the provision violates due process. The signatory decides whether or not to agree to the terms of the administrative consent order prior to executing the agreement. The signatory is provided due process protection since it may raise its defenses when the Department initiates an enforcement action to assess stipulated penalties for violations of the administrative consent order. The Department believes that this regulatory scheme meets all due process requirements. See, *State v. Mobil Oil,* 246 *N.J. Super.* 331, 338 (App. Div. 1991).

COMMENT 597: Chemical Waste Management of New Jersey stated that the stipulated penalties that may be assessed by the Department pursuant to the proposed rules are excessive and should be reduced. Pursuant to the proposed rules, stipulated penalties ranging from $1,000 to $25,000 may be assessed by the Department for major violations as defined in the administrative consent order. Penalties ranging from $200 to $10,000 may be assessed for minor violations. These stipulated penalties that may be assessed are overly punitive, especially in the context of a voluntary site remediation. Rather than creating an incentive to comply with the terms of a responsible party administrative consent order, as contemplated by the proposed rules (see 24 N.J.R. 1285), such excessive penalty amounts will create a disincentive for parties to participate in the remediation process. As stated in the proposed rules, the Department has a legitimate concern in ensuring that parties take seriously their obligations to cleanup a site. *Id.* These concerns on the part of the Department, however, must be balanced by countervailing concerns by responsible parties who commit to conduct site remediation—that penalty provisions are rationally related to the alleged administrative consent order non-compliance.

RESPONSE: The main purpose of stipulated penalties is to create an incentive to comply and to reinforce the expectation that the responsible party complete the work within the established schedules, and do the work according to the terms and conditions of the administrative consent order. The Department believes that stipulated penalties should be set at a level sufficient to provide an economic incentive to comply. Stipulated penalties must, therefore, be set at a level which will effectively "strip violators not only of profits made in connection with their [noncompliance], but also in a sufficient amount to deter others from similar [noncompliance]. The penalty that may be imposed will be large enough so as not to become the mere equivalent of permit fee or the mere cost of doing business [in this State]." *State of New Jersey, Department of Environmental Protection and the Pinelands Commission v. John Lewis,* 215 *N.J. Super.* 564, 576 (App. Div. 1987).

Although the signatory party voluntarily signs the administrative consent order, these cases are a priority to the Department and would be remediated with public funds absent the administrative consent order. Therefore, stipulated penalties are appropriate to encourage maintenance of the schedule for site remediation.

COMMENT 598: Kaye, Scholer, Fierman, Hays and Handler commented that as the Court *In Re Kimber Petroleum Corporation,* 539 *A.2d.* 1181, (1988), stated, "... If a challenging party has reasonable grounds for contesting the validity or applicability of an administrative order, it must be able to do so without penalty." *Id.* at 1184. The New Jersey Courts have always cautioned that the need for quick enforcement of environmental cleanup orders must still acknowledge some rationale respect for property rights. The approach taken by Department of Environmental Protection and Energy in the proposed administrative consent order contradicts the spirit of the Court's pronouncement, as Department of Environmental Protection and Energy may stand back and let stipulated penalties accrue to a substantial level without the ability of the respondent to seek judicial review. Such a construct is unfair and unduly coercive. We believe that a more reasonable approach is either to allow a respondent to seek judicial review in a timely fashion without a stay of the requirements of the administrative consent order, or to require the Department to stay the imposition of stipulated penalties once written notice is received from the respondent notifying the Agency that a material disagreement regarding a requirement, action, or deadline exists.

RESPONSE: The Department believes that the Appendix C administrative consent order sets up a mechanism that is in accordance with *Kimber* since pursuant to Paragraph 3 of the Reservation of Rights section of the administrative consent order when the Department initiates its judicial action to collect unpaid stipulated penalties, at that time, the signatory may raise its defenses. Paragraph 3 of the Reservation of Rights section of the Appendix C administrative consent order provides that if the signatory is successful in its defense that it failed to comply with a decision of the Department on the basis that the Department's decision was arbitrary, capricious or unreasonable, the signatory shall not be liable for penalties for failure to comply with that particular requirement of the administrative order.

The Department disagrees with the commenter's suggestion of allowing some type of intermediate judicial review prior to the remediation of a site. The Appellate Division restated most significantly that:

> intermediate procedural entanglements in judicial proceedings should be avoided and were inconsistent with the philosophy expressed by the Spill Compensation and Control Act and *Kimber,* i.e., that remediation and cleanup come first and that litigation must abide these priorities. *State v. Mobil Oil,* 246 *N.J. Super.* 331, 336 (App. Div. 1991) (emphasis added).

COMMENT 599: The Hackensack Water Company stated that the Stipulated Penalty Section provides for penalties to the Department upon failure to comply with any deadline, schedule or requirement of the administrative consent order. These penalties are accrued per violation, per day. The regulations provide no checks on what the remediator might consider arbitrary imposition of stipulated penalties. The comments state that any party who believes it is not liable for penalties assessed against it by the Department may attempt to settle the matter with the Department of Environmental Protection and Energy or may choose not to pay, in which case the Department might be forced to bring an enforcement action where the party could raise all of its defenses. It might be better if there was at least some measure of control against arbitrary agency action in the rule itself or in the administrative consent order.

RESPONSE: Paragraph 3 of the Reservation of Rights section of the Appendix C administrative consent order provides such language. It specifically allows the signatory to raise as defense to an action to collect unpaid penalties that the Department's actions were arbitrary.

COMMENT 600: The Commerce and Industry Association of New Jersey commented the Department supports its reasons for stipulated penalties by stating that they are necessary to ensure that high priority site remediation remains on schedule. This, of course, assumes that a potentially responsible party will be willing to enter into an administrative consent order with stipulated penalties in the first place. The potentially responsible party is even less likely to enter into the model administrative consent order since the potentially responsible party cannot challenge the reasonableness of the penalty until the Department moves to enforce its payment. The result in that penalities will accrue daily until the Department acts. There is no time limit imposed upon the Department to bring an enforcement action.

RESPONSE: The Department believes that responsible parties will enter into administrative consent orders with stipulated penalties. Since the mid-1980's, the Department has executed over 1,600 such administrative consent orders with responsible parties to remediate contaminated sites. If the alleged violator is concerned with the accrual of stipulated penalty amounts, it could control those amounts by coming into compliance and then raise its defenses when the Department initiates its enforcement action to collect the outstanding amounts or attempting to negotiate a settlement with the Department.

COMMENT 601: Chevron U.S.A. Inc. recommended the administrative consent order state the Department provide notice within 10 days after the performance is due or the noncompliance occurs, and without such notice, accrual of all stipulated penalties shall be stayed until the signatory receives said notice from the Department. The commenter is concerned that the Department may not notify the

signatory of a deficiency within a reasonable time frame. Also, the commenter recommends that stipulated penalties only accrue for 60 calendar days.

RESPONSE: The signatory should know if it has failed to comply with the schedule it has agreed to meet. The signatory will know by the Department's comment letter to a submittal whether such a submittal is in compliance with the terms and conditions of the administrative consent order. The Department believes stipulated penalties should continue to accrue until the non-compliance is corrected, if not then there is no incentive for the signatory to come into compliance and remediate the contaminated site.

COMMENT 602: Wheaton Industries, Inc. stated it is inappropriate in a consent order to give the Department authority to determine conclusively and unilaterally the occurrence of a violation of the administrative consent order. For the New Jersey Deparment of Environmental Protection and Energy to obtain relief, applicable law requires the New Jersey Department of Environmental Protection and Energy to demostrate the presence of violations of environmental laws or regulations based on objective requirements rather than upon the Department's unilateral inherently subjective determinations.

RESPONSE: As discussed in the Summary to these rules, the Legislature has designated the Department to determine whether remedial activities meet statutory requirements. A reasonable condition of the Department allowing another person to perform the remediation at a priority site is that the oversight document include certain provisions which serve as an incentive for compliance. The Department believes that this appendix clearly sets forth the requirements and obligations of the person signing the administrative consent order. That person certainly has the option of not executing the order if it so chooses. When an administrative consent order is executed, and the Department believes that a violation has occurred, the signatory has the opportunity to resolve the dispute with the Department or may reserve its right to raise its defense in an enforcement action the Department initiates as a result of the violation.

COMMENT 603: Colonial Pipeline Company suggested that the regulations be amended to provide a provision whereby the Department may waive or modify the stipulated penalties provision if a determination can be supported that they are inappropriate.

COMMENT 604: Cohen, Shapiro, Polisher, Shiekman and Cohen suggested that instead of having fixed stipulated penalties, any order issued or negotiated by the Department should provide that penalties "up to" the amount shown in the order may be imposed. This will give the Department the flexibility to ensure that on an ad hoc basis the penalty is consistent with the excursion.

COMMENT 605: Wheaton Industries, Inc. stated that the stipulated penalty amounts, if they are to be included at all, should be noted as ranges or as being adjustable based on the facts and equities of an individual case.

RESPONSE TO COMMENTS 603 TO 605: Subparagraphs 3(b) and (c) of the Appendix C administrative consent order do provide the Department discretion in determining the amount of stipulated penalties. The subparagraphs provide the Department with the discretion to make a determination that the amounts to be paid can be less than the maximum amounts listed therein.

COMMENT 606: Hackensack Water Company suggested that the stipulated penalty provisions should specifically reference the Force Majeure provision such that there is a statement that penalties will not accrue when non-compliance is due to circumstances beyond the party's control.

COMMENT 607: The Commerce and Industry Association of New Jersey suggests that the administrative consent order stipulated penalties section should specifically exempt from its scope those items included in the Force Majeure section of the model administrative consent order.

RESPONSE TO COMMENTS 606 AND 607: A delay in compliance determined by the Department to be caused by a Force Majeure event is not a violation of the administrative consent order and would not trigger stipulated penalties. As a result, the proposed revision is not necessary.

COMMENT 608: Chevron U.S.A. Inc. recommended that a deficiency in quality of information submitted not be considered a *per se* violation of this provision unless it is determined that said submittal was not made in good faith. Concern here is with a submission of information which the signatory believes is in compliance with administrative consent order requirements but which through innocent inadvertence or honest mistake technically is not, that is, a good faith defense. Alternatively, the commenter recommends that the signatory be afforded one mistake before the application of this provision would go into effect.

RESPONSE: It would be very difficult for the Department to determine whether or not a submittal was made in good faith. The Department can only consider substantive information submitted to determine compliance with the administrative consent order. The Department cannot accept the commenter's recommendation to allow one mistake before the imposition of stipulated penalties because such a rule could significantly delay the remediation of contaminated sites and therefore would be contrary to the legislative intent to expedite cleanups. The Department believes such mistakes should rarely occur because of the constant interaction and communication between the signatory's technical contact and the Department's case management team.

COMMENT 609: Cohen, Shapiro, Polisher, Shiekman and Cohen stated the administrative consent order makes it clear that each signatory to the order is jointly and severally liable for stipulated penalties. It logically follows that penalties should be calculated according to the number of breaches of the order rather than according to the number of signatories to the order. The language of the administrative consent order should provide that: "A separate penalty for a single violation of this administrative consent order shall not be imposed separately on each signatory."

RESPONSE: The Department believes that the commenter's concern is adequately addressed in the last sentence of Paragraph 1 of the stipulated penalty section of Appendix C.

COMMENT 610: Chemical Waste Management of New Jersey stated the proposed stipulated penalties provision is also unreasonable in light of the limited availability provided to a responsible party under the proposed rules to challenge Department action or decision-making. Little recourse is provided a party to seek an expeditious resolution of substantive issues that may arise between the Department and the party at key points throughout the cleanup process. If a party has a legitimate substantive dispute with a Department decision, the only recourse currently provided a party is to refuse to comply with a Department's decision-making and risk a protracted enforcement action during which significant stipulated and civil penalties may accrue. Without a mechanism in place to seek an expeditious resolution of disputes, the stipulated penalties provision as proposed is unreasonable. Moreover, by forcing responsible parties to risk substantial and excessive stipulated and civil penalties in order to pursue legitimate complaints regarding Department decision-making, the proposed responsible party administrative consent order denies parties equal protection and due process of the law. See, for example, *Ex parte Young,* 209 *U.S.* 123 (1908).

COMMENT 611: The Commerce and Industry Association of New Jersey stated that the administrative consent order is unclear as to when the Department actually engages in an "enforcement action." Stipulated penalties are due 30 days after a written demand by the Department. The regulations do not clarify whether this written demand is an enforcement action which is subject to challenge. Therefore, stipulated penalties could presumably accrue in addition to stipulated penalties for a failure to pay on time. These penalties would not be challengeable until the Department actually took an enforcement action.

COMMENT 612: Allied-Signal Inc., I.E. du Pont de Nemours and Co., and The General Electric Company stated that stipulated penalties are due and payable 30 days after written demand by the Department. It is unclear if this written demand constitutes enforcement action subject to challenge. It seems logical that such a demand should constitute an enforcement action because if it does not, a signatory responsible party may be subject, not only to the original stipulated penalties (accumulating each day), but also to additional stipulated penalties for failure to pay the penalty on time (also accumulating each day). If the Department's demand is not subject to review, these penalties will continue to accumulate until the Department brings an "enforcement action" allowing the signatory potentially responsible party to challenge the Department's assessment.

COMMENT 613: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company suggested instead of what it believes to be an inflexible penalty scheme, the Department should develop a fair procedure for the resolution of disputes arising under its proposed administrative consent order. This procedure should include the institution of penalties only upon notice and the opportunity for an administrative hearing or alternative dispute resolution within 30 days. The Department, by including a contemporaneous hearing or alternative dispute resolution provision, will not hinder its ability to impose justified

penalties. Rather, it will ensure potentially responsible parties an opportunity to be heard, thereby encouraging participation in the remediation process.

RESPONSE TO COMMENTS 610 TO 613: An enforcement action occurs only when the Department initiates an administrative action subject to review through the Office of Administrative Law, such as issuing a notice of civil administrative penalty assessment, or a judicial action, such as filing an action in Superior Court. It was not the Department's intent to consider a demand to pay stipulated penalties an enforcement action. Such a demand is made by the Department to enable a signatory to comply with the terms and conditions of the administrative consent order. That is, the agreement on the part of the signatory to pay stipulated penalties as determined by the Department. The Department has the option of initiating an action to enforce the administrative consent order if the signatory does not comply with this part of the agreement. Therefore, for clarification, the Department will delete the word "additional" from Paragraph 7 in the Stipulated Penalties section of the Appendix C administrative consent order.

As set forth in Paragraph 3 of the Reservation of Rights section, a signatory may only challenge the Department's demand for stipulated penalties in an enforcement action brought by the Department to collect such penalties. However, the Department does not expect disputes to rise to such an adversarial level. The Department encourages the signatory to meet with the Department prior to the Department making certain key decisions. Through this mechanism, the Department intends to consistently encourage the regular exchange of views and opinions with the party to avert the escalation of issues into adversarial disputes. In the event that such a dispute occurs, the signatory may also attempt to resolve the matter through the dispute resolution made available by the Department. Although stipulated penalties could continue to accrue and the Department can demand stipulated penalties for the failure to pay them, the signatory has many avenues available to it prior to such escalation which can prevent stipulated penalties from accruing in the first place.

The Department has discussed the issue of dispute resolution with the Site Remediation Advisory Group. As a result, the Department has developed language to describe within an administrative consent order how the parties can proceed to resolve any dispute which may arise. The Department has amended Appendix C to include this language.

COMMENT 614: Cohen, Shapiro, Polisher, Shiekman and Cohen suggested that stipulated penalties that would accrue for certain minor tasks could be paid into an interest bearing escrow account until the next completion date of a major deliverable. The Department would receive payment from the account by an escrow agent if the signatory failed to complete the minor task by the next completion date for a major deliverable.

The commenter also suggested modifying the stipulated penalty amounts to $50.00 per calendar day for the first one to 30 days and $100.00 per calendar day for violations which continue beyond the first 30 days.

RESPONSE: The Department disagrees with this suggestion because the commenter's suggested approach to stipulated penalties decreases the signatory's monetary incentive to comply with the administrative consent order. As previously discussed in this section, the Department may demand amounts of penalties less than the maximum articulated in the oversight document. This appears to be a simpler approach which would also be easier to implement than the commenter's approach.

COMMENT 615: Wheaton Industries, Inc. stated that since stipulated penalties serve as an up-front agreement on appropriate penalty amounts for administrative consent order violations, the Department's reservation of rights to seek civil or civil administrative penalties beyond stipulated penalties for administrative consent order violations conflicts directly with the basis for including stipulated penalties in a settlement document. Therefore, Appendix C administrative consent orders will be much more limited in acceptability and usefulness if parties are subject to "double jeopardy" for administrative consent order violations.

RESPONSE: The Department does not intend to pursue parties for both stipulated penalties and civil penalties for the same infraction. The Department will generally choose to pursue stipulated penalties or civil penalties.

Reservation of Rights

COMMENT 616: Chemical Waste Management of New Jersey stated the reservation of rights provision set forth in the responsible party administrative consent order (Section XI), which, among other things, reserved the Department's right to seek civil or civil administrative penalties against a person for violation of the administrative consent order, should expressly provide that any civil or civil administrative penalties assessed pursuant to this provision must be offset by stipulated penalties assessed and paid by responsible parties pursuant to the administrative consent order. The responsible party administrative consent order recognizes that payments of stipulated penalties by responsible parties shall be regarded as payments of civil or civil administrative penalties (Section X.6). Accordingly, stipulated penalties assessed and actually paid should be deducted from any statutory penalties imposed for the same event.

RESPONSE: Consistent with the previous response, the Department will generally pursue only one of the following, stipulated penalties, civil, or civil administrative penalties for any given violation of the administrative consent order.

COMMENT 617: Cohen, Shapiro, Polisher, Shiekman and Cohen requested replacing the first paragraph in the Reservation of Rights of the Appendix C administrative consent order, in which the Department reserves the right to unilaterally terminate the administrative consent order in the event the signatory violates or fails to meet its obligations thereunder, with the following:

The Department reserves the right to unilaterally terminate this administrative consent order in the event [person] materially violates the terms of this administrative consent order; provided, however, that before the Department terminates this administrative consent order pursuant to this paragraph, the Department shall notify [person] in writing of the obligations which [person] has not performed and [person] shall have a reasonable period of time, not to exceed forty-five (45) calendar days, unless a greater period of time is otherwise approved in writing by the Department, to perform such obligations.

RESPONSE: The Department agrees with the Commenter's approach and has amended the language accordingly. The Department did not include, however, the commenter's suggestion that the Department limit when it could unilaterally terminate an administratrive consent order to "material" violations because it is inconsistent with other enforcement provisions in the administrative consent order (such as stipulated penalties) and the Department's use of financial assurance. In addition, such a condition may create an unnecessary burden for the Department which could divert its attention away from the Department's statutory mandate to protect human health and the environment. The Department incorporated a shorter timeframe, 30 calendar days rather than 45 calendar days, to emphasize the importance of timely remediation at priority sites. The Department has included the option, however, to extend this time period if it determines it is appropriate in a particular circumstance.

COMMENT 618: Colonial Pipeline Company suggested that the regulations provide that the Department immediately notify the person in the event the Department unilaterally terminates the Order. In addition, it is suggested that the regulations specify that [Person's] duties and obligations pursuant to the Order shall cease upon Department's termination of the Order.

RESPONSE: As noted in the Department's previous response, the paragraph will provide written notice to the signatory prior to terminating the administrative consent order.

When the Department terminates an administrative consent order, certain obligations may remain outstanding which the Department refuses to waive such as outstanding payment for penalties, damages or reimbursement of costs.

COMMENT 619: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company stated the Department purports to reserve the right to seek penalties even with respect to actions which a party has paid stipulated penalties. A stipulated penalty, by definition, is an agreement as to the appropriate remedy for the harm occasioned by the violation, and ought not to provide a basis for seeking further penalties. At a minimum, the Department should have only the option of waiving stipulated penalties and seeking other civil or civil administrative penalties in lieu of stipulated penalties. Paragraph 3 of the Reservation Rights section of Appenix C administrative consent order purports to restrict a party's right to contest penalties and the collection of stipulated penalties by limiting the appeal to the administrative record judged by the standard of arbitrary, capricious and unreasonable. There is no procedure for establishing a proper administrative record with respect to a dispute about stipulated penalties or other penalties, and therefore the Department is without any basis to restrict judicial review to the administrative record. It is for the court

in review of the Department's actions to decide the evidentiary record, the adequacy of the record, and the standard of review. There is no basis in the statute for restricting judicial review, and any attempt to do so in an administrative consent order is overreaching into the functioning of the judiciary. This section should, therefore, be deleted.

RESPONSE: Since the signatory to the administrative consent order agrees to pay the stipulated amounts for violations of the administrative consent order, the only issue for the administrative record when the Department initiates an action to collect unpaid stipulated penalties would be whether the signatory violated the administrative consent order. The signatory may avail itself to the Department's internal dispute resolution procedure and supplement the administrative record during that process. The Department is confident that most disputes would be resolved prior to the accrual of stipulated penalties.

COMMENT 620: Colonial Pipeline Company believes it is unreasonable to include in the Order that the signatory waives any right to seek review of Department's decisions. At the very least, Department's decisions should be subject to an "arbitrary, capricious or unreasonable" standard of review.

COMMENT 621: Allied-Signal Inc., E.I. du Pont de Nemours and Co., The General Electric Company and the Commerce and Industry Association of New Jersey believe that Paragraph 3 of the Reservation Rights section of the Appendix C administrative consent order requires a signatory potentially responsible party to waive its right to challenge any decisions made by the Department under the administrative consent order, other than actions for injunctive relief or stipulated penalties.

Regardless of the desire of the Department to have the first and last word on all decisions under the administrative consent order, the citizens of New Jersey, which includes potentially responsible parties, are entitled to procedures that guarantee fundamental fairness. The New Jersey Appellate Division, in *State Dep't of Envtl. Protection v. Mobil Oil,* 246 *N.J. Super.* 331 (App. Div. 1991), states that the Department does not have "the absolute power to impose an administrative consent order with any terms it sees fit upon an alleged polluter, reserving *no* rights to the citizen to raise the administrative consent order's fundamental unfairness in a later enforcement proceeding." *Mobil Oil,* 246 *N.J. Super.* at 336 (emphasis in original). The Court concludes: "The need for quick enforcement must still acknowledge some rational respect for property rights." *Id.* at 336-37. The *Mobil Oil* court decided that "the alleged polluter ultimately will have ample due process protection, though of necessity delayed, but not diluted or denied altogether." The Department denies a signatory potentially responsible party its due process rights to a hearing by requiring parties signing an administrative consent order to agree not to seek review of any decision made by the Department pursuant to the administrative consent order (other than actions for injunctive relief or stipulated penalties). Pursuant to *Mobil Oil,* the Department does not possess the "absolute power" to require a party to waive its due process rights. Therefore, this section of Paragraph 3 in the Reservation of Rights section in the Appendix C administrative consent order should be deleted.

COMMENT 622: The Commerce and Industry Association of New Jersey commented that this type of provision flies in the face of the constitutional concept of fundamental fairness which requires that parties be given an opportunity to challenge the fairness of an order of the Department. It is impossible to foresee all the scenarios which may arise out of an agreement at the time that it is signed. Not only does the administrative consent order require the signatory potentially responsible party must also waive its rights to a hearing regarding the circumstances surrounding the execution of the administrative consent order. Section XIII, Paragraph 15 of the administrative consent order states that: [Person] waives its rights, to Administrative Hearing concerning the entry of this [order]. Additionally, Section XIII, Paragraph 24 mandates that the signatory waive its rights to contest the authority or jurisdiction of the Department to issue the order. Again, the commenter believes that the provisions violate the signatory's right to fundamental fairness and should therefore be removed from the model administrative consent order.

RESPONSE TO COMMENTS 620 TO 622: The excerpt of Paragraph 3 of the Appendix C administrative consent order noted by the commenter is to be read in context with the entire judicial action for injunctive relief or penalties when the signatory has not implemented a decision made by the Department under the administrative consent order. The signatory does not waive its right to challenge decisions made by the Department under the administrative consent order as the commenters suggest. Rather, a signatory may challenge the Department's decision, but only when the Department takes an enforcement action when the signatory fails to implement the Department's decision. The procedure set forth in Paragraph 3 is consistent with the *Mobil* decision since due process is afforded when the enforcement action is brought by the Department (*Mobil,* at 338) and remediation and cleanup come first and that litigation must abide these priorities. *Ibid* at 336.

COMMENT 623: Chevron U.S.A. Inc. expressed concern that by waiving the right to seek review or initiate any legal action to challenge any decision made by the Department, the signatory is denied due process and effectively gives the Department a blank check for remediation.

COMMENT 624: Wheaton Industries, Inc. stated the Department's reservations of the right to seek further relief to protect human health or the environment should be deleted or, if retained at all, must be limited to exceptional circumstances, such as the discovery of unknown conditions at a site after a consent order is issued. Otherwise, parties will be unnecessarily disinclined to enter an administrative consent order because it will insufficiently resolve the extent of their respective liabilities.

RESPONSE TO COMMENTS 623 AND 624: The Department disagrees with the commenter's suggestion to limit the Department's ability to require further protection of human health and the environment to "exceptional circumstances." Not only is that term vague and uncertain, it is inconsistent with the Department's legislative mandate to protect human health and the environment. Whether or not conditions are known to exist at the site before or after an administrative consent order is executed is not relevant to whether or not additional remediation is necessary at the site.

Force Majeure

COMMENT 625: Chevron U.S.A. Inc. suggested changing the word "necessary" to "reasonable" in the last sentence in Paragraph 1 of the Force Majeure section so it would read: "[Person] shall take all reasonable action to prevent or minimize any such delay." The commenter states a degree of reasonableness needs to be incorporated.

RESPONSE: The proposed language would change the actions a signatory should take to apply Force Majeure. The proposed language has the potential to increase project delays. The Department believes all necessary actions must be taken that would limit delays in remediating contaminated site.

COMMENT 626: Wheaton Industries, Inc. believes someone independent from the Department should make the determination based on objective criteria, rather than the Department's unilateral judgment, on whether the signatory has met the procedure for the application of Force Majeure to obtain an extension of time to perform.

RESPONSE: The Department disagrees with this comment. It is the Department's responsibility to remediate contaminated sites to protect human health and the environment. If a third party decides to perform the remediation in lieu of the Department, the Department is still required to ensure that the same level of remediation is performed that will ensure that level of protection. The Department must, therefore, make these determinations. Any signatory that disagrees with the Department's determination may elect to defend itself in an enforcement action the Department initiates.

COMMENT 627: Cohen, Shapiro, Polisher, Shiekman and Cohen stated that although the Department purports to want to expedite remedial activity, it refuses to set time limits for itself in responding to submissions by responsible parties. If the Department is unwilling to guarantee prompt responses to permit applications, it should acknowledge that its delay in responding to permit applications as a force majeure event. "Any delay caused by failure of the permitting agency to issue any required permits hereunder shall constitute a force majeure event."

RESPONSE: The commenter's suggested language is unacceptable since a permitting agency may be delayed in issuing a permit because the signatory failed to submit a adequate and complete permit application. Furthermore, the signatory should submit its compliance schedules contingent upon when a necessary permit is received from the permitting agency. In this way, the potential problem which the commenter identifies can be eliminated.

COMMENT 628: Chevron U.S.A. Inc. recommends that a provision be added that the Department provide reasonable assistance to the signatory to obtain site access. The process of gaining access from a reluctant party can be greatly assisted if the Department takes part in

the process. Also, the Department should not create provision in the administrative consent order that encourages excessive or unnecessary court/legal proceedings.

COMMENT 629: Hackensack Water Company commented that the Force Majeure provision pertains to justifiable party non-compliance due to circumstances beyond its control. This section states that failure to obtain access required to implement an administrative consent order will not constitute Force Majeure unless access has been denied by a court of competent jurisdiction. The Department must be notified within seven calendar days of any delay. In certain situations, it would be unreasonable to expect that a court would rule on access within seven days of the time the remediator learns it will not be given access. Penalties will accrue while court intervention is sought and received. Therefore, this provision should be qualified.

COMMENT 630: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company state at Paragraph 4(a), of the Force Majeure section of the Appendix C administrative consent order, the Department indicates that "force majeure" shall not include, inter alia, "delay in an interim requirement with respect to the attainment of subsequent requirements . . ." 24 N.J.R. 1306. Thus, an interim request affects a subsequent request. Moreover, in Paragraph 4(d), the Department provides that force majeure shall not include "failure to obtain an access required to implement this [Order], unless denied by a court of competent jurisdiction." *Id.* The judicial process for seeking access, as the Department is aware, is very time consuming and will, itself, delay access in many cases. If a signatory party goes to the court to obtain access and it takes a considerable length of time (that is, six months) to gain access, the entire schedule under the administrative consent order will be delayed. This inherent delay in the process, itself, should not prejudice the signatory party. Moreover, it is uncertain whether a potentially responsible party has standing to seek access in court. If only the Department has the authority to do so, this section is not viable.

RESPONSE TO COMMENTS 628 TO 630: The Department understands the commenters' concerns about obtaining access to areas not owned by the signatory. It is for this reason that the Department encourages the signatory to begin access discussions with the owners of the property as early in the process as possible. What the Department is looking for from the signatory is a concerted good faith effort to obtain that access, including pursuing judicial action if necessary. Anything short of this is unacceptable in that it may delay the remediation of a priority site. Similar to the scheduling issue in permits discussed above, the signatory is encouraged to establish its schedule not with absolute dates but conditioned upon obtaining the necessary access. The Department endorses the proposed statutory amendments in Senate Bill 1070 concerning the ability for a private party to obtain access for remediation.

General Provisions—Paragraph 2

COMMENT 631: Chevron U.S.A. Inc. suggests adding the word "reasonable" after the word "upon" on line 4 of the second Paragraph of the General Provisions. A degree of reasonableness needs to be incorporated.

RESPONSE: The Department disagrees with the need to make this change because all of the Department's actions are evaluated based upon a reasonable standard.

General Provisions—Paragraph 3

COMMENT 632: Chevron U.S.A. Inc. notes the term "site" appears to have been used interchangeably with "contaminated site," consequently this sentence should be rewritten to read ". . . access to the contaminated site . . ." in Paragraph 3 of the General Provisions section of the Appendix C administrative consent order, which provides the signatory allow Department access to the site.

RESPONSE: The Department has amended the rule to make it clear that the signatory must provide the Department access to all parts of the contaminated site to the extent that the signatory has access to those properties.

COMMENT 633: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company believe it seems unnecessary and burdensome for the Department to have access to a site "at all times." 24 N.J.R. 1306. The commentors suggest that this section be amended to provide for reasonable and appropriate access during business hours.

RESPONSE: Pursuant to N.J.A.C. 13:1D-9, the Department has the authority to enter any establishment to enforce environmental laws, rules and regulations. Emergencies at sites necessitating the Department's immediate access to a site may not necessarily occur during business hours. This paragraph reiterates the authority the Department has. The language proposed would limit the statutory authority of the Department.

General Provisions—Paragraph 8

COMMENT 634: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company stated that the first sentence in Paragraph 8 in the General Provisions section does not appear to be complete.

RESPONSE: This apparently was a typographical error, the word "notwithstanding" should have read "nothing."

General Provisions—Paragraph 10

COMMENT 635: Chevron U.S.A. Inc. requested that the provision concerning preservation of potential evidentiary documentation found at the site be deleted. Commenter stated as proposed, Paragraph 10 requires that the signatory determine which documentation is or is likely to become potential evidence. This puts an unreasonable burden on the regulated community. Additionally, some of the material may be subject to on-site storage limitations (that is, 90 storage for hazardous waste) or other regulatory storage prohibitions. This creates additional and unreasonable expenses. If the provision is not deleted the Department should specify a storage time period to a reasonable maximum of five years. After five years the signatory should be able to automatically dispose of any and all documents and materials.

COMMENT 636: Colonial Pipeline Company suggested the timeframe for preserving all potential evidentiary documentation and suggested the following: ". . . preserve all potentially evidentiary documentation found at the Site be for three years or until written approval."

COMMENT 637: Wheaton Industries, Inc. suggested paragraph 10 be revised as follows:

> "[Person] shall preserve all potential evidentiary **written** documentation found at the Site, including without limitation, documents, labels, **tapes, photographs**, and/or other **recorded** materials that could lead to the establishment of the identity of any [Person] which generated, treated, transported, stored or disposed of contaminants at the Site, until written approval is received from the Department to do otherwise. **This obligation in any event shall expire no later than three weeks after the Department has provided its final comments to [Person] under [order], unless the Department specifies a different expiration period in writing.**"

The commenter added the Department should not require that physical evidence such as drums and other containers, which may contain hazardous waste normally required to be subject to timely treatment or disposal, to be preserved on-site for an unspecified period of time. Compliance with such a requirement could give rise to unnecessary risks to health, safety, and the environment and could result in a violation of applicable environmental regulations relating to waste storage. The obligation to preserve this documentation should have some default expiration period to avoid the need for the Department or signatory parties to expend resources to make case-by-case expiration determinations unless specifically warranted.

COMMENT 638: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company stated that the requirement in Paragraph 10 to preserve all potential evidence, including such things as bottles and boxes, is impractical, unwarranted, and could be illegal. Is the party to keep old bottles and labels lying around, even if they are mandated for hazardous waste disposal? What if the written approval from the Department takes longer than the time permitted to remove the material? Suppose the evidentiary material poses a safety risk? Instead of the obligation as written, the commenters suggested that the signatory party be required to advise the Department of the existence of any potential evidentiary documentation found at the site in the course of work that could lead to the establishment of the identity of any person, other than the signatory party, as the responsible person. The burden would be upon the Department to take necessary investigatory actions.

RESPONSE TO COMMENTS 635 TO 638: Where there are bottles, drums, boxes, etc. at the site, the signatory should coordinate its compliance with the Department, which may include having the signatory notify the Department, analyze other contents, properly dispose of the material and send the analytical results to the Department. The purpose of this provision is to ensure that evidence that may link other responsible parties to the site is maintained in the event that the signatory becomes unwilling or unable to complete the remediation. In this way the

Department is in a position to preserve the limited public funds which are available to remediate contaminated sites in New Jersey. This information will also be of benefit to the signatory party in order to pursue contribution and possibly treble damages from other parties. The standard for compliance, therefore, must be for the signatory to retain that information that it or the Department would need to establish that a third party is a responsible party. Compliance with this provision must include compliance with any other applicable statutes and regulations.

General Provisions—Paragraph 11

COMMENT 639: Wheaton Industries, Inc. suggested that Paragaph 11 should confine the Department's ability to obtain information to non-privileged information only, and the signatory should be afforded appropriate protection to trade secrets and confidential business information.

COMMENT 640: Chevron U.S.A. Inc. suggested that Paragraph 11 should be changed to require only the submittal of data generated pursuant to the administrative consent order. Commenter also wanted deleted "... contractual documents ..." Commenter added that as proposed by the Department, a person would be required to keep all records of any sampling conducted at a site. It would be a violation not to keep this data, even if the results revealed that the samples were clean. The requirement is burdensome and serves no useful purpose. The New Jersey Spill Compensation and Control Act requires that a person notify the Department of a discharge. The Department will be immediately notified if any data indicates a discharge. The Spill Compensation and Control Act provides penalties for noncompliance. There is therefore no need for a facility to be required to provide all data and information concerning contamination, "whether or not such data and information was developed pursuant to this Order." Additionally, some of the documents are likely to be confidential contractual agreements between the [Person] and a contractor. This language only serves as a disincentive to obtaining an agreement.

COMMENT 641: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company stated that Paragraph 11 in the Reservation of Rights section of Appendix C concerning requests from the Department for site data would require that a party submit to the Department all information about a site whether or not developed in connection with the Consent Order should be deleted because it is unreasonably and contrary to the rules or evidence. Commenter added that the obligation represents a significant discovery burden which normally exist only in the context of litigation under circumstances in which there are provisions for protective orders from the courts. The commenter suggests that the obligation be limited to information developed pursuant to the administrative consent order and exclude privileged information.

RESPONSE TO COMMENTS 639 TO 641: The Department agrees to allow a signatory to make a claim of privilege on any information submitted pursuant to this paragraph. However, the Department necessarily needs all data generated about the site regardless of whether it was prepared in connection with the administrative consent order so that decisions on site remediation can be made based on the most complete information. The Department does not believe that data about contamination at a site, although not generated in response to a requirement under the administrative consent order, is necessarily privileged information. The Department does not know of any situation where information concerning site contamination would be withheld from the public under a protective order as suggested by the commenter.

General Provisions—Paragraph 12

COMMENT 642: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company stated Paragraph 12 of the general provisions purports to affect the application of the bankruptcy laws of the United States. The Bankruptcy Act, as a Federal act, preempts state law, and a consent order is not a device for suggesting a different treatment for obligations under the Consent Order than the Bankruptcy Act would otherwise permit. The obligations of the Environmental Cleanup Responsibility Act may well constitute dischargeable debt and debts which may be limited in bankruptcy. The Department has no authority to preempt bankruptcy rules.

RESPONSE: New Jersey statutes concerning the remediation of contaminated sites, such as the Environmental Cleanup Responsibility Act, have already been found not to be preempted by the Bankruptcy Code. See *Matter of Borne Chemical Co., Inc.*, 54 *B.R.* 126 (Bankr. D.N.J. 1984). Obligations under the Environmental Cleanup Responsibility Act have also been found to constitute ongoing regulatory obligations that are not dischargeable in bankruptcy. See *Torwico Electronics, Inc., v. State of New Jersey, Department of Environmental Protection and Energy*, Dkt. No. 92-1828(AET), slip op. at 5-6, (D.N.J. December 9, 1992).

General Provisions—Paragraph 15

COMMENT 643: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company stated that the administrative consent order set out in Appendix C requires, in Section XIII, Paragraph 15, that the signatory potentially responsible party waive its rights to a hearing concerning the entry of the administrative consent order subsection XIII, Paragraph 24 requires the signatory party to waive its rights to contest the authority or jurisdiction of the Department to issue the administrative consent order. Both of these provisions require a potentially responsible party to waive rights it is entitled to by law. According to *Mobil Oil*, the Department does not have the power to deny altogether a citizen's due process rights. Therefore, both of these provisions should be deleted.

RESPONSE: The Department does not want parties entering into the administrative consent orders unless they are doing so voluntarily. If they enter into an Administrative Consent Order, then it would be inappropriate for them to reserve their rights concerning their voluntary entry into an agreement with the Department.

Since the Department does not reserve its right to contest whether the signatory has the authority to enter in an administrative consent order, the commenter's suggestion is unnecessary. Furthermore, the Department does not want parties entering into the administrative consent orders unless they believe the Department has that authority.

General Provisions—Paragraph 18

COMMENT 644: Colonial Pipeline Company suggested that Paragraph 18 in the General Provisions section of Appendix C be modified to provide that the consent order represents the entire agreement between the Department and as to the particular site subject to the Order.

RESPONSE: The Department agrees with the comment and has amended the rule accordingly.

General Provisions—Paragraph 19

COMMENT 645: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company questioned the purpose of the requirement of Paragraph 19 of the General Provisions section of the administrative consent order for recording of administrative consent order with the county clerk.

RESPONSE: The purpose of the requirement of recording the administrative consent order with the county clerk is to provide access to those interested in the property with notice of the administrative consent order.

General Provisions—Paragraph 21

COMMENT 646: Wheaton Industries, Inc. commented that in Paragraph 21 in the General Provisions section of the administrative consent order is only relevant to a Person which owns the site, and its use should be limited to administrative consent orders with such a Person. Forty-five days prior notice of any alienation of property should be sufficient for the Department and would be more accommodating of the timing often associated with property transfers. Subparagraph (b) is not understandable as written. If the site is subject to the Environmental Cleanup Responsibility Act, then the alienation must meet Environmental Cleanup Responsibility Act requirements. In any event the Department will obtain appropriate notice and control. If the site is not subject to the Environmental Cleanup Responsibility Act, the requirements impose conditions on alienation not specified in any statute. Accordingly, Paragraphs 21a and b should be deleted.

RESPONSE: The Department has amended paragraph 21 by deleting subparagraphs (a) and (b) and indicating that the remaining language only applies to signatories who are the owners of the contaminated site.

COMMENT 647: Rutgers Environmental Law Clinic stated Section XIII, Paragraph 22(b), of the Environmental Cleanup Responsibility Act administrative consent order, 24 N.J.R. 1301 and Section XIII, Paragraph 21(b) of the responsible party administrative consent order have typographical errors because it appears that a phrase has been inadvertently omitted.

RESPONSE: The Department has deleted paragraph 21(b) from the responsible party administrative consent order.

General Provisions—Paragraph 23

COMMENT 648: Chevron U.S.A. Inc. suggested that in Paragraph 23 in the general provisions section concerning the Preservation of Site data, changing the requirement of preserving data after termination of the Administrative Consent order from 10 to five years. Additionally, commenter requested adding the statement that "After five years the [Person] may unilaterally dispose of all materials without requiring Departmental approval." The commenter added maintaining records is burdensome. Ten years is too long a time period. Additionally, the signatory should automatically be allowed to dispose of this material after five years. There is no need to add additional regulatory steps.

COMMENT 649: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company commented that 10 years requirement for document retention in Paragraph 23 of the General Provisions section of Appendix C is onerous. The period should be shortened to a more reasonable period (three years), and the authority to discard documents ought to be automatic unless the Department acts in response to written notice within a reasonable period (not to exceed 60 days). Commenter added it believed it is inappropriate for the Department to require that a party submit to the Department all of it its information and in doing so waive any privilege of confidentiality with respect to site condition documents. There may be circumstances in which the information should be submitted with a business confidentiality claim, or withheld under a claim of privilege. This provision ought to be deleted.

COMMENT 650: Colonial Pipeline Company commented that a reasonable time period to hold evidence is several years.

RESPONSE TO COMMENTS 648 TO 650: The Department established the 10-year requirement consistent with how the United States Environmental Protection Agency has addressed this issue in its Superfund program. The Department agrees with the comment that the signatory should have the ability to assert a confidentiality claim or privilege against some of the information and data identified in this paragraph, and notes that such is provided for in the last sentence of the paragraph. However, it is not appropriate to use this mechanism to deprive the Department of data related to the site conditions, sampling and monitoring data that the Department may need to make a decision to protect human health and the environment.

General Provisions—Paragraph 24

COMMENT 651: Wheaton Industries, Inc. stated that a person entering an administrative consent order as set out in Appendix C should also reserve its rights under New Jersey's Water Pollution Control Act and Solid Waste Management Act to the extent the Department subsequently requires any actions under those statutes, since the Department cites those statutes as a basis for issuing the administrative consent order. This Paragraph should be revised to add at the end "... and all its rights pursuant to the Water Pollution Control Act and Solid Waste Management Act concerning the Department's requiring further action under those Acts through this administrative consent order."

RESPONSE: The purpose of Paragraph 24 in the administrative consent order concerns the Department's right to choose a remedial action for the cleanup of a contaminated site. The commenter's suggested language is not appropriate, nor does the Department intend to limit any of its authority pursuant to any of the enabling acts by including the proposed language.

General Provisions—Paragraph 26

COMMENT 652: Edwards & Angell stated that the proposed requirement at Paragraph 26 in the Reservation of Rights section that administrative consent orders be filed with the county clerk is unduly burdensome and cumbersome. It is not clear that the ordered party can cause the clerk to file and return such documents. County clerks may resist filing administrative consent orders. At a minimum, parties should have an option to file a simple statement which summarizes the terms of the administrative consent order and discloses the availability of a complete document from the Department's files.

RESPONSE: The provision will be revised to be applicable to when the signatory is the site owner or will acquire title to the property at some future date. The Department wants the administrative consent order easily accessible to those individuals that are interested in the site.

COMMENT 653: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company states Paragraph 26 of the General Provisions section of Appendix C would have an open-ended obligation to impose such use and access restrictions "as may be deemed necessary by the Department." Moreover, the Department purports to exercise that right not only for its own administrative necessity but purportedly on behalf of "any citizen which is or may be damaged as a result of the violations of the use and access restrictions." The imposition of such conditions running with the land is a species of taking of property, which may not be obtained without due process of law. The obligation to impose such requirements if requested by the Department is well beyond the scope of the Environmental Cleanup Responsibility Act and impairs alienation. The Department should reserve the right to require use and access restrictions as an alternative to other clean-up which would not require such access or use restrictions, leaving the option in each case to the ordered party. It may be that the Department would insist on use and access restrictions under circumstances in which the ordered party would prefer to remediate to some different level to obviate the necessity of such restrictions.

RESPONSE: The commenter's suggestion is consistent with the Department's policy regarding deed restrictions. However, if the signatory believes that a deed restriction is objectionable, it could recommend to the Department another option to accomplish the same purpose. The Department may condition the satisfactory compliance with the administrative consent order on the signatory's continued performance of an activity such as a groundwater pump and treat system or that a deed restriction be continued to be maintained.

General Provisions—Paragraph 27

COMMENT 654: Hackensack Water Company stated this provision states that the requirements of the administrative consent order shall be deemed satisfied upon receipt of written notice that all obligations, pursuant to the Order, have been satisfied. This paragraph exempts the six preceding paragraphs, one of which pertains to use restrictions, from termination of obligations. There are no qualifications. If the Department is satisfied with remediation, and if use restrictions are no longer necessary, they should be lifted. If they are stringent or cumbersome, they might unduly burden the transfer of the land in question.

RESPONSE: The Department has deleted this language from paragraph 27.

General Provisions—Paragraph 28

COMMENT 655: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company stated this provision states that the Department does not release the signatory party from "any liabilities or obligations such person may have pursuant to any other authority, nor does the Department waive any of its rights or remedies pursuant thereto." This provision should include a covenant not to sue based upon the signatory party's compliance with the administrative consent order. Otherwise, the signatory party gains little by entering into the document. The Department is not at risk because the administrative consent order requires compliance with all other laws.

RESPONSE: The legislative scheme is that responsible parties remain liable for the contamination as long as it remains in the environment. Therefore, a covenant not to sue is inappropriate.

General Provisions—Paragraph 29

COMMENT 656: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company stated this provision requires a corporate resolution to be submitted to the Department along with the executed administrative consent order. The commenters suggest that every company cannot get a corporate resolution each time an administrative consent order is being signed and, therefore, this requirement may be impossible to satisfy. Moreover, a corporate resolution should not be necessary if it is being stipulated that the parties entering into the administrative consent order have the authority to bind the corporation.

RESPONSE: The Department must be assured that the individual signing the administrative consent order has the authority to bind a responsible corporation to undertake the remediation. It is reasonable to assume that a corporation has adequate time to institute measures to obtain a corporate resolution within the 90 days afforded a respondent to negotiate an administrative consent order.

General Provisions—Paragraph 30

COMMENT 657: Wheaton Industries, Inc. stated that the Department has provided no explanation of any basis for requiring two weeks advance notice for any extension request for any applicable deadline. It is often the case that a party will neither know nor reasonably be expected to know of the need for an extension more than two weeks in advance

of the deadline. Paragraph 30 in the Reservation of Rights section should be amended to read "... provided that any extension request is submitted to the Department within a reasonable time once the need for an extension is identified."

COMMENT 658: Colonial Pipeline Company suggested that Paragraph 30 be modified such that an extension request be submitted seven days prior to an applicable deadline. Based on the particular subject matter of the deadline, the signatory may not be aware an extension is needed 14 days prior to the deadline. In addition, Colonial Pipeline Company suggests the regulations provide that in the event Department refuses an extension request, Department notify the signatory of the reasons for such refusal.

COMMENT 659: Hackensack Water Company stated that Paragraph 30 allows the Department to consider a request for an extension of time to perform any requirement under the administrative consent order if the request is submitted to the Department two weeks prior to any applicable deadline. No provision is made for emergent circumstances and Force Majeure provisions are not incorporated.

RESPONSE TO COMMENTS 657 TO 659: The basis for requiring two weeks advance notice for any extension request for any applicable deadline is so the Department's case team, who will be working on other sites and projects, can rearrange their schedules to accommodate the signatory's request. The Department will consider extension of time for emergent circumstances which occur less than 14 days prior to a deadline. The Department will consider Force Majeure events as specified in the Force Majeure section of Appendix C. As stated previously, the Department will reasonably consider any such request.

General Provisions—Paragraph 31

COMMENT 660: Wheaton Industries, Inc. objected to the language in Paragraph 31 of the general provisions section of the Appendix C that the signatory has to agree that where the signatory fails or refuses to perform its obligations under the administrative consent order, it agrees that the Department shall have the right to exercise any option or combination of options available to the Department under the administrative consent order, or any other statute.

RESPONSE: The Department believes it is necessary for a signatory to expressly agree upfront when it executes the administrative consent order to remediate a priority site, that the Department can do what is necessary under the administrative consent order or under the law to assure that when the signatory's obligations are not performed, the signatory subsequently should not be able to argue it never agreed that the Department could exercise its options available to it, and thereby delay remediation of the site.

COMMENT 661: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company objected to Paragraph 31 with respect to stipulated and statutory penalties for the reasons set forth in its specific comments addressed to these issues.

RESPONSE: The Department merely reiterates rights it expressly has; this paragraph is only a reminder to the signatory of that fact.

General Provisions—Paragraph 32

COMMENT 662: Wheaton Industries, Inc. stated that Paragraph 32 is duplicative of the earlier Paragraph 27 in this Section of Appendix C, and should be deleted.

RESPONSE: The Department appreciates the commenter bringing this mistake to the Department's attention. The Department has deleted Paragraph 32.

COMMENT 663: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company stated that pursuant to Paragraph 32 of Appendix C, the requirements of the administrative consent order are deemed satisfied "upon the receipt by [Person] of written notice from the Department that [Person] has demonstrated, to the satisfaction of the Department, that [Person] has completed the substantive and financial obligations imposed by this [Order]." 24 N.J.R. 1307. A time period should be provided in which the Department must provide this notice of completion after requested by a signatory party. If a time frame is not provided, delay could substantially affect the rights of the signatory party.

RESPONSE: The Department will endeavor to respond as quickly as possible under the circumstances but cannot commit to a specific timeframe because there are many factors which may impact the time required to respond, including the complexity of the site conditions, the quality of the submittal, and other Department priorities at the time.

Suggested Additions to Appendix C

COMMENT 664: The Commerce and Industry Association of New Jersey stated that the model administrative consent order is very clear in allowing only two options for a party who has committed itself to an administrative consent order: (a) The signatory potentially responsible party must comply with all the requirements of the Department; or (b) If a dispute arises, the potentially responsible party can choose not to comply with the Department's requirement and thereby subject itself to a penalty of up to $25,000 per day. These options are not realistic alternatives for a potentially responsible party. It makes more sense for the administrative consent order to contain options such as alternative dispute resolution or mediation in cases of dispute. By including a timetable for such alternative dispute resolution, the Department could avoid undue delay in cleanup progress during negotiations. Similarly, allowing mediators with technical expertise to participate would contribute to the appropriate resolution of the dispute. By including such a provision, the incentive to enter into the administrative consent order is greatly increased.

COMMENT 665: The New Jersey Builders Association states the continued use of administrative consent orders at "high priority sites" leaves unaddressed the lack of any mechanism to resolve technical disputes between the New Jersey Department of Environmental Protection and Energy and the responsible parties. The preamble describes the methods of dispute resolution available—meetings with the Department, capitulation to Department demands, rejection of the Department imposed remediation. (24 N.J.R. 1284, second column.) These are obviously insufficient to an equitable resolution of disagreements. Meetings with the Department are a good first step and we support the Department's provision of an opportunity to discuss the issues. This will not, however, avoid altogether disagreements as to how best to proceed.

Capitulation to the Department will serve no good environmental purpose if the selected remedy is inappropriate or will not work. The responsible parties, however, even in the face of a patently inappropriate remedy, must nevertheless proceed and contest it only once they have spent the time and money implementing it. This futility should not be continued. Rejection of the Department's remedial demands is an illusory choice when the price tag—stipulated penalties and treble damages—is considered. Few parties can afford this immediate loss, the risk associated with it, and the subsequent legal costs, regardless of how convinced they may be. It is suggested that the Department consider the use of the many Alternate Dispute Resolution techniques available today to solve such impasses. Time deadlines could be imposed that would accommodate the urgency of the situation. Trained experts could be used to help resolve the technical questions. Some method should, however, be offered to allow parties to at least take the dispute to another forum before proceeding.

COMMENT 666: Chevron U.S.A. Inc. stated that the following language should be added to all of the decision documents in the appendices.

> In the event a dispute arises with respect to the interpretation or performance of, or the relationship created by, all or any part of this agreement, the parties shall attempt in good faith to resolve the dispute. If such efforts prove unsuccessful, each party agrees to consider the use of mediation, mini-trial, arbitration or other alternative dispute resolution techniques prior to resorting to litigation or penalty assessment. If mediation, minitrial, arbitration or other alternative dispute resolution techniques are utilized by the parties, each party agrees that no decision resulting therefrom shall include penalties.

The consent orders and agreements need to have a dispute resolution process included in their text. The regulated community must be assured of due process. Site remediation is a relatively new and complex activity. Many of the regulations and requirements can be interpreted in several different ways. Litigation and penalties are counter-productive.

RESPONSE TO COMMENTS 664 TO 666: The signatory also has the option of initiating dispute resolution, which is provided in the proposed rules. This is afforded to responsible parties in two ways. The Department encourages full and open communication between the Department and responsible parties and will attempt to resolve disputes through these communications, prior to conducting a cleanup or part of a cleanup using public funds. A responsible party also has the express opportunity to meet with the Department prior to the Department

making certain key decisions. This approach has been specified by the addition of the provision to the rule describing the Department's dispute resolution process. Through this mechanism, the Department intends to consistently encourage the regular exchange of views and opinions with the party to avert the escalation of issues into adversarial disputes. It is recognized by the Department that the dispute resolution afforded responsible parties is limited by the Department's policy. However, to meet the Legislative mandate of expediting remediation, the signatory can raise any and all defenses or issues that it is entitled to raise once the Department initiates its enforcement action. A responsible party has no right to pre-enforcement review in the State of New Jersey. Due process is afforded after the enforcement action is brought by the Department. It has been determined by the courts that remediation and cleanup come first and that litigation must abide these priorities. *Mobil* at 336.

COMMENT 667: Wheaton Industries, Inc. suggests the following provisions should be added to the order.

> It is understood and agreed that this administrative consent order shall in no way be construed to affect or waive claims that [person] may have against other persons or entities, including claims for contribution and/or indemnity, whether under state or federal statute including, but not limited to, 42 U.S.C. 9613(f). If needed for procedural or substantive reasons in order to preserve [person's] rights of contribution from third parties, the Department agrees to enter this administrative consent order as a Consent Judgment or Decree in a court of appropriate jurisdiction at the request of [person] and to provide for a thirty (30) day Public Comment Period prior to the effective date of such Consent Judgment.

Wheaton Industries, Inc. also states the final standard responsible party administrative consent order also should include the following provision regarding protection which the administrative consent order offers against possible claims from third parties for remediation or costs of response to the identified conditions at the site:

> With respect to claims for contribution against [Person] for matters addressed in this [Order], the Department and [Person] agree that [Person] is entitled to the full extent of protection from such contribution claims as is allowed under applicable law.

While Paragraph 3 of Section III of proposed Appendix C promises to refrain from requiring further action upon terms to be specified, persons need greater certainty as to the nature of that promise up front to evaluate whether to enter the administrative consent order and commit the necessary resources to its implementation.

COMMENT 668: Cohen, Shapiro, Polisher, Shiekman and Cohen suggested adding the following paragraphs to the Appendix C administrative consent order.

> In any contribution action brought by or on behalf of [person] against one or more persons or entities who have been identified by the Department as responsible for remediating the site but who are not parties to this administrative consent order and the law with respect to [persons'] rights is unsettled, the Department agrees that at [persons'] request it will file an amicus brief in support of [persons'] rights under state law to bring such claims for contribution" and "[Person] shall have the broadest contribution protection available with respect to any and all suits commenced or to be commenced by any persons or entities not parties to this administrative consent order, for any costs relating to investigation, cleanup, remediation or monitoring of the site or any contamination which may emanate from the site, by any persons or entities, not parties to this administrative consent order. Any settlements relating in any way to this site entered into among the Department and other responsible persons or entities subsequent to this administrative consent order shall contain a provision that such subsequent settling responsible persons or entities waive whatever rights such persons or entities might have to contribution or recovery from [persons].
>
> The Department agrees it will take all reasonable actions to assist [person] in preserving whatever rights it may have to contribution protection pursuant to any state or federal law, including but not limited to 42 U.S.C. 9613(f)(2). Such actions include, but are not limited to, causing a notice of this administrative consent order to be published in the New Jersey Register and Department of Environmental Protection and Energy Bulletin and made available to the public and interested parties for comment for a period of thirty (30) days prior to the administrative consent order becoming effective, entering this administrative consent order as a Consent Judgment or Decree with a court of appropriate jurisdiction; and/or filing an amicus brief in support of [person's] claims for contribution protection.

COMMENT 669: Chemical Waste Management of New Jersey states contribution protection should be provided to parties who perform all or part of a site remediation. Accordingly, the responsible party administrative consent order should provide that a responsible party that has complied with its obligation under an administrative consent order shall not be liable for claims brought by any person or entity for contribution based upon the same obligations set forth in the administrative consent order. As with a covenant not to sue, parties should be provided assurance that they will not be subject to liability based upon work or obligations performed by the party pursuant to the administrative consent order.

RESPONSE TO COMMENTS 667 TO 669: Last year the Legislature amended the Spill Compensation and Control Act to allow for a responsible party to seek contribution from another party. The Department believes that this legislation adequately addresses these concerns and that it is not in the public interest to further address this issue here.

COMMENT 670: Cohen, Shapiro, Polisher, Shiekman and Cohen suggests adding the following paragraph:

> Solely for the purpose of obtaining and maintaining access to the Site, the Department hereby designates [person] as its representative pursuant to the provisions of the National Contingency Plan at 40 C.F.R. Section 300.400(d)(3) with all of the rights pertaining thereto. If the owner of the site or any interest in the site refuses to provide [person] with access, the Department agrees to demand access and levy a civil administrative penalty against such owner pursuant to N.J.S.A. Sec. 58:10-23.11u(a)(1)(b), (c).

RESPONSE: Since obtaining site access up to now has not proven to be a significant impediment to responsible parties, the Department will continue to encourage responsible parties to obtain site access without the assistance of the Department as suggested in this comment.

COMMENT 671: Cohen, Shapiro, Polisher, Shiekman and Cohen states the Department should recognize that a responsible party who executes an administrative consent order should not be penalized twice for a single violation. Thus, to the extent that a permit violation is also an administrative consent order violation, the Department should be required to prosecute the violation as either a permit violation or an administrative consent order violation, but not both. This concept is contained in the language set out below:

> Notwithstanding any other provision of this administrative consent order, no stipulated penalties will be separately assessed pursuant to this administrative consent order for violations of any statute, ordinance, regulation or permit for which civil or civil administrative penalties are assessed pursuant to such statute, ordinance, regulation or permit, except that, in the event any such penalty assessed pursuant to such statute, ordinance, regulation or permit is less than the stipulated penalties provided in this administrative consent order for such violations, [person] agrees upon demand to pay to the Department the amount constituting the difference between the civil or civil administrative penalty assessed and that provided in the administrative consent order.

RESPONSE: The commenter's suggested language is inconsistent with the Department's statutory authority. The Department will, however, exercise its enforcement discretion in deciding which violation is pursued.

COMMENT 672: Rutgers Environmental Law Clinic stated that the public must be given notice and a substantial opportunity to comment upon the appropriate document to be used and the content of that document for all site remediations. There is no provision anywhere in these regulations for informing the public about site remediation activities in their community. Section XII, Paragraphs 20 and 27 of the standard Environmental Cleanup Responsibility Act administrative consent order, 24 N.J.R. 1301 and Section XIII, Paragraphs 19 and 26 of the standard responsible party administrative consent order, 24 N.J.R. 1306, require the party to file a copy of the administrative consent order and any use and access restrictions with the county clerk. At the very least, the party should be required to provide a copy of the proposed administrative consent order or other site investigation/remediation document to the municipal clerk, the chairperson of the municipal

environmental commission, and the local health officer. The responsible party should also be required to give public notice of the proposed action to property owners within 200 feet of the site and to publish a notice in the appropriate local newspaper. These public notices should indicate that the public shall have at least thirty days to comment upon the proposed action.

RESPONSE: The Department will include all contaminated sites on the master list which will be available to the public and sent to each municipality. The Department currently publishes in the New Jersey Department of Environmental Protection and Energy Status Report a list of over 600 major sites on an annual basis.

COMMENT 673: Wheaton Industries, Inc. stated the proposed regulation omits a crucial provision for providing adequate incentive for a Person to enter into a consent order, namely a covenant not to sue from the Department for further relief with respect to the matters addressed in the settlement, such as remediation work, prior costs incurred, or future costs to be incurred. Indeed, the primary quid pro quo for a Person to enter into an administrative consent order to perform remediation work or to pay costs is often to obtain resolution and repose of potential claims that may be brought against a Person relating to potential contamination. The final standard responsible party administrative consent order should include a covenant not to sue from the Department such as the following:

> In consideration of the actions that [Person] will perform and payments that [Person] will make under this [Order], the Department agrees that it will not bring any lawsuit or administrative action, nor will it recommend that the Attorney General's office bring any action, against [Person] under the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq., and the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq., relating to remediation or repayment of costs incurred or to be incurred in connection with the investigation of and response to the matters in the Findings herein above.

The responsible party administrative consent order should contain a covenant not to sue to be provided by the Department with respect to obligations assumed by a party pursuant to the responsible party administrative consent order. This covenant should take effect upon timely approval by the Department of the completion of a party's obligations under the administrative consent order. Parties should be provided assurance that they will not be subject to suit based upon work properly performed under the administrative consent order. A covenant not to sue will offer greater incentive for parties to undertake site remediation obligations.

RESPONSE: The Department believes that this issue is more appropriately one for the Legislature rather than the Department. It was the Legislature that established the public policy concerning the strict liability scheme for contaminated sites. It was the Legislature that established the "polluter pays" public policy by establishing a funding mechanism for site remediation which relies on certain dedicated funds, fees and cost recovery, rather than on general treasury funds. A regulatory scheme which provided for a covenant not to sue would be inconsistent with these strong public policies.

In the event that the Department gave such a waiver or release from liability to the responsible party for a contaminated site at which additional remediation was required, the Department would have no recourse but to conduct the remediation using limited public funds. The Department would then be unable to pursue that responsible party in a cost recovery action as the Legislature directs pursuant to the Spill Compensation and Control Act, N.J.A.C. 58:10-23.11 et seq. If the Department used funds from the Spill Fund, then the taxpayer paying into that Fund would be paying for remediation for which the responsible party was obligated to have paid. In any event, such a scheme would be inconsistent with the current legislative policies.

It is for these reasons that the Department disagrees with this covenant and, therefore, will not make the suggested amendment.

The Department notes that the current version of Senate Bill 1070 limits the circumstances in which the Department may require additional remediation.

COMMENT 674: Chevron U.S.A. Inc. suggested that the decision documents in Appendix C should include a confidentiality provision that should state, "The Department shall protect from disclosure any information which, if made public would divulge methods or processes entitled to protection as trade secrets of such person." The site history and characterization submission requirements of the decision documents may require submittal of information which may be confidential. Additionally, remediation contractors may claim that some of their processes or billable rates or other information is confidential. The Department has existing programs in place which provide for confidentiality determinations. For example, the New Jersey Pollution Discharge Elimination System program in accordance with N.J.A.C. 7:14A-11.2 et seq. provide a mechanism for confidentiality. The Department should be able to use the existing programs as an example to easily institute this provision.

RESPONSE: The Department agrees with this comment and will amend the rule accordingly by the addition of Paragraph 31.

COMMENT 675: Chemical Industry Council of New Jersey commented that an administrative consent order or memorandum of agreement should include a provision that a party entering one of these agreements waives some but not all of its rights. This provision might be added to N.J.A.C. 7:26C-2.1(c) and read: "Except as otherwise stated in this subchapter, nothing shall be construed as limiting any legal, equitable or administrative remedies which the party conducting remediation may have under any applicable law or regulation."

COMMENT 676: Hackensack Water Company commented that the party conducting remediation should be able to preserve its rights, especially since the standard memorandum of agreement and the administrative consent orders expressly state that the remediating party does not admit to liability by entering into the order. Although remediating parties waive certain rights by entering into the Environmental Cleanup Responsibility Act administrative consent order or the responsible party administrative consent order, the language might qualify retention of party rights (that is, "except as otherwise stated in this subchapter, nothing shall be construed as limiting any legal, equitable or administrative remedies which the party conducting remediation may have under any applicable law or regulation.").

RESPONSE TO COMMENTS 675 TO 676: The Department agrees with the concept of these comments and has added appropriate language in the Reservation of Rights section.

Other Comments

COMMENT 677: Edwards & Angell stated that the standard administrative consent order presented by the Department in Appendix C of the proposed rules create an unnecessary distinction between the Department and the Attorney General's Office by stating that "[t]he Department agrees that it will not bring any action, nor will it recommend that the Attorney General's office bring any action, including monetary penalties," for the Ordered Party's failure to take certain actions, the administrative consent order creates the implication that others, that is, State or County Health Departments, third parties, the Public Advocate, have the option to bring actions for the very acts or omissions which the Ordered Party seeks to resolve. An incentive for settlement is to avoid future costs. In light of the expansive provisions of the County Environmental Health Act, N.J.S.A. 26:3A2-21 et seq., the proposed administrative consent order language may actually increase the Ordered Party's risk. The commenter suggests that the standard administrative consent order state that it is intended to resolve or compromise any claims which the State, or anyone acting under authority of the State, may have against the ordered party for prior acts or omissions. Such a clause would merely shift the burden of proving that the administrative consent order was intended to resolve a claim to any third party seeking to go beyond the administrative consent order.

RESPONSE: The proposed standard administrative consent order in Appendix C does not provide the provisions presented by the commenter.

COMMENT 678: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company believe that the approach for oversight of the remediation of contaminated sites in the proposed rule is unecessarily and inappropriately inflexible and onerous. It is urged that the proposed rule be rewritten to provide for a greater emphasis on site-specific considerations and to allow for flexibility in the use, or nonuse, of oversight documents to facilitate site remediation within the State, thereby promoting more efficient and cost-effective remedial actions.

In the regulatory background discussion, the Department acknowledges that there are large, complex sites and, in technical terms, relatively simple, marginally impacted sites, even within the same program, such as landfills which range in size from a single building demolition landfill to a large municipal landfill. The Department recognizes that the different programs are "directed at a variety of

environmental concerns." The Department's challenge—to develop a consistent, comprehensive and coordinated role and to "oversee these activities while conserving and limiting the minimum amount of public resources dedicated to these resources (sic)"—should not obscure the vast differences in site to site considerations. Specific legal and factual issues surrounding a particular site should always take precedence over consistency and conformity. Consistency and conformity do not necessarily promote cost effective and efficient administration of site contamination. On the one hand the Department seems to recognize the necessity for flexibility, but proposes regulations that provide little acknowledgement of site specific considerations.

RESPONSE: The Department's experience over the past 10 years shows that a substantial amount of time can be spent negotiating oversight documents. The essential tasks in remediation are the same regardless of the size or complexity of the work: discovery, remedial investigation, remedy selection, implementation, and operation and maintenance. These oversight rules do allow for flexibility, particularly with respect to work done under a memorandum of agreement. In the case of the standard responsible party administrative consent order, a responsible party should document for the Department where appropriate that one or more aspects of investigation or remediation is unnecessary. For example, ground water may be unaffected, or there may not be any solid waste considerations. The Department will include these aspects of remediation in the administrative consent order and the responsible party's documentation that a task is unnecessary will become a part of the Department's record that all aspects of remediation have been considered. The Department has balanced the need for consistency with the need for flexibility in developing this approach to site remediation.

COMMENT 679: Edwards & Angell asked that the Department develop policies concerning de minimis settlements and municipal wastes as part of its final regulations. Multi-party directives force parties with minimal contributions to a site to incur unnecessary transaction costs. Moreover, the presence of numerous de minimis parties during the entire site remediation process also requires that the Department and the non-*deminimis* parties incur increased costs. Accordingly, they believe the Department should follow the Environmental Protection Agency's example and develop a policy which would allow de minimis parties to liquidate their contribution to the site remediation process at the earliest possible stage. Due to the joint and several nature of the *de minimis* parties' liability, any such *de minimis* settlement policy must include a provision for contribution protection. Similarly, as the Spill Compensation and Control Act is increasingly used at sites which received municipal solid wastes, the private and public parties are entitled to understand the Department's position and enforcement policy concerning municipal solid waste.

RESPONSE: The issue of *de minimis* settlements is under consideration and evaluation by the Department. The Department has only rarely permitted *de minimis* settlements, in part because there is no statutory authority for such settlements or for contribution protection. The Department is continuing to discuss its position and enforcement policy with respect to *de minimis* settlements, especially in the context of municipal solid waste, but has not defined its policy sufficiently to include it in a rule at this time. The Legislature is also considering legislation concerning municipal liability in certain situations.

Appendix D. Publicly Conducted Administrative Consent Order

Findings, Paragraph 4—No Admission of Liability

COMMENT 680: Chevron U.S.A. Inc. recommended adding the following language at the end of the Paragraph 4 in the Finding: "nor shall it be construed as a waiver of any right or defense [Person] may have with regard to the Site." Purpose of this amendment is to broaden the protection afforded [Person] by entering into the administrative consent order.

RESPONSE: The Department agrees with this concept and has included it in the rule.

Findings, Paragraph 5—Incorporation of Department Files

COMMENT 681: Wheaton Industries, Inc. commented that it may not be appropriate to have this consent order for reimbursement of the Department's costs cover all contaminants at or emanating from the designated site, particularly if the Person signing the consent order is responsible only for certain contaminants at the site which require separate and discrete remediation. The Department should retain discretion as to whether to include this paragraph in a "publicly-conducted" administrative consent order.

RESPONSE: The administrative consent order in Appendix D is for priority sites with the greatest potential threat to human health and the environment. For such sites it would be impractical for the Department to conduct only a partial remediation as the commenter suggests, since it is most efficient from both a resource and timeliness standpoint to address all the contamination once at such a site. The Department is then able to shift the resources of its publicly conducted site remediation program to another priority site for publicly conducted work. A responsible party may elect to pay for that portion of the remediation for which it believes it is responsible.

Findings, Paragraph 6—Scope of Investigation

COMMENT 682: Chevron U.S.A. Inc. commented that Paragraph 6 of the Finding concerning the scope of the investigation and cleanup should be revised to read, "The Department and the [Person] agree that the scope of the investigation and potential cleanup required by this administrative consent order will include all contaminants at the above referenced site pursuant to the enabling statute."

Commenter believed its wording change recognizes the fact that the cleanup will be limited to those contaminants, and source areas as specified in the enabling legislation. Additionally, adding the word "potential" in front of "clean up" recognizes the fact that the investigation may reveal that no cleanup is required. Scope of this provision is too broad with reference to "all contaminants" assuming not all contaminants require remedial action.

RESPONSE: The investigation and remediation of the site will be undertaken pursuant to the Technical Requirements for Site Remediation; N.J.A.C. 7:26E, therefore, commenter's proposed language is unnecessary.

Findings, Paragraph 7—Additional Provisions

COMMENT 683: Chevron U.S.A. Inc. stated that Paragragh 7 of the Appendix D administrative consent order indicates that additional provisions may be added to the Findings section of the administrative consent order. The commenter requests that Paragraph 7 include language that any such additional provisions be added with the concurrence of the signatory.

RESPONSE: It is the Department's intent to limit the time it takes to negotiate administrative consent orders by limiting rather than expanding the number of paragraphs to the Findings section to the administrative consent order. However, the Department will agree to add finding paragraphs with the concurrence of all parties. Therefore, the Department amended the rule in the appropriate locations.

Order—Reimbursement of Costs

COMMENT 684: Rutgers Environmental Law Clinic commented that responsible parties should reimburse Department of Environmental Protection and Energy for all costs. The Department indicated that section I of the Order section of the administrative consent order, which is optional, would require the responsible party to reimburse the Department of Environmental Protection and Energy for costs incurred by Department of Environmental Protection and Energy prior to the entry of the administrative consent order, in connection with the site. This section should not be optional. Where a party has been identified as responsible, it should pay the Department of Environmental Protection and Energy's costs associated with the site. This provision should not be negotiable. As written, this regulation encourages uncertainty and litigation, both of which were intended to be discouraged by these regulations.

COMMENT 685: Chevron U.S.A. Inc. commented that the paragraph should be deleted or amended to state exactly what costs the payment is required for. This paragraph does not specify what the required payment is for.

Chevron U.S.A. Inc. also commented that the Department must amend the paragraph to provide the [Person] with the criteria for establishing the dollar amount under Paragraph 2(a). No criteria are provided. This is equivalent to giving the Department a blank check. There are no provisions to require the Department to conduct the investigation, remediation and oversight in an efficient, cost effective manner.

Chevron U.S.A. Inc. also commented that [Person] should be given copies of the invoices upon the Department's receipt of same with an opportunity to challenge the work performed versus the dollars charged before the Department pays the invoice. The consent order needs to

be revised to provide the [Person] with this opportunity. Tremendous leverage is lost against the contractor if you first pay his invoice and subsequently challenge his work.

COMMENT 686: Wheaton Industries, Inc. commented that the Department should retain the flexibility to determine whether this administrative consent order should require prepayment of monies into an account to pay for the costs of a Remedial Investigation/Feasibility Study. Establishing such a condition as a prerequisite could provide a strong disincentive for any Persons to enter an administrative consent order to pay these costs, because the Person immediately loses use of these funds and cannot engage in a more orderly planning process to ensure these funds are available. The Department should have the flexibility to enter administrative consent orders calling for payment after the Department has incurred these costs.

Wheaton Industries, Inc. commented that, furthermore, any amounts which the Department either demands or draws down for reimbursement should be limited to amounts for which the Department is authorized by law to obtain reimbursement, and for which the Department has submitted a detailed summary of its costs according to the items and formulas identified for recovering costs under Appendix I to those regulations. Moreover, to the extent prepayment of monies into Remedial Investigation/Feasibility Study Account is employed, the third sentence of subparagraph (a) should be revised to state, "The Department may draw on such funds only to pay the costs of the Remedial Investigation/Feasibility Study which are recoverable under applicable law."

COMMENT 687: The New Jersey State Bar Association commented that we note that the order does not contain a provision entitling the ordered party to contest or object to invoices received from Department of Environmental Protection and Energy or its contractors. A mechanism should be provided to address disputes about the quality of work which has been performed, or the necessity for the work which has been authorized, or a contractor's invoice for work which the ordered party believes is not completed, and other similar matters.

RESPONSE TO COMMENTS 684 TO 687: The payment of prior costs is optional because no prior costs may have been incurred by the responsible party prior to entering into the administrative consent order. During the administrative consent order negotiations the Department will provide to the person responsible for conducting the remediation a summary of all prior Department costs the Department is requesting that person to pay. It has been the Department's experience that prior to execution of administrative consent orders, resolution is generally reached on the amount of such costs. If the Department and the person cannot reach agreement on the settlement of these costs, the Department would bifurcate the matter and allow the person to proceed with the remediation under the administrative consent order and pursue collection of the disputed amount of the prior costs separately, pursuant to the applicable statutes.

Order—Exchange of Information

COMMENT 688: Wheaton Industries, Inc. commented that if the Department is not obliged to incorporate or respond to comments a Person may submit on the deliverables, then this Paragraph 2 in the exchange of information section of Appendix D should be revised by adding at the end "... [Person] reserves its right to raise issues or challenges regarding the Deliverables at any subsequent time as otherwise authorized by law."

RESPONSE: The Department will amend the Appendix D administrative consent order to include a general reservation of rights for the signatory as a new paragraph 14 in the General Provisions section.

COMMENT 689: Wheaton Industries, Inc. commented that this limitation in Paragraph 5 in the exchange of information section in Appendix D on so-called "ex parte" communications with the Department's contractors is an excessive restriction which may abrogate First Amended rights and for which the Department has provided no explanation. If the Department believes that it is necessary to include a limitation on "ex parte" communications between a Person signing the administrative consent order and the Department's Remedial Investigation/Feasibility Study contractors, this paragraph at least should be amended to read, "[Person] agrees that no employee of, representative of, or consultant to [Person] shall have any ex-parte communications regarding matters relating to this administrative consent order with the contractor hired by the Department ..." The contractor and the Department may have other business relationships not relating to the Remedial Investigation/Feasibility Study on which communication clearly would be appropriate.

COMMENT 690: The New Jersey State Bar Association commented that the restriction in Section III, Paragraph 5, on communications with a contractor hired by the Department of Environmental Protection and Energy to verbal conversations in the field is both unnecessary and inappropriate. The ordered party under this document will have agreed to pay for those services, and if conversations need to take place about the work, the schedule, the content and documentation of invoices, or other relevant matters, those conversations should be permitted.

COMMENT 691: Chevron U.S.A. Inc. commented that the term ex-parte communications should be further clarified. When used in this context the term needs clarification.

RESPONSE TO COMMENTS 689 TO 691: Upon execution of an administrative consent order, the signatory has agreed to allow the Department to conduct a cleanup of their site; the signatory has not hired a contractor to conduct work at their site. The work is conducted pursuant to contracts between the contractors and the Department and the signatory has no control over the terms and conditions of such contracts. Additionally, since the work being performed may be involved in future litigation, the Department believes it would be put at a disadvantage if its contractor was put in a position of disclosing otherwise privileged information.

COMMENT 692: Wheaton Industries, Inc. and Chemical Waste Management of New Jersey commented that the standard publicly conducted administrative consent order must include an agreement from the Department not to bring an action for repayment of costs incurred against a Person under the various Acts cited in the Findings portion of this administrative consent order relating to matters addressed in the administrative consent order. Both commenters requested that the standard publicly conducted administrative consent order must include a provision on contribution protection.

RESPONSE: As discussed above, if the signatory is unwilling to settle those costs, the Department will bifurcate them from the remediation and pursue those costs separately. The Department does not think it is in the public interest to release the signatory from past cost, which could be substantial, in exchange for payment of subsequent remediation.

General Provisions, Paragraph 6

COMMENT 693: Wheaton Industries, Inc. commented that Paragraph 6 in the General Provisions section of Appendix D regarding Person's reservation of rights to challenge remedial action selected under the Spill Compensation and Control Act should be revised to allow a person to reserve its rights where the Department requires further payment under the administrative consent order.

RESPONSE: The Department believes the current language as proposed is sufficient since it provides that the responsible party reserves all of its rights pursuant to the Spill Compensation and Control Act.

COMMENT 694: Chevron U.S.A. Inc. commented that the Department should allow five business days instead of one to be notified that a petition for bankruptcy has been filed. Five business days or as soon as possible is commonly used in many commercial contracts since various complications can arise in making this communication. For example, a letter express mailed in New Jersey the day after filing (which may have occurred the prior night) might take an additional day or two. In addition, there is likely to be significant internal confusion and delays within a company filing for bankruptcy. In general, it is not clear that the benefits Department of Environmental Protection and Energy expects to realize justify the short notification requirements.

RESPONSE: The Department agrees with this comment and has amended the rule at Paragraph 7 accordingly.

COMMENT 695: Chevron U.S.A. Inc. commented that Paragraph 6 in the General Provisions section of the Appendix D administrative consent order which provides the signatory agrees not to: contest the Department to issue the administrative consent order; contest its terms or conditions except in an action brought by the Department to enforce its provisions, effectively deny the regulated community of reasonable due process.

RESPONSE: The Department does not want parties entering into the administrative consent orders unless they are doing so voluntarily. If they enter into an administrative consent order, then it would be inappropriate for them to reserve their rights concerning terms and conditions they have already agreed to by their voluntary entry into an agreement with the Department. Furthermore, the Department disagrees with the

commenter's statement that the signatory is effectively denied due process. The signatory decides whether or not to agree to the terms of the administrative consent order prior to executing the agreement. The signatory is provided due process protection when the Department takes its action to enforce the provisions of the administrative consent order. The Department believes that this regulatory scheme meets all due process requirements. See, *State v. Mobil Oil,* 246 *N.J. Super.* 351, 338 (App. Div. 1991).

General Provisions, Paragraph 11

COMMENT 696: The New Jersey State Bar Association commented that under Section IV, Paragraph 11, the present language would require the ordered party to agree not to bring any claim or demand for Spill Compensation and Control Act funds or sanitary landfill funds for actions performed under the order. This limitation is inappropriate in the broad form in which it is stated. Should work conducted under the order reveal that the ordered party would have a claim under the rules which govern the stated funds, there is no reason that claim should be barred. This order is designed to govern work being conducted at the ordered party's expense. Signing the order should not require the party who is paying for the work to forsake its legal rights.

COMMENT 697: Chevron U.S.A. Inc. commented that Paragraph 11 should be deleted. If the Department through the actions of its own personnel or contractors contributes to the contamination of the Site the [Person] should not be precluded from accessing any State segregated funds to apply to the portion of the remedial effort related to the Department's negligence.

RESPONSE TO COMMENTS 696 AND 697: The Department agrees with these comments and has made the appropriate change.

COMMENT 698: Chevron U.S.A. Inc. commented that in Paragraph 14 of the General Provisions section, instead of five days, that the signatory return the executed administrative consent order to the Department. We suggest 20 business days be allowed.

RESPONSE: As the terms and conditions of the document have already been agreed to, the proposed language introduces unnecessary delay into the administration of the cleanup.

COMMENT 699: Rutgers Environmental Law Clinic commented that the public should be adequately notified of activities at these sites. The standard publicly-conducted administrative consent order does not include a provision for filing the administrative consent order with a county clerk, as do the standard Environmental Cleanup and Responsibility Act administrative consent orders and responsible party administrative consent orders. There is no reason why these administrative consent orders should not be filed as well, and not just with the county clerk, but also with the municipal clerk, the chairperson of the municipal environmental commission, and the local health officer.

RESPONSE: The Department agrees with the concept and has included appropriate language in the General Provision section as Paragraph 13.

Appendix E. Standard Letter of Credit

COMMENT 700: Cohen, Shapiro, Polisher, Shiekman and Cohen said the requirement that the financial institution, surety and trustee subject themselves to the jurisdiction of New Jersey courts is designed to address a hypothetical problem which will rarely, if ever, exist. For various legal, regulatory and business reasons, many financial institutions are reluctant to subject themselves to the jurisdiction of New Jersey courts so companies with long established relationships with particular financial institutions will be forced to locate other institutions for services that comply with the oversight rules. This is a difficult and time consuming undertaking, and the benefit which this private sector burden confers on the Department is probably non-existent. How many times during the past decade has the Department been forced to commence judicial proceedings against a financial institution which has issued a letter of credit?

Cohen, Shapiro, Polisher, Shiekman and Cohen also objected to the requirement that the issuing financial institution have its principal office in New Jersey unless otherwise approved by the Department as a possible violation of the Commerce Clause of the United States Constitution and questions whether there is any realistic rationale for this requirement.

RESPONSE: Financial assurance for the performance of the obligations assumed under an administrative consent order is necessary to provide a ready source of private funds to the Department if the responsible party can not or will not complete the remediation. The requirements that the financial institution subject itself to the jurisdiction of this State and have its principal place of business in New Jersey enhance these objectives.

The Department would be at a severe disasdvantage if it were necessary to call on financial assurance provided by an out-of-State financial institution if that institution chose to contest the Department's right to obtain the assurance. The Department would be forced to litigate its right to the financial assurance in another state or another country, with the inherent legal and logistical implications. Every aspect of the litigation would be complicated by such factors as making service on the financial institution, travel expenses of attorneys and Department employees to other states, representation of the Department in other states, conflict of law principles, jurisdiction, and the risk of a decision inconsistent with New Jersey policy, precedent, and statutes.

The Department has in fact commenced judicial proceedings against providers of financial assurance; and financial institutions have refused to execute the financial assurance but the issues surrounding the refusal were resolved without resort to litigation. It is a reasonable assumption that a financial institution that will not subject itself to jurisdiction in New Jersey does not have its principal place of business here would be more likely to contest the Department's right to the financial assurance, knowing it could litigate the issue in its home jurisdiction at substantial cost and inconvenience to the Department.

There are many reputable financial institutions in New Jersey, both local and national, available to issue financial assurance. The Department retains the flexibility to waive the requirement that the financial institution have its principal place of business in New Jersey. See Appendix C, Standard Responsible Party Oversight Document, Paragraph VIII.3(a)(ii). The Department has frequently waived this requirement when negotiating Administrative Consent Orders in the past. The inconvenience to the regulated public articulated by the commenter is minimal compared to the interests of the Department in obtaining access to the financial assurance quickly and efficiently.

The Commerce Clause prohibits states from placing an undue burden on interstate commerce. States retain the authority under their police powers to regulate matters of legitimate local concern. Where the burden on interstate commerce is incidental, the statute will be upheld unless the burden is clearly excessive in comparison to the putative local benefits. Where the law discriminates against interstate commerce on its face or in its effect, it will be upheld if it serves a legitimate local purpose and no non-discriminatory means to achieve that purpose is available. *Maine v. Taylor,* 477 *U.S.* 131, 106 *S. Ct.* 2440, 91 *L.Ed.*2d 110 (1986). State statutes whose express or concealed purpose is to promote the economic interests of the state at the expense of interstate commerce will be held *per se* invalid. *Pike v. Bruce Church, Inc.*, 397 *U.S.* 137, 90 *S.Ct.* 844, 25 *L.Ed.*2d 174 (1970).

The purpose of the Department here is to accomplish efficient, thorough cleanups using private funds to the extent they are available. Financial institutions that agree to subject themselves to the jurisdiction of this State and have their principal place of business in this State are more readily accessible, are more accountable, and their ability to provide the financial assurance can more easily be evaluated by the Department. The purpose of the regulation is to secure environmental cleanups in New Jersey, not to gain an economic advantage for New Jersey financial institutions. The regulation allows out-of-State institutions to do other business in New Jerey and represents a minimal burden on interstate commerce. The Department can waive the requirement that the financial institution have its principal place of business in New Jersey where it is satisfied that the financial institution is adequately funded and will be accessible if the financial assurance is needed. The purpose, efficient cleanups using private funds, is a legitimate purpose within the state's police power, and the effect on interstate commerce is not excessive compared to the local benefit.

COMMENT 701: Chevron U.S.A., Inc. said that, where a clean-up can be accomplished in a shorter period, the letter of credit should have a term requirement shorter than one year to avoid additional costs to the company to maintain the letter of credit after the clean-up work is completed.

Chevron U.S.A., Inc. further commented that the required 120 calendar day notice of termination is much longer than necessary and may result in the Company incurring additional charges. Typically, notification requirements are for 30 or 60 days which should provide the Department sufficient time to take whatever action they deem appropriate.

RESPONSE: The 120 day notice period is consistent with Federal Resource Conservation and Recovery Act requirements and the Department's experience has not shown this to be a problem. The Department expects that the remediation of most priority sites pursuant to an administrative consent order will take longer than one year. It is, in any event, difficult to predict with any certainty how long the remediation will take prior to its initiation. In the event that the remediation is completed in less than one year, the Department will release the letter of credit as soon as it determines that the party to the administrative consent order has completed the substantive and financial obligations of the administrative consent order.

Appendix I. Oversight Cost Formula

Introduction

Comments made to the text of the rule regarding oversight costs have been consolidated herein and are responded to fully in this section.

Inposition of Oversight Costs

COMMENT 702: Shell Oil Company, Mobil Oil Corporation and Exxon Company, U.S.A. requested that the statutory authority and regulatory basis of authority for the proposed imposition of oversight fees be identified. Exxon Company, U.S.A. believes that the only statutory authority to impose an oversight fee exists in the Environmental Cleanup and Responsibility Act.

RESPONSE: The Department's authority to impose and collect its oversight costs is granted by both the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq. and the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq. The Spill Compensation and Control Act defines "cleanup and removal costs" as "**all** costs associated with a discharge, incurred by the State ..." (emphasis added) (N.J.S.A. 58:10-23.11(b)(d)). The Spill Compensation and Control Act makes a discharger liable to the Department for all cleanup and removal costs, and three times the cost of such cleanup and removal if the discharger fails to comply with a directive by the Department to cleanup and remove, or arrange for the cleanup and removal of, such discharge. N.J.S.A. 58:10-23.11f(a)(1).

The Water Pollution Control Act authorizes the Commissioner to commence a civil action for any violation of the act and to seek "any reasonable costs incurred by the State in removing, correcting or terminating the adverse effects upon water quality resulting from any unauthorized discharge of pollutants for which the action under this subsection may have been brought." N.J.S.A. 58:10A-10(c)(3).

Both statutes authorize the State to recover any and all costs incurred in the assurance that a contaminated site is cleaned up, whether that assurance entails the Department performing the cleanup itself or the Department overseeing the cleanup performed by a responsible party.

COMMENT 703: Exxon Company, U.S.A. questioned why a responsible party needs "approval" from the Department to conduct remediation, and thus pay an oversight fee. Other than the Environmental Cleanup and Responsibility Act, the statutes and existing rules do not require it. Why does the Department now want to first "approve" remediation?

COMMENT 704: Mobil Oil Corporation requested an explanation why the need has suddenly risen for the imposition of such oversight costs and how the costs will be used to benefit the regulated community and the environment.

COMMENT 705: Cohen, Shapiro, Polisher, Shiekman and Cohen believes the Department should have attempted to balance the cost of the proposed regulations to the private sector against the benefit to the State. The Department's rationale for such actions has been that the Department has to conserve its scarce resources. However, it is somewhat inconsistent to develop a regulatory program which requires full reimbursement, indeed even more than full reimbursement, of the Department for every moment it spends in overseeing the remediation of environmental concerns but defending these regulations as if there will be no such reimbursement.

COMMENT 706: Colonial Pipeline Company believes it is unwarranted to have the person executing an administrative consent order be obligated to reimburse the Department for costs and, that all taxpayers should share in this cost. Also, Colonial Pipeline stated that if the Department continues to require corporations to pay then other areas of government such as Fish and Game should likewise be 100 percent user subsidized. In addition, a person should only be subject to pay for Department costs which have not otherwise been compensated previously (that is, a person may have previously paid for Department's oversight costs pursuant to a memorandum of agreement covering the site).

RESPONSE TO COMMENTS 703 TO 706: Pursuant to N.J.S.A. 13:1D-1 et seq., the Commissioner is charged with the implementation and enforcement of environmental laws, rules, and regulations. In order to allow a person to participate in the remediation of a contaminated site, the Department must oversee the remediation to ensure satisfactory and complete compliance. Thus, the Department has instituted the oversight cost reimbursement policy. This policy assures that the Department will be reimbursed for the time spent ensuring that remediation is performed in a manner that is protective of human health and the environment.

Exxon Company, U.S.A. misinterprets the proposed rule as the Department requiring approval of a remediation which in turn causes the Department to seek reimbursement of its oversight costs incurred in giving its approval. Rather, in order for the Department to comply with its statutory mandates to ensure that remediation at a priority site performed by a responsible party is performed satisfactorily (that is, in compliance with all applicable statutes, rules and regulations) and completely, the Department must necessarily perform "oversight functions." Such costs incurred by the Department, caused solely by the responsible party, should be borne and reimbursed soley by the person responsible for conducting the remediation and not the taxpayers. For non-priority sites, the Department's oversight is available at the request of another party.

Oversight fees have been collected through the use oversight documents for the past several years (approximately since 1986). This benefits the citizens and other taxpayers of New Jersey as their tax dollars are not used in cleaning up contaminated sites where a responsible party is available to pay for all costs of a cleanup.

The cost of oversight is the responsibility of the responsible party as the need for Department oversight is the direct result of a responsible party's action. The requirement to reimburse the Department for money spent on the investigaton of a contaminated site is consistent with the legislative policy of the "polluter pays."

The Site Remediation Program does not receive any appropriation from the General Treasury Fund, but relies on fees, Federal government grants and reimbursement from responsible parties for its entire budget. The Department has devised a time accounting system that provides for an employee's hour for hour accounting of work performed on a specific project which can be further broken down into an hour for hour accounting of work performed on a specific aspect of a specific project. This system not only accounts for time spent on projects, but eliminates multiple reimbursements to the Department for the same task.

In the case of the memorandum of agreement, the responsibility for the cost of oversight must be borne by the person conducting the remediation. The memorandum of agreement is a contract under which the signatory pays the Department's oversight costs and benefits from the Department's involvement prior to the site becoming a priority.

COMMENT 707: Cohen, Shapiro, Polisher, Shiekman and Cohen believes it is bad policy, bad economics and bad government to develop a regulatory program which (i) immunizes the Department from legislative and executive budgetary constraints, (ii) permits the Department to operate its remedial program in large part without any oversight and (iii) actually discourages efficiency and cost effective decision making by the Department. Even if responsible parties would tolerate such a poorly conceived reimbursement system, its implementation would not be in the best interests of the people of this State.

RESPONSE: The Department's Site Remediation Program is not immunized from legislative and executive budgetary constraints. The Legislature decided not to give the Site Remediation Program any appropriations from the General Fund, but only certain dedicated funds and the ability for cost recovery. As a result, the Site Remediation Program is self-supportive. The program is mainly funded by making an hour for hour accounting of employees' time and then, based on the oversight costs formula, billing a responsible party for Department services.

The Commissioner is required to report on the status of the Department to the Legislature on a periodic basis. This keeps the Legislature informed of Department activities and initiatives as well as affording the Department the opportunity to obtain input from the Legislature on Department policies.

Oversight Cost Formula

COMMENT 708: The oversight cost formula purports to use coded hours times hourly rates. American Cyanamid Company, Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company questioned how the hourly rates are to be determined. Since staff members undertaking responsibility for oversight are not paid on an hourly basis and there is no published fixed or hourly rate, it is impossible to tell from the oversight cost formula the hourly rates applicable. The Department should publish a list of base salaries and explain the basis of the hourly rates to be used for each staff member in computing oversight costs.

RESPONSE: The hourly rate is calculated by dividing an employee's salary by the total number of hours to be worked in a calendar year. (For example, an employee whose work week consists of 40 hours would have an hourly rate of his salary divided by 2,080 hours [40 hours per week times 52 weeks in year]). Salary rates are available through the New Jersey Department of Personnel. It is unnecessary to publish what is already public information.

COMMENT 709: American Cyanamid Company, Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company questioned whether any additive, such as the salary additive, is justified. The Department purports to multiply the base amount by the additive factor of 1.22. This "salary additive" purportedly represents "the employees' reimbursable down time." The Department states that the down time involved includes vacation time, administrative leave, sick leave, holiday time and other approved "absent with pay" allowances. To the extent that the hourly rate incorporates the full base salary, there is no additional extra pay to which a staffer is entitled because of such down time. Down time merely affects the total number of hours an employee is available to work annually. Presumably down time is already in the appropriate hourly rate. On the face of it, it is arbitrary and capricious.

RESPONSE: As stated previously, the hourly rate is calculated by dividing an employee's salary by the total number of hours to be worked in a calendar year. (For example, an employee whose salary is $30,000, and whose work week consists of 40 hours per week (and hence 2,080 hours in a year), would cost the Department an hourly rate of $14.42.) An average of the Department's reimbursable salary leave was calculated at 22.0 percent. Therefore, an employee whose work week is 40 hours per week, or 2,080 hours per year, is entitled to 22.0 percent of 2,080 hours as reimbursable salary that won't actually be worked by the employee and therefore unavailable to be billed to a responsible party. This employee then can only directly bill 1,622 hours, while using 458 hours in non-billable leave time (that is, down time). However, the Department must still pay for the employee's leave of 458 hours, and therefore, incorporates this cost as part of the salary additive rate.

The commenters mistakenly assume that compensation for down time is already calculated into the hourly rate and that the hourly rate incorporates the full base salary. It does not. The down time not only affects the number of hours an employee is available to work annually but then necessarily affects his hourly rate. An alternative to utilizing a salary additive would be to calculate an hourly rate by dividing salary by the **actual** number of hours worked by an employee (excluding time off for vacation, sick days, holidays and other paid leave), which would simply result in a higher hourly rate, thus eliminating the need for a salary additive. The Department has chosen to use an average flat salary additive as employees are entitled to varying paid leave time. The actual additive can only be calculated at the end of a fiscal year when all the necessary information is available. Since the Department requires operating capital, billing cannot be delayed an entire year, thus for any given fiscal year, the rate used is that calculated from the previous year's figures.

COMMENT 710: American Cyanamid Company, Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company believe the Federal Insurance Contribution Act additive is too high. The Department's Fringe Benefit Rate is purportedly derived from the composite fringe benefit rate negotiated between the United States Department of Health and Human Services and the New Jersey Office of Management and Budget. Yet the State Department of the Treasury circular that memorializes that negotiated rate indicates that for base salaries between $53,400 and $125,000, the Federal Insurance Contribution Act additive is 1.45 percent and not 7.65 precent as set forth in the proposed regulations. This reduced Federal Insurance Contribution Act component must be incorporated into the fringe benefit rate.

RESPONSE: The fringe benefit rate which is applied to the direct labor costs is developed by the Department of Treasury's Office of Management and Budget. This rate is developed and negotiated with the U.S. Department of Health and Human Services on an annual basis and directed by Office of Management and Budget Circular Letter for use by all State agencies. The rate reflects the employer's contribution for pension, health benefits, worker's compensation, temporary disability insurance and Federal Insurance Contribution Act. In calculating the fringe benefits on the direct labor costs, the Department does apply the reduced rates when any individual's salary exceeds the base salaries related to the Federal Insurance Contribution Act. Most of the Department's staff earn less than $53,000 per year.

COMMENT 711: Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company questioned the indirect cost rate and believe the proposed method of calculating indirect costs is arbitrary, capricious and unsupported. The Department purports to charge an indirect cost rate of 132.24 percent which is developed pursuant to Federal Office of Management and Budget Circular A-87, "Cost Principles for State and Local Government." Yet neither of the rates that the Department quotes in its proposed regulations is consistent with the rates developed pursuant to Office of Management and Budget Circular A-87. The indirect cost rate that the Department has proposed is, on its face, arbitrary and capricious.

COMMENT 712: Kaye, Scholer, Fierman, Hays and Handler objected to the indirect cost rate of 134.24 percent. They do not believe that Office of Management and Budget Circular A-87 was developed for and was intended to apply to reimbursement by private parties. In this regard, they contended that the Department has inadequately complied with the Administrative Procedures Act and Regulatory Flexibility Act in analyzing and determining the economic and social impact of the proposed rules.

RESPONSE TO COMMENTS 711 AND 712: The 1992 indirect cost rate of 134.24 percent is consistent with the guidelines set forth in Office of Management and Budget Circular A-87. Office of Management and Budget Circular A-87 sets forth the principles for determining reimbursable costs which are applicable to grants and contracts with the Federal government. However, these costs do not include overhead costs the Department incurs for each direct labor hour because the Federal Grants Program provides direct funding for administrative salaries and overhead operating costs. Therefore, these costs are not included in the indirect cost pool of Office of Management and Budget Circular A-87.

The cost components for the indirect rate calculation are based on the actual expenditures for the total annual program costs. These costs are then segregated based on the Project Activity Codes to develop the indirect cost pool. The 1992 indirect cost rate of 134.24 is the result of dividing the indirect cost pool by the total direct project costs.

On an annual basis the Department will publish a notice in the New Jersey Register of the salary additive, fringe benefit and indirect cost rates for the next fiscal year.

COMMENT 713: American Cyanamid Company, Allied-Signal Inc., E.I. du Pont de Nemours and Co., and The General Electric Company, Chevron U.S.A. Inc., Cohen, Shapiro, Polisher, Shiekman and Cohen, Hoffman-Laroche, Inc., and Colonial Pipeline Company objected to the formula for administrative cost recovery multiplying each factor (the direct cost rate by the fringe benefit factor by the salary additive factor) and the resultant cumulative multiplier of 3.676 (1.22 × 1.2865 × 2.3424 = 3.676).

The more appropriate approach suggested was to apply the salary additive rate and the fringe benefit rate each separately to the base salary and to apply the indirect cost rate to the base salary increased only by the fringe benefit rate. They stated that the appropriate multiplier using the Department's proposed rate is: Base + (Base × .22) + (Base × .2865) + (Base × 1.2865 × 1.3424). The appropriate formula results in a multiplier of 3.233 instead of 3.676 using a 134.24 percent indirect cost rate.

RESPONSE: Assuming that each additive rate is correct, the method of calculating the oversight cost is accomplished correctly by multiplying each additive rate by the base which results in a cumulative multiplier factor of 3.676 (1.22 × 1.2865 × 2.3424) for the year 1992. The commenters mistakenly believe that an increase in cost due to compensation for down time does not result in a concomitant increase in fringe benefits and indirect costs—it does. Down time is compensable time that is not available to be billed to any project at the hourly rate, yet must be compensated for not only in base salary, but also in the cost of fringe benefits and indirect costs. Therefore, it is correct to

multiply the base salary by each additive, and not multiply the base salary by only the fringe benefit rate by the indirect cost rate and adding that product to the hourly rate times the salary additive as the commenters contended. Within the next few months, the Department will confer with the Department of Treasury to establish a group to review these rates and methods.

COMMENT 714: Chemical Waste Management of New Jersey believes that the proposed oversight costs for which the Department may be reimbursed, as set forth in the Responsible Party administrative consent order, may be excessive and not reasonably related to the actual labor expended by the Department. Determining oversight costs using additives may well result in assessing costs that have little bearing on the actual oversight exercised by the Department.

RESPONSE: The oversight cost formula reflects the true total costs actually incurred by the Department, recognizing of course that the cost to the Department for every employee includes not only base salary, but also the added expense of fringe benefits, compensable down time and other indirect costs. This system accounts for the level of effort on each activity and the Department's total costs associated with that activity. Therefore, the Department seeks reimbursement for the actual costs expended on a project.

COMMENT 715: The Chemical Industry Council of New Jersey believes that the Department's oversight costs associated with this proposal are excessive. As written, the effective rate for a State employee's salary for oversight activities is far more expensive than the salary rate found in the private business community. Chemical Industry Council of New Jersey offered as an example the Kestrel Development Project, located in Trenton which is currently undergoing remediation through the Department's Voluntary Cleanup Program. The costs for oversight activities by a private contractor on this project is approximately $18,000. Using the proposed formula, the costs calculated by the Department for the same effort exceeds $36,000. The Chemical Industry Council of New Jersey questioned the Department's rationale that the Voluntary Cleanup Program and the memorandum of agreement process was to result in low costs.

RESPONSE: The oversight cost formula is designed to recover all costs incurred by the Department for its oversight of a cleanup, no more and no less. Each component of the formula has been thoroughly discussed in the previous responses which demonstrated that each component is an actual cost to the Department. As the Department has recognized that many of the fee based activities within the Site Remediation Program do not reflect the true cost of doing business, the oversight cost formula was proposed. The Department cannot comment on any salary rate found in the private business community except that in many instances, a flat hourly rate is charged for an employee's time (that is, an attorney, engineer or other consultant) with neither any breakdown of that hourly rate, nor how the hourly rate was calculated. As to the example given by the Chemical Industry Council of New Jersey, without more information, the Department cannot respond to the comment made in that regard.

Suggested Changes

COMMENT 716: The Commerce and Industry Association of New Jersey and Hackensack Water Company believe that in order to prepare business plans, obtain financing and manage cash flow the regulated community should be assured of a reliable and predictable method of cost calculation associated with Department of Environmental Protection and Energy oversight. The Oversight Cost Formula needs to be expanded to include: (1) Department of Environmental Protection and Energy guidelines for the amount of staff time likely to be incurred in the review of a "typical" memorandum of agreement; (2) Department of Environmental Protection and Energy guidelines on the number of duplicate, replicate or split samples that are likely to be taken during the field investigation and the costs involved in their analysis (for example, one out of every 10); and (3) What type of outside services or contractors the Department plans to typically utilize during its oversight role.

RESPONSE: The memorandum of agreement is a new program so there is little information on which to base a cost estimate. The Department has no data on how many memoranda of agreement will be signed or their scope, for example. The cost of oversight will vary depending on the scope of the cleanup and the quality of the submissions to the Department. The memorandum of agreement is a completely voluntary offer to the regulated community to remediate contamination. No one is obligated to sign a memorandum of agreement and a person responsible for conducting a remediation is free to terminate a memorandum of agreement if it believes oversight costs are becoming excessive as long as it pays the oversight costs to the point of termination. The Department anticipates a quarterly billing cycle for oversight costs so the person responsible for conducting a remediation will be better able to evaluate whether it wishes to proceed before it has incurred large oversight costs.

As sites and their corresponding contamination (and therefore remediation) vary significantly, each site must be analyzed on an individual basis. Therefore, it is not possible to suggest guidelines on the number or type of samples that will be taken during the field investigation and the associated costs.

The Department believes that as the Voluntary Cleanup Program gets underway and becomes a routine method of conducting cleanups, the Department's oversight costs will be easier to predict for new cleanups by both the Department and the responsible party. It is well recognized by both the Department and the private sector that it is virtually impossible to predict the time, expense and scope of a cleanup until it gets underway. Often, the direction of a cleanup will depend on other preceding contingent factors (that is, the results of sampling or other testing, the discovery of new contamination, etc.). The Department has undertaken several rulemaking initiatives that will help the regulated community to improve the quality of submissions to the Department thereby reducing the Department's review time. Therefore, the only variable impacting cost will be site specific conditions and predicting will be easier.

The Department has an obligation to use State contractors for services if possible and these rates are available for public information. However, if a need arises for services beyond the current scope provided by the State contractors, then an outside contractor will be solicited, whose costs are undeterminable in advance.

COMMENT 717: The Commerce and Industry Association of New Jersey, Colonial Pipeline Company, and Hoffman-La Roche Inc. requested that the Department should include in the regulations a requirement that the Department provide the responsible party with an estimate or budget of likely oversight costs. This could be done after an initial review and assessment of the memorandum of agreement work scope. As presently drafted, the regulation is open-ended as to oversight cost. As written, the obligation to pay prior costs is not qualified by "reasonable" and/or "necessary."

RESPONSE: The Department cannot provide a reliable or predictable estimate or budget for oversight costs due to the individual case complexities (see earlier response). Therefore, the Department cannot estimate its own oversight costs with any degree of reliability due to the dynamic nature of any cleanup and its ever changing scope.

COMMENT 718: Cohen, Shapiro, Polisher, Shiekman and Cohen believes that the Department would have the authority to impose enormous costs on the responsible party simply by retaining outside consultants or utilizing outside contractors. The responsible party would have no opportunity whatsoever to participate meaningfully in the decision to retain an outside consultant or contractor, or in the development, bidding or oversight of the contract.

RESPONSE: As the Department would contract with outside contractors for services outside of the Department's expertise, the Department initially would be responsible to pay for all costs charged by the outside contractor. The Department would be reimbursed by the responsible party at a later date. After payment, the responsible party would then have an opportunity to challenge any costs charged to it by the Department, including direct outside contractor costs, as being arbitrary and capricious. As a potential responsible party is not entitled to pre-enforcement review of a directive according to *Matter of Kimber Petroleum,* 110 *N.J.* 69 (1988), a responsible party would be prohibited from challenging the Department's oversight costs prior to payment. Should pre-payment review be available, the Department would be exhausting an inordinate amount of its time and resources on defending challenges to the oversight costs billed (some challenges which could be assumed to be baseless and used solely for delaying purposes). This would not comport with neither the Legislative's goal of cleanup's first, litigation later, nor the Department's goal of achieving satisfactory and complete cleanup of sites in the State in the most efficient manner possible. Presently, it is not the Department's intent to contract oversight activities.

COMMENT 719: Mobil Oil Corporation took issue with the Department position that the memorandum of agreement has "no negative effects." Mobil noted that the proposed program, if voluntarily

entered into, will increase Mobil's cost of investigation and remediation by approximately 20 percent. This figure is based upon a comparison to work conducted in Oregon and in some California counties where parties pay an hourly fee for project review. The rates in these States range from $20.00 to $30.00 per hour. In order for the Department's cost per hour to remain as low, based on the Department's oversight cost formula, the average Department of Environmental Protection and Energy employee would have to earn only $5.00 to $8.00 per hour.

COMMENT 720: Exxon Company, U.S.A. submitted a chart outlined below to show the amounts that will be actually charged for random selected hourly rates:

Hourly Rate		Oversight Cost Formula
$20.00		$ 73.53
40.00	(Average)	147.06
60.00		220.59

The number of oversight hours will of course vary dependent on the complexity of the site and remediation activities. If a responsible party is going to subject himself or herself to a potential additional cost of $7,000 to $30,000 in oversight fees, what will they get for this cost? What is the incentive? The proposed rules need to be changed to better define either the disincentive for not conducting remediation or the incentive for requesting participation in oversight, and a much clearer explanation of what benefit(s) a responsible party is going to receive for paying an oversight fee.

RESPONSE TO COMMENTS 719 and 720: Mobil Oil Corporation's example that the cost of work conducted in Oregon is substantially less than the cost of equivalent work conducted by the Department is incorrect. The indirect cost rate in Oregon is 126 percent according to the State of Oregon's auditors, Coopers and Lybrand.

The Department believes that private parties perform cleanups for many reasons including improving property values and avoiding tort liability. An incremental increase in the cleanup costs alone is not likely to outweigh those reasons. The incentive for a responsible party to participate voluntarily in the memorandum of agreement/administrative consent order program and to agree to pay Department oversight costs is two-fold: the time and expense of a responsible party will be curtailed by the Department's oversight and involvement from the beginning of the cleanup toward ultimately what the Department requires; secondly, the memorandum of agreement provides an opportunity to a responsible party to control the scope of the remediation on a voluntary basis rather than being directed by the Department and becoming subjected to the collection of treble damages by the Department in a cost recovery action. Finally, a cleanup can only be deemed satisfactory and complete by the Department and implicit in this is the underlying benefit of getting the Department involved as early as possible to avoid mistakes and unnecessary cleanup costs.

COMMENT 721: Colonial Pipeline Company believes a right to audit clause must be included for all oversight activities.

COMMENT 722: Allied-Signal Inc., E.I. du Pont de Nemours and Co., The General Electric Company, Chevron U.S.A. Inc., Atlantic Electric, Chemical Waste Management of New Jersey, Cohen, Shapiro, Polisher, Shiekman and Cohen, and Mobil Oil Corporation noted there is no pre-payment procedure for legitimately investigating or disputing the Department's cost summaries. A dispute process should be included as well as a provision that only undisputed costs are to be submitted within the prescribed timeframe. Rather, the only recourse available to a party to object to oversight costs is non-compliance with the administrative consent order (refusal to pay) and the assertion of defenses to an enforcement action that could ultimately be brought by the Department. In essence, a party who may have a legitimate objection to oversight costs assessed must risk imposition of substantial stipulated and/or civil penalties that may far exceed the amount in dispute. The absence of a mechanism in the administrative consent order by which a party may obtain an expeditious review of Department oversight costs results in the substantial impairment of a party's due process and equal protection interests.

RESPONSE TO COMMENTS 721 AND 722: As with the cost recovery action, the Department cannot be hindered in its goal of cleaning up sites in this State by having its resources tied up in lengthy cost disputes. As the burden is upon the responsible party to show that the Department costs are unreasonable, it follows that a presumption is given to the Department that the costs imposed are reasonable and should be paid promptly. Furthermore, it would be unfair to impose the burden of costs incurred in collecting its oversight costs on the Department, as such would defeat the Department's underlying policy that the polluter pays and not the taxpayer. A right to challenge costs prior to payment provides no incentive for any responsible party to pay the costs without a challenge.

The Department will provide reasonable documentation of its costs along with its bills. The responsible party will be further aware of the Department's costs and efforts by virtue of receiving the Department's work product, on going discussions, attendance at meetings, inspection activities etc.

In the event that the responsible party does not agree with the Department's oversight costs, the responsible party may institute the Department's internal process for resolving disputes. The initial step requires that the responsible party notify the assigned case manager of the conflict to attempt to resolve it. If the conflict cannot be resolved between the case manager and the responsible party the responsible party may continue up the chain of command to the Commissioner or his or her designee as necessary.

COMMENT 723: Chemical Waste Management of New Jersey, Wheaton Industries, Inc., Colonial Pipeline Company, and American National Can believe the standard form administrative consent order should call for the Department to submit a detailed summary of its costs, including along with accrued interest the names of staffers charging time to oversight for this site the hours charged, the work performed, their respective hourly salary rates, and the indirect costs used by the Department. The final regulation should require the person to pay "for the full amount of the Department's oversight costs for the period being charged and for which payment is authorized under applicable law."

RESPONSE: The Department provides the information requested by the commenters to the responsible party with a summary of costs which sets forth the names of the individuals which have worked on the project activity, the dates each individual worked on the case, the amount of time (in hours) each individual spent working on the case, and the salary amount associated with that period of time. A responsible party can use that information along with the oversight cost reimbursement policy presented in Appendix I of the rule to cross check the Department's billing.

COMMENT 724: Cohen, Shapiro, Polisher, Shiekman and Cohen and Chevron U.S.A. Inc. believe the problem with the proposed oversight regulations is that the regulations themselves encourage and promote inefficiency. There is no incentive for the Department to become more efficient or make cost effective decisions. By these regulations, a responsible party is required to reimburse the Department for every minute that every Department employee devotes to a particular site.

RESPONSE: The incentive for the Department to be efficient and make cost effective decisions lies in the policy of the Department to clean up as many sites as possible as quickly as possible. For the Department to encourage employees to spend as much time overseeing a project because reimbursement is available as the commenters imply would be counter productive to the Department's cleanup goals. The more efficiently the Department operates, the more quickly the Department will accomplish its goals. Unlike a private entity, profit is not a goal of the Department. The Department benefits from operating efficiently for a number of reasons: (1) the less hours spent per site allows the Department to oversee more cleanups; (2) the less likely costs will be challenged; (3) the more likely a responsible party will pay promptly; and (4) the more cleanups that can be accomplished voluntarily by a responsible party, the less cleanups that will have to be performed by the Department.

Alternatives

COMMENT 725: New Jersey Petroleum Council and Shell Oil Company noted that the new formalized approach inherent in the Oversight Rules becomes more onerous when the prospect of oversight cost recovery is added. Based on the proposed oversight cost formula, a $20.00 an hour Department of Environmental Protection and Energy employee will be billed at a net cost of just under $74.00 an hour to amount to a 370 percent increase over the basic salary. At a minimum the Petroleum Council, Exxon Company, the Commerce and Industry Association of New Jersey, Atlantic Electric and Hoffman LaRoche recommended that the Department consider utilizing a minimum/maximum fee rather than a per hour fee as proposed. Without a fee cap, no responsible party would be willing to participate in the oversight program; the "blank check" is simply not acceptable.

COMMENT 726: Chevron U.S.A. Inc. and Mobil Oil Corporation believe the regulations should be revised to include a schedule of fees

as opposed to oversight cost reimbursement for responsible party actions. A set fee would be imposed for various document submittals. All fees should be duly promulgated.

RESPONSE TO COMMENTS 725 AND 726: The Department has determined that to ensure that the State of New Jersey is reimbursed fully for the resources expended in the oversight of the remediation of a contaminated site, an hour for hour reimbursement program is appropriate. The amount of resources expended directly correlates with the complexity of problems at a site and the quality of the submittals of a responsible party. Just as a minimum fee may not cover all costs, a maximum fee may overcompensate for the work performed.

Based on past experience, a per document fee schedule can result in costs for individual documents that are disproportionate to the actual cost to the Department to review that document. The oversight cost formula will provide an incentive to the responsible party to submit high quality, complete documents requiring the least review time possible.

A flat fee structure would not ensure that all oversight costs incurred by the Department would be recovered, thus creating a potential budgetary problem. As there is no reliable way to predict the scope of the cleanup until it gets underway, there would be no basis to formulate a flat fee structure. A flat fee results in some responsible parties paying too much, others too little. The Department is trying to be fair by having everyone pay their own costs.

The Department has recently proposed changes to the Environmental Cleanup Responsibility Act, Underground Storage Tanks and New Jersey Pollution Discharge Elimination System fee schedules consistent with the procedures included in Appendix I.

COMMENT 727: Cohen, Shapiro, Polisher, Shiekman and Cohen believes that a more rational oversight cost formula should be developed. One way to do this is to set a goal which would allocate perhaps five percent of any remedial project to oversight costs. Any costs in excess of five percent would have to be collected in a cost recovery proceeding where the Department would have to prove that the calculation and incurrence of such costs were reasonable.

RESPONSE: The Department is attempting to become a more efficient organization to not only accelerate the cleanup process, but to increase its productivity which in turn will lower the cost of remediation associated with Department activities. The Department cannot accurately predict how much oversight will be needed for a particular site and therefore could not allocate a set percentage of the total costs to pay for its oversight.

COMMENT 728: Mobil Oil Corporation believes if the Department is in need of additional revenue in order to manage an increased workload, Mobil recommends that rather than benefit paying customers through the memorandum of agreement process at the expense of others in the regulated community the following alternatives be employed: approach the Legislature for increased funding.

RESPONSE: The Legislature has already determined that no general funds will be given to the Site Remediation Program. The commenter is free to make its position known to the Legislature.

Summary of Changes on Adoption:

1. The Department has decided not to repeal the existing N.J.A.C. 7:26B-7 and related amendments because there is pending legislation that may call for the elimination of the oversight document requirements in the format presented in this proposal.

2. The Department made a number of minor grammatical and typographical changes and minor technical changes to either correct printing errors or clarify minor technical points.

3. In N.J.A.C. 7:26C-1.1(a), the Department has rearranged the language to clarify the intent of the provision.

4. In N.J.A.C. 7:26C-1.1(b), the Department has added the following language to clarify that this rule does not increase a person's obligations; "nor increase a responsible party's duties and obligations under existing statutes and regulations." Except as otherwise stated in this subchapter, nothing shall be construed as limiting any legal, equitable or administrative remedies which the party conducting remediation may have under any applicable law or regulation."

5. In N.J.A.C. 7:26C-1.1, the Department has added a new subsection (c) which clarifies that nothing in this rule prohibits a person from assessing or investigating a potentially contaminated site at risk.

6. In N.J.A.C. 7:26C-1.1(c), the Department has added the following language to clarify the intent of the subparagraph; "This chapter provides the procedures used to obtain the Department's approval for a site's compliance with applicable remediation standards."

7. In N.J.A.C. 7:26C-1.2(c)2ii, the Department has corrected a typographical error and has replaced the term "of" with the term "or."

8. The Department has added a subsection (d) to N.J.A.C. 7:26C-1.2, which makes the rule consistent with other Site Remediation rules concerning certification requirements by allowing the second certification to be signed by a duly authorized representative.

9. The Department has added a subsection (e) to N.J.A.C. 7:26C-1.2, which makes the rule consistent with other Site Remediation rules concerning certification requirements adding the following: "All signatures required by this section shall be notarized."

10. In N.J.A.C. 7:26C-1.3, the Department has added language to the definition of "CERCLA" to clarify that the Comprehensive Environmental Response Compensation, and Liability Act was amended by the Superfund Amendments and Reauthorization Act of 1986.

11. In N.J.A.C. 7:26C-1.3, in the definition of "contaminated site," the Department has added the phrase "at the site" and has replaced the term "exceeds" with the phrase "fails to satisfy" which more accurately describes the Department's application of the narrative and numerical standards to a site.

12. In N.J.A.C. 7:26C-1.3, in the definition of "contaminant," the Department has replaced the term "discharged" with the phrase "discharged by a person" to clarify that any of the referenced substances do not become contaminants unless discharged.

13. In N.J.A.C. 7:26C-1.3, in the definition of "discharge," the Department has deleted the phrase "including building interiors," to eliminate the confusion created by this phrase, and the phrase "A discharge does not include a discharge pursuant to and in compliance with a valid State or Federal permit[,]" to make the definition more closely track the statutory definition.

14. In N.J.A.C. 7:26C-1.3, the Department has deleted the definition of "high priority site" because it has been replaced with the definition "priority site."

15. In N.J.A.C. 7:26C-1.3, the Department has deleted the definitions of "industrial establishment" and "initial notice" as they are not used in the adopted rule.

16. In N.J.A.C. 7:26C-1.3, the Department has deleted the definition of "interim response action" to eliminate the confusion generated by this definition. Since the Department considers that an interim response action is a remedial action, this definition was extraneous.

17. In N.J.A.C. 7:26C-1.3, the Department has added the definition of "immediate environmental concern" as this term appears in the rule.

18. In N.J.A.C. 7:26C-1.3, the Department has added the definition "memorandum of understanding" to clarify the meaning of this term as it is used in this rule.

19. In N.J.A.C. 7:26C-1.3, the Department has deleted the phrase "owned, managed, held in trust or otherwise controlled by the State" to insure that the definition included all natural resources within New Jersey.

20. In N.J.A.C. 7:26C-1.3, the Department has deleted the definition of "negative declaration" as it is not necessary in the adopted rule because the Department did not adopt the section of the chapter where this phrase was used.

21. In N.J.A.C. 7:26C-1.3, the Department has deleted the definition of "operator" since the Department mistakenly defined this term by referencing N.J.A.C. 7:26B and the term is not defined in N.J.A.C. 7:26B.

22. In N.J.A.C. 7:26C-1.3, the Department has deleted the terms "and its agent," "or agents," and "and their agents" from the definition of "person" and added the term "estate" to eliminate any confusion caused by these phrases and to clarify this definition.

23. In N.J.A.C. 7:26C-1.3, the Department has replaced the phrase "hazardous substances" with "contaminants" to be consistent with the other definitions of the remedial phases.

24. In N.J.A.C. 7:26C-1.3, the Department has added the definition of the term "priority site" to replace the proposed definition of "high priority site" because this more accurately reflects how the Department conducts business.

25. In N.J.A.C. 7:26C-1.3, the Department has replaced the phrase "is a process to determine the nature and extent of site" with the phrase "are actions to investigate any known" in the definition of "remedial investigation" to clarify this definition.

26. In N.J.A.C. 7:26C-1.3, the Department has eliminated the phrase "IRA" (meaning "interim response action") from the definition of "remediation," since, as explained above, it has the same essential meaning as a remedial action.

27. In N.J.A.C. 7:26C-1.3, the Department has clarified the definition of "site investigation" to make it consistent with the definition that will appear in N.J.A.C. 7:26E.

28. In N.J.A.C. 7:26C-1.4, the Department has clarified the liberal construction language to make it consistent with the Department's other rules.

29. In N.J.A.C. 7:26C-2.1(c), the Department has added a provision stating that, except as otherwise provided in this subchapter, nothing herein affects the rights and remedies which the person conducting the remediation has pursuant to any applicable law or regulation.

30. In N.J.A.C. 7:26C-2.2(a), the Department has replaced the term "perform" with the phrase "conduct a complete," has added the sentence "or any portion or remedial phase including preliminary assessment, site investigation, remedial investigation, feasibility study, remedial design, or remedial action," and has deleted the sentence "Such agreements shall be a memorandum of agreement" to clarify the type of work permitted under a memorandum of agreement.

31. In N.J.A.C. 7:26C-2.5(i), the Department has replaced the phrase "obtain a cause of action against" with the phrase "seek to recover from" to clarify the Department's actions against non-complying directive recipients.

32. In N.J.A.C. 7:26C-2.7(b), the Department has deleted the term "high" and added the phrase "memorandum of agreement" to clarify which oversight document the Department is referring to.

33. The Department has deleted N.J.A.C. 7:26C-2.7(c) as it refers to the Environmental Cleanup Responsibility Act Administrative Consent Order which has also been deleted from this chapter.

34. In adopted N.J.A.C. 7:26C-2.7(c), the Department has added the phrase "responsible party administrative consent order" to clarify which oversight document the Department is referring to.

35. In adopted N.J.A.C. 7:26C-2.7(d), the Department has added the phrase "publicly conducted administrative consent order" to clarify which oversight document the Department is referring to.

36. The Department has recodified and clarified N.J.A.C. 7:26C-3.2(a) as N.J.A.C. 7:26C-3.1(b), to be consistent with the format of the other subchapters in the rule, and has added the phrase "at a site" to clarify the intent of the provision.

37. In proposed N.J.A.C. 7:26C-3.2(b), the Department has recodified this provision as subsection (a), added the phrase "to the Department," and replaced the phrase "available from the Department, to the Department at" with "Applications may be obtained from and submitted to"; changed the phrase "contamination permits" to "environmental permits"; added the phrase "identification of all" to "discharges and environmental permits"; and has amended the address, to clarify how a person may obtain a application to request a memorandum of agreement and to clarify where the applications should be submitted.

38. In N.J.A.C. 7:26C-3.2, the Department had added subsection (b) which clarifies how the Department will use the applications submitted by persons requesting memoranda of agreement, that is, to aid in the preparation of such memoranda.

39. In N.J.A.C. 7:26C-3.2(c), the Department has replaced the phrase "a completed application for" with the phrase "applications submitted requesting a memorandum of agreement to conduct a," and the phrases "or not" and "is necessary" with "it is necessary to conduct"; and has added "/or a" and "at the site." The Department has made these replacements and additions to clarify that in situations where a person requests a memorandum of agreement to conduct a preliminary assessment and/or site investigation, the Department must ensure that a preliminary assessment and site investigation have not been conducted already to eliminate the possibility of duplication of work.

40. In N.J.A.C. 7:26C-3.2(c)1, the Department has repositioned and modified "is not necessary" to clarify the Department's intent.

41. In N.J.A.C. 7:26C-3.2(c)2, the Department has added the phrases "to the applicant" and "at the site," and has replaced the term "for" with the phrase "to conduct," to clarify the intent of the provision.

42. In N.J.A.C. 7:26C-3.2(d), the Department has replaced "remediation" with "any remedial phase(s)," added the initial phrase "Except as provided in (c) above," added the phrase "to the applicant" after "submit," and has eliminated the phrase "other than a preliminary assessment and/or site investigation," to clarify that a person may conduct any remediation phase(s) pursuant to a memorandum of agreement.

43. In N.J.A.C. 7:26C-3.2, the Department has added subsection (e) which clarifies where a person may submit signed memoranda of agreement.

44. In N.J.A.C. 7:26C-3.2, the Department has added subsection (f) which specifies a time period for the Department to execute signed memoranda of agreement.

45. The Department has deleted N.J.A.C. 7:26C-4, Environmental Cleanup Responsibility Act Administrative Consent Orders, because there is pending legislation that may call for the elimination of the oversight document requirements in the format presented here. The Department will use the existing rules for administrative consent orders under this statute.

46. In N.J.A.C. 7:26C-5.2(a)1, the Department has eliminated the phrase "on a periodic basis"; has replaced the term "identify" with the phrase "prioritize known or suspected"; replaced the phrase "of high priority" with the phrase "to determine which sites are priority sites"; replaced the phrase "intends to allocate" with the phrase "will expend"; and replaced the term "person" with the term "responsible party(ies)." The Department made these replacements to clarify how the Department will notify responsible parties that a site is a priority and that they have the opportunity to conduct the remediation through an administrative consent order.

47. The Department has eliminated proposed N.J.A.C. 7:26C-5.4(b)4 since it refers to interim remedial actions which, as explained previously, the Department considers remedial actions and, therefore, no distinction should be made.

48. At N.J.A.C. 7:26C-5.4(b)4, the Department has added language to clarify that if an immediate environmental concern arises at a site it shall be addressed through a responsible party administrative consent order without the remedial investigation, feasibility study, financial assurance, and penalty sections. The Department has also deleted in N.J.A.C. 7:26C-5.4(b)3ii the concept of an "interim response action."

49. In N.J.A.C. 7:26C-5.5(a)3, the term "IRA" has been deleted and replaced with "a remedial action . . . to address immediate environmental concerns."

50. In N.J.A.C. 7:26C-5.6(c), the Department added the word "assurance" to be consistent with the rest of the subchapter.

51. In N.J.A.C. 7:26C Appendix A, Findings paragraph 1, the Department added the phrase "Borough, City, etc." and the phrase "i.e. Main Street to the north, etc." to clarify what type of information is inserted and what the Department wants as geographic boundaries.

52. In N.J.A.C. 7:26C Appendix A, Findings paragraph 2, the Department has repositioned the language within the paragraph to clarify the intent of the paragraph.

53. In N.J.A.C. 7:26C Appendix A, Findings paragraph 3, the Department has added the following language to clarify what activities a person may choose from to request a memorandum of agreement: "choose from the following those activities which apply" and "a. Preliminary Assessment, b. Site Investigation, c. Remedial Investigation, d. Remedial Alternative Analysis, e. Remedial Action."

54. In N.J.A.C. 7:26C Appendix A, Findings paragraph 4, the Department has added language to clarify any rights person may have, if any.

55. In N.J.A.C. 7:26C Appendix A, Findings paragraph 5, the Department has added the phrase to clarify the intent of the paragraph; "with the concurrence of [Person]."

56. In N.J.A.C. 7:26C Appendix A, section I, paragraph 1, the Department has replaced the phrase "[reference documents to be submitted, use title of document in N.J.A.C. 7:26E]" with the phrase "the following documents" and has added the following language to clarify what type of documents a person may submit to the Department: "[choose from the following those documents that apply]"

"a. Preliminary Assessment Report
b. Site Investigation Report
c. Remedial Investigation
i. Workplan
ii. Report
d. Remedial Alternative Analysis Report
e. Remedial Action
i. Workplan
ii. Report"

57. In N.J.A.C. 7:26C Appendix A, section I, paragraph 2, the Department has added language that clarifies the content of the Department's review of documents submitted pursuant to a memorandum of agreement.

58. In N.J.A.C. 7:26C Appendix A, section I, paragraph 3, the Department has added the term "calendar" to clarify how days will be

counted pursuant to the memorandum of agreement and how they have traditionally been counted under oversight documents.

59. In N.J.A.C. 7:26C Appendix A, section I, paragraph 4, the Department has added the term "[Person] determines" and has eliminated "it is determined" to clarify who can terminate the memorandum of agreement pursuant to this paragraph.

60. In N.J.A.C. 7:26C Appendix A, section I, paragraph 4, the Department has added a provision (e) which clarifies when the Department's oversight costs will cease to accrue.

61. In N.J.A.C. 7:26C Appendix A, section II, paragraph 1, the Department has replaced the phrase "[number of copies]" with the phrase "four (4)" to clarify how many copies the Department requires. The Department has also added the phrases "insert appropriate mailing address" and "Attention Section Chief" to clarify who shall be the Department's contact for the signatory.

62. In N.J.A.C. 7:26C Appendix A, section III, paragraph 1, the Department has added the term "add:" and repositioned the phrase "associated with the site" to clarify what prior costs the signatory shall be reimbursing the Department for.

63. In N.J.A.C. 7:26C Appendix A, section III, paragraph 2, the Department has replaced the phrase "required to comply" with the term "associated" to clarify the intent of the paragraph.

64. In N.J.A.C. 7:26C Appendix A, section V, paragraph 2, the Department has added language to clarify with which standards the signatory shall be in accordance.

65. In N.J.A.C. 7:26C Appendix A, section V, paragraph 4, the Department has added language to clarify person's responsibilities in the memorandum of agreement.

66. In N.J.A.C. 7:26C Appendix A, section V, paragraph 5, the Department has replaced the second use of the term "[Person]" with the term "person" to clarify that this is not referring to the signatory to the memorandum of agreement. The Department has also clarified the provision that the signatory need only preserve evidence which may provide a nexus between the contaminated site and any responsible party or lead to other areas of concern.

67. In N.J.A.C. 7:26C Appendix A, section V, paragraph 6, the Department has added language to clarify the procedures for privileged data.

68. In N.J.A.C. 7:26C Appendix A, section V, the Department has added a paragraph 7 which specifies the statement from the Department the signatory of the memorandum of agreement will receive at the completion of its obligations in the memorandum of agreement.

69. In N.J.A.C. 7:26C Appendix A, section V, adopted paragraph 9, the Department has changed the language to clarify that the memorandum of agreement is binding on each party, but this is subject to the right of termination contained in the memorandum of agreement.

70. The Department has deleted Appendix B, the administrative consent order proposed for the Environmental Cleanup Responsibility Act. Pending legislation may significantly change the format of this document, thus it will not appear as part of the adoption of N.J.A.C. 7:26C.

71. In N.J.A.C. 7:26C Appendix C, Findings section, paragraph 4, the Department has added language to clarify what rights the responsible party may have, if any.

72. In N.J.A.C. 7:26C Appendix C, Findings section, paragraph 5, the Department has added the term "public." This clarification was made in response to a number of comments that the Department would use non-public information in developing findings.

73. In N.J.A.C. 7:26C Appendix C, Findings section, paragraph 6, the Department has eliminated the phrase "The Department intends [and [Person] agrees [if applicable]] that" as the statement does not provide any additional meaning to paragraph 6 and several commenters thought this should be removed.

74. In N.J.A.C. 7:26C Appendix C, Findings section, paragraph 7, the Department has added language to clarify that the responsible party has input in the additional provisions that may be added to the document.

75. In N.J.A.C. 7:26C Appendix C, Section I, paragraph 2, the Department has replaced the term "[amount]" with the phrase "the amount indicated in the written summary" due to the fact that the Department does not always have an accurate quote of the past costs at the time the administrative consent order is issued nor at the time it is entered into. This is due to the way the costs are calculated, and the Department has replaced the phrase "payment for these" with the phrase "reimbursement of the" to clarify the intent of the paragraph.

76. In N.J.A.C. 7:26C Appendix C, the Department has eliminated the interim response action section (Section II) to clarify that the Department considers an interim remedial action as a remedial action and therefore it is covered under the remedial action section.

77. In N.J.A.C. 7:26C Appendix C, the Department has replaced sections III and IV with sections II, III, IV, and V to clarify the Department's requirements and to provide the responsible party with a schedule they can use to add predictability to the process.

78. In N.J.A.C. 7:26C Appendix C, section VI, Permit Application Process for Remedial Activities, the Department has moved paragraph 3 to section XVI paragraph 20, as this is a general statement and not a permit process requirement.

79. In N.J.A.C. 7:26C Appendix C, section VII, Progress Reports, paragraph 1, the Department has eliminated the phrase "If requested by the Department" because the Department does require progress reports to assess the progress of the remediation and to generate its workplans in order to dedicate the appropriate resources to the project. The Department has also added the language "Based on site specific activities being performed by [Person], the Department may request that progress reports be submitted monthly, semi-annually or annually." This change was made to clarify that it is possible that on some sites quarterly progress reports are not practicable.

80. In N.J.A.C. 7:26C Appendix C, the Department has eliminated section VIII, Financial Assurance and Project Review Cost, due to the requirements of pending legislation Senate Bill 1070.

81. In N.J.A.C. 7:26C Appendix C, the Department has added a section IX regarding financial assurance to clarify that the form and amount of financial assurance shall be determined by the Department on a case-by-case basis.

82. In N.J.A.C. 7:26C Appendix C, the Department has added a section X, Project Cost Review, to clarify the Department's project cost review requirements. The section consists of the requirements proposed in section VIII, paragraph 7.

83. In N.J.A.C. 7:26C Appendix C, section XI, Oversight Cost Reimbursement, paragraph 1, the Department has added the term "written" to clarify that the summary to be provided to the responsible party by the Department shall be a written summary.

84. In N.J.A.C. 7:26C Appendix C, section XII, Stipulated Penalties, paragraph 3(a), the Department has eliminated the phrase "v. Implement any approved interim response actions;" since this refers to interim response actions and, as previously explained, the Department has eliminated the phrase interim response action from the rule. The Department has also eliminated the phrase "xi. Submit payment of penalty or damage payments[.]" as it is not necessary to have it in this paragraph.

85. In N.J.A.C. 7:26C Appendix C, section XII, Stipulated Penalties, paragraph 4, the Department has added the phrase "the payment" to clarify the intent of the paragraph.

86. In N.J.A.C. 7:26C Appendix C, section XII, Stipulated Penalties, paragraph 7, the Department has deleted the term "additional" to clarify the intent of this paragraph. The term additional is not necessary in this paragraph.

87. In N.J.A.C. 7:26C Appendix C, section XII, Stipulated Penalties, the Department has eliminated paragraph 8 because this paragraph is a duplicate of paragraph 7.

88. In N.J.A.C. 7:26C Appendix C, section XIII, paragraph 1, the Department has eliminated the phrase "or fails to meet the obligations" as this is a redundant phrase, and has added language to provide the responsible party with notice of the Department's intent to terminate the administrative consent order.

89. In N.J.A.C. 7:26C Appendix C, section XIII, paragraph 2, the Department has eliminated the phrase "for matters not set forth in the findings of this [Order]" because all of the Department's findings of fact maintained in the Department's files are incorporated in the findings of the administrative consent order, which could mean that the Department might not be able to seek a penalty for anything else ever found in the Department's files. The ACO is not to be used as protection against responsible parties being held accountable for other environmental violations at their site not associated with the ACO.

90. In N.J.A.C. 7:26C Appendix C, section XIII, paragraph 4, the Department has replaced the term "[Person]" with the term "person" to clarify that this paragraph applies to any person and not just the signatory.

91. In N.J.A.C. 7:26C Appendix C, section XIII, the Department has added a paragraph 7 which clarifies what defenses a responsible party has in an enforcement action initiated by the Department.

92. In N.J.A.C. 7:26C Appendix C, section XIV, Force Majeure, paragraph 4(c), the Department has replaced the term "paragraph 1., above; and" with the phrase "the above paragraphs; and" to clairfy that the breach must fall within all the paragraphs of section XIV.

93. In N.J.A.C. 7:26C Appendix C, the Department has added section XV, Dispute Resolution, which sets forth the Department's internal dispute resolution process.

94. In N.J.A.C. 7:26C Appendix C, section XVI, General Provisions, paragraph 1, the Department has replaced the term "Paragraph []" with the phrase "this [Order]" to eliminate the need to reference a Department, and the Department has replaced the phrase "presence of" with the phrase "immediate threat caused by" and the phrase "which has the potential to" with the term "may," to clarify that the Department would not necessarily stop work, construction, improvement(s), or change(s) at the site merely from the presence of, but because of the threat that, hazardous substances pose to human health and the environment.

95. In N.J.A.C. 7:26C Appendix C, section XVI, General Provisions, paragraph 3, the Department has added language to clarify when the Department has access to the site.

96. In N.J.A.C. 7:26C Appendix C, section XVI, General Provisions, paragraph 5, the Department has added language to clarify this provision.

97. In N.J.A.C. 7:26C Appendix C, section XVI, General Provisions, paragraph 8, the Department has replaced the term "Notwithstanding" with the term "Nothing" as this was a typographical error.

98. In N.J.A.C. 7:26C Appendix C, section XVI, General Provisions, paragraph 10, the Department has added language to eliminate the confusion created by this paragraph and to clarify that the signatory need only preserve evidence which may provide a nexus between the contaminated site and any responsible party or lead to other areas of concern.

99. In N.J.A.C. 7:26C Appendix C, section XVI, General Provisions, paragraph 11, the Department has added language to clarify for which documents the responsible party may assert a privilege.

100. In N.J.A.C. 7:26C Appendix C, section XVI, General Provisions, paragraph 12, the Department has replaced the term "debt" with the term "claims" to clarify the intent of the paragraph and eliminated the end of the paragraph as it was redundant.

101. In N.J.A.C. 7:26C Appendix C, section XVI, General Provisions, paragraph 13, the Department has eliminated the term "Administrative" because it was a typographical error.

102. In N.J.A.C. 7:26C Appendix C, section XVI, General Provisions, paragraph 18, the Department has added language to clarify that this is the entire agreement between the Department and the responsible party and that it is for the site that is subject to the [Order].

103. In N.J.A.C. 7:26C Appendix C, section XVI, General Provisions, the Department has added a paragraph 20, which was moved from section VI, Permit Application Process for Remedial Activities.

104. In N.J.A.C. 7:26C Appendix C, section XVI, General Provisions, the Department has eliminated proposed paragraph 20 as this paragraph is not necessary under this oversight document.

105. In N.J.A.C. 7:26C Appendix C, section XVI, General Provisions, paragraph 21, the Department has added language which clarifies that this paragraph applies if the signatory to the administrative consent order is the owner of the site.

106. In N.J.A.C. 7:26C Appendix C, section XVI, General Provisions, the Department has deleted (a) and (b) of paragraph 21, as these provisions do not affect the remediation and, therefore, are not necessary because the Department decided these provisions were not essential in the Department's oversight of the remediation of a contaminated site.

107. In N.J.A.C. 7:26C Appendix C, section XVI, General provisions, paragraph 22, the Department has changed the term "signatory" to "party" to clarify the provision.

108. In N.J.A.C. 7:26C Appendix C, section XVI, General Provisions, paragraph 23, the Department has deleted "or a privilege" in the last sentence because it was not necessary to the meaning of the provision, and added "any privilege or" after "agrees not to assert" in the last sentence to make the second part of the sentence consistent with the first part of the sentence.

109. In N.J.A.C. 7:26C Appendix C, section XVI, General Provisions, paragraph 26, the Department has added "This paragraph will only be applicable when any signatory to the [Order] is the owner of the site and at such time that the signatory becomes an owner of the site." This language clarifies when this paragraph is operative.

110. In N.J.A.C. 7:26C Appendix C, section XVI, General Provisions, paragraph 27, the Department has deleted the last sentence to clarify that termination of the [Order] terminates all of the terms and conditions of the [Order].

111. In N.J.A.C. 7:26C Appendix C, section XVI, General Provisions, the Department has added a new paragraph 31 as follows: "[Person] may assert a claim of confidentiality for any information submitted by [Person] pursuant to this [Order], by following the Department's procedures in N.J.A.C. 7:14A-1." This provision allows a signatory to make a claim of confidentiality consistent with other regulatory schemes.

112. In N.J.A.C. 7:26C Appendix C, section XVI, General Provisions, the Department has deleted paragraph 32 because it was the same as paragraph 27.

113. In N.J.A.C. 7:26C Appendix C, section XVI, General Provisions, paragraph 33, the Department has deleted the administrative phrase "[Optional-use if the oversight document is an administrative consent order] because it is not necessary. There are several paragraphs in the administrative consent order which the Department would not include when it issues an administrative order pursuant to N.J.A.C. 7:26C-2.4(b). The Department has also deleted the phrase "within five (5) business days from the effective date" to make this paragraph consistent with the rest of the [Order].

114. In N.J.A.C. 7:26C Appendix D, Findings, Paragraph 1, the Department has changed the phrase "memorandum of agreement" to "administrative consent order" since this is an administrative consent order and not a memorandum of agreement.

115. In N.J.A.C. 7:26C Appendix D, Findings, Paragraph 4, the Department has changed "does not admit" to "neither admits" and added the following language to clarify [Person]'s rights with regard to the site under a publicly conducted administrative consent order: "nor waives any rights or defenses with regard to the Site except as specifically provided in this administrative consent order."

116. In N.J.A.C. 7:26C Appendix D, Findings, Paragraph 5, the Department has added the term "public" to the type of files which will be incorporated into the document.

117. In N.J.A.C. 7:26C Appendix D, Findings, Paragraph 6, the Department has eliminated the phrase "The Department intends [and [Person] agrees [if applicable]] that" as the statement does not provide any additional meaning to paragraph 6 and several commenters thought this should be removed.

118. In N.J.A.C. 7:26C Appendix D, Findings, Paragraph 7, the Department has added the following language to clarify how additional provisions will be added to the publicly conducted administrative consent order: "the concurrence of [Person]."

119. In N.J.A.C. 7:26C Appendix D section I, the Department has combined paragraphs 1 and 2.

120. In N.J.A.C. 7:26C Appendix D sections II and III, the Department has replaced the term "RI/FS" with "[remedial phase]" to clarify that this administrative consent order can be used by the Department to conduct any remediation phase, and not just the RI/FS, with funding from the responsible party.

121. In N.J.A.C. 7:26C Appendix D section II, paragraph 2(a), the Department added the phrase "to pay the Department's costs of the [remedial phase]," has replaced the phrase "such fund" with the phrase "the Account," and has replaced the term "amount" with "Account" to clarify the purpose for the "Account."

122. In N.J.A.C. 7:26C Appendix D section II, paragraph 2(b), the Department has added the phrase "to its contractors" to clarify who the Department is paying.

123. In N.J.A.C. 7:26C Appendix D section II, paragraph 2(c), the Department has replaced the phrase "from the Department" and the term "by" with the term "from." The Department has also replaced the term "[amount]" with the phrase "the amount necessary to satisfy (a) above, the phrase "in an amount" with the phrase "to restore the Account to an amount which will be," and the phrase "restore the Account to an amount of $ [amount]." with "pay the costs of the [remedial phase]." The Department has made these replacements to clarify for what the additional funds will be used.

124. In N.J.A.C. 7:26C Appendix D section II, paragraph 2(d), the Department has replaced the phrase "completion of the RI/FS" with the phrase "the Department's remedial work described in this administrative consent order" to clarify that this administrative consent

order can be used by the Department to conduct any remediation phase, and not just the RI/FS, with funding from the responsible party.

125. In N.J.A.C. 7:26C Appendix D section III, paragraph 1, the Department has deleted the terms "Remedial Investigation," "Feasibility Study Reports," and "Treatability Study Reports" to clarify that this administrative consent order can be used by the Department to conduct any remediation phase, and not just the RI/FS, with funding from the responsible party.

126. In N.J.A.C. 7:26C Appendix D section III, paragraph 4, the Department has replaced the word "conduct" with "implementation," added the phrase "site or the" and deleted the word "being" to clarify that the responsible party may need to obtain access for the site or to a property onto which contamination has emanated.

127. In N.J.A.C. 7:26C Appendix D, section IV, paragraph 2, the Department has deleted the word "all." as unnecessary.

128. In N.J.A.C. 7:26C Appendix D, section IV, paragraph 6, the Department has added "Compensation and Control" to the term "Spill Act."

129. In N.J.A.C. 7:26C Appendix D, section IV, paragraph 7, the Department has changed the number of business days for filing a petition of bankruptcy from the "first business day" to "five business days." The last sentence of this paragraph has also been deleted as it concerns financial assurance and this oversight document does not require financial assurance.

130. In N.J.A.C. 7:26C Appendix D section IV, paragraph 9, the Department has deleted "or [person] to eliminate any confusion.

131. In N.J.A.C. 7:26C Appendix D section IV, the Department has deleted Paragraph 11 to eliminate any confusion this paragraph may have caused.

132. In N.J.A.C. 7:26C Appendix D section IV, the Department has added a new paragraph 13 which outlines the process of recording the administrative consent order with the county clerk: "Within thirty (30) calendar days after the effective date of the administrative consent order, [person] shall record a copy of this administrative consent order with the County Clerk, [ ] County, State of New Jersey and shall provide the Department with written verification of compliance with this paragraph which shall include a copy of this administrative consent order stamped 'Filed' by the County Clerk."

133. In N.J.A.C. 7:26C Appendix D, section IV, the Department has added a paragraph providing a reservation of rights for the signatories.

134. In N.J.A.C. 7:26C Appendix D section IV, paragraph 14, the Department has deleted "the" before "[Person]", the phrase "financial assurance required by Paragraph [ ] above, and" and "by Paragraph [ ]."

135. In N.J.A.C. 7:26C Appendix I section II, the Department has added the following language to inform the regulated community that the cost factors do not remain static, but can change annually: "The values for the various factors are subject to change on an annual basis. The Department will publish these factors in the New Jersey Register on an annual basis to inform the public of revised rates."

136. In N.J.A.C. 7:26C Appendix I in sections I and II, the Department has deleted any definitive numbers relating to the additive factor/rate, the fringe benefit factor/rate and the indirect cost factor/rate, in response to the previous statement which has been added to the rule.

137. In N.J.A.C. 7:26C Appendix I in section II, in the discussion of fringe benefit rate the Department has changed the phrase "has negotiated" to "negotiates". The phrase "21.00%" has been deleted and replaced with "a certain percentage."

138. In N.J.A.C. 7:26C Appendix I in section II, the Department has changed the phrase "of 132.24% represents the rate which has been developed for this program" to "is."

139. In N.J.A.C. 7:26C Appendix I in section II, the Department has deleted the last paragraph to eliminate any confusion this paragraph may have caused.

Full text of the adoption follows (deletions from proposal shown in brackets with asterisks *[thus]*; additions to proposal shown in boldface with asterisks ***thus***):

CHAPTER 26C
DEPARTMENT OVERSIGHT OF THE REMEDIATION OF CONTAMINATED SITES

SUBCHAPTER 1. GENERAL INFORMATION

7:26C-1.1 Scope

(a) This chapter identifies the *[Department oversight]* documents available for a person *[to participate]* ***who participates*** in the remediation of a contaminated site or the assessment and investigation of a potentially contaminated site ***under Department oversight***, and presents the procedures to determine the applicable oversight document for a particular site.

(b) The participation by any person in any of the procedures outlined in this chapter shall not relieve that person from responsibility to comply with all other applicable statutes and regulations ***nor increase a responsible party's duties and obligations under existing statutes and regulations. Except as otherwise stated in this subchapter, nothing shall be construed as limiting any legal, equitable or administrative remedies which the party conducting remediation may have under any applicable law or regulation.***

(c) Nothing in this chapter prohibits a person for assessing or investigating a potentially contaminated site at risk without the Department's oversight unless:

i. The Department issues a directive pursuant to N.J.S.A. 58:10-23.11f; or

ii. The site is a priority site.

(d) This chapter provides the procedures used to obtain the Department's approval for a site's compliance with applicable remediation standards.*

7:26C-1.2 Certifications

(a) Any person making a submission to the Department required by this chapter, shall include the following signatures and two-part certification pursuant to (b) and (c) below.

(b) The following certification shall be signed by the highest ranking individual with overall responsibility for implementing the remediation of a site:

"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 penalties for knowingly submitting false, inaccurate or incomplete information and that I am committing a crime of the fourth degree if I make a written false statement which I do not believe to be true. I am also aware that if I knowingly direct or authorize the violation of any statute, I am personally liable for the penalties."

(c) The second certification shall be as indicated in (c)1 below.

1. "I certify under penalty of law that I have personally examined and am familiar with the information submitted herein 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 penalties for knowingly submitting false, inaccurate or incomplete information and that I am committing a crime of the fourth degree if I make a written false statement which I do not believe to be true. I am also aware that if I knowingly direct or authorize the violation of any statute, I am personally liable for the penalties."

2. The certification in (c)1 above 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 *[of]* ***or*** sole proprietorship, by a general partner or the proprietor, respectively; or

iii. For a municipality, State, Federal or other public agency, by either a principal executive officer or ranking elected official.

iv. For persons other than (c)2i through iii above by the person with legal responsibility for the site.

(d) All documents listed in (c) above shall be signed by a person described in (b)2i above who shall make the certification set forth in (b)2 above, or by a duly authorized representative of that person. A person is a duly authorized representative only if:

1. The authorization is made in writing by a person described in (b)2i above;

2. The authorization specifies either an individual or a position having a responsibility for the overall operation of the site or activity, such as the position of plant manager, or a superintendent or person of equivalent responsibility (a duly authorized representative may thus be either a named individual or any individual occupying a named position);

3. The written authorization is submitted to the Department; and

4. If the authorization is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of this subsection shall be submitted to the Department prior to or together with any reports, information, or applications to be signed by an authorized representative.

(e) All signatures required by this section shall be notarized.*

7:26C-1.3 Definitions

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

"Administrative consent order" means an administrative order issued by the Department which is consented to by one or more persons; and may be in the form of a memorandum of understanding for public entities at the Department's discretion.

"CERCLA" means the Comprehensive Environmental Response, Compensation, and Liability Act ***of 1980***, as amended ***by Superfund Amendments and Reauthorization Act of 1986*** (42 U.S.C. 9601 et seq.).

"Commissioner" means the Commissioner of the Department of Environmental Protection and Energy or his or her authorized representative.

"Contaminated site" means all portions of environmental media ***at the site*** that contain one or more contaminants at a concentration which *[exceeds]* ***fails to satisfy*** any applicable *[cleanup]* ***remediation*** standard, and includes all contamination at an industrial establishment, facility or other site, and all contamination which is emanating, or which has emanated, therefrom.

"Contaminant" means any *[discharged]* hazardous substance, hazardous constituent, hazardous waste or pollutant ***discharged by a person***.

"Decision document" means a document issued by the Department that outlines the engineering components and cleanup standards for all or part of a contaminated site. The decision document summarizes the history, characteristics and risks posed by conditions at the site. The decision document also describes, where appropriate, the remedial alternatives that were considered during the site investigation, the comparative analysis of those alternatives and provides the rationale for selection of the final remedial action, specifically explaining the remedial action.

"Department" means the New Jersey Department of Environmental Protection and Energy.

"Directive" means a document issued by the Department pursuant to N.J.S.A. 58:10-23.11 et seq. and N.J.S.A. 13:1D-1 et seq. to, among other things, notify the recipient thereof that the Department has determined that it is necessary to remove or arrange for the removal of a discharge of hazardous substances and that the Department believes the recipient is a person who may be subject to liability for the discharge of a hazardous substance.

"Discharge" means any intentional or unintentional act or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of a hazardous substance, hazardous constituent, hazardous waste or pollutant into the waters or onto the lands of the State*[, including building interiors;]* or into waters outside the jurisdiction of the State when damage may result to the lands, waters, or natural resources within the jurisdiction of the State. *[A discharge does not include a discharge pursuant to and in compliance with a valid State or Federal permit.]*

"ECRA" means the Environmental Cleanup Responsibility Act, N.J.S.A. 13:1K-6 et seq.

"Environmental medium" means any component such as soil, air, sediment, structures, ground water or surface water.

"EPA" means the United States Environmental Protection Agency.

["Feasibility study" or "FS" means a study to develop and evaluate options for remedial action pursuant to N.J.A.C. 7:26E. The FS emphasizes data analysis and is generally performed concurrently and in an interactive fashion with the remedial investigation (RI). The FS process uses data gathered during the RI to develop conceptual remedial action alternatives based on the characterization of the nature and extent of contamination. The RI data are used to define the objectives of the remedial action and to develop remedial action alternatives. Next, an initial screening of these alternatives is conducted to reduce the number of alternatives to a workable number. Finally, the FS involves an analysis for engineering, scientific, institutional, human health, environmental and cost factors of a limited number of alternatives which remain after the initial screening stage.]

"Hazardous constituent" means any substance defined as such pursuant to the Hazardous Waste Regulations, N.J.A.C. 7:26-8.16.

"Hazardous substance" means any substance defined as such pursuant to the Discharges of Petroleum and Other Hazardous Substances Regulations, N.J.A.C. 7:1E.

"Hazardous waste" means any solid waste as defined in the Solid Waste Regulations, N.J.A.C. 7:26-1.4, that is further defined as a hazardous waste pursuant to the Hazardous Waste Regulations, N.J.A.C. 7:26-8.

*["High priority site" means a contaminated site that is scheduled to be remediated with public funds unless a responsible party executes an administrative consent order pursuant to this subchapter.

"Industrial establishment" means any place of business or real property identified as an industrial establishment pursuant to N.J.A.C. 7:26B.

"Initial Notice" means both the completed GIS and the completed SES described at N.J.A.C. 7:26B-3.

"Interim response action" or "IRA" means the temporary or partial remediation of contaminants, or temporary or partial remediation of an operable unit as may be necessary due to a discharge or threat of a discharge to prevent, minimize, or mitigate damage to human health or to the environment, which may otherwise result from a discharge or threat of discharge. The term also includes, but is not limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals, and removal and care of wildlife.]*

"Immediate environmental concern" means a condition exists at a site posing an acute, direct threat to human health or the environment."

"Memorandum of agreement" means a written agreement between the Department and one or more persons concerning the Department's oversight of remediation pursuant to this chapter.

"Memorandum of understanding" means an oversight document issued by the Department to a public entity, similar to the form of an administrative consent order, but without the stipulated penalties and the financial assurance provisions.

"Multiple responsible parties" means five or more unrelated responsible parties, as determined by the Department, involved at a contaminated site.

"Natural resources" means all land, biota, fish, shellfish, and other wildlife, air, waters and other such resources *[owned, managed, held in trust or otherwise controlled by the State]*.

["Negative declaration" means a negative declaration as defined pursuant to N.J.A.C. 7:26B.]

"Operable unit" means part of a contaminated site for which a discrete action comprises an incremental step toward comprehensively addressing contaminated site problems. This discrete portion of remediation manages migration, or eliminates or mitigates a discharge, threat of a discharge, or pathway of exposure to a contaminant. Remediation of a site can be divided into a number of operable units, depending on the complexity of the problems associated with the site. Operable units may address geographical

portions of a site, specific site problems, or initial phases of an action, or may consist of any set of actions performed over time or any actions that are concurrent but located in different parts of a site.

"Operation, maintenance and monitoring" or "OM&M" means activities required to operate, maintain and ensure the effectiveness of a remedial alternative.

"Oversight document" means any document the Department issues pursuant to this chapter to define the role of a person conducting the remediation of a contaminated site, and may include, without limitation, an administrative order, administrative consent order, directive, memorandum of understanding, or memorandum of agreement.

["Operator" means any person defined as an operator pursuant to N.J.A.C. 7:26B.]

"Owner" means any person defined as an owner pursuant to N.J.A.C. 7:26B.

"Person" means any individual or entity, including without limitation, a public or private corporation, company, ***estate,*** association, society, firm, partnership, joint stock company, foreign individual or entity *[and its agents]*, interstate agency or authority, the United States and any of its political subdivisions *[or agents]*, the State of New Jersey *[and its agents]*, or any of the political subdivisions of or found within the State of New Jersey *[and their agents]*, or any of the other meanings which apply to the common understanding of the term.

"Pollutant" means any substance defined as such pursuant to the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq.

"Preliminary assessment" or "PA" means the initial search and evaluation of existing site specific operational and environmental information to determine if further investigation concerning the *[document]* ***documented***, alleged, suspected or potential release of *[hazardous substances]* ***any contaminants*** is required by the Department. The preliminary assessment is the first phase in the process of determining whether contaminants are present at a site.

"Priority site" means a site which has been evaluated based on the Department's remedial priority scoring system and is scheduled to be remediated with public funds unless a person executes an administrative consent order pursuant to this subchapter.

"Public entity" means any Federal, State or county agency, commission or authority, any municipality or municipal authority or any body corporate and politic created by the act or acts of the Federal government, the State Legislature or any county or municipal government.

"RCRA" means the Resource Conservation and Recovery Act, as amended (42 U.S.C. 6901 et seq.).

"Record of decision" or "ROD" is a decision document issued by the EPA pursuant to CERCLA, that outlines the engineering components and remediation goals in a remedial action plan for an NPL site or operable unit which is part of an NPL site. The ROD summarizes the history, characteristics and risks posed by conditions at the site. The ROD also describes the remedial alternatives that were considered during the feasibility study, the comparative analysis of those alternatives and provides the rationale for selection of the final remedial action, specifically explaining how the remedial action satisfies the requirements of CERCLA.

"Remedial action" or "RA" means those actions taken at a contaminated site and may be specified in a decision document, ROD, or other document the Department determines appropriate. The term includes, but is not limited to, such actions at the location of a contaminated site as compliance with cleanup standards, storage, confinement, perimeter protection using dikes, trenches, or ditches, clay or other covers, neutralization, cleanup of discharged contaminants and associated contaminated materials, ground water pumping and treatment, recycling or reuse, diversion, destruction, segregation of wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, treatment, off-site transport and off-site storage, treatment, destruction, or secure disposition of contaminants and associated contaminated materials, or any monitoring required to assure that such actions protect the public health or the environment. The term includes the permanent relocation of residents and businesses and community facilities where the Department determines that, alone or in combination with other measures, such relocation is more cost-effective than, and environmentally preferable to, the transportation, storage, treatment, destruction, or secure disposition off-site of such contaminants, or may otherwise be necessary to protect human health. The term includes the restoration of natural resources.

"Remedial alternative analysis" or "RAA" means a study to develop and evaluate options for remedial action pursuant to N.J.A.C. 7:26E. The RAA emphasizes data analysis and is generally performed concurrently and in an interactive fashion with the remedial investigation (RI). The RAA process uses data gathered during the RI to develop conceptual remedial action alternatives based on the characterization of the nature and extent of contamination. The RI data are used to define the objectives of the remedial action and to develop remedial action alternatives. Next, an initial screening of these alternatives is conducted to reduce the number of alternatives to a workable number. Finally, the RAA involves an analysis for engineering, scientific, institutional, human health, environmental and cost factors of a limited number of alternatives which remain after the initial screening stage.

"Remedial design" or "RD" means the technical analysis, procedures, and activities which follow the selection of a remedial action for a contaminated site and results in a detailed set of plans, reports and specifications for implementation of the remedial action.

"Remedial investigation" or "RI" *[is a process to determine the nature and extent of site]* ***are actions to investigate and or mitigate any known*** contamination and the problems presented by a discharge. The RI emphasizes data collection and site characterization, and is generally performed concurrently and in an interactive fashion with the *[feasibility study]* ***remedial alternative analysis***. The RI includes sampling and monitoring, as necessary, and includes the gathering of sufficient information to determine the necessity for remedial action and to support the evaluation of remedial alternatives.

"Remediation" means all necessary actions to investigate and clean up any known or suspected discharge or threatened discharge of contaminants, including, but not limited to, PA/SIs, *[IRAs, RI/FSs,]* ***RI, RAA,*** RDs, RAs, and OM&M.

"Responsible party" means a person who is in any way responsible for a contaminated site, or for the contaminants at a site including, for the purposes of this chapter, each owner or operator, and any other person obligated by law to clean up and remove contaminants at a site.

"Site investigation" or "SI" means the collection and evaluation of *[adequate]* data *[through biased environmental sampling to verify and support the findings of the preliminary assessment]* ***necessary to determine whether or not contaminants exist at the site which fail to satisfy the applicable remediation standard***.

"Solicitation document" means the document by which the Department seeks proposals from prospective offerors for the provision of services.

"Spill Act" means the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq.

7:26C-1.4 Liberal construction

These rules, being necessary to promote the *[human]* ***public*** health and *[the environment]* ***welfare***, shall be liberally construed in order to *[allow]* ***permit*** the Commissioner and the Department to effectuate the purposes of the law.

7:26C-1.5 Severability

If any section, subsection, provision, clause or portion of this chapter is adjudged invalid or unconstitutional by a court of competent jurisdiction, the remainder of this chapter shall not be affected thereby.

SUBCHAPTER 2. PROCEDURES FOR THE IDENTIFICATION OF THE APPROPRIATE OVERSIGHT DOCUMENT

7:26C-2.1 Scope

(a) This subchapter identifies:

1. The statutory authority for the Department to oversee a person's participation in the remediation of a site;

2. The oversight documents available depending on the circumstances of the particular site;

3. The procedures and requirements for a person to respond to a Spill Act Directive from the Department; and

4. The procedures to determine which particular oversight document is appropriate for a particular site.

(b) If a person conducting remediation elects to obtain Department oversight of those activities, the parties shall execute an oversight document pursuant to this chapter.

(c) Nothing in this subchapter shall be construed as limiting:

1. Any legal, equitable or administrative remedies against any person which the Department may have under any applicable law or regulation; *[or]*

2. The Department's discretion to pursue or to refrain from pursuing any such remedies*[.]**; or*

3. Except as otherwise stated in this chapter, any legal, equitable or administrative remedies which the party responsible for conducting the remediation may have under any applicable law or regulation.*

7:26C-2.2 Memorandum of agreement

(a) The Department may choose to enter into an agreement with any person through which that person agrees to *[perform]* ***conduct a complete*** remediation of certain known or suspected contaminated sites***, or any portion or remedial phase including preliminary assessment, site investigation, remedial investigation, remedial alternative analysis, remedial design, or remedial action****. *[Such agreements shall be a memorandum of agreement.]*

(b) The Department will include in each memorandum of agreement, pursuant to (a) above, provisions pursuant to N.J.A.C. 7:26C-3.

7:26C-2.3 Administrative consent order

(a) Pursuant to N.J.S.A. 13:1D-1 et seq., the Environmental Cleanup Responsibility Act, the Spill Compensation and Control Act, the Solid Waste Management Act, and the Water Pollution Control Act, the Department may issue an administrative consent order. Among other actions, the Department may issue administrative consent orders for the remediation of a contaminated site.

(b) The Department may choose to enter into an agreement with any person through which that person shall undertake remediation of a high priority site under the supervision of the Department. Such agreements shall be administrative consent orders.

(c) The Department will include in each administrative consent order for the remediation of a site provisions that conform to the requirements in N.J.A.C. 7:26C-4 or 5 as applicable.

7:26C-2.4 Administrative order

(a) Pursuant to N.J.S.A. 13:1D-1 et seq., the Solid Waste Management Act, and the Water Pollution Control Act, the Department may issue an administrative order. Among other actions, the Department may issue administrative orders for the remediation of a contaminated site.

(b) The Department will include, in each administrative order for the remediation of a contaminated site, provisions that conform to the requirements in N.J.A.C. 7:26C-5 to the extent appropriate to the particular enforcement action.

7:26C-2.5 Spill Act directive

(a) Pursuant to the Spill Compensation and Control Act, the Department may direct persons who are in any way responsible for a discharge of a hazardous substance to:

1. Conduct the remediation of a contaminated site, including the actual removal of the contamination or measures designed to prevent or mitigate damages to human health or the environment; or

2. Arrange for the remediation of a contaminated site, including such indirect arrangements as the funding by the responsible party of the government's costs to conduct the necessary remediation, or any other indirect arrangement deemed appropriate by the Department in the exercise of its enforcement discretion.

(b) This directive is intended to constitute a clear, written notice of that person's potential liability under N.J.S.A. 58:10-23.11 for any costs of cleanup, civil penalties or damages, and to provide that person a timely opportunity to respond to the directive.

(c) To the extent possible, the Department will in the directive provide general notice as to:

1. The site of the discharge or threatened discharge;

2. The identity of those responsible parties receiving the directive;

3. The connection of the directive recipient to the discharge;

4. The nature of the necessary remediation or the estimated costs to be incurred;

5. The actions that the directive recipients are directed to accomplish;

6. The manner and timetable for the undertaking of those activities; and

7. The identification of a period in which the recipients shall respond to the directive.

(d) The Department may issue a notice to an insurer or any other person who may have financial responsibility for those believed by the Department to be in any way responsible for a discharge of a hazardous substance.

(e) In those instances where the Department directs the performance of remediation, the Department may, in the exercise of its enforcement discretion, require the entry of an agreement in the form of an administrative consent order in order to provide assurance that any remediation required by that directive will be performed in a timely and proper fashion. These administrative consent orders shall conform to N.J.A.C. 7:26C-5.

(f) Prior to the expiration of the time for a response contained in the directive, the Department will be available to discuss the directive with the directive recipient. These discussions shall be initiated by the directive recipient and inquiries shall be made to the Department's contact person designated in the directive.

(g) The directive recipient shall communicate its selection of one of the following responses to the directive in writing to the Department's contact person identified in the directive within the time period set forth in the directive.

1. If the directive recipient decides to comply with the directive, the directive recipient shall respond in accordance with the specific instructions contained within the directive.

2. If the directive recipient decides not to comply with the directive, but decides to pay for certain portions of the remediation specified in the directive, the directive recipient shall make such payment in mitigation of any liability that it may possess and comply with (h) below; however, the Department may refuse any payment made pursuant to this paragraph if there are any conditions attached to that payment.

3. If the directive recipient decides not to comply with the directive, the directive recipient shall indicate in writing that it chooses not to take any actions to comply with the directive and comply with (h) below.

(h) If the directive recipient chooses to pay in mitigation of its liability under a directive or not to comply with a directive, the directive recipient shall submit a written response to the Department according to the requirements in the directive.

1. The directive recipient shall include in the response a detailed explanation of the recipient's reasons for its decision, including all good cause defenses therefore. These written reasons will serve both to enable the Department to consider the recipient's contentions as to liability and to establish the nature and extent of any good cause defenses to treble damages.

2. The defenses the directive recipient includes in its written response to the directive will establish the good cause defenses to

treble damages which the directive recipient may raise in a subsequent action by the Department to enforce the directive. The Department will rely on such defenses raised in a timely manner in its decision to proceed with public funds to remove or arrange for the removal of the discharge.

(i) In those circumstances where a person has chosen not to comply with a directive by executing an administrative consent order pursuant to this chapter, not to pay in mitigation of its liabilities under a directive, or not to respond to a directive, the Department may perform the remediation and *[obtain a cause of action against]* ***seek to recover from*** the directive recipient in an amount equal to three times the cost of the remediation conducted in accordance with the directive. In order to obtain such a treble recovery, the Department must initiate a cost recovery action in court against the directive recipient and must prove, as an initial matter, its entitlement to a single-cost recovery against the directive recipient. If the Department is able to establish a single-cost recovery against a directive recipient, it will be entitled to treble the cost recovery unless the recipient can establish that the directive recipient had, at the time required to respond to the directive, an objectively reasonable basis for failing to comply with the directive.

(j) Nothing in this section shall prohibit the Department from pursuing a cost recovery action against any person.

7:26C-2.6 Court action

Pursuant to the Environmental Cleanup Responsibility Act, Water Pollution Control Act and the Spill Compensation and Control Act, other environmental statutes and the common law, the Department may seek a range of judicial relief to address a contaminated site. The Department will exercise its enforcement discretion on a case-by-case basis in determining whether or not and how to proceed with court actions for the remediation of a contaminated site.

7:26C-2.7 Procedures to identify the appropriate oversight document for a particular case

(a) The purpose of this section is to establish the procedures for the identification of the specific oversight document which is appropriate depending on the specific set of circumstances relevant to a particular case.

(b) If any person elects to perform remediation at a site which the Department has not identified as a *[high]* priority site and the site is not subject to ECRA, the appropriate oversight document is identified in N.J.A.C. 7:26C-3***, memorandum of agreement***.

[(c) If the site is subject to ECRA, the appropriate oversight document is identified in N.J.A.C. 7:26C-4.]

*[(d)]****(c)*** If the Department has identified the contaminated site as a *[high]* priority site and the site is not subject to ECRA, the appropriate oversight document is identified in N.J.A.C. 7:26C-5***, responsible party administrative consent order***.

*[(e)]****(d)*** If the Department has elected to conduct the remediation itself and any person elects to pay the Department for the cost of the remediation, the appropriate oversight document is identified in N.J.A.C. 7:26C-5***, publicly conducted administrative consent order***.

SUBCHAPTER 3. *[MEMORANDA]* ***MEMORANDUM*** OF AGREEMENT

7:26C-3.1 Scope

(a) This subchapter contains:

1. The procedures to obtain a memorandum of agreement; and

2. The wording requirements for a memorandum of agreement.

(b) If any person elects to perform any remedial phase(s) with the Department's oversight, at a site which the Department has not identified as a priority site and the site is not subject to ECRA, the remedial phase(s) shall be governed by a memorandum of agreement pursuant to this subchapter.

7:26C-3.2 Procedure to obtain a memorandum of agreement

[(a) Any person may conduct remediation pursuant to N.J.A.C. 7:26C-2.7(b) with Department review pursuant to a memorandum of agreement as provided in this subchapter.]

*[(b)]****(a)*** To obtain a memorandum of agreement pursuant to this subchapter, a person shall submit ***to the Department*** a completed application*[,]* including the name of the applicant, site owner, tenants and operators, the site location and current and intended use, ***identification of all*** discharges and *[contamination]* ***environmental*** permits, environmental compliance information and other information requested by the Department*[, available from the Department, to the Department at]***. Applications may be obtained from and submitted to*** the following address:

Division of Responsible Party Site Remediation
New Jersey Department of Environmental Protection and Energy
Bureau of Field Operations
CN 028
Trenton, New Jersey 08625-0028
Attn: MOA Application

(b) The Department will review completed applications and will utilize the information contained in the completed applications to aid in the preparation of the memoranda of agreement.

(c) The Department will review *[a completed application for]* ***applications submitted requesting a memorandum of agreement to conduct a*** preliminary assessment and***/or a*** site investigation to determine whether *[or not]* ***it is necessary to conduct*** a preliminary assessment and/or site investigation *[is necessary]* ***at the site***. Within 30 calendar days after the Department's receipt of the completed application, the Department shall either:

1. Inform the applicant in writing that ***it is not necessary to conduct*** a preliminary assessment and/or site investigation *[is not necessary]* at the site; or

2. Submit ***to the applicant*** a memorandum of agreement *[for]* ***to conduct*** a preliminary assessment and/or site investigation ***at the site*** for the applicant's signature.

(d) *[Within]* ***Except as provided in (c) above, within*** 30 calendar days after the Department's receipt of a completed application for *[remediation other than a preliminary assessment and/or site investigation,]* ***any remedial phase(s)*** the Department shall submit ***to the applicant*** a memorandum of agreement for the applicant's signature.

(e) Each signed memorandum of agreement shall be submitted to the Department, for Department execution, to the address indicated in the cover letter to the memorandum of agreement.

(f) The Department will execute each signed memorandum of agreement within 14 calendar days after the Department's receipt of the signed memorandum of agreement from the applicant.

7:26C-3.3 Wording of memorandum of agreement

The Department shall prepare each memorandum of agreement pursuant to the standard memorandum of agreement in Appendix A, incorporated herein by reference, as appropriate for the specific remediation phase(s) the applicant intends to conduct.

SUBCHAPTER 4. *[ECRA ADMINISTRATIVE CONSENT ORDERS]* ***(RESERVED)***

*[7:26C-4.1 Scope

(a) This subchapter contains:

1. The eligibility criteria for obtaining an ECRA administrative consent order;

2. The procedure to obtain an ECRA administrative consent order; and

3. The wording requirements for an ECRA administrative consent order.

7:26C-4.2 Eligibility criteria for obtaining an ECRA administrative consent order

(a) Pursuant to (b) below, the Department may enter into an administrative consent order with the owner or operator of an industrial establishment so that the closing, termination or transferring of operations may occur provided that compliance with ECRA is ensured as specified in the administrative consent order.

(b) The Department may, in its discretion, enter into an ECRA administrative consent order if the applicant presents sufficient information to support a Department determination that one of the following applies:

1. If there is a stock tender offer, either friendly or hostile;
2. If there is a public offering of securities traded or to be traded on Federally regulated stock exchanges;
3. If the industrial establishment is required to develop a detailed sampling or cleanup plan, or both, and the Department determines that a negative declaration or cleanup plan approval pursuant to N.J.A.C. 7:26B-5 will not be granted within four months for the time the Initial Notice is submitted pursuant to N.J.A.C. 7:26B-3;
4. If there is a sale or transfer to a New Jersey State, county, or municipal department, agency or authority with the power of eminent domain;
5. If bankruptcy or insolvency is likely to occur if this transaction does not take place prior to implementation of the provisions of ECRA;
6. If layoffs of employees by either the seller or buyer are likely to occur if the transaction does not take place prior to implementation of the provisions of ECRA;
7. If there is a transaction involving one or more industrial establishment(s) in New Jersey, that is a part of a transaction involving multiple places of business at least one of which is not located in New Jersey;
8. If financing is provided by the New Jersey Economic Development Authority or other governmental department, authority or agency;
9. If a tenant requests an administrative consent order due to lease termination by its landlord in which the tenant has fewer than 180 days notice of termination; or
10. If a landlord requests an administrative consent order due to lease termination by its tenant in which the landlord has fewer than 180 days notice of termination.

7:26C-4.3 Procedure to obtain an ECRA administrative consent order

(a) To apply for an ECRA administrative consent order pursuant to this subchapter, the applicant shall submit a completed application to the Department including the name of the applicant, site owner, tenants and operators, the site location and current and intended use, discharges and contamination permits, environmental compliance information and other information requested by the Department. Applications are available from the Department at the following address:

Division of Responsible Party Site Remediation
New Jersey Department of Environmental Protection and Energy
CN 028
Trenton, New Jersey 08625-0028
Attn: ECRA ACO Application

(b) Within 14 calendar days after the Department's receipt of a completed application for an ECRA administrative consent order, the Department shall submit an ECRA administrative consent order for the applicant's signature.

7:26C-4.4 Types and language of ECRA administrative consent orders

(a) The standard ECRA administrative consent order in Appendix B, incorporated herein by reference, is applicable in all situations pursuant to this subchapter, except as provided in (b) below.

(b) The Department has developed variations from the standard ECRA administrative consent order. The following alternate ECRA administrative consent orders may be applicable when the applicant presents sufficient information to support a Department determination that one of the following apply:

1. An owner or operator is completing a transaction at multiple industrial establishments (multiple-site ECRA administrative consent order);
2. There are multiple ECRA subject tenants (tenant ECRA administrative consent order);
3. A modification or addition is applicable to an existing administrative consent order (ECRA administrative consent order amendment); or
4. After an initial ECRA administrative consent order is issued, but before a cleanup plan or a negative declaration is approved, another person triggers ECRA for the same industrial establishment (subsequent sale ECRA administrative consent order—the owner or operator executing this administrative consent order accepts guarantor liability under ECRA).

(c) The language for the individual ECRA administrative consent order identified in (b) above shall conform to the language in the standard ECRA administrative consent order to the greatest extent practical, as determined by the Department, according to the specific situation to which the ECRA administrative consent order applies. The Department, in its sole discretion, shall prepare each ECRA administrative consent order for the particular circumstances identified in (b) above.

7:26C-4.5 Determination of financial assurance amount

(a) The Department shall determine the amount of financial assurance required for an ECRA administrative consent order, based upon a completed ECRA administrative consent order application, by identifying the areas of concern at the industrial establishment and estimating the cost of remediation for each area of concern and then adding all of the estimates to arrive at a total amount for the financial assurance.

(b) The responsible party may submit for the Department's evaluation the following additional information:

1. A detailed cost estimate for remediation of areas of concern, identifying the areas of concern, proposed remedial activities, and the estimated costs of those activities, to be performed at the site;
2. The condition of areas of concern prior to completion of remediation, the remediation completed and the condition of the areas upon completion of the remedial activities; and
3. Information concerning whether or not the responsible party possesses adequate funds to post the financial assurance, including its most recent corporate or other applicable tax returns for the past three years and any other additional information required by the Department.

(c) The Department may, in its discretion, adjust the amount of the financial determined pursuant to (a) above, based on any information submitted pursuant to (b) above.

7:26C-4.6 Administrative consent order signatories and liability

(a) Each ECRA administrative consent order shall be signed by:

1. The owner or operator of the industrial establishment; and
2. At the Department's discretion, any other person, including, without limitation, a purchaser, transferee, or mortgagee; however, any such persons shall be strictly liable, jointly and severally, for compliance with the ECRA administrative consent order.

(b) If the operator signs an ECRA administrative consent order and the owner does not, or if the owner signs an administrative consent order and the operator does not, the owner and the operator remain strictly liable, jointly and severally, with the signatories to the ECRA administrative consent order, for compliance with ECRA.]*

SUBCHAPTER 5. RESPONSIBLE PARTY ADMINISTRATIVE CONSENT ORDERS

7:26C-5.1 Scope

(a) This subchapter presents:

1. The procedure the Department will use to inform the responsible party(s) for a particular site that the site is a high priority site;
2. The evaluation process the Department will use to decide whether or not to defer to an existing permit or oversight document for a high priority site; and
3. The procedure the Department will use to identify the appropriate oversight document for a person performing remediation of a high priority site.

(b) If the Department, in its discretion, elects to allow a person to participate in the remediation of a high priority contaminated site,

such participation shall be governed by an administrative consent order pursuant to this subchapter.

(c) The degree, manner and scope of that participation will be based on the specifics of each case as determined by the Department pursuant to this subchapter.

7:26C-5.2 Notification of *[high]* priority sites

(a) The Department will provide notification to the responsible party(s) for a particular site that the Department has identified the site as a *[high]* priority site as follows:

1. The Department*[, on a periodic basis,]* will *[identify]* ***prioritize known or suspected*** contaminated sites *[of high priority]* ***to determine which sites are priority sites*** at which the Department *[intends to allocate]* ***will expend*** public resources for site remediation unless a *[person]* ***responsible party(ies)*** agrees to fund and/or implement the remediation pursuant to an administrative consent order in accordance with this subchapter; and

2. The Department will notify in writing the responsible *[party(s)]* ***party(ies)*** for those *[high]* priority sites to inform them that the contaminated site will be remediated with public funds unless the responsible *[party(s)]* ***party(ies)*** executes an administrative consent order pursuant to this subchapter.

7:26C-5.3 Deferral to an existing regulatory or enforcement mechanism

(a) In some instances, a high priority site may be the subject of remediation pursuant to other Federal or State regulatory or enforcement mechanisms. For example, certain sites may be the subject of an enforcement order from the EPA pursuant to CERCLA, or a corrective action order pursuant to RCRA. Similarly, in certain instances, the remediation of a contaminated site may be subject to such State regulatory programs as ECRA, or the New Jersey Underground Storage of Hazardous Substances Act, N.J.S.A. 58:10A-21 et seq., or through a New Jersey Pollutant Discharge Elimination System permit issued pursuant to the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq.

(b) In determining the nature and extent of a responsible party's participation in the remediation of a contaminated site pursuant to this subchapter, the Department will evaluate the entirety of the circumstances surrounding the contaminated site and determine whether or not the remediation being performed pursuant to an existing regulatory or enforcement mechanism is sufficient. In making such an evaluation, the Department will evaluate the nature of the actions causing the contamination and any other relevant factors on the basis of the information then currently available, including among other things, the nature and extent of the contamination, the threat posed to human health and the environment, the nature of necessary remedial action, the nature and status of the ongoing remediation.

(c) Based upon the evaluation described in (b) above, the Department, in an exercise of its discretion, will decide to either:

1. Allow a regulatory or enforcement mechanism already in effect at the site to control the remediation at the site;

2. Pursue additional regulatory or enforcement mechanisms, including, but not limited to, those described in N.J.A.C. 7:26C-2; or

3. A combination of (c)1 and 2 above.

(d) The Department may reconsider its decision whether or not to defer to ongoing remediation activities at any time.

7:26C-5.4 Types and language of responsible party administrative consent orders

(a) The standard responsible party administrative consent order in Appendix C, incorporated herein by reference, is applicable in all situations pursuant to this subchapter, except as modified in (b) below.

(b) The Department has developed variations of the standard responsible party administrative consent order as follows:

1. For multiple responsible parties conducting the remedial investigation and feasibility study only, the standard responsible party administrative consent order shall be used without the remedial design, remedial action, and operation, maintenance and monitoring sections;

2. For one or more responsible parties implementing the remedial action, the standard responsible party administrative consent order shall be used without the interim response action, remedial investigation, and feasibility study sections;

3. For a public entity:

i. Conducting the entire remediation, the standard responsible party administrative consent order requirements shall be used excluding the financial assurance and penalty sections; and

ii. Implementing the remedial action, the standard responsible party administrative consent order shall be used without the *[interim response action,]* remedial investigation, *[feasibility study,]* ***remedial alternative analysis,*** and financial assurance and penalty sections; and

4. *[For any person conducting interim remedial actions only, the standard responsible party administrative consent order shall be used without the remedial investigation, feasibility study, remedial design, remedial action, operation, maintenance and monitoring, financial assurance and stipulated penalties sections.]* ***For any person implementing a remedial action necessary to address an immediate environmental concern, the standard responsible party administrative consent order shall be used without the remedial investigation, remedial alternative analysis, financial assurance and penalty sections.***

(c) If a contaminated site does not fit within any of the specific categories described in (b) above, the Department will select the administrative consent order based upon the similarity of the contaminated site and person to the categories listed in this subchapter or upon other factors in the exercise of its discretion.

(d) When any person agrees to pay the Department for all of its costs of remediation, the administrative consent order shall be consistent with the standard administrative consent order in Appendix D, incorporated herein by reference.

(e) Nothing in this section shall be construed as limiting the Department from settling additional issues in an administrative consent order.

(f) The Department may select an administrative consent order different from that provided for in this subchapter, based upon the Department's consideration of the current status of negotiations at the time of adoption of this chapter.

(g) Appendices E (Standard Letter of Credit), F (Standard Standby Trust Agreement), G (Standard Fully Funded Trust Agreement) and H (Standard Surety Bond) as referenced in Appendix C, and Appendix I (Oversight Cost Formula) as referenced in Appendix B, are incorporated herein by reference as part of this chapter.

7:26C-5.5 Negotiation procedures

(a) The Department will apply the following procedures to facilitate the entry of an administrative consent order.

1. The Department will notify, in writing, the responsible party of a negotiation period that shall not exceed 90 days. If negotiations have not been concluded within the established negotiation period, the Department in the exercise of its enforcement discretion may extend the negotiation period for a period of up to 45 days.

2. In those circumstances where the Department determines that a contaminated site involves multiple responsible parties, the Department may establish an initial period, that shall not exceed 60 days, prior to the start of the negotiation period during which the responsible parties have the opportunity to organize into a single representative body that will pursue negotiations with the Department. Whether or not a single representative body is formed during this initial period, the negotiation period shall commence as specified in the written notice given pursuant to (a)1 above.

3. Notwithstanding (a)1 and 2 above, if the Department determines that *[an IRA]* ***a remedial action*** is necessary ***to address an immediate environmental concern*** at a contaminated site, the Department shall specify the appropriate period of negotiation.

(b) If the Department agrees to allow a responsible party to conduct the remediation of a *[high]* priority contaminated site, the responsible party shall execute an administrative consent order

pursuant to this subchapter within the negotiation period specified at (a) above and in no case after the Department begins its publicly-funded process by issuing a solicitation document for the required *[RI/FS]* ***remedial phase*** of the contaminated site.

(c) If the Department agrees to allow a responsible party to implement the selected remedial action for a contaminated site, the responsible party shall execute an administrative consent order pursuant to this subchapter within the time frame specified by (a) above, and in no case after the Department begins the publicly-funded process by issuing a solicitation document for the remedial design of the selected remedial action for the contaminated site.

(d) If the time for the negotiation of the administrative consent order specified at (a) above has expired without the execution of an administrative consent order, a responsible party may nevertheless participate in the required remediation of a contaminated site by paying all or part of the cost of the remediation. Any partial payment by responsible party will mitigate, but will not satisfy, the liability of the responsible party for the Department's cleanup and removal costs, statutory penalties and treble damages.

7:26C-5.6 Determination of financial assurance amount

(a) The Department shall determine the amount of financial assurance required for a responsible party administrative consent order by identifying the areas of concern at the contaminated site and estimating the cost of remediation for each area of concern and then adding all of the estimates to arrive at a total amount for the financial assurance.

(b) The responsible party may submit for the Department's evaluation the following additional information:

1. A detailed cost estimate for remediation of areas of concern, identifying the areas of concern, proposed remedial activities, and the estimated costs of those activities, to be performed at the site;

2. The condition of areas of concern prior to completion of remediation, the remediation completed and the condition of the areas upon completion of the remedial activities; and

3. Information concerning whether or not the responsible party possesses adequate funds to post the financial assurance, including its most recent corporate or other applicable tax returns for the past three years and any other additional information required by the Department.

(c) The Department may, in its discretion, adjust the amount of the financial ***assurance*** determined pursuant to (a) above, based on any information submitted pursuant to (b) above.

[APPENIX] ***APPENDIX*** A
STANDARD MEMORANDUM OF AGREEMENT

The standard memorandum of agreement contains references to [Person], blank brackets [ ], and bracketed directions which specify required information. Upon the Department's issuance or entry of a memorandum of agreement, the Department will replace these terms, blank spaces and bracketed directions with the appropriate information for the specific memorandum of agreement.

IN THE MATTER OF	:	
THE [Name of the *[subject]* site] ***SITE***:		MEMORANDUM
AND	:	OF
[Name of [Person]]	:	AGREEMENT

This Memorandum of Agreement is *[issued]* ***entered into*** pursuant to the authority vested in the Commissioner of the New Jersey Department of Environmental Protection and Energy (hereinafter "the Department") by N.J.S.A. 13:1D-1 et seq. and the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq. and the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq. and duly delegated to the Assistant Director, Division of Responsible Party Site Remediation pursuant to N.J.S.A. 13:1B-4.

FINDINGS

1. The property that is the subject of this memorandum of agreement is owned by [full name of current property owner], and is located at [address] and is designated as Block [____], Lot [____] on the tax maps of the *[Township]* ***[Township, Borough, City, etc.]*** of [____], [____] County, New Jersey (hereinafter the "Site"). The Site encompasses [____] acres and is bounded generally by [geographic boundaries ***i.e. Main Street to the north, etc.***].

2. [The full name *[and mailing address of each person]* ***of Company/Person*** executing the memorandum of agreement*[,]**]* (hereinafter "[Person]"), ***incorporated in the State of [ ]*** *[*describe structure, ***if different from corporation*** e.g., *[corporation,]* partnership, government entity*[.]*]*, ***with principal offices at [ ], is the party executing this memorandum of agreement.***

3. The intent of this memorandum of agreement is to allow [Person] to conduct any of the remedial activities outlined herein with oversight from the Department. [Person] has indicated to the Department in its application dated that it wishes to conduct the following activities at the Site with the Department's oversight:

[*[Give brief description of activities here.]* ***choose from the following those activities which apply***]

a. Preliminary Assessment
b. Site Investigation
c. Remedial Investigation
d. Remedial Alternative Analysis
e. Remedial Action*

4. By entering into this memorandum of agreement, [Person] does not admit to any fact, fault or liability under any statute or regulation for conditions which existed before, during, or after [Person]'s execution of this memorandum of agreement ***nor shall it be construed as a waiver of any right or defense [Person] may have with regard to the Site***.

5. [Additional provisions may be added at the Department's discretion ***with the concurrence of [Person].***]

AGREEMENT

I. Remediation

1. [Person] agrees to submit *[[reference documents to be submitted, use title of documents in N.J.A.C. 7:26E]]* ***the following documents*** and the Department agrees to review and comment on documents submitted.

[choose from the following those documents that apply]
a. Preliminary Assessment Report
b. Site Investigation Report
c. Remedial Investigation
i. Workplan
ii. Report
d. Remedial Alternative Analysis
e. Remedial Action
i. Workplan
ii. Report*

2. Within thirty (30) calendar days after the Department's receipt of any submission pursuant to this memorandum of agreement, the Department will inform [Person] in writing of any administrative deficiencies in the submission, pursuant to N.J.A.C. 7:26E, that will prevent the Department from conducting its review. When the Department determines that the submission is administratively complete, the Department will notify [Person] in writing of the timeframe required for the Department to complete the review. ***This review will include a determination by the Department whether or not all remedial activities have been carried out consistent with applicable rules, standards, and guidelines.***

3. Within seven (7) ***calendar*** days after the effective date of this memorandum of agreement, [Person] will submit to the Department: a) the name, address and telephone number of the individual who will be the contact for [Person] regarding technical matters concerning this memorandum of agreement and b) the name, and address of the designated agent for [Person] for the purpose of service for all matters concerning this memorandum of agreement.

4. [Person] may terminate this memorandum of agreement if *[it is determined]* ***[Person] determines*** that it is no longer feasible or desirable to continue with this memorandum of agreement, when [Person]:

a. Submits full payment to the Department for any Department oversight costs the Department incurred pursuant to this memorandum of agreement which [Person] has not paid;

b. Notifies the Department in writing of its intentions to terminate this memorandum of agreement;

c. Submits all data generated pursuant to this memorandum of agreement; and

d. Ensures that no environmental hazards exist at the Site as a result of [Person's] actions pursuant to this memorandum of agreement.

e. The Department will cease review of any submittals under this memorandum of agreement on the date it receives the notice of intent to terminate described in Paragraph I.4(b) above; and no oversight costs will accrue after the Department has determined that the signatory is in full compliance with Paragraph I.4. The Department will then prepare a summary of its costs and provide it to [Person]. The date of termination of this agreement is the date of the Department's receipt of both the full unconditional payment of all of the Department's oversight costs and all data required by paragraph 4.c. above.

II. Project Coordination

1. Unless otherwise directed by the Department, [Person] shall submit *[[number of copies]]* ***four (4)*** copies of all documents required by this memorandum of agreement to the person identified below, who shall be the Department's contact for [Person] for all matters concerning this memorandum of agreement.

[ ]

[*insert appropriate mailing address*]

Attention: Section Chief

III. Financial Obligations

1. Upon receipt of a summary of the Department's costs incurred in connection with its oversight functions of this memorandum of agreement ***,*** [and if applicable, ***add:*** for all prior costs ***associated with the Site*]** *[associated with the Site,]* [Person] shall submit to the Department a cashier's or certified check payable to the "Treasurer, State of New Jersey" with NJDEPE Form 062A for the full amount of the Department's oversight costs. [Person] cannot be released from its obligations under this memorandum of agreement, until all oversight costs, for work performed by the Department, are paid.

2. Beginning three hundred sixty-five (365) calendar days after the effective date of this memorandum of agreement, and annually thereafter on that same calendar day, [Person] shall submit to the Department a detailed summary of all monies spent to date pursuant to this memorandum of agreement, the estimated cost of all future expenditures *[required to comply]* ***associated*** with this memorandum of agreement (including any operation and maintenance costs), and the reason for any changes from the previous cost review [Person] submitted.

IV. Reservation of Rights

1. The Department reserves the right to unilaterally terminate this memorandum of agreement in the event that [Person] violates any terms or fails to meet the obligations of this memorandum of agreement or in the event that the Site becomes a high priority for the Department.

2. Nothing herein, including any document the Department issues as agreed to above, shall be interpreted to constitute a release or waiver of liability for any of the conditions which existed before, during or after the Department's execution of this memorandum of agreement.

V. General Conditions

1. [Person] shall, in addition to any other obligation required by law, notify the Department contact immediately upon knowledge of any condition posing an immediate threat to human health and/or the environment.

2. [Person] shall perform all work conducted pursuant to this memorandum of agreement in accordance with N.J.A.C. 7:26E and prevailing professional standards ***then prevailing***.

3. [Person] shall conform all actions required by this memorandum of agreement with all applicable Federal, State and local laws and regulations.

4. Nothing in this memorandum of agreement shall ***be deemed to impose on [Person] any additional liabilities or obligations, other than those specifically stated herein. Nothing shall*** relieve [Person] from complying with all other applicable laws and regulations.

5. [Person] shall preserve all potential evidentiary documentation found at the Site, ***which may provide a nexus between the contaminated site and any responsible party or lead to the discovery of other areas of concern*** including without limitation, documents, labels, drums, bottles, boxes or other containers, and/or other physical materials that could lead to the establishment of the identity of any *[[Person]]* ***person*** which generated, treated, transported, stored or disposed of contaminants at the Site, until written approval is received from the Department to do otherwise.

6. Upon receipt of a written request from the Department, [Person] shall submit to the Department all data and information concerning contamination at the Site, including technical records and contractual documents, and raw sampling and monitoring data, whether or not such data and information was developed pursuant to this memorandum of agreement. ***If [Person] believes any such data or information is protected by a privilege it will retain the data and information and notify the Department of the nature of the document and the privilege claimed. [Person] may request that the Department keep confidential information contained in a submission to the Department pursuant to N.J.A.C. 7:14A-11.**

7. The Department will issue a no further action statement when the Department has determined that the signatory has conducted the agreed upon remedial activities pursuant to this memorandum of agreement and the remedial activities are in accordance with all Department requirements.*

*[7.]****8.*** This memorandum of agreement shall be governed and interpreted under the laws of the State of New Jersey.

*[8.]****9.*** This memorandum of agreement shall be binding, jointly and severally, on each *[signatory]* ***party***, its successors and assignees ***subject to the right of termination above***. No change in the ownership or corporate or business status of any *[signatory,]* ***party,*** or of the facility or Site shall alter any signatory's responsibilities under this memorandum of agreement.

*[9.]****10.*** This memorandum of agreement shall become effective upon execution hereof by all parties.

Date:_____ NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ENERGY

BY: _____
Signature

_____
Print Full Name Signed Above

_____
Title

Date:_____ [Print Name of Company executing Order]

BY: _____
Signature

_____
Print Full Name Signed Above

_____
Title

APPENDIX B
(RESERVED)

*[STANDARD ECRA ADMINISTRATIVE CONSENT ORDER

The standard ECRA administrative consent order contains references to [Person], [amount], and other blank brackets [ ]. Upon the Department's issuance or entry of an administrative consent order, the Department will replace these terms and blank spaces with the appropriate information for that specific oversight document.

IN THE MATTER OF	:	ADMINISTRATIVE
[Name of Person]	:	CONSENT ORDER
ECRA CASE NO.	:	

This Administrative Consent Order is issued pursuant to the authority vested in the Commissioner of the New Jersey Department of Environmental Protection and Energy (hereinafter "the Department") by N.J.S.A. 13:1D-1 et seq. and the Environmental Cleanup Responsibility Act, N.J.S.A. 13:1K-6 et seq., the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., and the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq., and duly delegated to the Assistant Director, Division of Responsible Party Site Remediation pursuant to N.J.S.A. 13:1B-4.

FINDINGS

1. On [date], [Person] submitted to the Department an application for an administrative consent order pursuant to N.J.A.C. 7:26C-2. The administrative consent order application is incorporated herein by reference and includes the following information:

[Fill in information on Industrial Establishment(s) and Transaction(s)]

2. The Transaction described in Paragraph 1 above is the sale, transfer and/or closing of an Industrial Establishment as defined by ECRA. The Department and the [Person] expressly agree that the Transaction is

subject to ECRA. The [Person] has requested that the Department prepare an administrative consent order which, when effective, will allow the Transaction to be consummated prior to the completion of all administrative requirements.

3. By entering this administrative consent order, [Person] does not admit to any fact, fault or liability under any statute or regulation concerning the condition of the Industrial Establishment.

4. All of the Department's files concerning the [name of Industrial Establishment] are incorporated herein and made a part hereof.

5. The Department and [Person] agree that the scope of the investigation and cleanup required by this administrative consent order will include all contaminants at the above reference Industrial Establishment, and all contaminants which are emanating from or which have emanated from the Industrial Establishment.

6. [Additional provisions may be added at the Department's discretion.]

ORDER

I. Penalty, Damages and Reimbursement of Prior Costs [Optional]

1. [Person] shall submit to the Department a certified or cashier's check made payable to the "Treasurer, State of New Jersey" submitted with Form 062A for $ [amount], no later than [person's] signature and submission of this administrative consent order to the Department. Payment of this penalty shall not relieve [person's] obligation to fully comply with this administrative consent order. Furthermore, the Department's acceptance of this penalty shall not be construed as a waiver of the Department's right to compel [Person] to specifically perform its obligations pursuant to this administrative consent order.

2. Within thirty (30) calendar days after receipt of a written summary of the Department's costs incurred to the effective date of this administrative consent order in accordance with N.J.A.C. 7:26C Appendix I, [Person] shall submit [amount] to the Department as payment for these costs, in connection with the investigation of, and response to, the matters described in the Findings hereinabove, including the costs associated with the preparation of this administrative consent order. [Person] shall make payment of the above amount by a cashier's or certified check payable to the ("Treasurer, State of New Jersey" or "Administrator, New Jersey Spill Compensation Fund", as appropriate) and submitted with DEPE Form 062A.

II. Interim Response Action

1. [Person] shall implement interim response action(s) as follows:

[Include specific provisions for interim response action(s) or if interim response action(s) have already been initiated at the site, include the specific interim response action(s) provisions from such oversight document, including a reference to the date the oversight document was issued. If no IRA's are required at the time of execution of the ACO "None Required" will be included herein.]

2. Within forty-five (45) calendar days after the effective date of this administrative consent order or as otherwise directed by the Department, [Person] shall submit to the Department a detailed draft Interim Response Action Work Plan (hereinafter "IRA Work Plan") in accordance with N.J.A.C. 7:26E.

3. Within ninety (90) days after receipt of the Department's written approval of the IRA Work Plan, [Person] shall implement and submit the results of the IRA Work Plan in accordance with N.J.A.C. 7:26E along with one of the following: a proposed no action alternative; a proposed remedial action; or a supplemental IRA Work Plan.

4. Upon the Department's approval of a no action alternative submitted pursuant to Paragraph 3 above, no further action shall be required as specifically stated in the Department's approval.

5. Upon receipt of the Department's written approval of a remedial action plan, [Person] shall implement any Department-approved remedial action in accordance with the approved schedule.

6. If the Department approves a supplemental IRA Work Plan pursuant to Paragraph 3 above, [Person] shall perform the additional work pursuant to Paragraph 3 above.

7. If the Department determines that any submittal made under this section is inadequate or incomplete, then the Department shall provide the [Person] with written notification of the deficiency(ies), and the [Person] shall revise and resubmit the required information within a reasonable period of time not to exceed thirty (30) days from receipt of such notification.

8. During the time this administrative consent order is in effect, if the Department determines that additional interim response actions are required, [Person] shall conduct the required work pursuant to Paragraph 2 through 7, above.

III. Remedial Investigation and Action Requirements

1. The [Person] shall complete and submit the Initial Notice (commonly referred to as ECRA I and II) pursuant to N.J.A.C. 7:26B-3.

2. In the event that the Department determines that no RI Work Plan is required at the submit Industrial Establishment pursuant to this administrative consent order, [Person] shall submit a proposed negative declaration affidavit, in accordance with N.J.A.C. 7:26B-5, within a reasonable timeframe not to exceed thirty (30) days from receipt of the Department's written request for a proposed negative declaration.

3. Within ninety (90) days after receipt of the Department's written approval of the Remedial Investigation Workplan (hereinafter "RI Work Plan") [Person] shall implement and submit the results of the RI Work Plan in accordance with N.J.A.C. 7:26E along with one of the following and all appropriate fees required pursuant to N.J.A.C. 7:26B-1:

(a) A proposed negative declaration pursuant to N.J.A.C. 7:26B-5;

(b) A proposed remedial action pursuant to N.J.A.C. 7:26E; or

(c) A supplemental RI Work Plan pursuant to N.J.A.C. 7:26E.

4. Upon the Department's approval of a negative declaration submitted pursuant to Paragraph 3 above, no further action shall be required as specifically stated in the Department's approval.

5. Upon receipt of the Department's written approval of a remedial action plan, [Person] shall implement the Department-approved remedial action in accordance with the approved time schedule or defer implementation of all or part of the remedial action subject to the Department approval pursuant to N.J.A.C. 7:26E.

6. If the Department approves a supplemental RI Work Plan pursuant to Paragraph 3 above, [Person] shall perform the addition work pursuant to Paragraph 3 above.

7. If the Department determines that any submittal made under this section is inadequate or incomplete, then the Department shall provide the [Person] with written notification of the deficiency(ies), and the [Person] shall revise and resubmit the required information within a reasonable period of time not to exceed thirty (30) days from receipt of such notification.

8. During the time this administrative consent order is in effect, if the Department determines that additional remedial investigation is required, [Person] shall conduct additional remedial investigation as required by the Department in writing and submit a supplemental work plan.

IV. Feasibility Study

1. If required by the Department, [Person] shall submit to the Department a Feasibility Study Report (hereinafter "FS Report") in accordance with N.J.A.C. 7:26E.

V. Permit Application Process for Remediation Activities

1. Within thirty (30) calendar days after receipt of the Department's written notification regarding the Department's selection of the remedial action, [Person] shall submit to the Department a detailed draft permit application submission schedule in accordance with N.J.A.C. 7:26E for all relevant federal, State and local permit applications, certifications or modifications necessary to implement the selected remedial action.

2. Upon receipt of the Department's written approval of the permit application schedule, [Person] shall carry out the permit application process in accordance with the approved schedule.

3. This administrative consent order shall not be construed to be a permit or in lieu of a permit for any activities which require permits and it shall not relieve [Person] from obtaining and complying with all applicable federal, State and local permits necessary for any activities which [Person] must perform in order to carry out the obligations of this administrative consent order.

4. [Person] shall submit complete applications for all federal, State and local permits or permit modifications required to carry out the obligations of this administrative consent order in accordance with the approved schedules.

5. Within thirty (30) calendar days after [Person's] receipt of written comments from the permitting agency concerning any permit application to a federal, State, or local agency, or within a time period extended in writing by the Department, [Person] shall modify the permit application to conform to the permitting agency's comments and resubmit the permit application to the agency. The determination as to whether or not the permit application, as resubmitted, conforms with the agency's comments or is otherwise acceptable to the agency shall be made solely by the agency.

6. The terms and conditions of any federal, State or local permit or permit modification issued to [Person] shall not be preempted by the terms and conditions of this administrative consent order even if the

terms and conditions of any such permit or permit modification are more stringent than the terms and conditions of this administrative consent order.

7. To the extent that the terms and conditions of any federal, State or local permit or permit modification are substantially equivalent to the terms and conditions of this administrative consent order, [Person] waives any rights it may have to contest such terms and conditions of any such permit.

VI. Progress Reports

1. If requested by the Department, [Person] shall submit quarterly progress reports to the Department in accordance with the next Paragraph. [Person] shall submit the first progress report on or before the last calendar day of the fourth calendar month following the effective date of this administrative consent order. [Person] shall submit a progress report thereafter on or before the last calendar day of the month following the next three calendar months being reported.

2. [Person] shall detail the status of [Person's] compliance with this administrative consent order in each progress report and shall include the following:

i. Identification of the contaminated site and a reference to this administrative consent order, including signatory parties and effective date;

ii. Identification of specific requirements of this administrative consent order, including the corresponding Paragraph number and schedule, which were initiated during the reporting period;

iii. Identification of specific requirements of this administrative consent order, including the corresponding Paragraph number and schedule, which were initiated in a previous reporting period, which are still in progress and which will continue to be carried out during the next reporting period;

iv. Identification of specific requirements of this administrative consent order, including the corresponding Paragraph number and schedule, which were completed during this reporting period;

v. Identification of specific requirements of this administrative consent order, including the corresponding Paragraph numbers and schedule, which were scheduled to have been completed during the reporting period and were not;

vi. An explanation of each specific requirement of this administrative consent order not met, including actions taken or to be taken to address each such requirement;

vii. Identification of the specific requirements of this administrative consent order, including the corresponding Paragraph number and schedule, that will be initiated during the next reporting period; and

viii. All data generated during the reporting period which indicate that conditions at the contaminated site exceed federal, State or local human health based standards or criteria, or in the absence thereof, any data which indicate potential human health concerns; and

ix. All reports and other information required pursuant to any work plan or report the Department approves pursuant to this administrative consent order.

VII. Project Coordination

1. [Person] shall submit to the Department all documents required by this administrative consent order, including correspondence relating to force majeure issues, by delivery with an acknowledgement of receipt from the Department. The date that the Department executes the acknowledgement will be the date the Department uses to determine [Person's] compliance with the requirements of this administrative consent order and the applicability of stipulated penalties and any other remedies available to the Department.

2. With seven (7) calendar days after the effective date of this administrative consent order, [Person] shall submit to the Department the name, title, address and telephone number of the individual who shall be [Person's] technical contact for the Department for all matters concerning this administrative consent order and [Person] shall designate an agent for the purpose of service for all matters concerning this administrative consent order and shall provide the Department with the agent's name and address.

3. Unless otherwise directed in writing by the Department, [Person] shall submit all payments and [ ] copies of all documents required by this administrative consent order to the individual identified below, who shall be the Department's contact for [Person] for all matters concerning this administrative consent order:

[Name, title, address and telephone number of Department contact]

4. [Person] shall notify, both verbally and in writing, the contact person listed above at least fourteen (14) calendar days prior to the initiation of any field activities.

VIII. Financial Assurances and Project Cost Review

1. Within five (5) calendar days after the effective date of this administrative consent order, [Person] shall obtain and provide to the Department financial assurance in the form acceptable to the Department in the amount(s) of (amount). The financial assurance shall conform with the requirements of N.J.S.A. 13:1K-9(b)3, N.J.A.C. 7:26B-6 and this Administrative Consent Order.

2. [Person] shall select a financial institution or surety, and a trustee, that shall agree in writing to be subject to the jurisdiction of New Jersey courts for all claims made by the Department against the financial assurance. Within fourteen (14) calendar days after the effective date of this administrative consent order, [Person] shall submit the written agreement with such financial institution or surety and the trustee to the Department with the financial assurance.

3. In the event that the the Department determines that [Person] has failed to perform any of the obligations under this administrative consent order or ECRA, the Department may proceed to draw on that amount of the financial assurance necessary to complete the performance of the obligation; provided, however, that before the Department takes this action, the Department shall notify [Person] in writing of the obligation(s) which it has not performed, and shall have thirty (30) calendar days after receipt of such notice, unless extended in writing by the Department, to remedy the failure to perform such obligation. Notwithstanding any other provisions of this administrative consent order, [Person] reserves its rights, if any, to commence an action seeking judicial review of the Department's draw-down or expenditure of the financial assurance at any time after such draw-down has occurred. During the pendency of such an action, [Person] will not seek to enjoin the Department from the drawing down of funds or the expenditure of funds drawn down pursuant to this provision. Penalties assessed for violations of this administrative consent order shall not be drawn against the financial assurance.

4. At any time, [Person] may apply to the Department to substitute other financial assurances as specified by this subchapter, in a form, and manner acceptable to the Department.

5. Upon the Department approval of a remedial action, the [Person] shall amend the amount of the financial assurance, specified in Paragraph 1 above, to equal the estimated cost of implementation of the approved remedial action, or shall provide such other financial assurance as may be approved by the Department in an amount equal to the estimated cost of implementation of the approved remedial action.

6. The [Person] shall comply with the following project cost reviews requirements:

(a) Beginning 365 calendar days after the effective date of this administrative consent order, and annually thereafter on that same calendar day, the [Person] shall submit to the Department a detailed review of all costs required for the (person) compliance with this administrative consent order, including:

i. A detailed summary of all monies spent to date pursuant to this administrative consent order;

ii. The estimated cost of all future expenditures required to comply with this administrative consent order, including any operation, maintenance and monitoring costs; and

iii. The reason for any changes from the previously submitted cost review.

(b) At any time after the [Person] submit the first cost review pursuant to the preceding Paragraph, the [Person] may request the Department's approval to reduce the amount of the financial assurance to reflect the remaining costs of performing the obligations under this administrative consent order. If the Department grants written approval of such a request, the [Person] may amend the amount of the then existing financial assurance consistent with that approval.

(c) If the estimated costs of meeting the [Person] obligations in this administrative consent order at any time increase to an amount greater than the financial assurance, the [Person] shall:

i. Within thirty (30) calendar days after receipt of written notice of the Department's determination, increase the amount of the then existing financial assurance or provide additional financial assurance to an amount equal to the Department's approved estimated cost; and

ii. Upon notification from the Department pursuant to Paragraph 34, Section XI General Provisions, that the obligations of this administrative consent order have been satisfied, the [Person] shall be relieved of any

further obligation to maintain in full force and effect the financial assurance required by this administrative consent order for the facility which is the subject of the Department approved Negative Declaration. Upon the Department's written approval of the completion of any remedial action required by this administrative consent order, as verified by final site inspection pursuant to N.J.A.C. 7:26B-5 and upon the [Person's] satisfaction of all financial obligations in connection therewith, the [Person] shall be relieved of any further obligation to maintain in full force and effect the financial assurance required by this administrative consent order for the facility at which the approved remedial action has been completed.

IX. Stipulated Penalties

1. [Person] agrees to pay stipulated penalties to the Department for [Person's] failure to comply with any of the deadlines, schedules or requirements of this administrative consent order including those established and approved by the Department in writing pursuant to this administrative consent order. Each day of violation for each deadline, schedule or requirement not complied with shall be an additional, separate and distinct violation. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this administrative consent order. Each signatory to this administrative consent order shall be jointly and severally liable for stipulated penalties for violations of this administrative consent order which result in the Department's issuance of a demand for stipulated penalties.

2. Stipulated penalties shall begin to accrue on the first calendar day after the performance is due or noncompliance occurs and not at the time the Department gives notice of the violation for stipulated penalties. Stipulated penalties shall then continue to accrue through the final day of correction of the non-compliance. The Department may determine that a submittal of insufficient quality constitutes non-compliance and one or more violations of this administrative consent order. Stipulated penalties for such violations shall accrue from the date [Person] made the submission for sixty (60) calendar days, unless the Department provides [Person] with written notice that stipulated penalties for such violations continue to accrue beyond the sixty (60) day period. In which case stipulated penalites will continue to accrue until [Person] corrects the non-compliance.

3. [Person's] payment of stipulated penalties for [Person's] failure to comply with the deadlines, schedules and requirements associated with this administrative consent order, as identified below, shall be made according to this Paragraph:

(a) Major violations include [Person's] failure, according to the schedules in the administrative consent order, to:

i. Submit any remedial investigation workplans;

ii. Submit any remedial action workplans;

iii. Implement any approved remedial investigation workplan;

iv. Implement any approved remedial action workplan;

v. Implement any approved interim response actions;

vi. Submit permit applications;

vii. Satisfy any financial assurance requirement;

viii. Failure to allow the Department or its authorized agents access to the site; and

ix. Implementation and recording of permanent use and/or access restrictions.

x. Reimbursement of oversight costs, including prior costs; and

xi. Submit payment of penalty or damage payments.

(b) [Person] agrees to pay stipulated penalties for the major violations, identified in (a) above, up to the following amounts as determined by the Department:

Calendar Days After Due Date	Stipulated Penalties per Calendar Day
1-14	$ 1,000
15-29	$ 2,500
30-44	$ 5,000
45-59	$10,000
60-over	$25,000

(c) [Person] agrees to pay stipulated penalities for all other violations, not identified in (a) above, up to the following amounts as determined by the Department:

Calendar Days After Due Date	Stipulated Penalties per Calendar Day
1-14	$ 200
15-29	$ 500
30-44	$ 1,000
45-59	$ 5,000
60-over	$10,000

4. Stipulated penalties shall be due and payable thirty (30) calendar days after [Person's] receipt of a written demand by the Department. [Person] shall make payment of stipulated penalties by a cashier's or certified check payable to the "Treasurer, State of New Jersey" submitted with DEPE Form 062A, and shall be accompanied by a letter referencing this administrative consent order and the Department's written demand for stipulated penalties.

5. [Person] shall regard payments of stipulated penalties pursuant to this administrative consent order as payments of civil or civil administrative penalties.

6. The payment of stipulated penalties does not alter [Person's] responsibility to complete any requirement of this administrative consent order.

7. If [Person] fails to pay stipulated penalties pursuant to this section, the Department may take additional enforcement action, including without limitation, instituting civil proceedings to collect such penalties or assessing civil administrative penalties.

8. If [Person] fails to pay stipulated penalties pursuant to this section, the Department may take additional enforcement action, including without limitation, instituting civil administrative penalties.

X. Reservation of Rights

1. The Department will not exercise its right to void the Transaction described in the Findings above, except in the event that the [Person] fails to submit an approvable negative declaration or remedial action as required hereinabove. The Department's right to void the subject sale or transfer shall terminate upon the Department's written approval of an appropriate negative declaration or remedial action submitted by the [Person] pursuant to this administrative consent order and ECRA.

2. Nothing in this administrative consent order shall preclude the Department from seeking civil or civil administrative penalties, costs and damages or any other legal or equitable relief against [Person] for matters not set forth in the Findings of this administrative consent order. The Department reserves the right to conduct any remediation itself at any time.

3. Nothing in this administrative consent order, including the Department's assessment of stipulated penalties, shall preclude the Department from seeking civil or civil administrative penalties or any other legal or equitable relief against [Person] for violations of this administrative consent order. In any such action brought by the Department under this administrative consent order for injunctive relief, civil, or civil administrative penalties or collection of stipulated penalties, [Person] may raise, among other defenses, a defense that [Person] failed to comply with a decision of the Department, made pursuant to this administrative consent order, on the basis that the Department's decision was arbitrary, capricious or unreasonable. If [Person] is successful in establishing such a defense based on the administrative record, [Person] shall not be liable for penalties for failure to comply with that particular requirement of the administrative consent order. Similarly, in the event that [Person] prevails in any proceeding in which [Person] alleges that the Department acted arbitrarily, capriciously, or unreasonably in exercising its right under to draw on the financial assurance, the Department will refund, to the account of the financial assurance the amount of the funds so drawn. Although [Person] may raise such defenses in any action initiated by the Department for injunctive relief or stipulated penalties, [Person] hereby agrees not to otherwise seek review of any decision made or to be made by the Department pursuant to this administrative consent order and under no circumstances shall [Person] initiate any action or proceeding challenging any decision made or to be made by the Department pursuant to this administrative consent order.

4. This administrative consent order shall not be construed to affect or waive the claims of federal or State natural resources trustees against any [Person] for damages for injury to, destruction of, or loss of natural resources, unless expressly provided herein, and then only to the extent expressly provided herein.

5. The Department reserves the right to require [Person] to take or arrange for the taking of any and all additional measures if the Department determines that such actions are necessary to protect human health or the environment.

6. Notwithstanding any other provision of this administrative consent order, [Person] reserves its right to challenge, as a contested case pursuant to N.J.S.A. 52:14B-1 et seq., that the Department's draw on the financial assurance provided pursuant to this administrative consent order was arbitrary, capricious or unreasonable; [Person] agrees, however, not to initiate any such challenge until after the Department has corrected or implemented the requirement of this administrative consent order which was the focus of the Department's draw. The Department reserves its right to contest any such action.

XI. Force Majeure

1. If any event specified in the following Paragraph occurs which [Person] believes or should believe will or may cause delay in the compliance or cause non-compliance with any provision of this administrative consent order, [Person] shall notify the Department in writing within seven (7) calendar days of the start of delay or knowledge of the anticipated delay, as appropriate, referencing this Paragraph and describing the anticipated length of the delay, the precise cause or causes of the delay, any measures taken or to be taken to minimize the delay, and the time required to take any such measures to minimize the delay. [Person] shall take all necessary action to prevent or minimize any such delay.

2. The Department will extend in writing the time for performance for a period no longer than the delay resulting from such circumstances as determined by the Department only if:

(a) [Person] has complied with the notice requirements of the preceding Paragraph;

(b) Any delay or anticipated delay has been or will be caused by fire, flood, riot, strike or other circumstances beyond the control of [Person]; and

(c) [Person] has taken all necessary action to prevent or minimize any such delay.

3. The burden of proving that any delay is caused by circumstances beyond the control of [Person] and the length of any such delay attributable to those circumstances shall rest with [Person].

4. "Force Majeure" shall not include the following:

(a) Delay in an interim requirement with respect to the attainment of subsequent requirements;

(b) Increases in the cost or expenses incurred by [Person] in fulfilling the requirements of this administrative consent order;

(c) Contractor's breach, unless [Person] demonstrates that such breach falls within Paragraph 1 above; and

(d) Failure to obtain access required to implement this administrative consent order, unless denied by a court of competent jurisdiction.

XII. General Provisions

1. [Person] shall, in addition to any other obligation required by law, notify the Department contact identified in Paragraph [ ] immediately upon knowledge of any condition posing an immediate threat to human health and the environment. The Department reserves the right to stop any construction, improvement(s), or change(s) at the site(s) subject to this administrative consent order, due to the presence of hazardous substances or wastes, the disturbance of which, prior to implementation of the Department-approved remedial action, which has the potential to cause a threat to human health and the environment as determined by the Department.

2. In the event that the Department determines that a meeting concerning the remediation of the site is necessary at any time, [Person] shall ensure that the [Person's] appropriate representative is prepared and available for, and participates in such a meeting upon written notification from the Department of the date, time and place of such meeting.

3. In addition to the Department's statutory and regulatory rights to enter and inspect, [Person] shall allow the Department and its authorized representatives access to the site at all times for the purpose of monitoring [Person's] compliance with this administrative consent order and/or to perform any remedial activities [Person] fails to perform as required by this administrative consent order.

4. [Person] shall not construe any informal advice, guidance, suggestions, or comments by the Department, or by [Persons] acting on behalf of the Department, as relieving [Person] of its obligation to obtain written approvals as required herein.

5. [Person] shall perform all work conducted pursuant to this administrative consent order in accordance with prevailing professional standards.

6. [Person] shall provide a copy of this administrative consent order to each contractor and subcontractor retained to perform the work required by this administrative consent order and shall condition all contracts and subcontracts entered for the performance of such work upon compliance with the terms and conditions of this administrative consent order. [Person] shall be responsible to the Department for ensuring that its contractors and subcontractors perform the work herein in accordance with this administrative consent order.

7. [Person] shall conform all actions required by this administrative consent order with all applicable federal, State, and local laws and regulations.

8. Nothing in this administrative consent order shall relieve [Person] from complying with all other applicable laws and regulations. Compliance with the terms of this administrative consent order shall not excuse the [Person] from obtaining and complying with any applicable federal, state or local permits, statutes, regulations and/or orders while carrying out the obligations imposed by ECRA through this administrative consent order. This administrative consent order shall not preclude the Department from requiring that the [Person] obtain and comply with any permits, and/or orders issued by the Department under the authority of the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq., and the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq., for the matters covered herein. The terms and conditions of any such permit shall not be preempted by the terms and conditions of this administrative consent order if the terms and conditions of any such permit are more stringent than the terms and conditions of this administrative consent order. Should any of the measures to be taken by the [Person] during the remediation of any ground water and surface water pollution result in a new or modified discharge as defined in the New Jersey Pollutant Discharge Elimination System ("NJPDES") regulations, N.J.A.C. 7:14A-1 et seq., then the [Person] shall obtain a NJPDES permit or permit modification from the Department prior to commencement of the activity.

9. All work plans and documents required by this administrative consent order and approved in writing by the Department are incorporated herein and made a part hereof.

10. [Person] shall preserve all potential evidentiary documentation found at the site until written approval is received from the Department to do otherwise, including without limitation, documents, labels, drums, bottles, boxes or other containers, and/or other physical materials that could lead to the establishment of the identity of any person which generated, treated, transported, stored or disposed of contaminants at the site.

11. Upon the receipt of a written request from the Department, [Person] shall submit to the Department all data and information, including technical records and contractual documents, concerning contamination at the site, including raw sampling and monitor data, whether or not such data and information, including technical records and contractual documents, was developed pursuant to this administrative consent order.

12. Obligations and penalties of this administrative consent order are imposed pursuant to the police powers of the State of New Jersey for the enforcement of law and the protection of the human health, safety and welfare and are not intended to constitute debt or debts which may be limited or discharged in a bankruptcy proceeding. No obligations imposed by this administrative consent order are intended to constitute a debt, claim, penalty or other civil action which could be limited or discharged in a bankruptcy proceeding.

13. [Person] hereby consents to and agrees to comply with this administrative consent order which shall be fully enforceable as an Administrative Order in the New Jersey Superior Court pursuant to the Department's statutory authority.

14. The Department agrees that it will not bring any action, nor will it recommend that the Attorney General's Office bring any action, including monetary penalties, for the [Person] failure to comply with (a) the time requirements in N.J.S.A. 13:1K-9(b)1 that the Department be notified within five (5) days of execution of an agreement of sale or public release of its decision to close, and (b) the time requirement in N.J.S.A. 13:1K-9(b)2 that a Negative Declaration or Remedial Action be submitted sixty (60) days prior to transfer of title or closing operations for the transaction described in Paragraph 1.B above.

15. No modification or waiver of this administrative consent order shall be valid except by written amendment to this administrative consent order duly executed by [Person] and the Department. Any amendment to this administrative consent order shall be executed by the Department and all [Person]. The Department reserves the right to require the resolution of any outstanding violations of ECRA, the rules or this administrative consent order prior to executing any such amendment.

16. [Person] waives its rights to an administrative hearing concerning the entry of this administrative consent order.

17. This administrative consent order shall be governed and interpreted under the laws of the State of New Jersey.

18. If any provision of this administrative consent order or the application thereof to any person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this administrative consent order or the application of such provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby and each provision of this administrative consent order shall be valid and enforced to the fullest extent permitted by law.

19. This administrative consent order represents the entire integrated agreement between the Department and [Person] and supersedes all prior negotiations, representations or agreements, either written or oral, unless otherwise specifically provided herein.

20. Within thirty (30) calendar days after the effective date of this administrative consent order, [Person] shall record a copy of this administrative consent or with the County Clerk, [ ] County, State of New Jersey and shall provide the Department with written verification of compliance with this Paragraph which shall include a copy of this administrative consent order stamped "Filed" by the County Clerk.

21. Any officer or management official of the [Person] who knowingly directs or authorizes the violation of any provision of ECRA shall be personally liable for the penalty established pursuant to N.J.S.A. 13:1K-13, N.J.A.C. 7:26B-9 and the Spill Compensation and Control Act.

22. The site or any portion thereof may be freely alienated provided that [Person] complies with the requirements in this Paragraph and all other applicable law.

(a) At least ninety (90) calendar days prior to the date of such alienation, [Person] shall notify the Department in writing of the proposed alienation, the name of the grantee, the extent of the alienation, and a description of the grantor's continuing obligations, if any, which grantee has agreed to perform.

(b) At least 90 calendar days prior to transfer of ownership of [Person's] facility, site, or portion thereof which are the subject of this administrative consent order, and shall simultaneously verify to the Department that such notice has been given.

(c) Any contract to alienate the site shall require the grantee to allow the implementation and continuation of all activities and obligations pursuant to this administrative consent order and to allow [Person], the Department and its authorized representatives access to the site for purposes of such activities and obligations. Any alienation shall not affect [Person's] obligations under this administrative consent order.

(d) [Person] shall include in any instrument of conveyance, including but not limited to a deed, title, lease, easement or license for the site a written notice that the site is the subject of this administrative consent order. Any such instrument of conveyance shall be subject to the requirements set forth in this administrative consent order regarding the use of the site and deed restrictions.

23. This administrative consent order shall be binding, jointly and severally, on each signatory, its successors, assignees and any trustee in bankruptcy or receiver appointed pursuant to a proceeding in law or equity. No change in the ownership or corporate status of any signatory or of the facility or site shall alter signatory's responsibilities under this administrative consent order.

24. [Person] shall preserve, during the pendency of this administrative consent order and for a minimum of ten (10) years after its termination, all data and information, including technical records, potential evidentiary documentation and contractual documents, in its possession or in the possession of their divisions, employees, agents, accountants, contractors, or attorneys which relate in any way to the contamination at the site, despite any document retention policy to the contrary. After this ten-year period, [Person] may make a written request to the Department to discard any such documents. Such a request shall be accompanied by a description of the documents involved, including the name of each document, date, name and title of the sender and receiver and a statement of contents. Upon receipt of written approval by the Department, [Person] may discard only those documents that the Department does not require to be preserved for a longer period. Upon receipt of a written request by the Department, the [Person] shall submit to the Department all data and information, including technical records and contractual documents or copies of the same. [Person] reserves whatever rights it may have, if any, to assert any privilege or a privilege regarding such data or information, however, [Person] agrees not to assert confidentiality claims with respect to any data related to site conditions, sampling, or monitoring.

25. [Person] agrees not to contest the authority or jurisdiction of the Department to issue this administrative consent order; [Person] further agrees not to contest the terms or conditions of this administrative consent order except as to interpretation or application of such specific terms and conditions that are being enforced in any action brought by the Department to enforce the provisions of this administrative consent order. [Person] reserves all of its rights pursuant to the Spill Act concerning the Department's selection of any remedial action pursuant to this administrative consent order.

26. [Person] shall provide to the Department written notice of the dissolution of its corporate or partnership identity, the liquidation of the majority of its assets or the closure, termination or transfer of operations at least thirty (30) calendar days prior to such action. Upon such notice, [Person] shall submit a cost review pursuant to Paragraph [ ] to the Department. [Person] shall also provide written notice to the Department of a filing of a petition for bankruptcy no later than the first business day after such filing. This requirement shall be in addition to any other statutory requirements arising from the dissolution of corporate or partnership identity, the liquidation of the majority of assets, or the closure, termination or transfer of operations. Upon receipt of notice of dissolution of corporate identity, liquidation of assets or filing of a petition for bankruptcy, the Department may request and, within fourteen (14) days of the Department's written request, the [Person] shall obtain and submit to the Department additional financial assurance pursuant to this administrative consent order.

27. [Person] shall not make any use of the site or take any actions at the site inconsistent within this administrative consent order. [Person] shall impose such use and/or access restrictions as may be deemed necessary by the Department. The use and access restrictions are to run with the land and be for the benefit of and enforceable by the Department and any citizen which is or may be damaged as a result of violations of the use and access restrictions. The use and access restrictions shall provide actual and constructive notice to any subsequent grantee of the locations and concentrations of all contaminants which remain at the site and of the use and access restrictions imposed. Within thirty (30) calendar days after [Person's] receipt of a written request from the Department, [Person] shall record the restrictions with [ ] County Clerk, [ ] County, State of New Jersey, and provide the Department with a copy of this administrative consent order stamped "Filed" by the [ ] County Clerk.

28. Except as otherwise set forth herein, by the execution of this administrative consent order the Department does not release any person from any liabilities or obligations such person may have pursuant to ECRA, or any other applicable authority, nor does the Department waive any of its rights or remedies pursuant thereto.

29. [Person] shall submit to the Department, along with the executed original administrative consent order, documentary evidence in the form of a corporate resolution, that the signatory has the authority to bind [Person] to the terms of this administrative consent order. Any signatory to this administrative consent order, who is executing this administrative consent order on behalf of an entity other than that individual, shall provide to the Department appropriate documentary evidence as specified in N.J.A.C. 7:26B-1 authorizing the signatory to bind the entity to the provisions of this administrative consent order.

30. If the [Person] does not consummate the transaction described in Paragraph 1 above, and, therefore, no ECRA triggering event has occurred, the [Person] may withdraw from ECRA pursuant to N.J.A.C. 7:26B-3. If the [Person] withdraw from ECRA pursuant to N.J.A.C. 7:26B-3, this administrative consent order shall be null and void.

31. The Department will consider a request for an extension of time to perform any requirement under ECRA or this administrative consent order, provided that any extension request is submitted to the Department two weeks prior to any applicable deadline to which the extension request refers.

32. [Person] expressly agree that in the event that [Person] or [Person] fails or refuses to perform any obligation(s) under this administrative

consent order as determined by the Department, the Department shall have the right to exercise any option or combination of options available to the Department under this administrative consent order, ECRA, or any other statute to ensure full and complete ECRA compliance.

33. [Optional paragraph—The Department and [Person] expressly agree that the Department shall allow [Person] to complete the Merger within forty-five (45) days of the effective date of this administrative consent order, without requiring [Person] to amend this administrative consent order to include the Merger. In the event that [Person] does not complete the Merger within this time period, [Person] shall enter into an amendment to this administrative consent order prior to [Person's] completion of the Merger.]

34. Except as otherwise provided, the requirements of this administrative consent order shall be deemed satisfied upon the receipt by [Person] of written notice from the Department that [Person] has demonstrated, to the satisfaction of the Department, and [Person] has completed the substantive and financial obligations imposed by this administrative consent order. Such written notice shall not relieve [Person] from the obligation to conduct future investigation or remediation activities pursuant to federal, State or local laws for matters not addressed by this administrative consent order. Furthermore, such written notice shall not terminate the obligations and requirements set forth in the preceding six (6) Pargapgraphs.

35. This administrative consent order shall be effective upon the execution of this administrative consent order by the Department and the [Person]. The [Person] shall return a fully executed administrative consent order to the Department together with the financial assurance required by Paragraph [ ] above, and signature authorization required by Paragraph [ ] above within five (5) business days from the effective date.

36. This administrative consent order shall be null and void unless executed by the [Person] within thirty (30) days of the Department signing.

37. Upon the effective date of this administrative consent order, the [Person] may complete the Transaction described in Paragraph [ ] above, subject to the conditions of this administrative consent order.

Date:_____ NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ENERGY

BY: _____
Signature

_____
Print Full Name Signed Above

_____
Title

Date:_____ [Print Name of Company executing Order]

BY: _____
Signature

_____
Print Full Name Signed Above

_____
Title]*

APPENDIX C
STANDARD RESPONSIBLE PARTY OVERSIGHT DOCUMENT

The standard responsible party oversight document contains references to [Person] [amount], [Order], and other blank brackets [ ]. Upon the Department's issuance or entry of an [Order], the Department will replace these terms and blank spaces with the appropriate information for that specific oversight document.

IN THE MATTER OF ***THE***	:	
[Site name]	:	[ORDER]
AND	:	
[Name of Person]	:	

This [Order] is issued pursuant to the authority vested in the Commissioner of the New Jersey Department of Environmental Protection and Energy (hereinafter "the Department" ***or "DEPE"***) by N.J.S.A. 13:1D-1 et seq., and the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq., and the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq. and duly delegated to the Assistant Director, Division of Responsible Party Site Remediation pursuant to N.J.S.A. 13:1B-4.

FINDINGS

1. [The name, location, street address and general description of the contaminated site (hereinafter "Site") which is the subject of the *[memorandum of agreement]* ***[Order]***.]

2. [The full name and mailing address of each responsible party executing the [Order] if applicable.]

3. [The regulatory and enforcement history of the site.]

4. By entering this [Order], [Person] *[does not admit]* ***neither admits*** to any fact, fault or liability under any statute or regulation concerning the condition of the Site [if applicable] ***nor waives any rights or defenses with regard to the site except as specifically provided in this [Order]***.

5. All of the Department's ***public*** files concerning the [name of site] are incorporated herein and made a part hereof.

6. *[The Department intends [and [Person] agrees [if applicable]] that the]* ***The*** scope of the investigation and *[cleanup]* ***remediation*** required by this [Order] will include all contaminants at the above referenced Site, and all contaminants which are emanating from or which have emanated from the Site.

7. [Additional provisions may be added at the Department's discretion] ***with concurrence of [Person].**[.]**

ORDER

I. Penalty, Damages and Reimbursement of Prior Costs [Optional]

1. [Person] shall submit to the Department a certified or cashier's check made payable to the "Treasurer, State of New Jersey" submitted with Form 062A for $ [amount], no later than [person's] signature and submission of this [Order] to the Department. Payment of this penalty shall not relieve [person's] obligation to fully comply with this [Order]. Furthermore, the Department's acceptance of this penalty shall not be construed as a waiver of the Department's right to compel [Person] to specifically perform its obligations pursuant to this [Order].

2. Within thirty (30) calendar days after receipt of a written summary of the Department's costs incurred to the effective date of this [Order] in accordance with N.J.A.C. 7:26C Appendix I, [Person] shall submit *[[amount]]* ***the amount indicated in the written summary*** to the Department as *[payment for these]* ***reimbursement of the*** costs*[,]* in connection with the investigation of, and response to, the matters described in the Findings hereinabove, including the costs associated with the preparation of this [Order]. [Person] shall make payment of the above amount by a cashier's or certified check payable to the ("Treasurer, State of New Jersey" or "Administrator, New Jersey Spill Compensation Fund", as appropriate) and submitted with DEPE Form 062A.

*[II. Interim Response Action

1. [Person] shall implement interim response action(s) as follows:

[Include specific provisions for interim response action(s) or if interim response action(s) have already been initiated at the site, include the specific interim response action(s) provisions from such oversight document, including a reference to the date the oversight document was issued. If no IRA's are required at the time of execution of the ACO, "None Required" will be included herein.]

2. Within forty-five (45) calendar days after the effective date of this [Order] or as otherwise directed by the Department, [Person] shall submit to the Department a detailed draft Interim Response Action Work Plan (hereinafter "IRA Work Plan") in accordance with N.J.A.C. 7:26E.

3. Within ninety (90) days after receipt of the Department's written approval of the IRA Work Plan, [Person] shall implement and submit the results of the IRA Work Plan in accordance with N.J.A.C. 7:26E along with one of the following: a proposed no action alternative; a proposed remedial action; or a supplemental IRA Work Plan.

4. Upon the Department's approval of a no action alternative submitted pursuant to Paragraph 3 above, no further action shall be required as specifically stated in the Department's approval.

5. Upon receipt of the Department's written approval of a remedial action plan, [Person] shall implement any Department-approved remedial action in accordance with the approved schedule.

6. If the Department approves a supplemental IRA Work Plan pursuant to Paragraph 3 above, [Person] shall perform the addition work pursuant to Paragraph 3 above.

7. If the Department determines that any submittal made under this section is inadequate or incomplete, then the Department shall provide the [Person] with written notification of the deficiency(ies), and the [Person] shall revise and resubmit the required information within a reasonable period of time not to exceed thirty (30) days from receipt of such notification.

8. During the time this [Person] is in effect, if the Department determines that additional interim response actions are required, [Person] shall conduct the required work pursuant to Paragraph 2 through 7, above.

III. Remedial Investigation and Action Requirements

1. Within forty-five (45) calendar days after the effective date of this [Order], [Person] shall submit to the Department a detailed Remedial Investigation Work Plan (hereinafter "RI Work Plan") in accordance with N.J.A.C. 7:26E.

2. Within ninety (90) days after receipt of the Department's written approval of the RI Work Plan, [Order] shall implement and submit the results of the RI Work Plan in accordance with N.J.A.C. 7:26E along with one of the following:

(a) A proposed no action alternative;

(b) A proposed remedial action; or

(c) A supplemental RI Work Plan.

3. Upon the Department's approval of a no action alternative submitted pursuant to Paragraph 2 above, no further action shall be required as specifically stated in the Department's approval.

4. Upon receipt of the Department's written approval of a remedial action plan, [Person] shall implement any Department-approved remedial action in accordance with the approved schedule.

5. If the Department approves a supplemental RI Work Plan pursuant to Paragraph 3 above, [Person] shall perform the addition work pursuant to Paragraph 3 above.

6. If the Department determines that any submittal made under this section is inadequate or incomplete, then the Department shall provide the [Person] with written notification of the deficiency(ies), and the [Person] shall revise and resubmit the required information within a reasonable period of time not to exceed thirty (30) days from receipt of such notification.

7. During the time this [Order] is in effect, if the Department determines that additional remedial investigation is required, [Person] shall conduct additional remedial investigation as required by the Department in writing and submit a supplemental work plan.

IV. Feasibility Study

1. If required by the Department, [Person] shall submit to the Department a Feasibility Study Report (hereinafter "FS Report") in accordance with N.J.A.C. 7:26E.]*

***II. Remedial Investigation and Action Requirements**

1. Within [ ] calendar days after the effective date of this [Order] or longer as authorized by the Department, [Person] shall submit to the Department a detailed draft Remedial Investigation Work Plan (hereinafter the "RI Work Plan") in accordance with N.J.A.C. 7:26E.

2. Within [ ] calendar days after receipt of the Department's written comments on the draft RI Work Plan, or longer as authorized by the Department, [Person] shall modify the draft RI Work Plan to conform to the Department's comments and shall submit the modified RI Work Plan to the Department. The determination as to whether or not the modified RI Work Plan, as resubmitted, conforms to the Department's comments and is otherwise acceptable to the Department shall be made solely by the Department in writing.

3. Upon receipt of the Department's written final approval of the RI Work Plan, [Person] shall conduct the remedial investigation in accordance with the approved RI Work Plan and the schedule therein.

4. [Person] shall submit to the Department a draft Remedial Investigation Report (hereinafter "RI Report") in accordance with N.J.A.C. 7:26E and the RI Work Plan and the schedule therein.

5. If upon review of the draft RI Report the Department determines that additional remedial investigation is required, [Person] shall conduct additional remedial investigation as directed by the Department and submit a second draft RI Report.

6. Within [ ] calendar days after receipt of the Department's written comments on the draft or second draft (if applicable pursuant to the preceding paragraph) RI Report, or longer as authorized by the Department, [Person] shall modify the draft or second draft RI Report to conform to the Department's comments and shall submit the modified RI Report to the Department. The determination as to whether or not the modified RI Report, as resubmitted, conforms with the Department's comments and is otherwise acceptable to the Department shall be made solely by the Department in writing.

III. Remedial Alternative Analysis

1. Within [ ] calendar days after the Department's final approval of the RI Report, or as otherwise directed by the Department, [Person] shall submit to the Department a draft Remedial Alternative Analysis Report (hereinafter "RAA Report") in accordance with N.J.A.C. 7:26E.

2. Within [ ] calendar days after receipt of the Department's written comments on the draft RAA Report, or longer as authorized by the Department, [Person] shall modify the draft RAA Report to conform to the Department's comments and shall submit the modified RAA Report to the Department. The determination as to whether or not the modified RAA Report, as resubmitted, conforms to the Department's comments and is otherwise acceptable to the Department shall be made solely by the Department in writing.

IV. Remedial Action

1. The Department will make the selection of the remedial action alternative.

2. Within [ ] calendar days after receipt of the Department's written notification of selection of a remedial action alternative, shall submit to the Department a detailed draft Remedial Action Work Plan in accordance with N.J.A.C. 7:26E.

3. Within [ ] calendar days after receipt of the Department's written comments on the draft Remedial Action Work Plan, or longer as authorized by the Department, [Person] shall modify the draft Remedial Action Work Plan to conform to the Department's comments and shall submit the modified Remedial Action Work Plan to the Department. The determination as to whether or not the modified Remedial Action Work Plan, as resubmitted, conforms to the Department's comments and is otherwise acceptable to the Department shall be made solely by the Department in writing.

4. Upon receipt of the Department's written final approval of the Remedial Action Work Plan, [Person] shall implement the approved Remedial Action Work Plan in accordance with the schedule therein.

5. [Person] shall submit to the Department a draft Remedial Action Report (hereinafter "RA Report") in accordance with N.J.A.C. 7:26E and the RA Work Plan and the schedule therein.

6. If upon review of the draft RA Report the Department determines that additional remedial action is required, [Person] shall conduct additional remedial action as directed by the Department and shall submit a second draft RA Report.

7. Within [ ] calendar days after receipt of the Department's written comments on the draft or second draft (if applicable pursuant to the preceding paragraph) RA Report, or longer as authorized by the Department, [Person] shall modify the draft or second draft RA Report to conform to the Department's comments and shall submit the modified RA Report to the Department. The determination as to whether or not the modified RA Report, as resubmitted, conforms with the Department's comments and is otherwise acceptable to the Department shall be made solely by the Department in writing.

V. Additional Remedial Investigation and Remedial Action

1. If at any time that this [Order] is in effect the Department determines that the prevailing standards in N.J.A.C. 7:26E are not being achieved or that additional remedial investigation and/or remedial action is required to protect human health or the environment, [Person] shall conduct such additional activities as directed by the Department.*

*[V.]***VI.*** Permit Application Process for Remedial Activities

1. Within thirty (30) calendar days after receipt of the Department's written notification regarding the Department's selection of the remedial action, [Person] shall submit to the Department a detailed draft permit application submission schedule in accordance with N.J.A.C. 7:26E for all relevant federal, State and local permit applications, certifications or modifications necessary to implement the selected remedial action.

2. Upon receipt of the Department's written approval of the permit application schedule, [Person] shall carry out the permit application process in accordance with the approved schedule.

[3. This [Order] shall not be construed to be a permit or in lieu of a permit for any activities which require permits and it shall not relieve [Person] from obtaining and complying with all applicable federal, State and local permits necessary for any activities which [Person] must perform in order to carry out the obligations of this [Order].]

*[4.]***3.*** [Person] shall submit complete applications for all federal, State and local permits or permit modifications required to carry out the obligations of this [Order] in accordance with the approved schedules.

*[5.]***4.*** Within thirty (30) calendar days after [Person's] receipt of written comments from the permiting agency concerning any permit application to a federal, State, or local agency, or within a time period extended in writing by the Department, [Person] shall modify the permit application to conform to the permitting agency's comments and resubmit the permit application to the agency. The determination as to whether or not the permit application, as resubmitted, conforms with the agency's comments or is otherwise acceptable to the agency shall be made solely by the agency.

*[6.]***5.*** The terms and conditions of any federal, State or local permit or permit modification issued to [Person] shall not be preempted by the terms and conditions of this [Order] even if the terms and conditions of any such permit or permit modification are more stringent than the terms and conditions of this [Order].

*[7.]***6.*** To the extent that the terms and conditions of any federal, State or local permit or permit modification are substantially equivalent to the terms and conditions of this [Order], [Person] waives any rights it may have to contest such terms and conditions of any such permit.

*[VI.]***VII.*** Progress Reports

1. *[If requested by the Department,]* [Person] shall submit quarterly progress reports to the Department in accordance with the next *[Paragraph]* ***paragraph***. [Person] shall submit the first progress report on or before the last calendar day of the fourth calendar month following the effective date of this [Order]. [Person] shall submit a progress report thereafter on or before the last calendar day of the month following the next three calendar months being reported. ***Based on site specific activities being performed by [Person], the Department may request that progress reports be submitted monthly, semi-annually or annually.***

2. [Person] shall detail the status of [Person's] compliance with this [Order] in each progress report and shall include the following:

i. Identification of the contaminated site and a reference to this [Order], including signatory parties and effective date;

ii. Identification of specific requirements of this [Order], including the corresponding *[Paragraph]* ***paragraph*** number and schedule, which were initiated during the reporting period;

iii. Identification of specific requirements of this [Order], including the corresponding *[Paragraph]* ***paragraph*** number and schedule, which were initiated in a previous reporting period, which are still in progress and which will continue to be carried out during the next reporting period;

iv. Identification of specific requirements of this [Order], including the corresponding *[Paragraph]* ***paragraph*** number and schedule, which were completed during this reporting period;

v. Identification of specific requirements of this [Order], including the corresponding *[Paragraph]* ***paragraph*** numbers and schedule, which were scheduled to have been completed during the reporting period and were not;

vi. An explanation of each specific requirement of this [Order] not met, including actions taken or to be taken to address each such requirement;

vii. Identification of the specific requirements of this [Order], including the corresponding *[Paragraph]* ***paragraph*** number and schedule, that will be initiated during the next reporting period; and

viii. All data generated during the reporting period which indicate that conditions at the contaminated site exceed federal, State or local human health based standards or criteria, or in the absence thereof, any data which indicate potential human health concerns; and

ix. All reports and other information required pursuant to any work plan or report the Department approves pursuant to this [Order].

*[VII.]***VIII.*** Project Coordination

1. [Person] shall submit to the Department all documents required by this [Order], including correspondence relating to force majeure issues, by delivery with an acknowledgement of receipt from the Department. The date that the Department executes the acknowledgement will be the date the Department uses to determine [Person's] compliance with the requirements of this [Order] and the applicability of stipulated penalties and any other remedies available to the Department.

2. Within seven (7) calendar days after the effective date of this [Order], [Person] shall submit to the Department the name, title, address and telephone number of the individual who shall be [Person's] technical contact for the Department for all matters concerning this [Order] and [Person] shall designate an agent for the purpose of service for all matters concerning this [Order] and shall provide the Department with the agent's name and address.

3. Unless otherwise directed in writing by the Department, [Person] shall submit all payments and [ ] copies of all documents required by this [Order] to the individual identified below, who shall be the Department's contact for [Person] for all matters concerning this [Order]:

[Name, title, address and telephone number of Department contact]

4. [Person] shall notify, both verbally and in writing, the contact person listed above at least fourteen (14) calendar days prior to the initiation of any field activities.

*[VIII. Financial Assurances and Project Cost Review

1. Within five (5) calendar days after the effective date of this [Order], [Person] shall obtain and provide to the Department financial assurance in the form acceptable to the Department in the amount(s) of [amount]. The financial assurance shall conform with the requirements of this [Order].

2. [Person] shall select a financial institution or surety, and a trustee, that shall agree in writing to be subject to the jurisdiction of New Jersey courts for all claims made by the Department against the financial assurance. Within fourteen (14) calendar days after the effective date of this [Order], [Person] shall submit the written agreement with such financial institution or surety and the trustee to the Department with the financial assurance.

3. The financial assurance shall meet the following requirements:

(a) Irrevocable letter of credit:

i. The wording of the irrevocable letter of credit shall be identical to the wording specified in N.J.A.C. 7:26C Appendix E;

ii. The irrevocable letter of credit shall be issued by a New Jersey State or federally chartered bank, savings bank, or savings and loan association, which, unless otherwise approved by the Department in writing, has its principal office in New Jersey; and,

iii. The irrevocable letter of credit shall be accompanied by a letter from [Person] referring to the irrevocable letter of credit by number, issuing institution and date and providing the following information: the name and address of the site which is the subject of the [Order] and the amount of funds securing the [Person's] performance of all its obligations under the [Order].

(b) Surety bond:

i. The wording of the surety bond shall be identical to the wording specified in N.J.A.C. 7:26C Appendix F;

ii. The surety company issuing the surety bond shall be among those listed as acceptable sureties on Federal bonds in the most recent version of Circular 570 issued by the U.S. Department of the Treasury, which is published annually on July 1 in the Federal Register; and

iii. The surety bond shall be accompanied by a letter from [Person] referring to the surety bond by number, issuing institution and date and providing the following information: the name and address of the site which is the subject of the [Order] and the amount of funds securing the [Person's] performance of all its obligations under the [Order].

iv. The surety bond shall be accompanied by an irrevocable standby trust fund which wording shall be identical to the wording specified in N.J.A.C. 7:26 Appendix G.

v. The irrevocable standby trust fund may, at the discretion of the Department, be the depository for all funds paid pursuant to a draft by the Department against the letter of credit.

(c) Fully funded trust:

i. The wording of the fully funded trust shall be identical to the wording specified in N.J.A.C. 7:26C Appendix H.

ii. The trustee shall be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a Federal or New Jersey agency. The trustee shall agree to be subject to the jurisdiction of New Jersey courts.

iii. An executed certification of acknowledgement that is identical to the wording specified in N.J.A.C. 7:26C Appendix G shall be submitted to the Department with the fully funded trust and the irrevocable standby trust.

4. In the event that the Department determines that [Person] has failed to perform any of the obligations under this [Order], the Department may proceed to draw on that amount of the financial assurance necessary to complete the performance of the obligation; provided, however, that before the Department takes this action, the Department shall notify [Person] in writing of the obligation(s) which it has not performed, and shall have thirty (30) calendar days after receipt

of such notice, unless extended in writing by the Department, to remedy the failure to perform such obligation. Notwithstanding any other provisions of this [Order], [Person] reserves its rights, if any, to commence an action seeking judicial review of the Department's draw-down or expenditure of the financial assurance at any time after such draw-down has occurred. During the pendency of such an action, [Person] will not seek to enjoin the Department from the drawing down of funds or the expenditure of funds drawn down pursuant to this provision. Penalties assessed for violations of this [Order] shall not be drawn against the financial assurance.

5. At any time, [Person] may apply to the Department to substitute other financial assurances as specified by this subchapter, in a form and manner acceptable to the Department.

6. Upon the Department approval of a remedial action, the [Person] shall amend the amount of the financial assurance, specified in Paragraph 1 above, to equal the estimated cost of implementation of the approved remedial action, or shall provide such other financial assurance as may be approved by the Department in an amount equal to the estimated cost of implementation of the approved remedial action.

7. The [Person] shall comply with the following project cost reviews requirements:]*

***IX. Financial Assurance**

1. The Department shall negotiate the language concerning the amount and form of the financial assurance on a case-by-case basis.*

X. Project Cost Review

*[(a)]***1.*** Beginning three hundred sixty-five (365) calendar days after the effective date of this [Order], and annually thereafter on the same calendar day, *[the]* [Person] shall submit to the Department a detailed review of all costs required for *[the [Person]]* ***[Person's]*** compliance with this [Order], including:

*[i.]***(a)*** A detailed summary of all monies spent to date pursuant to this [Order];

*[ii.]***(b)*** The estimated cost of all future expenditures required to comply with this [Order], including any operation, maintenance and monitoring costs; and

*[iii.]***(c)*** The reason for any changes from the previously submitted cost review.

*[(b)]***2.*** At any time after *[the]* [Person] submits the first cost review pursuant to the preceding *[Paragraph, the]* ***paragraph,*** [Person] may request the Department's approval to reduce the amount of the financial assurance to reflect the remaining costs of performing the obligations under this [Order]. If the Department grants written approval of such a request, *[the]* [Person] may amend the amount of the then existing financial assurance consistent with that approval.

*[(c)]***3.*** If the estimated costs of meeting *[the]* [Person***'s***] obligations in this [Order] at any time increase to an amount greater than financial assurance, *[the]* [Person] shall:

*[i.]***(a)*** Within thirty (30) calendar days after receipt of written notice of the Department's determination, increase the amount of the then existing financial assurance or provide additional financial assurance to an amount equal to the Department's approved estimated cost; and

*[ii.]***(b)*** Upon notification from the Department pursuant to Paragraph [ ] that the obligations of the [Order] have been satisfied, *[the]* [Person] shall be relieved of any further obligation to maintain in full force and effect the financial assurance required by this [Order] for the site which is the subject of this [Order]. Upon the Department's written approval of the completion of any *[cleanup]* ***remediation*** required by this [Order], as verified by final site inspection and upon *[the]* [Person's] satisfaction of all financial obligations in connection therewith, *[the]* [Person] shall be relieved of any further obligation to maintain in full force and effect the financial assurance required by this [Order] for the *[facility]* ***Site*** at which the approved *[cleanup]* ***remediation*** has been completed.

*[IX.]***XI.*** Oversight Cost Reimbursement

1. Within thirty (30) calendar days after receipt from the Department of a ***written*** summary*[,]* of the Department's costs, including all accrued interest incurred pursuant to (a)2 below, determined pursuant to N.J.A.C. 7:26C Appendix I, [Person] shall submit to the Department a cashier's or certified check payable to the "Treasurer, State of New Jersey" and submitted with DEPE form 062A, for the full amount of the Department's oversight costs, for the period being charged.

2. Interest shall accrue on the unpaid balance of oversight costs, beginning at the end of the thirty (30) calendar day period established in the preceding *[Paragraph]* ***paragraph***, at the rate established by Rule 4:42 of the current edition of the Rules Governing the Courts of the State of New Jersey.

*[X.]***XII.*** Stipulated Penalties

1. [Person] agrees to pay stipulated penalties to the Department for [Person's] failure to comply with any of the deadlines, schedules or requirements of this [Order] including those established and approved by the Department in writing pursuant to this [Order]. Each day of violation for each deadline, schedule or requirement not complied with shall be an additional, separate and distinct violation. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this [Order]. Each signatory to this [Order] shall be jointly and severally liable for stipulated penalties for violations of this [Order] which result in the Department's issuance of a demand for stipulated penalties.

2. Stipulated penalties shall begin to accrue on the first calendar day after the performance is due or noncompliance occurs and not at the time the Department gives notice of the violation or non-compliance to [Person] or issues a written demand for stipulated penalties. Stipulated penalties shall then continue to accrue through the final day of correction of the non-compliance. The Department may determine that a submittal of insufficient quality constitutes non-compliance and one or more violations of this [Order]. Stipulated penalties for such violations shall accrue from the date [Person] made the submission for sixty (60) calendar days, unless the Department provides [Person] with written notice that stipulated penalties for such violations continue to accrue beyond that sixty (60) day period. In which case stipulated penalties will continue to accrue until [Person] corrects the non-compliance.

3. [Person's] payment of stipulated penalties for [Person's] failure to comply with the deadlines, schedules and requirements associated with the major deliverables and tasks required by this [Order], as identified below, shall be made according to this *[Paragraph]* ***paragraph***:

(a) Major violations include [Person's] failure, according to the schedules in the [Order], to:

i. Submit any remedial investigation workplans;

ii. Submit any remedial action workplans;

iii. Implement any approved remedial investigation workplan;

iv. Implement any approved remedial action workplan;

[v. Implement any approved interim response actions;]

*[vi.]***v.*** Submit permit applications;

*[vii.]***vi.*** Satisfy any financial assurance requirement;

*[viii.]***vii.*** Failure to allow the Department or its authorized agents access to the site; *[and]*

*[ix.]***viii.*** Implementation and recording of permanent use and/or access restrictions*[.]***; and***

*[x.]***ix.*** Reimbursement of oversight costs, including prior costs*[; and]***.***

[xi. Submit payment of penalty or damage payments.]

(b) [Person] agrees to pay stipulated penalties for the major violations, identified in (a) above, up to the following amounts as determined by the Department:

Calendar Days After Due Date	Stipulated Penalties per Calendar Day
1-14	$ 1,000
15-29	$ 2,500
30-44	$ 5,000
45-59	$10,000
60-over	$25,000

(c) [Person] agrees to pay stipulated penalties for all other violations, not identified in (a) above, up to the following amounts as determined by the Department:

Calendar Days After Due Date	Stipulated Penalties per Calendar Day
1-14	$ 200
15-29	$ 500
30-44	$ 1,000
45-59	$ 5,000
60-over	$10,000

4. Stipulated penalties shall be due and payable thirty (30) calendar days after [Person's] receipt of a written demand by the Department. [Person] shall make payment of stipulated penalties by a cashier's or certified check payable to the "Treasurer, State of New Jersey" submitted

with DEPE Form 062A, and ***the payment*** shall be accompanied by a letter referencing this [Order] and the Department's written demand for stipulated penalties.

5. [Person] shall regard payments of stipulated penalties pursuant to this [Order] as payments of civil or civil administrative penalties.

6. The payment of stipulated penalties does not alter [Person's] responsibility to complete any requirement of this [Order].

7. If [Person] fails to pay stipulated penalties pursuant to this section, the Department may take *[additional]* enforcement action, including without limitation, instituting civil proceedings to collect such penalties or assessing civil administrative penalties.

[8. If [Person] fails to pay stipulated penalties pursuant to this section, the Department may take additional enforcement action, including without limitation, instituting civil administrative penalties.]

*[XI.]***XIII.*** Reservation of Rights

1. The Department reserves the right to unilaterally terminate this [Order] in the event [Person] violates the terms *[or fails to meet the obligations]* of this [Order]*[.]* ***provided, however, that before the Department takes this action, the Department shall notify [Person] in writing of the obligation(s) which it has not performed, and [Person] shall have thirty (30) calendar days after receipt of such notice, unless extended in writing by the Department, to remedy the failure to perform such obligation(s).***

2. Nothing in this [Order] shall preclude the Department from seeking civil or civil administrative penalties, costs and damages or any other legal or equitable relief against [Person] *[for matters not set forth in the Findings of this [Order]]*. The Department reserves the right to conduct any remediation itself at any time.

3. Nothing in this [Order], including the Department's assessment of stipulated penalties, shall preclude the Department from seeking civil or civil administrative penalties or any other legal or equitable relief against [Person] for violations of this [Order]. In any such action brought by the Department under this [Order] for injunctive relief, civil, or civil administrative penalties or collection of stipulated penalties, [Person] may raise, among other defenses, a defense that [Person] failed to comply with a decision of the Department, made pursuant to this[Order], on the basis that the Department's decision was arbitrary, capricious or unreasonable. If [Person] is successful in establishing such a defense based on the administrative record, [Person] shall not be liable for penalties for failure to comply with that particular requirement of the [Order]. Similarly, in the event that [Person] prevails in any proceeding in which [Person] alleges that the Department acted arbitrarily, capriciously, or unreasonably in exercising its right under to draw on the financial assurance, the Department will refund, to the account of the financial assurance the amount of the funds so drawn. Although [Person] may raise such defenses in any action initiated by the Department for injunctive relief or stipulated penalties, [Person] hereby agrees not to otherwise seek review of any decision made or to be made by the Department pursuant to this [Order] and under no circumstances shall [Person] initiate any action or proceeding challenging any decision made or to be made by the Department pursuant to this [Order].

4. This [Order] shall not be constructed to affect or waive the claims of federal or State natural resources trustees against any *[[Person]]* ***person*** for damages or injury to, destruction of, or loss of natural resources, unless expressly provided herein, and then only to the extent expressly provided herein.

5. The Department reserves the right to require [Person] to take or arrange for the taking of any and all additional measures if the Department determines that such actions are necessary to protect human health or the environment.

6. Notwithstanding any other provision of this [Order], [Person] reserves its right to challenge, as a contested case pursuant to N.J.S.A. 52:14B-1 et seq., that the Department's draw on the financial assurance provided pursuant to this [Order] was arbitrary, capricious or unreasonable; [Person] agrees, however, not to initiate any such challenge until after the Department has corrected or implemented the requirement of this [Order] which was the focus of the Department's draw. The Department reserves its right to contest any such action.

7. Except as otherwise stated in this [Order], nothing herein shall be construed as limiting any legal, equitable or administrative remedies which the party conducting remediation may have under any applicable law or regulation. In any enforcement action the Department initiates pursuant to this [Order], [Person] reserves any defenses which the Spill Compensation and Control Act, *Matter of Kimber Petroleum Corp.*, 110 N.J. 69 (1988) or their amendments, supplements and progeny allow.

*[XII.]***XIV.*** Force Majeure

1. If any event specified in the following *[Paragraph]* ***paragraph*** occurs which [Person] believes or should believe will or may cause delay in the compliance or cause non-compliance with any provision of this [Order], [Person] shall notify the Department in writing within seven (7) calendar days of the start of delay or knowledge of the anticipated delay, as appropriate, referencing this *[Paragraph]* ***paragraph*** and describing the anticipated length of the delay, the precise cause or causes of the delay, any measure taken or to be taken to minimize the delay, and the time required to take any such measures to minimize the delay. [Person] shall take all necessary action to prevent or minimize any such delay.

2. The Department will extend in writing the time for performance for a period no longer than the delay resulting from such circumstances as determined by the Department only if:

(a) [Person] has complied with the notice requirements of the preceding *[Paragraph]* ***paragraph***;

(b) Any delay or anticipated delay has been or will be caused by fire, flood, riot, strike or other circusmtances beyond the control of [Person]; and

(c) [Person] has taken all necessary action to prevent or minimize any such delay.

3. The burden of proving that any delay is caused by circumstances beyond the control of [Person] and the length of any such delay attributable to those circumstances shall rest with [Person].

4. "Force Majeure" shall not include the following:

(a) Delay in an interim requirement with respect to the attainment of subsequent requirements;

(b) Increases in the cost or expenses incurred by [Person] in fulfilling the requirements of this [Order];

(c) Contractor's breach, unless [Person] demonstrates that such breach falls within *[Paragraph 1., above]* ***the above paragraphs***; and

(d) Failure to obtain access required to implement this [Order], unless denied by a court of competent jurisdiction.

***XV. Dispute Resolution**

1. In the event a conflict arises between [Person] and the Department, [Person] may institute the Department's internal process for resolving disputes. The initial step requires that [Person] notify the assigned case manager of the issue(s) that is (are) in dispute. If [Person] and the Department cannot resolve the dispute, [Person] has the option to contact the assigned case manager's supervisor. If the dispute cannot be resolved at that level, it will continue up the chain of command to the Bureau Chief, Assistant Director, Director, Assistant Commissioner and Commissioner or his or her designee, as necessary.*

*[XIII.]***XVI.*** General Provisions

1. [Person] shall, in addition to any other obligation required by law, notify the Department contact identified in *[Paragraph [ ]]* ***this [Order]*** immediately upon knowledge of any condition posing an immediate threat to human health and the environment. The Department reserves the right to stop any construction, improvement(s), or change(s) at the site(s) subject to this [Order], due to the *[presence of hazardous substances or wastes]* ***immediate threat caused by contaminants***, the disturbance of which, prior to implementation of the Department-approved remedial action, *[which has the potential to]* ***would or may*** cause a threat to human health and the environment as determined by the Department.

2. In the event that the Department determines that a meeting concerning the remediation of the site is necessary at any time, [Person] shall ensure that *[the]* [Person's] appropriate representative is prepared and available for, and participates in such a meeting upon written notification from the Department of the date, time and place of such meeting.

3. In addition to the Department's statutory and regulatory rights to enter and inspect, [Person] shall allow the Department and its authorized representatives access *[to the site]* ***to all areas of the Site [Person] has access*** at all times for the purpose of monitoring [Person's] compliance with this [Order] and/or to perform any remedial activities [Person] fails to perform as required by this [Order].

4. [Person] shall not construe any informal advice, guidance, suggestions, or comments by the Department, or by [Persons] acting on behalf of the Department, as relieving [Person] of its obligation to obtain written approvals as required herein.

5. [Person] shall perform all work conducted pursuant to this [Order] in accordance with prevailing professional standards ***then prevailing***.

6. [Person] shall provide a copy of this [Order] to each contractor and subcontractor retained to perform the work required by this [Order] and shall condition all contracts and subcontracts entered for the performance of such work upon compliance with the terms and conditions of this [Order]. [Person] shall be responsible to the Department for ensuring that its contractors and subcontractors perform the work herein in accordance with this [Order].

7. [Person] shall conform all actions required by this [Order] with all applicable federal, *[state]* ***State*** and local laws and regulations.

8. *[Notwithstanding]* ***Nothing*** in this [Order] shall relieve [Person] from complying with all other applicable laws and regulations. Compliance with the terms of this [Order] shall not excuse *[the]* [Person] from obtaining and complying with any applicable federal, state or local permits, statutes, regulations and/or orders while carrying out the obligations imposed by this [Order]. This [Order] shall not preclude the Department from requiring that *[the]* [Person] obtain and comply with any permits, and/or orders issued by the Department under the authority of the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq., *[the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq.,]* and the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq., for the matters covered herein. The terms and conditions of any such permit shall not be preempted by the terms and conditions of this [Order] if the terms and conditions of any such permit are more stringent than the terms and conditions of this [Order]. Should any of the measures to be taken by *[the]* [Person] during the remediation of any ground water and surface water pollution result in a new or modified discharge as defined in the New Jersey Pollutant Discharge Elimination System ("NJPDES") regulations, N.J.A.C. 7:14A-1 et seq., then *[the]* [Person] shall obtain a NJPDES permit or permit modification from the Department prior to commencement of the activity.

9. All work plans and documents required by this [Order] and approved in writing by the Department are incorporated herein and made a part hereof.

10. [Person] shall preserve all potential evidentiary documentation found at the site ***which may provide a nexus between the contaminated site and any responsible party or lead to the discovery of other areas of concern*** until written approval is received from the Department to do otherwise, including without limitation, documents, labels, drums, bottles, boxes or other containers, and/or other physical materials that could lead to the establishment of the identity of any person which generated, treated, transported, stored or disposed of contaminants at the site.

11. Upon the receipt of a written request from the Department, [Person] shall submit to the Department all data and information, including technical records and contractual documents, concerning contamination at the site, including raw sampling and monitor data, whether or not such data and information, including technical records and contractual documents, was developed pursuant to this [Order]. ***[Person] reserves its right to assert a privilege regarding such documents, but agrees not to assert any confidentiality or privilege claim with respect to any data related to site conditions, sampling or monitoring.***

12. Obligations and penalties of this [Order] are imposed pursuant to the police powers of the State of New Jersey for the enforcement of law and the protection of the human health, safety and welfare and are not intended to constitute debt or *[debts]* ***claims*** which may be limited or discharged in a bankruptcy proceeding. *[No obligations imposed by this [Order] are intended to constitute a debt, claim, penalty or other civil action which could be limited or discharged in a bankruptcy proceeding.]*

13. [Person] hereby consents to and agrees to comply with this [Order] which shall be fully enforceable as an *[Administrative]* Order in the New Jersey Superior Court pursuant to the Department's statutory authority.

14. No modification or waiver of this [Order] shall be valid except by written amendment to this [Order] duly executed by [Person] and the Department. Any amendment to this [Order] shall be executed by the Department and *[all]* [Person]. The Department reserves the right to require the resolution of any outstanding violations of the rules of this [Order] prior to executing any such amendment.

15. [Person] waives its rights to an administrative hearing concerning the entry of this [Order].

16. This [Order] shall be governed and interpreted under the laws of the State of New Jersey.

17. If any provision of this [Order] or the application thereof to any person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this [Order] or the application of such provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby and each provision of this [Order] shall be valid and enforced to the fullest extent permitted by law.

18. This [Order] represents the entire integrated agreement between the Department and [Person] ***concerning the site subject to this [Order]*** and supersedes all prior negotiations, representations or agreements, either written or oral, unless otherwise specifically provided herein.

19. Within thirty (30) calendar days after the effective date of this [Order], [Person] shall record a copy of this [Order] with the County Clerk, [ ] County, State of New Jersey and shall provide the Department with written verification of compliance with this *[Paragraph]* ***paragraph*** which shall include a copy of this [Order] stamped "Filed" by the County Clerk.

[20. Any officer or management official of the [Person] who knowingly directs or authorizes the violation of any provision of this [Order] shall be personally liable for the penalty established pursuant to the Solid Waste Management Act, the Spill Act and the Water Pollution Control Act.]

20. This [Order] shall not be construed to be a permit or in lieu of a permit for any activities which require permits and it shall not relieve [Person] from obtaining and complying with all applicable federal, State and local permits necessary for any activities which [Person] must perform in order to carry out all obligations of this [Order].

21. The site or any portion thereof may be freely alienated provided that [Person]***, if an owner of the site,*** complies with the requirements in this *[Paragraph]* ***paragraph*** and all other applicable *[law]* ***laws***.

*[(a) At least ninety (90) calendar days prior to the date of such alienation, [Person] shall notify the Department in writing of the proposed alienation, the name of the grantee, the extent of the alienation, and a description of the grantor's continuing obligations, if any, which grantee has agreed to perform.

(b) At least ninety (90) calendar days prior to transfer of ownership of [Person's] facility, site, or portion thereof which are the subject of this [Order], and shall simultaneously verify to the Department that such notice has been given.]*

*[(c)]***(a)*** Any contract to alienate the site shall require the grantee to allow the implementation and continuation of all activities and obligations pursuant to this [Order] and to allow [Person], the Department and its authorized representatives access to the site for purposes of such activities and obligations. Any alienation shall not affect [Person's] obligations under this [Order].

*[(d)]***(b)*** [Person] shall include in any instrument of conveyance, including but not limited to a deed, title, lease, easement or license for the site a written notice that the site is the subject of this [Order]. Any such instrument of conveyance shall be subject to the requirements set forth in this [Order] regarding the use of the site and deed restrictions.

22. This [Order] shall be binding, jointly and severally, on each *[signatory]* ***party***, its successors, assignees and any trustee in bankruptcy or receiver appointed pursuant to a proceeding in law or equity. No change in the ownership or corporate status of any *[signatory]* ***party*** or of the facility or site shall alter *[signatory's]* ***party's*** responsibilities under this [Order].

23. [Person] shall preserve, during the pendency of this [Order] and for a minimum of ten (10) years after its termination, all data and information, including technical records, potential evidentiary documentation and contractual documents, in its possession or in the possession of their divisions, employees, agents, accountants, contractors, or attorneys which relate in any way to the contamination at the site, despite any document retention policy to the contrary. After this ten year period, [Person] may make a written request to the Department to discard any such documents. Such a request shall be accompanied by a description of the documents involved, including the name of each document, date, name and title of the sender and receiver and a statement of contents. Upon receipt of written approval by the Department, [Person] may discard only those documents that the Department does not require to be preserved for a longer period. Upon receipt of a written request by the Department, *[the]* [Person] shall submit to the Department all data and information, including technical

records and contractual documents or copies of the same. [Person] reserves whatever rights it may have, if any, to assert any privilege *[or a privilege]* regarding such data or information, however, [Person] agrees not to assert ***any privilege or*** confidentiality claims with respect to any data related to site conditions, sampling, or monitoring.

24. [Person] agrees not to contest the authority or jurisdiction of the Department to issue this [Order]; [Person] further agrees not to contest the terms or conditions of this [Order] except as to interpretation or application of such specific terms and conditions that are being enforced in any action brought by the Department to enforce the provisions of this [Order]. [Person] reserves all of its rights pursuant to the Spill Act concerning the Department's selection of any remedial action pursuant to this [Order].

25. [Person] shall provide to the Department written notice of the dissolution of its corporate or partnership identity, the liquidation of the majority of its assets or the closure, termination or transfer of operations at least thirty (30) calendar days prior to such action. Upon such notice, [Person] shall submit a cost review pursuant to *[Paragraph [ ]]* ***this [Order]*** to the Department. [Person] shall also provide written notice to the Department of a filing of a petition for bankruptcy no later than the first business day after such filing. This requirements shall be in addition to any other statutory requirements arising from the dissolution of corporate or partnership identity, the liquidation of the majority of assets, or the closure, termination or transfer of operations. Upon receipt of notice of dissolution of corporate identity, liquidation of assets or filing of a petition for bankruptcy, the Department may request and, within fourteen (14) days of the Department's written request, the [Person] shall obtain and submit to the Department additional financial assurance pursuant to this [Order].

26. ***This paragraph will only be applicable when any signatory to the [Order] is the owner of the site and/or at such time that the signatory becomes an owner of the site.*** [Person] shall not make any use of the site or take any actions at the site inconsistent within this [Order]. [Person] shall impose such use and/or access restrictions as may be deemed necessary by the Department. The use and access restrictions are to run with the land and be for the benefit of and enforceable by the Department and any citizen which is or may be damaged as a result of violations of the use and access restrictions. The use and access restrictions shall provide actual and constructive notice of any subsequent grantee of the locations and concentrations of all contaminants whch remain at the site and of the use and access restrictions imposed. Within thirty (30) calendar days after [Person's] receipt of a written request from the Department, [Person] shall record the restrictions with ***the*** [ ] County Clerk, [ ] County, State of New Jersey, and provide the Department with a copy of this [Order] stamped "Filed" by the [ ] County Clerk.

27. Except as otherwise provided, the requirements of this [Order] shall be deemed satisfied upon the receipt by [Person] of written notice from the Department that [Person] has demonstrated, to the satisfaction of the Department, that [Person] has completed the substantive and financial obligations imposed by this [Order]. Such written notice shall not relieve [Person] from the obligation to conduct future investigation or remediation activities pursuant to federal, *[state]* ***State*** or local laws for matters not addressed by this [Order]. *[Furthermore, such written notice shall not terminate the obligations and requirements set forth in the preceding six (6) Paragraphs.]*

28. Except as otherwise set forth herein, by the execution of this [Order] the Department does not release [Person] from any liabilities or obligations such person may have pursuant to any other authority, nor does the Department waive any of its rights or remedies pursuant thereto.

29. [Person] shall submit to the Department, along with the executed original [Order], documentary evidence in the form of a corporate resolution, that the signatory has the authority to bind [Person] to the terms of this [Order].

30. The Department will consider a request for an extension of time to perform any requirement under this [Order], provided that any extension request is submitted to the Department two weeks prior to any applicable deadline to which the extension request refers.

31. [Person] may assert a claim of confidentiality for any information submitted by [Person] pursuant to this [Order], by following the Department's procedures in N.J.A.C. 7:14A-11.

*[31.]***32.*** [Person] expressly agree***s*** that in the event that [Person] *[or [Person]]* fails or refuses to perform any obligation(s) under this [Order] as determined by the Department, the Department shall have the right to exercise any option or combination of options available to the Department under this [Order], or any other statute.

[32. Except as otherwise provided, the requirements of this [Order] shall be deemed satisfied upon the receipt by [Person] of written notice from the Department that [Person] has demonstrated, to the satisfaction of the Department, that [Person] has completed the substantive and financial obligations imposed by this [Order]. Such written notice shall not relieve [Person] from the obligation to conduct future investigation or remediation activities pursuant to federal, State or local laws for matters not addressed by this [Order].]

33. *[[Optional—use if the oversight document is an administrative consent order—]]* This [Order] shall be effective upon the execution of this [Order] by the Department and *[the]* [Person]. The [Person] shall return a fully executed [Order] to the Department together with the financial assurance required by Paragraph [ ] above, and signature authorization required by Paragraph [ ] above *[within five (5) business days from the effective date]*.

Date:_____ NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ENERGY

BY: _____
Signature

_____
Print Full Name Signed Above

_____
Title

Date:_____ [Print Name of Company executing Order]

BY: _____
Signature

_____
Print Full Name Signed Above

_____
Title

APPENDIX D
STANDARD PUBLICLY CONDUCTED ADMINISTRATIVE CONSENT ORDER

The standard publicly conducted administrative consent order contains—references to [Person], [amount], and other blank brackets [ ]. Upon the Department's issuance or entry of an administrative consent order, the Department will replace these terms and blank spaces with the appropriate information for that specific oversight document.

IN THE MATTER OF ***THE***	:	
[Site Name] ***SITE***	:	ADMINISTRATIVE
[and] ***AND***	:	CONSENT ORDER
[Name of Person]	:	

The Administrative Consent Order is issued and entered into pursuant to the authority vested in the Commissioner of the New Jersey Department of Environmental Protection and Energy, (hereinafter the "Department") by N.J.S.A. 13:1D-1 et seq., and the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., and the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq., and duly delegated to the Assistant Director for the Division of Responsible Party Site Remediation pursuant to N.J.S.A. 13:1B-4.

FINDINGS

1. [The name, location, street address and general description of the contaminated site (hereinafter "Site") which is the subject of the *[memorandum of agreement]* ***administrative consent order***.]

2. [The full name and mailing address of each responsible party executing the administrative consent order if applicable.]

3. [The regulatory and enforcement history of the site.]

4. By entering this administrative consent order, [Person] *[does not admit]* ***neither admits*** to any fact, fault or liability under any statute or regulation concerning the condition of the Site [if applicable] ***nor waives any rights or defenses with regard to the site except as specifically provided in this administrative consent order***.

5. All of the Department's ***public*** files concerning the [name of site] are incorporated herein and made a part thereof.

6. The *[Department intends [and [Person] agrees [if applicable]] that the]* scope of the investigation and cleanup required by this administrative consent order will include all contaminants at the above referenced Site, and all contaminants which are emanating from or which have emanated from the Site.

7. [Additional provisions may be added at the Department's discretion ***with the concurrence of [Person]***.]

ORDER

I. Reimbursement of Prior Costs [Optional]

1. Within thirty (30) calendar days after the effective date of this administrative consent order, [Person] shall pay to the Department the sum of $ [amount] as reimbursement of costs incurred by the Department to date, in connection with the investigation of, and response to, the matters described in the Findings hereinabove. ***[Person] shall make payment of the above amount by a cashier's or certified check payable to the "Treasurer, State of New Jersey" and submit it with DEPE Form 062A to:***

[2. [Person] shall submit to the Department within five (5) calendar days after the effective date of this administrative consent order a cashier's or certified check payable to the "Treasurer, State of New Jersey" in the amount of $ [amount]. Payment shall be submitted along with Form 062A to:]

New Jersey Department of Environmental Protection
and Energy
Bureau of Revenue
CN 402
440 East State Street
Trenton, New Jersey 08625-0402

II. Payment

1. The Department will conduct *[an RI/FS]* ***a [remedial phase]*** of hazardous substances, as defined by the Spill Compensation and Control Act, and all pollutants, as defined by the Water Pollution Control Act, discharged at, emanating from, or which have emanated from the Site. The *[RI/FS]* ***[remediation phase]*** will be performed in accordance with ***N.J.A.C.*** 7:26E.

2. [Person] shall pay for all *[costs]* of the Department's ***costs*** in its prepration and performance of the *[RI/FS]* ***[remedial phase]*** described above, including contracting costs and the cost of the Department's administration and supervision of the performance of the *[RI/FS]* ***[remedial phase]*** as follows (hereinafter collectively "cost of the *[RI/FS]* ***[remedial phase]***"):

(a) Within thirty (30) calendar days after the effective date of this administrative consent order, [Person] shall pay the sum of $ [amount] to the Department ***to pay the costs of the [remedial phase]***. The Department shall deposit this payment in a separate interest bearing account (hereinafter "Account"). The Department will draw on *[such funds]* ***the Account*** to pay the costs of the *[RI/FS]* ***[remedial phase]***. All interest earned upon the *[amount]* ***Account*** shall be credited to the Account.

(b) Within thirty (30) calendar days after payment of the invoices by the Department, the Department ***to its contractors***, the Department will provide [Person] with copies of all invoices submitted to the Department by its contractors. Within thirty (30) calendar days after the Department draws down on the Account the Department will provide [Person] with a statement showing that the Department has paid the invoices from the Account.

(c) Within seven (7) calendar days after receipt *[from the Department]* of a written notice *[by]* ***from*** the Department that the balance of the Account has fallen below *[$ [amount]]* ***the amount necessary to satisfy (a) above***, [Person] shall submit such payments to the Department *[in an amount]* ***to restore the Account in an amount which will be*** sufficient to *[restore the Account to an amount of $ [amount]]* ***pay the costs of the [remedial phase]***. The Department will deposit this payment in the Account.

(d) Funds remaining in the Account upon ***the Department's*** completion of the *[RI/FS]* ***remedial phases described in this administrative consent order*** shall be promptly returned to [Person] by the Department.

III. Exchange of Information

1. The Department will provide [Person] with final copies of *[RI/FS]* ***[remedial phase]*** documents defined as Deliverables in the approved contract between the Department and its contractor(s), which include: Work Plan and Sampling Plans; Quality Assurance/Quality Control ("QA/QC") Protocols; *[Remedial Investigation]* ***[remedial phase]*** Reports; Endangerment or Risk Assessment Reports; *[Feasibility Study Reports; Treatability Study Reports;]* and Data Reports that include all data that have passed or failed QA/QC. For any data that fails QA/QC, the reasons for such failure will be explained in the data report.

2. [Person] may submit written comments to the Department on the Deliverables. The Department will review all such comments submitted by [Person], but is under no obligation to incorporate [Person's] comments in the Deliverables.

3. The Department will schedule meetings concerning the *[RI/FS]* ***[remedial phase]*** with [Person] on a quarterly basis, or more often if considered necessary or appropriate by both the Department and [Person].

4. The Department will provide [Person] with reasonable advance notice of all field activities for conducting of the *[RI/FS]* ***[remedial phase]***. The Department will not exclude [Person] representatives from being present during the *[conduct]* ***implementation*** of *[RI/FS]* ***[remedial phase]*** activities and ***from*** taking split-samples of all samples collected as part of the *[RI/FS]* ***[remedial phase]*** provided however, that [Person***'s***] representatives *[does]* ***do*** not in any way impede the progress of the *[RI/FS]* ***[remedial phase]***, and subject to [Person] obtaining any necessary access agreement to the ***site or the*** property *[being]* where *[RI/FS]* ***[remedial phase]*** activities are taking place.

5. [Person] agrees that no employee of, representative of, or consultant to [Person] shall have any ex-parte communications with the contractor hired by the Department to conduct the *[RI/FS]* ***[remedial phase]*** other than simple verbal exchanges which may occur in the field and are necessary to conduct the *[RI/FS]* ***[remedial phase]*** field activities.

IV. General Provisions

1. [Person] hereby consents to and agrees to comply with this administrative consent order which shall be fully enforceable as an Administrative Order in the New Jersey Superior Court pursuant to the Department's statutory authority.

2. No modification or waiver of this administrative consent order shall be valid except by written amendment to this administrative consent order duly executed by [Person] and the Department. Any amendment to this administrative consent order shall be executed by the Department and *[all]* [Person]. The Department reserves the right to require the resolution of any outstanding violations of the rules or this administrative consent order prior to executing any such amendment.

3. [Person] waives its rights to an administrative hearing concerning the entry of this administrative consent order.

4. This administrative consent order shall be governed and interpreted under the laws of the State of New Jersey.

5. This administrative consent order shall be binding, jointly and severally, on each signatory, its successors, assignees and any trustee in bankruptcy or receiver appointed pursuant to a proceeding in law or equity. No change in the ownership or corporate status of any signatory or of the facility or site shall alter signatory's responsibilities under this administrative consent order.

6. [Person] agrees not to contest the authority or jurisdiction of the Department to issue this administrative consent order; [Person] further agrees not to contest the terms or conditions of this administrative consent order except as to interpretation or application of such specific terms and conditions that are being enforced in any action brought by the Department to enforce the provisions of this administrative consent order. [Person] reserves all of its rights pursuant to the Spill ***Compensation and Control*** Act concerning the Department's selection of any remedial action pursuant to this administrative consent order.

7. [Person] shall provide to the Department written notice of the dissolution of its corporate or partnership identity, the liquidation of the majority of its assets or the closure, termination or transfer of operations at least thirty (30) calendar days prior to such action. Upon such notice, [Person] shall submit a cost review pursuant to Paragraph [ ] to the Department. [Person] shall also provide written notice to the Department of a filing of a petition for bankruptcy no later than *[the first]* ***five*** business day***s*** after such filing. This requirements shall be in addition to any other statutory requirements arising from the dissolution of corporate or partnership identity, the liquidation of the majority of assets, or the closure, termination or transfer of operations. *[Upon receipt of notice of dissolution of corporate identity, liquidation of assets or filing of a petition for bankruptcy, the Department may request and, within

fourteen (14) days of the Department's written request, the [Person] shall obtain and submit to the Department additional financial assurance pursuant to this administrative consent order.]*

8. [Person] shall submit to the Department, along with the executed original administrative consent order, documentary evidence in the form of a corporate resolution, that the signatory has the authority to bind [Person] to the terms of this administrative consent order.

9. [Person] expressly agree*s* that in the event that [Person] *[or [Person]]* fails or refuses to perform any obligation(s) under this administrative consent order as determined by the Department, the Department shall have the right to exercise any option or combination of options available to the Department under this administrative consent order, or any other statute.

10. Except as otherwise provided, the requirements of this administrative consent order shall be deemed satisfied upon the receipt by [Person] of written notice from the Department that [Person] has demonstrated, to the satisfaction of the Department, that [Person] has completed the substantive and financial obligations imposed by this administrative consent order. Such written notice shall not relieve [Person] from the obligation to conduct future investigation or remediation activities pursuant to federal, State or local laws for matters not addressed by this administrative consent order.

[11. [Person] agrees not to bring an action or maintain any existing or future claim or demand upon any State fund(s), established for the purpose of remediating or responding to environmental contamination, including the New Jersey Spill Compensation Fund, N.J.S.A. 58:10-23.11 et seq., and the Sanitary Landfill Facility Contingency Fund, N.J.S.A. 13:1E-100 et seq., for the cost of any cleanup and removal costs or any other actions required by this Administrative Consent Order and for damages sustained by [Person], its predecessors or its successors and assigns as a result of contamination attributable from [Person's] operations or any of the Sites, provided however, [Person] does not release or waive any right it may have to seek damages otherwise from any other responsible party for such costs or damages.]

*[12.]***11.*** By entering into this Administrative Consent Order, the Department does not waive its right to assess or collect civil or civil administrative penalties for past, present and future violations by [Person] of any New Jersey environmental statutes or regulations.

*[13.]***12.*** [Person] admits that it has agreed to comply with the terms of this Administrative Consent Order. Neither the entry into this Administrative Consent Order nor the conduct of [Person] hereunder, shall be construed as any admission of fact, fault or liability by the [Person] under any applicable laws or regulations.

13. Within thirty (30) calendar days after the effective date of this [Order], [Person] shall record a copy of this [Order] with the County Clerk, [ ] County, State of New Jersey and shall provide the Department with written verification of compliance with this paragraph which shall include a copy of this [Order] stamped "Filed" by the County Clerk.

14. Except as otherwise stated in this [Order], nothing herein shall be construed as limiting any legal, equitable or administrative remedies which [Person] may have under any applicable law or regulation. In any enforcement action the Department initiates pursuant to this [Order], [Person] reserves any defenses which the Spill Compensation and Control Act, *Matter of Kimber Petroleum Corp.*, 110 N.J. 69 (1988) or their amendments, supplements and progeny allow.

*[14.]***15.*** This administrative consent order shall be effective upon the execution of this administrative consent order by the Department and *[the]* [Person]. The [Person] shall return a fully executed *[administrative consent order]* ***[Order]*** to the Department together with the *[financial assurance required by Paragraph [ ] above, and]* signature authorization required *[by Paragraph [ ]]* above within five (5) business days from the effective date.

Date:_____ NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ENERGY

BY: _____
Signature

_____
Print Full Name Signed Above

_____
Title

Date:_____ [Print Name of Company executing Order]

BY: _____
Signature

_____
Print Full Name Signed Above

_____
Title

APPENDIX E
STANDARD LETTER OF CREDIT

The standard letter of credit contains references to [Person], [amount], and other blank [ ] which the issuing institution shall fill in as appropriate when issuing the letter of credit.

LETTER OF CREDIT WORDING

[_____, 19___]

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION & ENERGY
DIVISION OF RESPONSIBLE PARTY SITE REMEDIATION
CN 028
Trenton, New Jersey 08625
Attention: Chief, Bureau of Budget and Accounting

RE: Administrative Consent Order, [date executed] Division of Responsible Party Site Remediation [site and location include street address lot(s) and block(s) municipality and county]

Dear Sir or Madam:

We hereby establish our Irrevocable Standby Letter of Credit No. ____ in your favor, at the request and for the account of [Person] and address up to the aggregate amount of [amount written out] U.S. Dollars [$ amount], available upon presentation by you of:

(1) Your sight draft, bearing reference to this letter of credit No. ____, and

(2) Your signed statement reading as follows: "I certify that the amount of the draft is payable pursuant to the terms and provisions of the _____, 19 ___ Administrative Consent Order executed by the New Jersey Department of Environmental Protection and Energy and [Person] in order to remedy contamination identified at site and location.

This letter of credit is irrevocable and issued for a period of at least one (1) year. This letter of credit is effective as of [date] and shall expire on [date at least one year later], but such expiration date shall be automatically extended for a period of [at least one year] on [date] and on each successive expiration date, unless, at least 120 calendar days before the current expiration date, we notify both you and [Person] by certified mail that we have decided not to extend this letter of credit beyond the current expiration date. In the event you are so notified, any unused portion of the credit shall be available upon presentation of your sight draft for 120 calendar days after the date of receipt by both you and [Person], as shown on the signed return receipts.

Whenever this letter of credit is drawn on under and in compliance with the terms of this credit, we shall duly honor such draft upon presentation to us, and we shall deposit the amount of the draft directly into the standby trust fund of [Person] in accordance with your instructions.

We hereby agree to be subject to the jurisdiction of the New Jersey courts for all claims made by the NJDEPE against the letter of credit and that this letter of credit shall be construed and enforced according to the State of New Jersey.

We shall not cancel this letter of credit on the basis of a request from [Person] until we have received written authorization from you.

This letter of credit is subject to [insert "the most recent edition of the Uniform Customs and Practice for Documentary Credits, published by the International Chamber of Commerce," or "the Uniform Commercial Code"]

Very truly yours,
[Name of Issuing Bank]
[Signature and Title of Official]
[Printed Name of Officials]
[Date]

APPENDIX F
STANDARD STANDBY TRUST AGREEMENT

The standard standby trust agreement contains references to [Person], [amount], and other blank brackets [ ] which the issuing institution shall fill in as appropriate when issuing the standby trust agreement.

STANDBY TRUST AGREEMENT WORDING

Trust Agreement, "Agreement", entered into as of [date] by and between [Person] known as "Grantor" and issuing institution the "Trustee".

Whereas, the New Jersey Department of Environmental Protection and Energy, "NJDEPE", an agency of the State of New Jersey, has entered into an Administrative Consent Order with Grantor dated _____, 19____, to cleanup contamination identified at site and location, a copy of which is annexed hereto as Schedule "A", pursuant to which Grantor is obligated to establish a trust fund to assure the availability of funds to secure the performance of Grantor's obligations under that Administrative Consent Order.

Whereas, the Grantor, acting through its duly authorized officers, has selected the Trustee to be the trustee under this agreement, and the Trustee is willing to act as trustee.

Now, Therefore, the Grantor and the Trustee agree as follows:

Section 1. Definitions. As used in this Agreement:

(a) The term "Grantor" means [Person] who enters into this Agreement and any successors or assigns of the Grantor.

(b) The term "Trustee" means the Trustee who enters into the Agreement and any successor Trustee, who has the authority to act as a trustee and whose trust operations are regulated and examined by a Federal or New Jersey agency. The name, address and title of the Trustee is:

_____

_____

_____

(c) The term "Commissioner" means the Commissioner of the New Jersey Department of Environmental Protection and Energy.

(d) The term "Beneficiary" means the New Jersey Department of Environmental Protection and Energy.

(e) The term "NJDEPE" means the New Jersey Department of Environmental Protection and Energy.

Section 2. Identification of Facilities and Cost Estimates. This Agreement pertains to the facilities and cost estimates identified on attached Schedule "A".

Section 3. Establishment of Fund. The Grantor and the Trustee hereby establish a trust fund, the "Fund", for the benefit of NJDEPE. The Grantor and the Trustee intend that no third party have access to the Fund except as herein provided. The Fund is established initially as consisting of the property, which is acceptable to the Trustee, described in Schedule "B", attached hereto. Such property and any other property subsequently transferred to the Trustee is referred to as the Fund, together with all earnings and profits thereon, less any payments or distributions made by the Trustee pursuant to this Agreement. The Fund shall be held by the Trustee, IN TRUST, as herein provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the Grantor, any payments necessary to discharge any liabilities of the Grantor established by the NJDEPE.

Section 4. Payment for Performance of Administrative Consent Order. The Trustee shall make payment from the Fund as the NJDEPE Commissioner shall direct, in writing, to provide for the payment of the costs of performing Grantor's obligations under the _____, 19____ Administrative Consent Order (annexed hereto as Schedule "A"). The Trustee shall reimburse the Grantor or other persons, as specified by NJDEPE, in such amounts as the NJDEPE shall direct in writing. In addition, the Trustee shall refund to the Grantor such amounts, as the NJDEPE specifies in writing. Upon refund, such funds shall no longer constitute part of the Fund, as defined herein.

Section 5. Payments Comprising the Fund. Payments made to the Trustee for the Fund shall consist of cash or securities acceptable to the Trustee.

Section 6. Trustee Management. At such time as the corpus of the Trustee shall invest and reinvest the principal and income of the Fund and keep the Fund invested as a single fund, without distinction between principal and income. In investing, reinvesting, exchanging, selling and managing the Fund, the Trustee shall discharge his/her duties with respect to the Trust fund solely in the interest of the beneficiary and with the care, skill, prudence and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims; except that:

(i) Securities or other obligations of the Grantor, or any other owner or operator of the facilities or any of their affiliates, as defined in the Investment Company Act of 1940, as amended, 15 U.S.C. 80a-2(a), shall not be acquired or held, unless they are securities or other obligations of the Federal or a State government;

(ii) The Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent insured by an agency of the Federal or State government; and

(iii) The Trustee is authorized to hold cash awaiting investment or distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

Section 7. Commingling and Investment. The Trustee is expressly authorized in its discretion:

(a) To transfer from time to time any or all of the assets of the Fund to any common, commingled or collective trust fund created by the Trustee in which the Fund is eligible to participate, subject to all of the provisions thereof, to be commingled with the assets of other trusts participating therein; and

(b) To purchase shares in any investment company registered under the Investment Company Act of 1940, 15 U.S.C. 80a-1 et seq., including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the Trustee. The Trustee may vote such shares in its discretion.

Section 8. Express Powers of Trustee. Without in any way limiting the powers and discretions conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

(a) To sell, exchange, convey, transfer or otherwise dispose of any property held by it, by public or private sale. No person dealing with the Trustee shall be bound to see to the application of the purchase money or to inquire into the validity or expedience of any such sale or other disposition;

(b) To make, execute, acknowledge and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;

(c) To register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with certificates of the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of such securities in a qualified central depository even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository with other securities deposited therein by another person or to deposit or arrange for the deposit of any securities issued by the United States Government or any agency or instrumentality thereof, with a Federal Reserve bank, but the books and records of the Trustee shall at all times show that all securities are part of the Fund;

(d) To deposit any cash in the Fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the Federal or State government; and

(e) To compromise or otherwise adjust all claims in favor or against the Fund.

Section 9. Taxes and Expenses. All taxes of any kind that may be assessed or levied against or in respect of the Fund and all brokerage commissions incurred by the Fund shall be paid from the Fund. All other expenses incurred by the Trustee in connection with the administration of this Trust, including fees for legal services rendered to the Trustee, the compensation of the Trustee to the extent not paid directly by the Grantor and all other proper charges and disbursements of the Trustee shall be paid from the Fund.

Section 10. Annual Valuation. The Trustee shall, annually, at least 30 calendar days prior to the anniversary date of establishment of the Fund, furnish to the Grantor and to the NJDEPE a statement confirming the value of the Trust. Any securities in the Fund shall be valued at market value as of no more than 60 calendar days prior to the anniversary date of establishment of the Fund. The failure of the Grantor to object in writing to the Trustee within 90 calendar days after the statement has been furnished to the Grantor and the NJDEPE shall constitute a conclusively binding assent by the Grantor, barring the Grantor from asserting any claim or liability against the Trustee with respect to matters disclosed in the statement.

Section 11. Advice of Counsel. The Trustee, may from time to time, consult with counsel, who may be counsel to the Grantor, with respect to any questions arising as to the construction of this Agreement of any action to be taken hereunder. The Trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

Section 12. Trustee Compensation. The Trustee shall be entitled to reasonable compensation for its services, as agreed upon in writing from time to time with the Grantor.

Section 13. Successor Trustee. The Trustee may resign or the Grantor may replace the Trustee, but such resignation or replacement shall not be effective until the Grantor has appointed a successor trustee and this successor accepts the appointment. The successor trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor trustee's acceptance of the appointment, the Trustee shall assign, transfer and pay over to the successor trustee the funds and properties then constituting the Fund. If for any reason, the Grantor cannot or does not act in the event of the resignation of the Trustee, the Trustee may apply to a court of competent jurisdiction for the appointment of a successor trustee or for instructions. The successor trustee shall specify the date on which it assumes administration of the trust in writing sent to the Grantor, the NJDEPE and the present Trustee by certified mail 10 calendar days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this Section shall be paid as provided in Section 9.

Section 14. Instructions to the Trustee. All orders, requests and instructions by the Grantor to the Trustee shall be in writing, signed by such persons as are designated in the attached Schedule "C". The Trustee shall be fully protected in acting without inquiry in accordance with the Grantor's orders, requests and instructions. All orders, requests, and instructions by the NJDEPE to the Trustee shall be in writing, signed by the NJDEPE Commissioner or his/her designee and the Trustee shall act and shall be fully protected in acting in accordance with such orders, requests and instructions. The Trustee shall have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the Grantor or NJDEPE hereunder has occurred. The Trustee shall have no duty to act in the absence of such orders, requests and instructions from the Grantor and/or NJDEPE, except as provided for herein.

Section 15. Amendment of Agreement. This Agreement may be amended by an instrument in writing executed by the Grantor, the Trustee and the NJDEPE or by the Trustee and the NJDEPE if the Grantor ceases to exist and no successors or assigns are named.

Section 16. Irrevocability and Termination. Subject to the right of the parties to amend this Agreement, as provided in Section 15, this Trust shall be irrevocable and shall continue until terminated at the written agreement of the Grantor, the Trustee and the NJDEPE or of the Trustee and the NJDEPE, if the Grantor ceases to exist. Upon termination of the Trust, all remaining trust property, less final trust administration expenses, shall be delivered to the Grantor.

Section 17. Immunity and Indemnification. The Trustee shall not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this Trust or in carrying out any directions by the Grantor or the NJDEPE issued in accordance with this Agreement. The Trust shall be indemnified and saved harmless by the Grantor or the Trust Fund, or both, from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct in its official capacity, including all expenses reasonably incurred in its defense in the event the Grantor fails to provide such defense.

Section 18. Choice of Law. This Agreement shall be administered, construed and enforced according to the laws of the State of New Jersey.

Section 19. Interpretation. As used in this Agreement, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each Section of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

In Witness Whereof the parties have caused this Agreement to be executed by their respective officers, duly authorized, and their corporate seals to be hereunto affixed and attested, as of the date first above written:

DATE: _____ [NAME OF GRANTOR]

BY: _____

TITLE: _____

DATE: _____ [NAME OF TRUSTEE]

BY: _____

TITLE: _____

CERTIFICATION OF ACKNOWLEDGEMENT

TO BE EXECUTED BY BOTH THE GRANTOR AND TRUSTEE

State of

County of

On the ____ day of _____ before me personally came [name] to me known, who, being by me duly sworn, did depose and say that she/he resides at [address], that she/he is [title] of [corporation], the corporation described in and which executed the Trust Agreement; that she/he knows the seal of said corporation; that the seal affixed to such instruments is such corporate seal; that is [was] so affixed by order of the Board of Directors of said corporation, and that she/he signed her/his name thereto by like other.

_____

[Signature of Notary Public]

SCHEDULE A

Instructions to the Grantor:

Include here a copy of the Administrative Consent Order.

SCHEDULE B

Instructions to the Grantor:

Include here the initial amount of money the Administrative Consent Order requires you to deposit in the irrevocable standby trust fund.

$ _____ in cash

$ _____ in securities

SCHEDULE C

Instructions to the Grantor:

Include here the required information of your designee for communications with the Trustee.

individual's name, title

[Person]

CERTIFICATE OF ACKNOWLEDGEMENT

State of

County of

On this ____ day of _____, 19____, before me personally came [name] to me known, who being by me duly sworn, did depose and say that she/he resides at _____, that she/he is [title] of [Person], the corporation described in and which executed the Trust Agreement pursuant to the Administrative Consent Order dated _____, 19____, that she/he knows the seal of said corporation; that

the seal affixed to such instruments is such corporate seal; that it was so affixed by Order of the Board of Directors of said corporation, and that she/he signed her/his name thereto by like order.

[Notary Public]

APPENDIX G
STANDARD FULLY FUNDED TRUST AGREEMENT

The standard fully funded trust agreement contains references to [Person], [amount], and other blank brackets [ ] which the issuing institution shall fill in as appropriate when issuing the fully funded trust agreement.

FULLY FUNDED TRUST AGREEMENT

RE: RESPONSIBLE PARTY SITE REMEDIATION
ADMINISTRATIVE CONSENT ORDER executed on [date]by the New Jersey Department of Environmental Protection and Energy and [PERSON] for the investigation and cleanup of the contaminated site located at [include lot and block numbers, municipality and county]

Trust Agreement, "Agreement", entered into as of [date] by and between [Person] known as "Grantor" and issuing institution the "Trustee".

Whereas, the New Jersey Department of Environmental Protection and Energy, "NJDEPE", an agency of the State of New Jersey, has entered into an Administrative Consent Order with Grantor dated _____, 19___, to cleanup contamination identified at site and location, a copy of which is annexed hereto as "Schedule "A", pursuant to which Grantor is obligated to establish a trust fund to assure the availability of funds to secure the performance of Grantor's obligations under that Administrative Consent Order.

Whereas, the Grantor, acting through its duly authorized officers, has selected the Trustee to be the trustee under this agreement, and the Trustee is willing to act as trustee.

NOW, THEREFORE, the Grantor and the Trustee agree as follows:

Section 1. Definitions.

As used in this Agreement:

(a) The term "Grantor" means the owner of operator of the industrial establishment entering into this Agreement and any successors or assigns of the Grantor.

(b) The term "Trustee" means the Trustee who enters into the Agreement and any successor Trustee.

(c) The term "Commissioner" means the Commissioner of the New Jersey Department of Environmental Protection and Energy.

(d) The term "Beneficiary" means the New Jersey Department of Environmental Protection and Energy.

(e) The term "NJDEPE" means the New Jersey Department of Environmental Protection and Energy.

Section 2. Identification of Industrial Establishment and Cost Estimates.

This Agreement pertains to the industrial establishments and cost estimates identified in "Schedule "A".

Section 3. Establishment of Fund.

The Grantor and the Trustee hereby establish a trust fund, hereinafter the "Fund", for the benefit of NJDEPE. The Grantor and the Trustee intend that no third party shall have access to the fund except as herein provided. The Fund is established initially as consisting of the property, which is acceptable to the Trustee and NJDEPE, described in Schedule "B", attached hereto. Such property and any other property subsequently transferred to the Trustee is referred to as the Fund, together with all earnings and profits thereon, less any payments or distributions made by the Trustee pursuant to this Agreement. The Fund shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount of adequacy of, nor any duty to collect from the Grantor, any payments necessary to discharge any liabilities of the Grantor established by the NJDEPE.

Section 4. Payment for Cleanup.

The Trustee shall make payment from the Fund as the NJDEPE Commissioner, or his designee, shall direct, in writing, to provide for the payment of the cleanup costs of the industrial establishment [as appropriate add "pursuant to the Administrative Consent Order dated _____ or "covered by the cleanup approved by the NJDEPE on _____] and this Agreement. The Trustee shall reimburse the Grantor or other persons, as specified by the NJDEPE, from the Fund for cleanup expenditures in such amounts as the NJDEPE shall direct in writing. In addition, the Trustee shall refund to the Grantor such amounts the NJDEPE specifies in writing. Upon refund, such funds shall no longer constitute part of the Fund, as defined herein.

Section 5. Payments Comprising the Fund.

Payments made to the Trustee for the Fund shall consist of cash or securities acceptable to the Trustee.

Section 6. Trustee Management.

At such time as the corpus of the Fund is funded with more than one dollar, the Trustee shall invest and reinvest the principal and income of the Fund and keep the Fund invested as a single fund, without distinction between principal and income, in accordance with general investment policies and guidelines which the Grantor may communicate in writing to the Trustee from time to time, subject, however, to the provisions of this Section. In investing, reinvesting, exchanging, selling and managing the Fund, the Trustee shall discharge his duties with respect to the Fund solely in the interest of the NJDEPE as the beneficiary and with the care, skill, prudence and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims; except that:

i. Securities or other obligations of the Grantor, or any other owner or operator of the facilities or any of their affiliates, as defined in the Investment Company Act of 1940, as amended, 15 U.S.C. 80a-2(a), shall not be acquired or held, unless they are securities or other obligations of the Federal or a State government;

ii. The Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent insured by an agency of the Federal or State government; and

iii. The Trustee is authorized to hold cash awaiting investment of distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

Section 7. Commingling and Investment.

The Trustee is expressly authorized in its discretion:

(a) To transfer from time to time any or all of the assets of the Fund to any common, commingled or collective trust fund created by the Trustee in which the Fund is eligible to participate, subject to all of the provisions thereof, to be commingled with the assets of other trusts participating therein; and

(b) To purchase shares in any investment company registered under the Investment Company Act of 1940, 15 U.S.C. 80a-1 et seq., including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the Trustee. The Trustee may vote such shares in its discretion.

Section 8. Express Powers of Trustee.

Without in any way limiting the powers and discretions conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

(a) To sell, exchange, convey, transfer or otherwise dispose of any property held by it, by public or private sale. No person dealing with the Trustee shall be bound to see to the application of the purchase money or to inquire into the validity or expedience of any such sale or other disposition;

(b) To make, execute, acknowledge and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;

(c) To register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with certificates of the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of such securities in a qualified central depository even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository with other securities deposited therein by another person, or to deposit or arrange for the deposit of any securities issued by the Federal Government of the United States or any agency or

instrumentality thereof, with a Federal Reserve bank, but the books and records of the Trustee shall at all times show that all securities are part of the Fund;

(d) To deposit any cash in the Fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the Federal or State government; and

(e) To compromise or otherwise adjust all claims in favor of or against the Fund.

Section 9. Taxes and Expenses.

All taxes of any kind that may be assessed or levied against or in respect of the fund and all brokerage commissions incurred by the Fund shall be paid from the Fund. All other expenses incurred by the Trustee in connection with the administration of this Trust, including fees for legal services rendered to the Trustee, the compensation of the Trustee to the extent not paid directly by the Grantor and all other proper charges and disbursements of the Trustee shall be paid from the Fund.

Section 10. Annual Valuation.

The Trustee shall, annually, at least 30 calendar days prior to the anniversary date of establishment of the Fund, furnish to the Grantor and to the NJDEPE a statement confirming the value of the Trust. Any securities in the Fund shall be valued at market value as of no more than 60 calendar days prior to the anniversary date of establishment of the Fund. The failure of the Grantor to object in writing to the Trustee within 90 calendar days after the statement has been furnished to the Grantor and the NJDEPE shall constitute a conclusively binding assent by the Grantor, barring the Grantor from asserting any claim or liability against the Trustee with respect to matters disclosed in the statement.

Section 11. Advice of Counsel.

The Trustee may, from time to time, consult with counsel, who may be counsel to the Grantor, with respect to any questions arising as to the construction of this Agreement or any action to be taken hereunder. The Trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

Section 12. Trustee Compensation.

The Trustee shall be entitled to reasonable compensation, from time to time, for its services, as agreed upon in writing with the Grantor.

Section 13. Successor Trustee.

The Trustee may resign or the Grantor may replace the Trustee, but such resignation or replacement shall not be effective until the Grantor has appointed a successor trustee and this successor accepts the appointment. The successor trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor trustee's acceptance of the appointment, the Trustee shall assign, transfer and pay over to the successor Trustee the funds and properties constituting the Fund. If for any reason, the Grantor cannot or does not act in the event of the resignation of the Trustee, the Trustee may apply to a court of competent jurisdiction for the appointment of a successor Trustee or for instructions. The successor trustee shall specify the date on which it assumes administration of the trust in writing sent to the Grantor, the NJDEPE and the present Trustee by certified mail 10 days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this Section shall be paid as provided in Section 9.

Section 14. Instructions to the Trustee.

All orders, requests and instructions by the Grantor to the Trustee shall be in writing, signed by such persons as are designated in Schedule "C". The Trustee shall be fully protected in acting without inquiry in accordance with the Grantor's orders, requests and instructions. All orders, requests and instructions by the NJDEPE to the Trustee shall be in writing, signed by the NJDEPE Commissioner or his/her designee and the Trustee shall act and shall be fully protected in acting in accordance with such orders, requests and instructions. The Trustee shall have the right to assume, in the absence of a written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the Grantor of NJDEPE hereunder has occurred.

The Trustee shall have no duty to act in the absence of such orders, requests and instructions from the Grantor and/or NJDEPE, except as provided for herein.

Section 15. Amendment of Agreement.

This agreement may be amended by an instrument in writing executed jointly by the Grantor or the Grantor's principals, successors, and assigns if Grantor has dissolved, the Trustee and the NJDEPE or by the Trustee and the NJDEPE if the Grantor ceases to exist and no successors or assigns are named.

Section 16. Irrevocability and Termination.

Subject to the right of the parties to amend this Agreement, as provided in Section 15, this Trust shall be irrevocable and shall continue until terminated at the written agreement of the Grantor, the Trustee and the NJDEPE or of the Trustee and the NJDEPE, if the Grantor ceases to exist. Upon termination of the Trust, all remaining trust property, less final trust administration expenses, shall be delivered to the Grantor.

Section 17. Immunity and Indemnification.

The Trustee shall not incur personal liability of any nature in connection with any act of omission[s], made in good faith, in the administration of this Trust or in carrying out any directions by the Grantor or the NJDEPE issued in accordance with the Agreement. The Trustee shall be indemnified and saved harmless by the Grantor or from the Trust Fund, or both, from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct in its official capacity, including all expenses reasonably incurred in its defense in the event the Grantor fails to provide such defense.

Section 18. Choice of Law.

This Agreement shall be administered, construed and enforced according to the laws of the State of New Jersey.

Section 19. Interpretation.

As used in this Agreement, words in the singular include the plural and words in the plural include the singular.

The descriptive headings for each Section of this Agreeemnt shall not affect the interpretation or the legal efficacy of this Agreement.

In Witness Whereof, the parties have caused this Agreement to be executed by their respective officer or management officials, duly authorized, and their corporate seals to be hereunto affixed and attested, as of the date first above written:

[NAME OF GRANTOR]

DATE:_____ BY:_____

TITLE:_____

[NAME OF TRUSTEE]

DATE:_____ BY:_____

TITLE:_____

CERTIFICATION OF ACKNOWLEDGMENT
TO BE EXECUTED BY BOTH THE GRANTOR AND TRUSTEE

State of

County of

On the ____ day of _____ before me personally came [name] to me known, who, being by me duly sworn, did depose and say that she/he resides at [address], that she/he is [title] of [corporation] the corporation described in and which executed the Trust Agreement; that she/he knows the seal of said corporation; that the seal affixed to such instruments is such corporate seal; that is [was] so affixed by order of the Board of Directors of said corporation, and that she/he signed her/his name thereto by like other.

_____

[Signature of Notary Public]

Schedule A

Instructions to the Grantor:

Include here a copy of the Administrative Consent Order.

Schedule B

Instructions to the Grantor:

Include here the initial amount of money the Administrative Consent Order requires you to deposit in the standby trust fund

$_____ in cash

$_____ in securities

Schedule C

Instructions to the Grantor:

Include here the required information of your designee for communications with the Trustee.

_____ _____

Individual's name Title

_____

Company

APPENDIX H

STANDARD SURETY BOND

The standard surety bond contains references to [Person], [amount], and other blank brackets [ ] which the issuing institution shall fill in as appropriate when issuing the surety bond.

SURETY BOND

RE: ADMINISTRATIVE CONSENT ORDER executed on [date] by the New Jersey Department of Environmental Protection and Energy and [PERSON] for the investigation and cleanup of the contaminated site located at [include lot and block numbers, municipality and county]

Date bond executed:_____

Effective date:_____

Principal: [Legal name and business address of owner or operator of the industrial establishment]

Type of organization [insert "individual", "joint venture," "partnership", or "corporation"]

State of incorporation_____

Surety(ies): [names and business addresses]

Total penal sum of bond:_____

Know All Persons By These Presents, That we, the Principal and Surety(ies) hereto are firmly bound to the New Jersey Department of Environmental Protection and Energy, hereinafter NJDEPE, in the above penal sum for the payment of which we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally; provided that, where the Surety(ies) are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes, each Surety binds itself, jointly and severally with the Principal, for the payment of such sum only as is set forth opposite the name of such Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sum.

WHEREAS, said Principal has entered into an Administrative Consent Order with NJDEPE dated [date], under which Principal has agreed, among other things, to undertake certain actions in order to comply with the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq., the Solid Waste Management Act, N.J.S.A. 58:10-23.11 et seq., and all obligations set forth by the Administrative Consent Order executed for the above referenced property.

WHEREAS, said Principal is required to provide financial assurance in the amount equal to or greater than the cost estimate for implementation of the obligations set forth by the Administrative Consent Order date _____.

WHEREAS, the condition of this obligation is such that, if Principal shall promptly and faithfully perform its obligations under the Administrative Consent Order, then this obligation shall be null and void; otherwise the surety bond shall remain in full force and effect to assure and guarantee the performance and implementation of all obligations set forth by the Administrative Consent Order for this site.

WHEREAS, said Principal shall establish a standby trust fund as is required by the Administrative Consent Order when a surety bond is used to provide a mechanism for access by NJDEPE to all or part of such financial assurance required by the Administrative Consent Order to assure performance of the implementation of all obligations set forth by the Administrative Consent Order.

NOW, THEREFORE, the conditions of this obligation are such that if the Principal shall faithfully perform its obligations under the Administrative Consent Order, whenever required to do so, regarding each site for which this surety bond guarantees performance, then this obligation shall be null and void, otherwise it is to remain in full force and effect.

The Surety(ies) shall become liable on this bond obligation only when the Principal has failed to fulfill the conditions described above. Upon notification by the NJDEPE that the Surety(ies) shall place funds in the amount guaranteed for the investigation and cleanup of the site into the standby trust fund as directed by the NJDEPE within ten (10) days of receipt of NJDEPE's notification.

The liability of the Surety(ies) shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall amount in the aggregate to the sum of the bond, but in no event shall the obligation of the Surety(ies) hereunder exceed the amount of said sum.

The Surety(ies) may cancel the bond by sending notice of cancellation by certified mail to the Principal and to the NJDEPE contact referenced above; provided, however, the cancellation shall not occur during the 120 days beginning on the date of receipt of the notice of cancellation by both the Principal and the NJDEPE, as evidenced by the return receipts, nor shall cancellation occur while proceedings to enforce the terms of the Administrative Consent Order are pending or actions to a violation of the Administrative Consent Order are underway.

The Principal may terminate the bond by sending written notice to the Surety(ies); provided, however, that no such notice shall become effective until the Surety(ies) receive(s) written authorization for termination of the bond by the NJDEPE.

In WITNESS WHEREOF, the Principal and Surety(ies) have executed this Performance Bond and have affixed their seals on the date set forth below.

The persons whose signatures appear below hereby certify that they are authorized to execute this surety bond on behalf of the Principal and the Surety(ies) and that the wording of this surety bond is identical to the wording required by the Administrative Consent Order dated _____.

Principal

[Signature(s)]

[Date]

[Name(s)]

[Title(s)]

[Corporate Seal]

[Name and address]

State of incorporation:_____

Liability limit:_____

[Signature(s)]

[Date]

[Name(s) and title(s)]

[Corporate seal]

[For every co-surety, provide signature(s), corporate seal, and other information in the same manner as for Surety above].

Bond premium:_____

APPENDIX I
OVERSIGHT COST FORMULA

I. Formula

Administrative Cost Recovery Formula = A + B as detailed below.

A. Case Management Team

Staff members—including case managers, geologists, technical coordinators, samplers, inspectors, supervisors, section chiefs, etc.—who have coded to the site-specific project activity code (PAC) reflecting direct hours worked on the case. Actual hours and salaries for all staff members using the specific PAC will be included in the formula calculations.

(Sum of coded hours x hourly rates) x *[1.22]* additive factor x *[1.2865]* fringe benefit factor x *[2.3424]* indirect cost factor = A

B. Direct Costs

Represents any non-salary direct site-specific costs such as laboratory analysis contractor expenses, etc. These costs will be billed directly to the responsible party as a formula add on.

Direct costs = B

II. Factor Definitions

The values for the various factors are subject to change on an annual basis. The Department will publish those factors in the New Jersey Register on an annual basis to inform the public of revised rates.

Salary Additive Rate—22.0%

The NJDEPE salary additive represents the prorated percentage of charges attributable to employees' reimbursable "down-time." This time includes vacation time, administrative leave, sick leave, holiday time, and other approved "absent with pay" allowances. The calculation for the salary additive is the sum of the reimbursable leave salary divided by the net Department regular salary for a given fiscal year. The direct salary charges are multiplied by the calculated percentage and the result is added to the direct salaries to determine the total reimbursable salary costs for a particular site/project.

Fringe Benefit Rate*[—28.65%]*

The New Jersey Office of Management and Budget *[has negotiated]* ***negotiates*** with the United States Department of Health and Human Services for a composite fringe benefit rate of *[21.00%]* ***a certain percentage*** of base salaries *[for the year ending June 30, 1992]*. The rate is applicable to personnel who are members of the Public Employees' Retirement System (PERS) and covers charges for the following benefits: pension, health benefits including prescription drug and dental care program, workers compensation, temporary disability insurance and unused sick leave. The employer's share of FICA taxes*[—7.65% for calendar year 1991—]*is added to the composite fringe benefit rate *[for a total of 28.65%]*. The rate is used by all state agencies for estimating and computing actual charges for fringe benefit costs related to Federal, Dedicated and Non-State programs.

Indirect Cost Rate*[—134.24%]*

The indirect cost rate *[of 132.24% represents the rate which has been]* ***is*** developed for this program in accordance with Federal OMB Circular A-87, "Cost Principles for State and Local Governments". Indirect costs are defined as those costs which are incurred for a common or joint purpose benefitting more than one cost objective and not readily assignable to the cost objectives specifically benefitted without effort disproportionate to the results achieved.

The components of the Department's indirect cost rate include indirect salaries and various indirect non-salary costs incurred by Department management, the Division of Publicly Funded Site Remediation, the Division of Responsible Party Site Remediation, and divisional indirect offices—i.e., Commissioner, Division Directors and Assistant Directors, the Division of Financial Management and General Services and the Division of Personnel.

Also, building rent and the Departmental allocation as determined by the Department of Treasury in the Statewide Cost Allocation Plan are includable as indirect costs. The Statewide Cost Allocation Plan pertains to central services costs which are approved on a fixed basis and included as part of the costs of the State Department during a given fiscal year ending June 30.

The total of these indirect costs divided by the total direct costs of these programs determine the indirect cost rate.

[This rate represents the actual indirect cost for the fiscal year ending June 30, 1991. The rate will be updated annually after the close of the fiscal year.]

(a)

PINELANDS COMMISSION

Pinelands Comprehensive Management Plan Development Review Approval and Waiver Expiration Adopted Amendments: N.J.A.C. 7:50-4.1 and 4.70

Proposed: January 19, 1993 at 25 N.J.R. 225(a).
Adopted: April 2, 1993 by the New Jersey Pinelands Commission, Terrence D. Moore, Executive Director.
Filed: April 21, 1993 as R.1993 d.211, **with substantive changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 13:18A-6j.

Effective Date: May 17, 1993.
Expiration Date: Exempt.

Summary of Public Comments and Agency Responses:

In association with publication of the proposed amendments in the January 19, 1993 edition of the New Jersey Register, the Pinelands Commission transmitted the proposal to each Pinelands Area municipality and county for review and comment. This also serves to notify members of the Pinelands Municipal Council pursuant to N.J.S.A. 13:18A-7f. Additionally, the Pinelands Commission:

- sent notice of the hearing to all persons and organizations which subscribe to the Commission's public hearing registry; and
- placed advertisements of the hearing in the five official newspapers of the Commission.

The following commented on the proposal:

David Barclay, Esq. representing West Town School

Robert H. Karen, New Jersey Builders Association

Michael J. Gross, Esq. of Giordano, Halleran and Ciesla representing Orleans Builders and Developers, Inc.

Patrick F. McAndrew, Esq. of Brandt, Haughey, Penberthy, Lewis and Hyland

Guliet D. Hirsch, Esq. representing Hovsons, Inc.

Richard M. Hluchan, Esq. of Levin and Hluchan representing James T. O'Brien

Don Kirchhoffer of Pinelands Preservation Alliance

A formal public hearing was held on January 28, 1993, at which Commission Executive Director Terrence Moore presided. Oral testimony was received from one individual. In addition, six written comments were received. Director Moore recommended that the amendments be adopted as proposed, with the change as described below.

Oral comments were recorded on magnetic tape which is on file at the Commission's office at Springfield Road, New Lisbon, New Jersey. Written comments may be examined or the tapes may be heard during normal business days from 9:00 A.M. to 5:00 P.M.

Seven comments were received. Of these, six consisted of objections to, and requests for further extension of, the December 31, 1994 deadline set by the proposed amendments for obtaining all necessary construction permits. The following reasons for the objections were set forth by the various commenters: (A) the time it takes to obtain development financing would not permit all waiver units to be built; (B) all construction permits cannot be obtained by December 31, 1994 nor can construction be completed by the following year; (C) the rule does not take into account special cases; (D) the rule does not provide a further extension for the one waiver approval for which the Commission previously extended the January 14, 1991 expiration date as part of a ruling on an adjudicatory hearing; (E) the deadline is arbitrary and unfair, and may be illegal; (F) the deadline would have adverse land use and regional economic impacts; (G) the deadline is unnecessary from an environmental standpoint and serves no other valid public purposes; and (H) the rule is inconsistent with the Permit Extension Act and the Municipal Land Use Law. The remaining comment, summarized in (I) below, also consisted of an objection to the December 31, 1994 deadline; however, this commenter requested that the Commission maintain the existing deadline for the completion of affected projects. Detailed discussion of each of these points follow.

A. Development financing cannot be obtained without an extension beyond December 31, 1993, in part because financing agencies will not consider such requests until the rules have been adopted.

COMMENT: Two organizations and one individual felt that the proposed amendments should allow extensions of valid municipal approvals beyond December 31, 1994 for all waiver applications subject to this rule proposal because of the unlikelihood that development financing can be secured unless such extensions are permitted. One commenter believed that no financial source will provide project financing until the Commission formally adopts the amended rules.

RESPONSE: The proposed amendments relate to applications which received approvals granted by the Pinelands Development Review Board between February 8, 1979 and June 28, 1979, approvals granted under the Commission's Interim Rules and Regulations between June 28, 1979 and January 14, 1981, and waiver approvals issued upon the basis of an applicant's having secured valid municipal development approval prior to February 8, 1979 and having documented expenditures made in reliance thereon (referred to as A-2 waivers).

It should be noted that the proposed amendments provide real extensions to most projects, and that these extensions relate to approvals that were granted well in advance of those covered by the Permit Extension Act. Thus, the amendments are more generous than the provisions of that Act. In addition, the development community has indicated in the past that any uncertainty concerning expiration dates hinders financing. The amendments are designed to eliminate any uncertainty that does exist concerning the expiration of these approvals. The elimination of uncertainty for individual projects should have a positive impact on the ability to obtain financing, especially since many, if not most, of the projects covered by these rules are well known to potential lenders who may have financed earlier sections of the development.

The proposed amendments only clarify the exact expiration date by establishing a specific expiration date to coincide with P.L.1992, c.82 (the Permit Extension Act) for those projects with approvals from the above sources which required planning board or board of adjustment approvals and obtained all such necessary municipal board approvals by January 14, 1991.

Applicants subject to these amendments will have been afforded at least 13 years within which to complete their projects from the time they received their initial approvals. The Commission believes that this period of time is sufficient for completion of even the larger scale, phased residential projects affected by this rule proposal. In any case, actual project completion is not the Commission's objective. The Commission's original objective was merely to provide a developer with an **opportunity** to complete a project; the objective of this proposal is to clarify when the opportunity expires.

B. Construction permits cannot all be secured by December 31, 1994, nor can construction be completed one year later.

COMMENT: The commenters also felt that the proposed amendments should allow longer extensions because the December 31, 1994 deadline provides insufficient time within which to secure all necessary construction permits, based upon the inherent time constraints of the existing lending and development processes.

One organization believed that the amendments require the completion of all affected projects by December 31, 1994. A second organization believed that the amendments require the completion of all affected projects by December 31, 1995.

RESPONSE: The amendments only clarify an expiration date which provides a developer with an opportunity to obtain construction permits. They do not, and are not intended to, guarantee the completion of projects. However, it should be noted that the amendments do not necessarily require a developer to complete all construction by December 31, 1994, but merely to obtain all necessary construction permits by that date. Thereafter, such permits may remain valid pursuant to N.J.A.C. 5:23-2.16(b) which sets no specific period of validity, provided that construction is commenced within one year and that every six months thereafter construction is ongoing.

Additionally, the commenters have not provided the Commission with any information to indicate that projects unable to secure all needed construction permits by the December 31, 1994 deadline could otherwise secure all necessary extensions from finanical and other review agencies to make these projects viable by **any** set date. Given the long period of time these developments have already had to get necessary financing and approvals, extending the deadline date as suggested would not give the Commission any guarantee that completion of these projects would be forthcoming by any set date (even if such completion were a Commission objective, which it is not).

C. Special cases remain that should be individually evaluated for additional extensions.

COMMENT: Three commenters felt that relief from the December 31, 1994 deadline should be granted for "hardship" cases. Specifically, one organization felt that municipal development approval extensions should be permitted for a retirement community project because of the financial burdens that will be borne by individual home owners, many of whom are living on fixed incomes, due to unanticipated increases in homeowner association fees as a result of the inability of the developer to sell all planned units.

Another commenter believed that an 18 month period after the December 31, 1994 deadline should be allowed in cases where applicants risk losing substantial sums of money from in-place investing in improvements for projects that would be unable to proceed to completion as a result of the Comprehensive Management Plan waiver deadlines.

A third commenter felt that regulatory relief should be granted on a case-by-case basis where the December 31, 1994 deadline would result in arbitrary and absurd circumstances.

RESPONSE: The Commission is merely clarifying the expiration date for these approvals. When it adopted the original rule establishing the January 14, 1991 expiration date, the Commission rejected having a provision allowing for exceptions to that date. Nothing in the comments provide a justification for changing that policy decision. Both the existing rule and these amendments are intended to provide an opportunity for project completion, not to guarantee project completion. If the suggestion to allow project buildout based on investment in infrastructure were followed, all developers could invest sufficiently by December 31, 1994 to justify full buildout. This is clearly contrary to the intent of the Commission.

While not the subject of these rules, there may be other means to address the issues raised by individual cases, including managing developments until December 31, 1994 so as not to preclude other uses of the property if the entire project is not completed. The Comprehensive Management Plan management area location and other characteristics of each site make it difficult, if not impossible, to deal with each individual situation in a general rule. However, municipalities have some flexibility in submitting amendments to their land use ordinances to the Commission for certification to deal with site specific situations, and the new density transfer provisions in Forest and Rural Development Areas may also provide additional options.

D. The special case where a waiver did not expire on January 14, 1991 should be covered by the proposed rules.

COMMENT: One organization believed that the provisions of the amendments concerning tolling of the December 31, 1994 date should also apply to the approval that the Commission previously extended beyond January 14, 1991, in instances where the applicant has been delayed in the implementation of a waiver by litigation or other particularized circumstances.

RESPONSE: The one application which received an extension of the January 14, 1991 deadline as part of a Commission decision following an adjudicatory hearing is a special, unique circumstance, and should not be governed by these amendments. The Commission decision was to extend until September 6, 1991 the obtaining of all necessary planning board and board of adjustment approvals. The applicant did not obtain all such approvals by that date. Issues arising from that fact are currently in litigation and are best resolved by that process not by creating a special provision to deal with one applicant. This amendment is not providing any extension to any other applicant that did not receive necessary approvals by the January 14, 1991 date.

E. The proposed deadline is unfair, arbitrary, and perhaps illegal.

COMMENT: Three organizations view the December 31, 1994 deadline as arbitrary. One believed that larger projects should be given a longer period than smaller projects. Another commenter believed that an extension of the time period for valid municipal approvals beyond the December 31, 1994 deadline should be granted for all waivers affected by these amendments except those for which it has been demonstrated that the property owner or developer has abandoned all efforts to complete the project following adequate public notice and hearing.

One organization believed that the Commission is equitably estopped from imposing the December 31, 1994 deadline.

RESPONSE: The purpose of these amendments is only to clarify the deadline by which all local construction approvals needed for those projects affected by the proposal must be obtained. The Comprehensive Management Plan establishes expiration dates for other types of development; the amendments merely clarify the date for one class of projects. Such a date was requested by some in the development community.

Clarifying an existing expiration provision for a class of projects by setting a specified day is well within the Commission's mandated policy making responsibilities and is not unfair, arbitrary or illegal.

The date selected coincides with the period designated as a "economic emergency" by the Permit Extension Act, and as such, is clearly not arbitrary. The total cumulative length of the extension will actually exceed that provided by the Permit Extention Act.

A fixed expiration date will serve to establish a degree of certainty regarding the fate of Review Board, Interim Rules and A-2 waiver approvals, some of which have remained in stasis for many years. This certainty is a prerequisite for sound land use planning at both the local and regional levels. (The Municipal Land Use Law permits discretionary time periods for final site plan or major subdivision approvals in some instances; however, the periods must be related to reasonable expectations of project build-out and may not be indefinite or it is inconsistent with the Municipal Land Use Law.) Extending the deadline in perpetuity would unfortunately prolong the period of uncertainty regarding when or if these projects will be completed, and would raise serious equity concerns regarding affording special treatment for these classes of Pinelands approvals vis a vis other projects that face expiration dates.

While larger sized projects may require longer periods in the timing of buildout, no suggestion of just how an adjustment for this possible difference was offered. In fact, the primary timing difference may be between single unit projects and multi-unit projects. In any case, all of the projects have had many years to be completed. Actions could, and in many cases, were taken to speed development and increase sales. It would be unfair to the projects that did achieve buildout through whatever means to now establish further periods for those that did not. Given the length of time that has been allocated, additional time is not found to be necessary.

Whether the Commission is equitably estopped from imposing a deadline in a particular situation can only be determined on a case-by-case basis and does not preclude this rulemaking.

However, this is not a situation where equitable estoppel could be applied against the Commission. Since 1987, the Commission has had regulations setting the expiration of Review Board, Interim Rules, and A-2 waivers. In addition to the formal rulemaking process, these deadlines were communicated to the regulated public through a variety of means including newspaper advertisements, press releases and letters to identified property owners. Therefore, the commenter could not reasonably have anticipated that a waiver would be in effect indefinitely. The comment received does not identify an alternative deadline that allows sufficient time for projects benefiting from these approvals to be completed. The commenter has only stated that the waiver should remain in effect until market conditions dictate that there is sufficient demand for the units originally anticipated when the builders made their initial investment. As noted above, the effect of the clarification contained in this amendment will be to extend the duration of approvals for most applications.

F. The proposed rules would have adverse land use and regional economic impacts

COMMENT: Two organizations and one individual felt that the proposed amendments would result in the creation of isolated vacant lots interspersed throughout these developments.

One individual and one organization believed that long-term adverse local economic impacts would result from the proposed amendments. The organization stated that municipal master plans, zoning ordinances and planning projections were based on anticipation of the completion of projects that would be affected by the proposed amendments. The organization mentioned that lowered property tax ratables would result from unbuilt and partially built development projects.

One organization felt that extending the time period for valid municipal approvals beyond the December 31, 1994 deadline should be permitted due to the present economic recession that the State and nation are experiencing, and due to the relatively small number of dwelling units which will be affected by the proposed amendments.

RESPONSE: For those projects which are proceeding as phased development, a situation of scattered vacant lots is unlikely. In this case, it is more probable that one or more phases would not be constructed in their entirety, rather than portions of phases left unbuilt. Developers will have the ability to develop their projects before December 31, 1994 in such a way as to minimize such situations. In cases where vacant lots do result, other options remain. For example, in two of the Comprehensive Management Plan's management areas (Forest and Rural Development), such lots may possibly be used in the newly created development transfer programs by combining them with non-contiguous land to meet by-right densities.

Certain effects of the proposed amendments are economically positive and similar to those envisioned by the Legislature through the economic benefits of the Permit Extension Act. The amendments would give certain projects in the Pinelands Area the same economic benefit afforded to projects located outside the Pinelands through December 31, 1994. Additionally, these properties retain the option to submit an application to the Commission based on the current regulations contained in the Comprehensive Management Plan.

Furthermore, characterizing these residential projects in a wholly positive light with respect to municipal fiscal impacts ignores the possibility that long-term service expenditure demands from residential developments may outstrip any gains in tax ratables. It also ignores the location of many of these projects away from developed areas where municipal services would be more efficiently provided. No evidence was presented to evaluate these impacts.

In proposing these amendments, the Commission weighed the development implications of the current economic climate against the Commission's obligation to protect the sensitive environmental resources of the Pinelands. The Commission believes that the proposed amendments satisfactorily accommodate both objectives.

G. The proposed amendments are unnecessary for environmental protection or any other public purpose

COMMENT: One organization believes that the proposed amendments serve no valid public purpose, and that any waiver approval premised upon a finding of no substantial impact on the resources of the Pinelands should be allowed to continue in accordance with market demand. Two organizations commented that extending the time period for valid municipal approvals beyond the December 31, 1994 deadline would not lead to adverse environmental impacts to the Pinelands.

The latter opinion was submitted by one organization based on the belief that the development impacts of any additional units that would be allowed under such extension of time have already been recognized and accommodated in the Commission's 1980 Comprehensive Management Plan.

The organization stated that the number of built dwelling units approved under the A-2 waiver provisions, the Commission's Interim Rules and Regulations, and by the Pinelands Development Review Board, as well as overall levels of residential development in the Pinelands region are lower than that which was anticipated by the Commission's 1980 Comprehensive Management Plan.

The lower than anticipated number of existing waiver units is attributed by the commenter to the subsequent downsizing of approved waiver projects and the elimination of approximately 4,800 waiver units from applications which failed to obtain necessary municipal approvals by the January 14, 1991 deadline.

The lower overall levels of residential development in the Pinelands region was demonstrated by the commenter by reference to a finding of lower than anticipated base densities in built and approved development projects in Pinelands Regional Growth Areas in the Commission's October 1988 "The Pinelands Development Credit Program" report. Overall lowered zone capacities in Regional Growth Areas as reported in the Commission's December 1991 Second Progress Report on Plan Implementation were also referenced. The commenter also suggested that existing Pinelands county population levels as reported in the 1990 Census are well below population projections from the 1980 Comprehensive Management Plan and more recent projections from the Department of Labor and the Center for Urban Policy Research.

RESPONSE: An expiration for these approvals is already part of the rules. These amendments clarify the existing rules. The clarification of an existing expiration date clearly has the public purpose of providing guidance to the development community. For most developments, the amendments will result in a longer period of time to obtain all necessary construction permits. The setting of an expiration date earlier than what some in the development community would like is based upon providing a reasonable amount of time for completion of this class of projects that do not have an adverse impact on the resources of the Pinelands. These developments are inconsistent with the rules that have been in effect since January 14, 1981. These rules were determined to be necessary to protect the resources of the Pinelands. By limiting the duration of these approvals, the Commission will be able to ascertain the total impact of these approvals and ascertain whether any regulatory changes are appropriate. If adjustments to the density provisions of the Com-

prehensive Management Plan are appropriate, such adjustments should be made through amendments dealing with the permitted densities and management area boundaries and not through an indefinite extension of approvals which are inconsistent with regulations which have been in effect since 1981.

The 1980 Comprehensive Management Plan is an end-point plan which estimates ultimate potential build-out levels for both population and housing units in the Pinelands Regional Growth Areas. The Commission recognizes the actual development levels will inevitably be somewhat lower than that which is permitted by the Regional Growth Area theoretical zone capacities. The Plan does not mandate a certain specified growth level; rather it attempts to provide an adequate level of development opportunities in areas where such growth can be accommodated. The reports cited show that additional opportunities are not needed. Additionally, the location of most waiver projects in areas where such development is not desirable would argue for better siting should such needs be identified.

The fact that population levels have not reached projected levels from the 1980 Comprehensive Management Plan simply suggests that the projected levels will be reached at a later point in time. Indeed, lower than anticipated growth levels in these areas suggests that there presently exists greater than anticipated opportunities for additional development, and thus less of a need to consider additional extensions for approved waivers.

Additionally, the Regional Growth Area capacity adjustments referenced by the commenter were made to comply with a goal of the Comprehensive Management Plan to provide for residential growth opportunities while affording protection of Pinelands resources. Even with the adjustments, ample opportunities for residential development in conformance with Comprehensive Management Plan environmental standards remain in the Regional Growth Areas.

It should be noted that the subject approvals were not intended to provide an indefinite period of protection for projects that were initially approved prior to the adoption of the Comprehensive Management Plan. The Pinelands Development Review Board was established and the interim Rules and Regulations were adopted in order to provide relief for applicants who were ready to proceed with their developments prior to the adoption of the Comprehensive Management Plan, not as a way to permanently grandfather those parcels from the provisions of the Comprehensive Management Plan. Similarly, the A-2 waiver provisions were intended to provide relief for developments which had received municipal development approvals prior to February 8, 1979, but were unable to proceed after that date because of the establishment of Pinelands regulations. The goal of the A-2 waiver provision was to enable those applicants who qualified to continue construction of developments which had been started prior to 1979, not to guarantee that these units could be built at any time in the future, regardless of the rules then in effect.

H. The proposed deadline is inconsistent with other State laws, for example, the Permit Extension Act and the Municipal Land Use law

COMMENT: One organization believed that the proposed amendments are contrary to the intent of the Permit Extension Act because extensions beyond the December 31, 1994 deadline are not precluded by the Act.

One organization expressed the opinion that had the general development plan provisions of P.L. 1987, c.129, effective May 28, 1987, been in effect prior to adoption of the Comprehensive Management Plan, many of the larger projects would have elected to utilize a general development plan process which would have afforded them greater flexibility in the time periods for local approvals and extensions. As a result, many of the projects now subject to the proposed amendments would not have been so had the general development plan provisions been in place earlier.

RESPONSE: As stated in the rule proposal Summary, the approvals subject to this rule proposal were exempted by the Legislature from the extension provisions of the Permit Extension Act. The State legislature, in promulgating this Act, acknowledged that the Federally recognized, unique resources of the Pinelands necessitated treating such permits and approvals differently from those issued elsewhere in the State.

For the purpose of clarification, the Commission has, at its discretion, decided to utilize the December 31, 1994 date as the date by which all construction permits must be obtained by those developments which required planning board and board of adjustment approvals and received all such board approvals by January 14, 1991. In fact, the Comprehensive Management Plan goes further than the Permit Extension Act. That Act only extends approvals that expire between January 1, 1989 and December 31, 1994. Almost all the approvals being extended by these amendments were granted many years before that date.

The observation concerning new provisions of the Municipal Land Use Law adopted subsequent to the establishment of the Pinelands Commission is immaterial. The Commission cannot base its regulatory policies on a hypothetical change in the date a statute was enacted. Even if this statute (which applies to municipal approvals) had been adopted earlier, it would not have impacted the Commission's ability to establish the expiration date for approvals granted by it or the Pinelands Development Review Board (see, for example, *Ocean Acres, Inc. v. Department of Environmental Protection,* 168 *N.J. Super.* 597, (App. Div. 1979)). Flexibility in expiration dates does not equate to indefiniteness.

I. Request that no extension of the current period until expiration be granted

COMMENT: One commenter stated that insufficient reason for any extension of time to obtain construction permits had been given. Furthermore, even if sufficient reason had been given, no "tolling" of time prior to the date of these rules should be permitted. Finally, Pinelands permits were properly exempted from the Permit Extension Act and these regulations should not change this.

RESPONSE: The reasons for these amendments have been previously cited, and include the need to clarify an ambiguous situation. Any "tolling" prior to the adoption of these rules results in exactly the same expiration date as the deadline: only if the "tolling" is subsequent to June of 1993 does any difference result. These amendments will take effect before then. The Pinelands approvals subject to these amendments are still exempt from the provisions of the Permit Extension Act.

Summary of Agency Initiated Change:

No changes were made as a result of the comments received. However, in the Commission's legal review of the proposed amendments, it was discovered that the proposed amendments contained a potential ambiguity concerning the expiration of the covered approvals that did not require planning board or board of adjustment approval. Therefore, a change upon adoption is being made to clarify that if work based on a construction permit issued prior to January 14, 1991 was commenced within 12 months of its date of issue, the permit would not expire unless it becomes invalid pursuant to N.J.A.C. 5:23-2.16(b) after the December 31, 1994 date set by the Permit Extension Act. If no work was commenced within the 12 month period, then the Pinelands approval subject to these amendments previously expired under the prior regulations. These amendments would not change the fact that these approvals already expired.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***).

7:50-4.1 Applicability

(a) (No change.)

(b) As of January 14, 1991, the provisions of this Plan shall apply to any proposed development or portion thereof which received approval from the Pinelands Commission pursuant to the Interim Rules and Regulations or which received approval from the Pinelands Development Review Board and said approvals expired as of that date or will expire subsequent to that date, without exception, unless the requirements in (b)1, 2 and 3 or in (b)4 below have been and continue to be met:

1. All necessary municipal planning board or board of adjustment approvals were obtained by January 14, 1991;

2. No additional approval, extension, renewal or any other action whatsoever is required or received from either the municipal planning board or board of adjustment after January 14, 1991; and

3. All necessary approvals, including all necessary construction permits, are obtained by December 31, 1994 or within 18 months of the expiration of any tolling pursuant to N.J.S.A. 40:55D-21 of the running of the period of the planning board or board of adjustment approval pursuant to N.J.S.A. 40:55D-47 or 40:55D-52, whichever is later; and no construction permit becomes invalid pursuant to N.J.A.C. 5:23-2.16(b) after the latter of said dates; or

4. Where no municipal planning board or board of adjustment approvals were required, all necessary construction permits were issued prior to January 14, 1991***, the authorized work was com-**

menced within 12 months after the issuance of the permits* and no such permit becomes invalid pursuant to N.J.A.C. 5:23-2.16(b) after *[that date]* ***December 31, 1994***.

(c) (No change.)

7:50-4.70 Effect of grant of waiver; expiration; recordation; effective date

(a) (No change.)

(b) Waivers approved under former N.J.A.C. 7:50-4.66(a)1ii, repealed effective November 2, 1987, and former N.J.A.C. 7:50-4.55(a)1iii, repealed effective September 12, 1985, shall expire as follows:

1. (No change.)

2. Any waiver previously approved under the prior municipal development approval standard contained in the previously repealed N.J.A.C. 7:50-4.66(a)1ii expired as of January 14, 1991 or will expire subsequent to that date, without exception, unless the requirements in (b)2i, ii and iii or in (b)2iv below have been and continue to be met:

i. All necessary municipal planing board or board of adjustment approvals were obtained by January 14, 1991;

ii. No additional approval, extension, renewal or any other action whatsoever is required or received from either the municipal planning board or board of adjustment after January 14, 1991; and

iii. All necessary approvals, including all necessary construction permits, are obtained by December 31, 1994 or within 18 months of the expiration of any tolling pursuant to N.J.S.A. 40:55D-21 of the running of the period of the planning board or board of adjustment approval pursuant to N.J.S.A. 40:55D-47 or N.J.S.A. 40:55D-52, whichever is later; and no construction permit becomes invalid pursuant to N.J.A.C. 5:23-2.16(b) after the latter of said dates; or

iv. Where no municipal planning board or board of adjustment approvals were required, all necessary construction permits were issued prior to January 14, 1991***, the authorized work was commenced within 12 months after issuance of the permits*** and no such permit becomes invalid pursuant to N.J.A.C. 5:23-2.16(b) after *[that date]* ***December 31, 1994***.

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

(a)

BOARD OF COMMISSIONERS OF PILOTAGE

Rules of the Board of Commissioners of Pilotage Drug Free Workplace Program

Adopted New Rules: N.J.A.C. 7:61-3

Proposed: February 16, 1993 at 25 N.J.R. 625(a).
Adopted: April 15, 1993 by the Board of Commissioners of Pilotage, Hon. Richard L. Amster, Vice President.
Filed: April 22, 1993 as R.1993 d.212, **without change**.

Authority: N.J.S.A. 12:8-2.

Effective Date: May 17, 1993.
Expiration Date: May 17, 1998.

Summary of Public Comment and Agency Response:

One comment was received from the United States Department of Transportation, United States Coast Guard, Captain of the Port of New York (Captain of the Port).

COMMENT: The Captain of the Port supported the adoption of the proposed rules as published and expressed pleasure on the aggressive action being taken on the part of the Board of Commissioners of Pilotage.

RESPONSE: The Board concurs with the Captain of the Port's comment.

Full text of the adoption follows:

CHAPTER 61
RULES OF THE BOARD OF COMMISSIONERS OF PILOTAGE

SUBCHAPTERS 1. and 2. (RESERVED)

SUBCHAPTER 3. DRUG FREE WORKSHOP PROGRAM

7:61-3.1 Scope, authority and purpose

(a) The purpose of this subchapter is to implement the New Jersey Board of Commissioners of Pilotage's ("Board") policy to maintain a drug and alcohol-free workplace. Pursuant to N.J.S.A. 12:8-1 et seq., the Board is the agency of the State of New Jersey responsible for licensing and regulating pilots and apprentices of the State. In carrying out this responsibility, the Board is firmly committed to the protection of the environment and to the safest and most efficient operation of all ports and waters served by New Jersey licensed pilots and registered apprentices. It is the Board's responsibility, pursuant to N.J.S.A. 12:8-1 et seq., to ensure that all New Jersey licensed pilots and registered apprentices are competent and fit for duty, and to maintain public confidence in New Jersey licensed pilots and registered apprentices. To carry out this responsibility, the Board is requiring the United New Jersey Sandy Hook Pilots' Benevolent Association and the United New Jersey Sandy Hook Pilots' Association (collectively referred to as the "Association") to test New Jersey licensed pilots and registered apprentices for dangerous drugs and alcohol in the workplace and to report the verified positive results of any such test to the Board.

(b) It is the responsibility of each New Jersey licensed pilot and registered apprentice to comply with the requirements of this subchapter. The stringent requirements of this subchapter reflect the heavy responsibility borne by every New Jersey licensed pilot and registered apprentice, the safety-sensitive nature of the responsibilities of State-licensed pilots and apprentices and the difficulty of defining any level of dangerous drugs or alcohol which rules out the possibility of impairment.

(c) This subchapter prohibits, among other things, the use or possession of dangerous drugs by a New Jersey licensed pilot or registered apprentice whether on duty, subject to being called on duty or off duty. This subchapter also prohibits, among other things, the use of alcohol by a New Jersey licensed pilot or registered apprentice while both on duty or subject to being called on duty or during a four hour period prior to both being on duty or subject to being called on duty.

7:61-3.2 Application, severability and notice of rules

(a) This subchapter applies to all New Jersey licensed pilots and registered apprentices regardless of classification.

(b) Chemical drug testing of New Jersey licensed pilots and registered apprentices must be conducted as required by this subchapter.

(c) Every licensed pilot or registered apprentice must receive a copy of these rules from the President of the Association and such receipt shall be documented.

(d) Each section of this subchapter is severable. In the event that in any section, subsection or division is held invalid in a court of law, the remainder of this subchapter shall continue in full force and effect.

7:61-3.3 Definitions

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise:

"Alcohol" means ethyl alcohol (ethanol). References to use or possession of alcohol include use of any beverage, mixture or preparation containing ethyl alcohol.

"Apprentice" means a person who is registered with the Commissioners pursuant to N.J.S.A. 12:8-10.

"Association" means the United New Jersey Sandy Hook Pilots' Benevolent Association or the United New Jersey Sandy Hook Pilots' Association.

"Board" or "Commissioners" means the New Jersey Board of Commissioners of Pilotage.

"BreathScan" means a portable breathalyzer with the trade name *BreathScan* found suitable by the National Highway Traffic Safety Administration as a first line test for breath alcohol concentration quantification or its equivalent.

"Chemical drug test" means a scientifically recognized test which analyzes an individual's breath, blood, urine, for evidence of dangerous drug or alcohol use.

"Conviction" means a finding of guilt (including a plea of *nolo contendere*) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or state criminal drug statutes.

"Controlled substance" means a controlled substance listed in schedules I through V of 21 U.S.C. 812.

"Criminal drug statute" means any Federal or state criminal statute involving the manufacture, distribution, dispensing, use or possession of any controlled substance or drug.

"Dangerous drug" means a narcotic drug, controlled substance and/or marijuana as defined in 21 U.S.C. 802 including substances listed in Schedules I through V of 21 U.S.C. 812.

"Directly involved" means issuing or failing to issue an order, or taking an action or failing to take an action which is determined to be, or cannot be ruled out as, a causative factor in the events leading to or causing an incident or in exacerbating or aggravating the severity of an incident.

"Discharge" means any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of a hazardous substance into the waters or onto the lands of the State, or into waters outside the jurisdiction of the State when damage may result to the lands, waters or natural resources within the jurisdiction of the State.

"Fails a chemical drug test for drugs" means the test result is reported as positive for the presence of dangerous drugs or drug metabolites in an individual's system after a medical review officer's review.

"Hazardous substance" means a hazardous substance as defined by N.J.S.A. 58:10-23.11b.

"Intoxicated" as used throughout N.J.S.A. 12:8-1 et seq. means to have a positive alcohol test.

"Intoxicant" as used throughout 46 C.F.R. part 16 and 49 C.F.R. part 40 means any form of alcohol, dangerous drug, or combination thereof.

"Medical Review Officer" means a licensed physician designated by the Association to carry out the duties specified in this subchapter and who meets the qualifications of 49 CFR 40.33(b).

"On duty" means any time period during which a pilot or apprentice is engaged in pilotage operations or related duties.

"Pass a chemical drug test" means not to test positive for the presence of a dangerous drug or drug metabolites in an individual's system after a Medical Review Officer's review.

"Pilot" means a person duly licensed by the Commissioners as a pilot in New Jersey pursuant to N.J.S.A. 12:8-1 et seq.

"Pilot operations" means to navigate, steer, direct, manage, or sail a vessel, or to control, monitor, or maintain the vessel's main or auxiliary equipment or systems. Operation includes:

1. Determining the vessel's position, piloting, directing the vessel along a desired trackline, keeping account of the vessel's progress through the water, ordering or executing changes in course, rudder position, or speed, and maintaining a lookout;

2. Controlling, operating, monitoring, maintaining, or testing: the vessel's propulsion and steering systems; electric power generators; bilge, ballast, fire, and cargo pumps; deck machinery including winches; windlasses, and lifting equipment; lifesaving equipment and appliances; firefighting systems and equipment; and navigation and communication equipment; and

3. Mooring, anchoring, and line handling, loading or discharging of cargo or fuel; assembling or disassembling of tows; and maintaining the vessel's stability and watertight integrity.

"Positive alcohol test" means a blood alcohol concentration of .04 percent or greater as measured by grams of alcohol per 100 milliliters of blood, or grams of alcohol per 210 liters of breath.

"President of the Association" means the duly elected or appointed President of the Association.

"Subject to being called on duty" means any time period during which a pilot or apprentice is required to be available to be called "on duty" by the Association.

"User of dangerous drugs" means an individual who fails a test for dangerous drugs.

"Workplace" means any location at which pilotage or related duties are performed, including, but not limited to, vessels, motor vehicles, offices or government facilities.

7:61-3.4 Prohibitions

(a) No pilot or apprentice shall:

1. Except as set forth in N.J.A.C. 7:61-3.5, use, possess, manufacture, distribute, sell or dispense dangerous drugs at any time whether on duty or off duty;

2. Consume alcohol either while on duty or while subject to being called on duty or during the four hour period prior to being on duty or subject to being called on duty;

3. Be intoxicated by having a blood alcohol concentration of .04 percent or greater either while on duty or while subject to being called on duty or during the four hour period prior to either being on duty or subject to being called on duty;

4. Fail to cooperate with any aspect of the specimen collection or chemical drug testing program set forth in this subchapter; or

5. Violate any other provision of this subchapter.

(b) Any pilot or apprentice who violates (a) above shall be subject to penalties, including suspension or license revocation, as set forth in this subchapter.

7:61-3.5 Use of prescribed dangerous drugs

(a) Possession and/or use of dangerous drugs by a pilot or apprentice may be permitted if specifically prescribed by a licensed physician; provided that the dangerous drug is being used at the prescribed dosage and is in the original container clearly labeled with the Pilot or apprentice's name, the name of the drug, and the prescribing physician's Federal Drug Enforcement Administration number, and that prior to the possession or use by the pilot or apprentice of the dangerous drug:

1. The Medical Review Officer (MRO) is provided with a written, sworn certification by the pilot or apprentice that:

i. The pilot or apprentice described his or her assigned duties to the prescribing physician before the drug was prescribed, and furnished the physician with a written official description of his or her duties provided by the Board, and that the prescribing physician advised the pilot or apprentice that use of the prescribed dangerous drug at the prescribed dosage is consistent with the safe performance of the pilot or apprentice's duties;

ii. The drug is in its original container clearly labeled with the pilot or apprentice's name, the name of the drug, and the prescribing physician's Federal Drug Enforcement Administration number; and

iii. The drug will be used at the dosage prescribed; and

2. The MRO has determined that use of the drug at the prescribed dosage is consistent with the safe performance of the pilot or apprentice's duties. The MRO shall inform the pilot or apprentice of his or her approval or disapproval of the use of the prescribed drug within 24 hours after receipt of the written, sworn certification of the pilot or apprentice.

7:61-3.6 Implied consent; cooperation with collection and testing

(a) Pilots or apprentices required to be tested for dangerous drugs and/or alcohol pursuant to this subchapter shall provide complete, valid, undiluted, unadulterated breath, urine or blood samples as requested pursuant to this subchapter; shall supply all information requested by the laboratory; and shall otherwise cooperate with all collection and testing procedures implemented pursuant to this subchapter.

(b) If a pilot or apprentice fails to comply or cooperate with any collection or testing procedure pursuant to this subchapter, or with

collection site personnel, the Association shall be notified. The Association shall immediately inform the Board of any failure to comply or cooperate.

(c) As provided in this subchapter, failure to comply or cooperate with any collection or testing procedures implemented pursuant to this subchapter shall subject a pilot or apprentice to penalties, including suspension and/or license revocation, pursuant to N.J.S.A. 12:8-19.

7:61-3.7 Pre-registration testing

(a) The Board shall not enter on its books nor shall the Association employ an individual as an apprentice unless the individual passes a chemical drug test for dangerous drugs.

(b) The specific date of such chemical drug tests for dangerous drugs shall be unannounced, but shall occur within the month prior to the registration. Notice of the specific date of chemical drug test for dangerous drugs shall be provided only so far in advance as is necessary to ensure the individual's presence at the time and place set for testing.

7:61-3.8 Random testing

(a) The Association shall establish a program for the chemical drug testing of pilots and apprentices for dangerous drugs on a random basis.

(b) Random selection of pilots and apprentices means that every member of the population of pilots and apprentices has an equal chance of selection on a statistically valid basis. The testing frequency and selection process shall be such that pilot or apprentice's chance of selection continues to exist throughout a pilot's membership or an apprentice's employment. Therefore, pilots or apprentices randomly tested will remain in the pool of persons subject to testing even after the individual has been tested.

(c) A random test may be required on any day which a pilot or apprentice is subject to being called on duty or is on duty. Notice of a pilot or apprentice's selection for testing shall be provided only to the extent as is necessary to ensure the individual's presence at the time and place set for testing.

(d) The Association shall ensure that pilots and apprentices are tested on a random basis at an annual rate of not less than 50 percent of the total number of pilots and apprentices in the pool of Sandy Hook pilots and apprentices during each calendar year.

7:61-3.9 Reasonable belief testing

(a) The Association shall require any pilot or apprentice who is reasonably believed to have used or be using a dangerous drug and alcohol to submit to a chemical drug test for dangerous drugs and alcohol.

(b) The Association's decision to test must be based on a reasonable and articulable belief that the pilot or apprentice has used or is using a dangerous drug or alcohol based on direct observation of specific, contemporaneous physical, behavioral, or performance indicators of probable use. Where practicable, this belief should be based on the observation of the pilot or apprentice by two pilots licensed by the State of New Jersey or licensed by the State of New York (Sandy Hook pilots).

(c) The Sandy Hook pilots who entertain the reasonable belief shall immediately notify the President or member of the Executive Committee of the Association. The President or member of the Executive Committee of the Association shall direct the pilot or apprentice to undergo a chemical drug test for dangerous drugs and alcohol as soon as practicable, but not more than eight hours after the Sandy Hook pilots notify the President or member of the Executive Committee of the Association of their reasonable belief.

(d) In all cases where an individual is required to be tested based upon a reasonable belief pursuant to (a) above, a written report shall be made, setting forth the facts upon which the reasonable belief is based, including the specific, contemporaneous physical, behavioral, or performance indicators of probable dangerous drug or alcohol use. The report shall be signed by the Sandy Hook pilots who had the reasonable belief, and by the President or member of the Executive Committee of the Association. This report shall be submitted to the Board within 72 hours of the administering of the chemical drug test for dangerous drugs and alcohol.

(e) Any pilot or apprentice required to undergo reasonable belief testing shall be prohibited from engaging in pilotage operations pending the outcome of the tests. The pilot or apprentice shall be returned to normal duties if the tests are negative.

7:61-3.10 Post-incident testing

(a) A pilot or apprentice shall submit to a post-incident chemical drug test for dangerous drugs and alcohol if he or she is directly involved in an incident which results or is likely to result in:

1. Property damage exceeding $10,000;

2. An injury to any person requiring professional medical treatment beyond first aid; or

3. A discharge of a hazardous substance into the waters or onto the lands of the State, or into waters outside the jurisdiction of the State when damage may result to the lands, waters or natural resources within the jurisdiction of the State.

(b) The President or member of the Executive Committee of the Association shall direct any pilot or apprentice directly involved in the incident to report for the chemical drug test for dangerous drugs and alcohol as soon as practicable, but not more than eight hours after the incident.

(c) Any pilot or apprentice required to undergo post-incident testing shall be prohibited from engaging in pilotage operations pending of outcome of the tests. The pilot or apprentice shall be returned to normal duties if the tests are negative.

7:61-3.11 Drug testing procedures

This subchapter incorporates by reference the Federal procedures for transportation workplace drug testing programs set forth at 49 CFR Part 40 regarding the preparation for drug testing, specimen collection and laboratory analysis. All drug testing required pursuant to this subchapter will be done by urinalysis. The Federal regulations must be consulted to determine the specific procedures which must be established and utilized by the Association in carrying out its drug testing program. Generally, the Federal regulations provide: that the privacy of the pilot or apprentice is maintained during specimen collection while ensuring the integrity of the specimen; that only laboratories using qualified personnel and which are certified by the Federal Department of Health and Human Services are to be used; and that laboratories are following quality assurance and quality control procedures.

1. Preparation for testing and specimen collection shall be conducted in accordance with 49 CFR 40.23 and 40.25.

2. The testing laboratory personnel shall meet all requirements at 49 CFR 40.27.

3. The testing laboratory analysis procedures shall be those required by 49 CFR 40.29.

4. The testing laboratory quality assurance and quality control procedures and standards shall be those required by 49 CFR 40.31.

5. The testing laboratory shall meet all requirements at 49 CFR 40.39.

7:61-3.12 Alcohol testing procedures

(a) Chemical drug testing for alcohol shall be conducted by a two-step process. Initial screening shall be performed by using a portable breathalyzer, the *BreathScan* or its equivalent.

(b) The *BreathScan* units are manufactured to show a full color change at the 0.04% blood alcohol level (BAC) level.

(c) The *BreathScan* screening will be performed by personnel employed by the drug testing facility with which the Association contracts pursuant to N.J.A.C. 7:61-3.18.

(d) The testing by the *BreathScan* units and maintenance of the *BreathScan* units will be conducted according to the manufacturer's instructions included with each unit.

(e) A color change in the testing unit indicating a BAC level above or at the 0.04 percent level will require follow-up chemical drug testing in order to confirm the precise alcohol level. The President or a member of the Executive Committee of the Association shall direct any pilot or apprentice screening positive to report for a blood test for alcohol as soon as practicable, but not more than one hour after the initial screening. The blood sample will be collected, tested

and reported under chain of custody procedures by qualified, trained personnel employed by the drug testing facility with which the Association contracts pursuant to N.J.A.C. 7:61-3.18.

(f) A pilot or apprentice will be deemed to have tested positive for alcohol if the confirming blood test shows a level of 0.04 percent or above for grams of alcohol per 100 milliliters of blood.

7:61-3.13 Medical Review Officer—verification and reporting of positive test results

(a) The Association shall designate a Medical Review Officer (MRO) meeting the qualifications of 49 CFR 40.27. The MRO shall review all chemical drug test results for dangerous drugs or alcohol reported by the laboratory as positive and shall verify that the laboratory reports of the results are reasonable and shall examine alternate medical explanations for positive test results.

(b) The MRO shall promptly contact all individuals with positive test results and shall, prior to reporting the test as positive to the Association and the Board, provide the individual with an opportunity to discuss the test results.

(c) If the MRO determines that the test is false-positive or if the MRO determines that the test results are scientifically insufficient for further action, the test shall be reported as negative.

(d) The MRO shall report all verified positive test results and indicate the dangerous drugs and/or alcohol for which there was a verified positive test to the President of the Association within 48 hours of their verification by the MRO.

(e) The President of the Association shall, within 48 hours after receipt of the MRO's report, provide a written report of all verified positive test results and indicate the drugs and/or alcohol for which there was a verified positive test to the Board.

7:61-3.14 Protection of employee records

(a) The laboratory performing chemical drug testing pursuant to this subchapter shall report the test results only to the MRO.

(b) The MRO shall maintain the confidentiality of the chemical drug test results and report only verified positive test results and the drugs and/or alcohol for which there was a verified positive test to the Association and/or the Board.

(c) The Association and the Board shall maintain the confidentiality of the chemical drug test results and release information regarding verified positive tests only in the context of a hearing before the Board or in a lawsuit, grievance or other proceeding arising from a verified positive chemical drug test.

(d) The laboratory shall disclose information related to a positive chemical drug test of an individual only to the individual, the Association, the Board or decisionmaker in a lawsuit, grievance, or other proceeding arising from a verified positive chemical drug test.

(e) Any pilot or apprentice who is the subject of a chemical drug test conducted under this subchapter shall, upon written request, have access to any records relating to his or her chemical drug test.

7:61-3.15 Notice to Board of criminal or Coast Guard charges and convictions

(a) All apprentices and pilots shall notify the President of the Association in writing within 24 hours or prior to reporting on duty, whichever event occurs first, after being formally charged with a violation and/or being convicted under:

1. Any Federal or state criminal drug statute;

2. Any United States Coast Guard regulation pertaining to the use or possession of drugs or alcohol; or

3. Any motor vehicle statute for driving while under the influence or driving while intoxicated.

(b) Within 48 hours after receipt of written notification of conviction, the Association shall provide written notification of such conviction to the Board.

(c) The Association shall require any pilot or apprentice who tests positive for dangerous drugs or alcohol under a United States Coast Guard regulation to submit to a chemical drug test for dangerous drugs and/or alcohol within 48 hours of such positive test and to be subject to increased, unannounced chemical drug testing for dangerous drugs and/or alcohol for a period as determined by the Board of up to 24 months.

7:61-3.16 Suspension or revocation of license/appointment

(a) Any pilot who is intoxicated while on duty or subject to being called on duty shall immediately be prohibited from engaging in pilotage operations and shall, after opportunity for a hearing:

1. For the first offense:

i. Forfeit the pilotage fee for the pilotage operations performed while intoxicated;

ii. Be suspended from duty for six months; and

iii. Pay a penalty of $50.00; and

2. For the second offense, have his or her license permanently revoked.

(b) Any apprentice who is intoxicated while on duty or subject to being called on duty shall immediately be prohibited from engaging in pilotage operations and shall, after opportunity for a hearing, have his or her registration permanently revoked.

(c) Any pilot or apprentice who fails to comply or cooperate with specimen collection and/or chemical drug testing; or who tests positive on a chemical drug test required pursuant to this subchapter or a chemical drug test required pursuant to the Federal regulations, 46 C.F.R. part 16; or who is convicted under a Federal or state criminal drug statute or any state motor vehicle statute for driving while under the influence or driving while intoxicated; or who violates any other provision of the subchapter, shall immediately be prohibited from engaging in pilotage operations and shall, after opportunity for a hearing, have his or her license/registration permanently revoked unless there are extenuating circumstances which, in the discretion of the Board, justify only the suspension of his or her license/registration.

(d) Any pilot or apprentice who was prohibited from engaging in pilotage operations pending a hearing before the Board and who is not suspended or who does not have his or her license/registration revoked following his or her hearing before the Board shall be returned to normal duties and shall receive retroactive pay for the period during which he or she was prohibited from engaging in pilotage operations.

(e) Any pilot or apprentice who is suspended from duty pursuant to (a), (b) and/or (c) above must pass a chemical drug test for dangerous drugs and alcohol prior to reinstatement. The specific date of such test shall be unannounced, but shall occur within the month prior to reinstatement. Notice of the specific date of such test shall be provided only so far in advance as is necessary to ensure the individual's presence at the time and place set for testing. In addition, the pilot or apprentice shall be subject to increased, unannounced chemical drug testing for dangerous drugs and alcohol at the pilot's or apprentice's expense for a period as determined by the MRO of up to 60 months.

7:61-3.17 Hearings and appeals

(a) Hearings conducted for violations of this subchapter and the imposition of penalties shall be conducted before the Board or if the Board so directs shall be referred to the Office of Administrative Law pursuant to the procedures at N.J.A.C. 1:1.

(b) Notice of hearing, time and place of hearing, alleged violation(s) and possible penalties to be imposed shall be in writing. This written notice of hearing must be received by the alleged violator, either by personal service or by certified mail sent to his or her usual place of abode, at least 15 calendar days prior to the date of the hearing.

7:61-3.18 Responsibilities of the Association

(a) After consultation with and approval by the Board, the Association shall promptly enter into an agreement(s) or contract(s) with a testing facility and an MRO for the performance of the tests and duties required by this subchapter.

(b) It shall be the responsibility of the Association, except as otherwise provided in this subchapter, to pay for the tests required by this subchapter and the fees of the MRO.

(c) It shall be the responsibility of the Association to direct the pilots and apprentices to present themselves at the time and place for the test(s) required by this subchapter.

(d) The contract(s) or agreement(s) between the Association and the laboratory selected to do the testing and the MRO shall provide

that the laboratory and MRO shall cooperate with the Board and shall comply with the requirements of this subchapter including maintaining the confidentiality of test results, providing reports, providing documents and providing competent witnesses for hearings.

(e) This subchapter shall not in any way limit the authority of the Board to suspend or revoke the license of any pilot or terminate any apprenticeship as authorized by any other regulations of the Board or the laws of the State of New Jersey.

(f) The Association shall submit a copy of its proposed procedures implementing this subchapter and copies of the proposed agreement(s) or contract(s) between the Association and the organization designated to conduct the testing and MRO to the Board for review and approval.

(g) This subchapter shall not in any way preclude other drug or alcohol testing required or authorized by any state or Federal statute or regulation.

(h) At each regular meeting of the Board, the President of the Association shall report the number of random chemical drug tests performed pursuant to the requirements of this subchapter, a summary of the number of verified positive tests and negative tests and the dangerous drugs which have been identified in the verified positive tests.

(i) In the event the President of the Association is unable to perform the duties imposed upon him or her by this subchapter they may be performed by a member of the Executive Committee of the Association.

7:61-3.19 Incorporation by reference

(a) Any reference in this subchapter to any of the documents or sources listed in (c) below shall be deemed to incorporate such document or source by reference.

(b) Any future supplements or amendments to any of the documents or sources incorporated by reference into this subchapter will not be incorporated in this subchapter or become operative in New Jersey unless the Board proposes an amendment to this subchapter, and will provide opportunity for public comment on such proposed amendment, in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.

(c) The following documents and sources are incorporated by reference within this subchapter:

1. United States Code, Title 21, Parts 802 and 812;
2. Code of Federal Regulations, Title 21, Parts 1301-1316; and
3. Code of Federal Regulations, Title 49, Part 40, Procedures for Transportation Workplace Drug Testing Programs, Sections 40.23, 40.25, 40.27, 40.29, 40.31 and 40.39.

EMERGENCY ADOPTION

LABOR

(a)

OFFICE OF PUBLIC SAFETY COMPLIANCE

Carnival and Amusement Rides
Bungee Jumping

Emergency Adopted Amendments and Concurrent Proposed Amendments: N.J.A.C. 12:195-2.1, 3.22 and 6.1

Emergency Adopted New Rules and Concurrent Proposed New Rules: N.J.A.C. 12:195-7

Emergency Amendments and New Rules Adopted and Concurrent Proposed Amendments and New Rules.

Authorized: April 28, 1993 by Raymond L. Bramucci, Commissioner, Department of Labor.

Gubernatorial Approval (see N.J.S.A. 52:14B-4(c)): May 3, 1993.

Emergency Amendments Filed and Emergency New Rules Filed: May 3, 1993 as R.1993 d.244.

Authority: N.J.S.A. 5:3-31 et seq.

Emergency Adopted Amendments and Emergency New Rules Effective Date: May 3, 1993.

Emergency Amendments and New Rules Expiration Date: July 2, 1993.

Concurrent Proposal Number: PRN 1993-306.

Submit written comments by June 16, 1993 to:

Linda Flores, Special Assistant
External and Regulatory Affairs
Office of the Commissioner
Department of Labor
CN 110
Trenton, New Jersey 08625-0110

These amendments and new rules were adopted on an emergency basis and became effective upon acceptance for filing by the Office of Administrative Law (see N.J.S.A. 52:14B-4(c) as implemented by N.J.A.C. 1:30-4.4). Concurrently, the provisions of these emergency amendments and emergency new rules are being proposed for readoption in compliance with the normal rulemaking requirements of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. The readopted rules become effective upon the acceptance for filing by the Office of Administrative Law (see N.J.A.C. 1:30-4.4(d)), if filed on or before the emergency expiration date.

The agency emergency adoption and concurrent proposal follows:

Summary

Pursuant to his authority under the Carnival-Amusement Rides Safety Act, N.J.S.A. 5:3-31 et seq., the Commissioner of Labor emergency adopts and concurrently proposes amendments to the rules governing carnival and amusement rides found at N.J.A.C. 12:195 and emergency adopts and concurrently proposes new rules for the safe operation of bungee jumping rides in this State. The rules are being adopted on an emergency basis to avoid imminent peril to the public health, safety and welfare.

In the summer of 1991 there was just one bungee jumping operation in the State of New Jersey. By the summer of 1992, there were 16 bungee jumping operations, representing a 1,500 percent increase. However, New Jersey, as did other states, found itself without standards specifically designed to regulate this new amusement ride to ensure the maximum safety in the operation of this attraction.

But at the Federal level, the Occupational Safety and Health Administration (OSHA) implemented a strategy for the inspection of bungee jumping operations by May of 1992, based upon the general industry standards which prohibit certain operational practices pertaining to cranes designed to ensure worker safety at the workplace. Specifically, OSHA advised that employers, using mobile cranes with suspended personnel platforms from which bungee jumping is performed, would be cited for violating the Federal rule, 29 CFR 1910.180(h)(5)(v), prohibiting the movement of a load while an individual is on it. In addition, OSHA advised that employers could also be cited for violating the prohibition found at 29 CFR 1910.184(c)(11) against the shock loading of slings, as in the case where an employee/jump master is required to ride on the personnel platform to assist the jumper.

The need to develop rules to govern the bungee jumping industry is urgent. The North American Bungee Association (NABA), a trade organization for the bungee jumping industry in the United States, reported in its November 5, 1992 "Incident Summary" 12 accidents involving bungee jumping since July 1, 1991 in several states, including New Jersey, Arizona, California, Illinois, Michigan, Maine, Minnesota and South Dakota. These accidents involved patrons and workers alike and resulted in serious injuries and fatalities.

The Summary noted the following incidents: an employee died after being disconnected from the bungee cord system during the jump; a jumper struck the ground during a jump as the balloon lost its ability to maintain above-ground altitude; one employee was paralyzed after being catapulted from the ground; an employee suffered head injuries when she struck the crane's boom during the recoil phase of her jump; an individual became disconnected from the bungee cord after leaving the jumper-basket, thereby falling on the air-bag and subsequently bouncing to the ground; a jump supervisor was killed and a bungee jumper employee injured when the jumper-basket was lifted up into the crane's top pulley after the jump occurred and subsequently fell to the ground after critical components of the crane failed; an employee struck the underside of a jumper-basket after being catapulted from the ground; an employee died when the bungee cord became disconnected from the crane during the jump and the air-bag proved insufficient to break the fall; an individual became wrapped in the bungee cord during the recoil phase of the jump; and, finally an individual struck the ground while being lowered after the bungee jump. Additional incidents have been reported by others.

Similar accidents have occurred in other countries as well: in 1989, three bungee jump related deaths occurred in France; one death and a serious injury have been recorded in New Zealand; and in 1992 a death occurred in Canada.

In New Jersey, over a one-week period in 1992, a woman in North Wildwood broke vertebrae in her neck when a cord failed to snap back; an empty crane used to lift riders into the air toppled over while it was being moved in Wildwood; and a honeymoon couple defied the single jump provision of the State permit by jumping together. In response to these events and cognizant of those in other states, the Commissioner of Labor convened the Advisory Board on Carnival and Amusement Ride Safety which was created by statute at N.J.S.A. 5:3-33 and with its unanimous support temporarily suspended bungee jumping operations in the State until such time as each operation could be reinspected for potential safety hazards, based upon the general carnival-amusement ride standards. Once the rides were reinspected, the Commissioner lifted the ban; however, because of the absence of standards specific to bungee rides, it was determined that further study and development of regulations on bungee jumping operations, including equipment, training and methods, was necessary.

In the fall of 1992, the Commissioner called together the first regional public hearing involving bungee and crane operators, medical and safety experts, and representatives of state and Federal government agencies from five states—New York, Connecticut, Delaware, Pennsylvania and New Jersey—to determine the specific standards needed to assure the safety of bungee jumping rides.

The Power Crane and Shovel Association (PCSA), a group within the Construction Industry Manufacturers Association (CIMA) representing manufacturers of mobile cranes, as well as individual manufacturers, testified that they do not endorse the use of construction cranes for the handling of personnel. Construction cranes, stated PCSA, are intended and designed for moving material. The PCSA's testimony explained that the crane's design has no secondary systems which could support the operation in the event of a primary system failure. The PCSA also advised that all operator training which pertains to crane operations concerns the handling of material exclusively, not personnel. In addition, the PCSA pointed out that mobile cranes expose the public to crane movement capabilities with which they may not be familiar: cranes are capable of being rotated 360 degrees to the right or left; the boom or tower portion of the crane is capable of being raised and lowered so

that the tower portion is perpendicular to the ground or, if lowered 90 degrees, parallel to the ground; and the heights of certain cranes, the "hydraulic boom variety," may be extended or retracted at the will of the operator. PCSA noted that any one or all of these factors combined could present a life threatening danger.

These types of dangers, in fact, were evidenced in the July 1992 accident in which two persons died and one person was injured on a bungee jump ride in Michigan. The crane platform carrying the individuals was hoisted to a point where the apparatus attached to the platform was pulled through the sheave, or pulley, at the tip of the crane tower, causing the connection to separate from the platform and fall.

Based upon an independent examination and review of the public hearing record, the nature and causes of the accidents which have been reported to date and the slight margin of error present in the operation of bungee jumps, the New Jersey Commissioner of Labor has determined that it is in the best interests of the citizens and residents of New Jersey as well as visitors to the State to adopt rules establishing the minimum safety standards which an operator shall meet in order to conduct bungee jumping operations within this State. Moreover, guided principally by the Federal government's determination that violation of OSHA standards compromises worker safety and the lack of endorsement for the use of cranes by manufacturers for this purpose, the Commissioner has determined that only bungee jumping conducted from fixed and permanent structures will be allowed to operate in this State. Similar restrictions on bungee jumping have been placed by other states including Connecticut, Delaware, Virginia and Maryland.

The emergency amendments and new rules were reviewed by the Advisory Board on Carnival and Amusement Ride Safety at a March 16, 1993 meeting convened for this purpose. The Advisory Board unanimously recommended the amendments and new rules governing bungee jumping operations in New Jersey for emergency adoption.

Based upon the available evidence, bungee jumping constitutes an inherently dangerous activity which, if unregulated, presents an imminent peril to the public. Accordingly, the State's paramount interest in regulating bungee jumping operations requires the adoption of emergency new rules for the protection of bungee jumpers and spectators from the threat of serious injury. Inasmuch as the carnival and amusement ride season is close at hand, the amendments and new rules are being implemented on an emergency basis to insure the safe operation of this carnival and amusement ride as soon as possible.

The following provides a summary of the amendments to the chapter covering carnival and amusement rides generally and describes the specific provisions applicable to bungee jumping operations which are contained in a new subchapter 7.

N.J.A.C. 12:195-2.1, Definitions, is amended to include in this section the meaning of new words and phrases which pertain to the bungee jumping industry. In addition, the definition of "owner" has been amended to exclude employees who operate or manage amusement rides from coverage under the term.

N.J.A.C. 12:195-3.22 is amended to extend the requirements applicable to hydraulic systems to pneumatic systems as well.

N.J.A.C. 12:195-6.1(a) is amended to add N.J.S.A. 51:1-83 and 93 as additional documents referred to by reference.

N.J.A.C. 12:195-7.1 sets forth the purpose of the subchapter to maximize the safety of bungee jumpers and spectators when bungee jumping operations are in progress.

N.J.A.C. 12:195-7.2 sets forth the scope and coverage of the subchapter.

N.J.A.C. 12:195-7.3 lists those bungee jumping related activities which are prohibited under the subchapter.

N.J.A.C. 12:195-7.4 sets forth the annual inspection and duplicate permit fees required before bungee jumping operations may begin.

N.J.A.C. 12:195-7.5 mandates a bungee jump operating manual at each site and sets forth the matters which must be addressed by the manual.

N.J.A.C. 12:195-7.6 sets forth the insurance requirements which must be met in order to conduct bungee jumping operations.

N.J.A.C. 12:195-7.7 delineates the requisite certifications related to the bungee jump operation which must be submitted by an engineer licensed by the State of New Jersey, including certifications pertaining to hoisting or suspension, plot plans, schematic drawings and calculations, equipment, operations, training, maintenance manuals, designs and construction.

N.J.A.C. 12:195-7.8 provides the specifications, procedures and other requirements pertaining to the various mechanical components of the bungee jumping operation including the scales, weights, bungee cords and end connections, jump harnesses, carabineers, and locking devices, anchors, air bags, platforms and rescue procedures.

Finally, N.J.A.C. 12:195-7.9 specifies radio communication between the jump master and operator as a requirement for bungee jumping operations.

Social Impact

The adopted amendments and new rules establish safety rules for bungee jumping activities regarding worker training, fees and permits, operating manuals, certification of site and equipment by professional engineers, mandatory retirement of equipment, certification of scales, insurance and electrical safety requirements, among others. These conform to already existing regulatory language whose intent is to provide the bungee jumpers and spectators with protection against hazardous carnival and amusement rides so that the ride can be confidently enjoyed. The rules also provide clarification and stability for carnival and amusement ride owners as to the requirements mandated by the State, thereby minimizing the need for wholesale reinspections and suspensions of bungee jumping activities during the season.

The rules prohibit various other inherently dangerous activities, including tandem jumping and catapulting which pose serious threats to patrons. Of particular significance in this regard is the inclusion among prohibited activities of bungee jumping conducted from mobile cranes. The prohibition is predicated both upon the determination by OSHA that these operations violate Federal regulations and the uniform lack of endorsement by crane manufacturers. Moreover, the vast majority of the known accidents and other mishaps have occurred during bungee jumping operated from mobile cranes. Accordingly, for the protection of the public, these regulations prohibit bungee jumping activities which violate Federal, State or local laws or regulations and operate with equipment not designed for this activity.

Economic Impact

The promulgation of the rules governing bungee jumping operations is expected to result in increased costs to bungee jumping owners and operators because of the more stringent requirements imposed pertaining to equipment, inspection, permits and insurance. Furthermore, worker training, engineering certifications, reporting and recordkeeping requirements are also expected to increase the costs of those operators who are not presently investing in these safeguards. The fee associated with the inspection of bungee jumping operations is established at $500.00 and the permit duplication fee is set at $25.00. These regulations also increase the requisite amount of insurance coverage to $1,000.000, due to the high risk of serious injury which may occur during bungee jumping; this increase will undoubtedly increase the premium for this level of liability coverage.

Bungee jump operators will also incur additional costs to obtain the necessary structural safety certifications from professional engineers, as is required of other carnival and amusement ride owners. Various other rides requiring load tests and structural construction are also certified by professional engineers. This cost is a necessary and routine cost for the carnival and amusement ride industry.

The bungee jumping attractions are being prohibited from using cranes, thus requiring these operators to incur additional start-up costs in the construction or leasing of a fixed structure from which bungee jumps may be performed. Though this cost may initially be burdensome to the operators, fixed structures such as towers may accommodate more than one jump from the same tower simultaneously, which will potentially be more lucrative. Moreover, limiting the bungee jump operations to use of permanent structures is expected to result in a more stable business commitment on the part of the bungee jumping industry to the economy of this State.

The requirements imposed by these amendments and new rules are expected to result in increased patronage by the general public by instilling confidence in the integrity of bungee jumping operations in this State. This increased patronage will result in additional revenues to the carnival and amusement ride industry as well as general tax revenues to the State.

In the immediate future, the regulatory compliance costs may result in increased charges to patrons of bungee jumping rides. These costs would appear to be well within the limits of reasonableness given that the average charge for the bungee jump ride is presently $60.00, down from the $75.00 initially charged. However, the costs of compliance are necessary and essential to minimize the dangers presented in bungee jumping activities.

Regulatory Flexibility Analysis

During the 1992 season, there were 16 bungee jumping operations in the State, most of which are small businesses as defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The new rules impose recordkeeping, reporting and compliance requirements necessary for the safe operation of bungee jumps. These requirements are similar to the kinds of requirements imposed on other carnival and amusement ride operators. These reporting, recordkeeping and compliance requirements include worker training, inspection and permit fees, operating manuals, certification of site and equipment, retirement of equipment, insurance and electrical safety. The professional services of a New Jersey licensed engineer are required to provide the various certification requirements imposed by the rules. Cost factors are discussed in the Economic Impact above.

Because of the slight margin of error and potential for serious injury, no lesser recordkeeping, reporting and compliance requirements can be allowed for small businesses.

Full text of the adopted emergency and concurrent proposed amendments and new rules follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

12:195-2.1 Definitions

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

"Accepted engineering practice" means that which conforms to accepted principles, tests, or standards of accredited authorized agencies, and to standards or generic principles and practices of safety engineering.

...

"Air bag" means a device which cradles the body using a multi-cell release breather system to dissipate the energy due to a fall, thereby allowing the jumper to land without an abrupt stop or bounce.

...

"Approved operating site" means the area including the preparation area, the jump space, the landing area and the recovery area as reflected on the site plan drawings submitted by the operator pursuant to this chapter in conjunction with the registration of a bungee jumping operation and as approved by the Commissioner.

"Approving authority" means the Commissioner of Labor.

"Binding" means material used to wrap and hold together the jumper's ankles which is tied together and attached to the bungee cord.

...

"Bungee cord" means the elastic rope attached to the jumper which lengthens and shortens to produce a bouncing action.

"Bungee cord loop end connections" means the loop of cord generally provided by the manufacturer.

"Bungee cord end connections" means a static line runner commonly made from tubular nylon webbing.

"Bungee jumping" means the activity where a person free falls from a height and the person's descent is limited by his or her attachment to a bungee cord.

"Bungee jumping operation" means all activity associated with bungee jumping.

"Carabineer" means a shaped metal device of the spring loaded design with a gate used to connect sections of the bungee cord, jump rigging, equipment, or safety gear as well as all other life supporting activities.

...

"Catapulting, launching or reverse jumping" means the practice of stretching the bungee cord while attached to the jumper who is held on the ground, then released and propelled upward.

...

"Controlled load lowering" means a system or device on the power train, other than the load hoist brake, which can regulate the lowering rate of speed of the hoist mechanism.

"Department" means the New Jersey Department of Labor.

...

"Double or tandem jumping" means the practice of two or more individuals jumping simultaneously from the same jump platform, whether from a common bungee cord or individual bungee cords.

"Dynamic load" means the load placed on the rigging and attachments by the free fall, including the bouncing movements, of the jumper.

"Equipment" means each component which is utilized in a bungee jumping operation, including power or manually operated devices to raise, lower and hold loads.

"Fence" means a permanent or temporary structure designed and constructed to prevent public intrusion.

...

"Harness" means an assembly to be worn by a jumper and attached to a bungee cord.

...

"Incident" means an event that does or could result in injury to a person, damage to equipment, or the interruption or stopping of a bungee jumping operation.

"Jump area" means the ground level area of the jump zone.

"Jump height" means the distance from the jump point to the position on the ground at which an object dropped from the jump point would impact, exclusive of any air bag or other impediments.

"Jump master" means a person at least 18 years of age who is responsible for the supervision and control of the entire bungee jumping operation.

"Jump operator" means a person at least 18 years of age who assists the jump master to prepare a jumper for jumping.

"Jump point" means the position from which the jumper leaps from the platform.

"Jumper" means a person at least 18 years of age who leaps from a platform while attached to a bungee cord.

"Jumper weight" means the weight of the jumper, exclusive of any bungee jumping equipment or apparatus, which is used to select the proper bungee cord.

"Jump zone" means the space allowed for the maximum possible movements of the jumper or any part of the jumper while attached to a bungee cord.

...

"Landing area" means the surface area on which the jumper is lowered.

"Launching." See "catapulting."

"Lowering system" means any manual or mechanical equipment capable of lowering a jumper to the designated landing area.

...

"Operating manual" means the document that contains the required procedures and forms for the safe operation of the bungee jumping activity at the stated site.

"Owner" means a person who owns[,] or leases[, controls, or manages] the operations of a carnival or amusement ride, including the State or any of its subdivisions.

...

"Platform" means the designated part of the structure from which the jumper leaps.

"Preparation area" means a separate area on the support structure or part where the jumper is prepared for jumping.

"Recovery area" means an area near the landing area where the jumper may choose to recover from the jump before exiting the bungee jumping operation site.

...

"Reverse jumping." See "catapulting."

...

"Rigging system" means a combination of components that connect the bungee cord to the jumper and the bungee cord to the structure, lowering/raising device or platform. The rigging system includes ropes, pulleys, carbineers, shackles and lowering/raising devices.

"Rope" means wire rope.

"Safety hook" means a hook with a latch to prevent the rigging or loads from accidentally slipping off the hook.

"Sandbagging" means the practice of loading excess weight to a jumper intending to release the excess weight at the bottom of the jump, thus gaining extra momentum on the rebound.

"Scale" means a weighing device or apparatus which has been approved as to type, construction and operation by the Superintendent of the State Office of Weights and Measures pursuant to N.J.S.A. 51:1-93.

...

"Structure" means a permanent building or tower used for bungee jumping.

"Stunt jumping" means the combining of any other activity with bungee jumping.

"Tandem jumping." See "double jumping."

...

12:195-3.22 Hydraulic **or pneumatic** systems

(a) Hydraulic **or pneumatic** systems and other related equipment used in connection with amusement rides shall be free of leaks and maintained to insure safe operation at all times.

(b) An amusement ride which depends upon hydraulic **or pneumatic** pressure to maintain safe operation shall be provided with a positive means of preventing loss in pressure that could result in injury to a passenger.

(c) Hydraulic **and pneumatic** lines shall be guarded so that sudden leaks or breakage will not endanger the passengers or the public.

12:195-6.1 Documents referred to by reference

(a) (No change.)

1.-12. (No change.)

13. N.J.S.A. 34:6-47.1 et seq., High Voltage Proximity Act; [and]

14. N.J.A.C. 5:18, Uniform Fire Code[.]; **and**

15. N.J.S.A. 51:1-83 and 93, Standards, Weights, Measures and Containers.

SUBCHAPTER 7. SPECIAL PROVISIONS FOR BUNGEE JUMPING OPERATIONS

12:195-7.1 Purpose

The purpose of this subchapter is to maximize safety to bungee jumpers and spectators while bungee jumping operations are in progress.

12:195-7.2 Scope

The scope of this subchapter is to set forth specific rules applicable to bungee jumping operations which shall be adhered to in addition to the general provisions of the rules governing carnival and amusement rides in this chapter. Where a specific provision is provided covering bungee jumping which conflicts with the general provisions of this chapter, the provisions set forth in this subchapter shall govern.

12:195-7.3 Prohibited activities

(a) The following practices and activities are prohibited:

1. Catapulting;

2. Double jumping;

3. Launching;

4. Reverse jumping;

5. Sandbagging;

6. Stunt jumping;

7. Tandem jumping;

8. More than two persons on the jump point, except for the allowance of one additional employee approved for training purposes only;

9. A bungee jumping operation which is exposed to wind velocity exceeding 25 miles per hour or other dangerous weather condition;

i. Wind velocity shall be measured by an anemometer mounted on the tower at least as high as the jump point and capable of being read from ground level as well as the jump point;

10. Bungee jumping from a mobile or fixed-type crane or lifting device not designed, approved and/or manufactured to carry, transport or in any fashion move a person;

11. A bungee jumping operation which is in violation of any Federal, State or local law or regulation with respect to any part of its operation; and

12. Any bungee type ride not specifically approved by the Commissioner.

12:195-7.4 Inspection fee and permit

An owner of a bungee jumping operation shall adhere to all of the provisions pertaining to the inspection and permitting procedures and requirements found at N.J.A.C. 12:195-1.9, except that the inspection fee for a bungee jumping operation shall be $500.00 and the duplicate permit fee shall be $25.00.

12:195-7.5 Operating manual

(a) Each site shall have an operating manual for the safe operation of bungee jumping on the site. The manual and all amendments shall be held on the site and shall be freely available to staff and the Commissioner.

(b) The manual shall include, but not be limited to, the following:

1. Site plan;

2. Description of operating system and equipment;

3. Job procedures for each task in the operating system;

4. Job descriptions;

5. Maintenance inspection records;

6. Testing procedures and recording;

7. Criteria for the periodic maintenance or replacement of rigging, hardware, bungee cords, harnesses, or lifelines as required by the manufacturer;

8. Emergency plan and procedures;

9. Reports of injuries, damage, and incidents;

10. Bungee cord and equipment log books;

11. Inspection procedures, standards, and follow-up actions;

12. Setting up the site equipment;

13. Lists of all staff including their qualifications and training; and

14. Testing and checking for the following:

i. Personnel protective equipment including gloves, harnesses, and life lines;

ii. The communication system(s)—communications must be maintained between all operations personnel involved with the actual jump. For example, the jump master and jump operator must be in communication at all times by way of telephone or radio;

iii. Examine the jump equipment and rigging;

iv. Telephone service to reach emergency medical personnel;

v. Carry out test jumps and check the bungee cord performance;

vi. Staff briefing for the day's operations; and

vii. Ensure the exclusion of the public from the operating areas.

12:195-7.6 Insurance, bond or other security

An owner of a bungee jumping operation shall adhere to all of the provisions pertaining to insurance, bond or other security found at N.J.A.C. 12:195-1.14, except that the amount of insurance liability shall be not less than $1,000,000 for injury suffered by persons participating in a bungee jumping operation.

12:195-7.7 Engineering certification

(a) Prior to approval of a bungee jump operation, a New Jersey licensed professional engineer shall forward to the Department two signed and sealed submittals of the following (Note: Only the embossed seal of a professional engineer shall be acceptable):

1. Certification of hoisting equipment, tower or other methods of hoisting or suspension;

2. Plot plan of jump site within 200 feet of a bungee operation;

3. Schematic drawings of structure foundation and load bearing certification;

4. Elevation schematic and calculations of G forces, bungee height and safety zone betweem maximum bungee elongation and air bag;

5. Certification of all equipment used in a bungee operation such as bungee ropes, harnesses, carbineers, straps, etc.;

6. Certification of operation, training and maintenance manuals;

7. Certification of inspection of entire bungee operation and equipment;

8. Certification that design and construction is in accordance with accepted engineering practices and that all reasonable foreseeable hazards have been guarded against in design; and

9. Definitive statement by a professional engineer that the bungee operation is safe and acceptable to operate with the equipment identified in the submittal.

12:195-7.8 Mechanical equipment

(a) Scales:

1. Scales shall be tested and sealed by a New Jersey Weights and Measures officer at least once a year.

2. Scales shall be tested using certified test weights before the opening of the ride each day.

(b) Weights:

1. Each bungee jumping operation shall obtain test weights in the aggregate capacity of 300 pounds which have been tested and sealed by the Superintendent of the State Office of Weights and Measures.

(c) Bungee cords:

1. Operating testing: All commercial operators shall follow the inspection and testing recommendations set forth by the cord manufacturer;

2. All bungee cord manufacturers must provide specifications to purchasers on maximum usage of bungee cords expressed in number of jumps;

3. Bungee cords shall be retired when the cords exhibit deterioration or damage, do not react according to specifications or have reached the maximum usage expressed in number of jumps as specified by the manufacturer. All commercial operators must have an auditable system for recording the number of jumps on each individual cord in use. This data must be readily available to the Commissioner upon request.

4. Bungee cords retired from use shall be destroyed by cutting the cord into five foot lengths.

(d) Bungee cord end connections:

1. All end connections shall be of a size and shape to allow easy attachment to the jumper harnesses and to the rigging. On multiple cord systems, each cord must meet its own independent end connection.

2. All end attachment points subject to wear are to be retired when the cord is retired.

3. On multiple cord systems, all end attachment points shall be bound together in a protective sheath that allows the individual ends to move with respect to each other.

4. All cords shall be inspected each day for wear, slippage, or any other abnormalities, unless the manufacturer specifies more frequent inspections.

(e) Jump harnesses:

1. A jump harness shall be either:

i. A full body harness; or

ii. An ankle harness or ankle strapping that is tied off in such a manner so as to secure the jumper to the cord end connection. The ankle harness/strapping must evidence redundancy. A link to a waist harness is required.

2. Neither harness shall cause bruising.

3. Harnesses shall be available to fit the range of jumper sizes accepted for jumping.

4. The harness shall have a minimum breaking strength of 4,000 pounds, be suitable for the type of jumping conducted and shall be manufactured by an organization approved to manufacture similar harnesses to an approved standard.

5. Each harness shall be inspected prior to harnessing a jumper and shall be removed from service when it exhibits signs of excessive wear, damage, or when it has met the manufacturer's maximum usage allowance.

(f) Carabineers and locking devices:

1. Specification—carabineers shall be of the screw type lock with a minimum main axis breaking strength of 8,000 pounds.

2. Use—a minimum of two carabineers shall be used at each bungee end connection point.

3. Design and construction—all carabineers shall be designed and constructed using the existing standards for mountaineering and rescue gear.

4. Testing—all carabineers shall be inspected daily and shall be removed from service when the locking mechanisms fail to lock properly, the springs are worn or the locking gates deform.

(g) Anchors:

1. Specification: There shall be two anchors that attach the bungee cord to the structure. Each shall have a minimum strength of 8,000 pounds or shall be designed with a minimum factor of safety of five, whichever is more. There shall be a carabineer that attaches each anchor to the bungee cord end. The two carabineers shall not be connected to each other.

2. Where wire rope is used, it shall have staged ends with a thimble eye or be continuous. Other connection systems are acceptable if they meet the aforementioned strength specifications.

3. Daily inspection of the anchors shall be carried out and any portion showing sign of excessive wear shall be removed from service immediately.

(h) Air bags:

1. An air bag shall be provided.

2. A minimum of a 10 foot safety zone shall be maintained above the air bag.

(i) Platforms:

1. Platforms shall be constructed so as to provide safety and security to the public by providing the following. Every platform shall:

i. Be completely enclosed except for the jumping off area;

ii. Have a nonskid floor surface;

iii. Be provided with a gate equipped with locking devices to prevent accidental openings;

iv. Be provided with anchor rails or points to secure the jumper prior to jump;

v. Have no more than two persons on the platform during bungee jumping operations, the jumper and jump master. A third (employee only) may be added for training and instruction purposes only;

vi. Be permanently attached to a structure; and

vii. Be constructed so that the jump point shall not exceed 100 feet above the ground surface.

(j) Rescue procedures: All operations regardless of jump platform in use must have a secondary retrieval system. All appropriate staff must be trained on proper rescue procedures. Prior to bungee jumping operations, all appropriate staff must conduct a test rescue.

12:195-7.9 Communication

Radio communication shall be provided between the jump master and the jump operator(s).

PUBLIC NOTICES

COMMUNITY AFFAIRS

(a)

DIVISION OF HOUSING AND DEVELOPMENT
Industrialized Buildings Commission
Notice of Public Hearing

Take notice that the Industrialized Buildings Commission, an interstate compact agency of which the State of New Jersey is a member, will hold a public hearing on June 3, 1993 on two proposed documents entitled "Uniform Administrative Procedures" and "Model Rules and Regulations for Industrialized/Modular Buildings." The hearing will begin at 9:00 A.M. and will be held at the Sheraton International Conference Center, 11810 Sunrise Valley Drive, Reston, VA 22091; (703) 620-9000. Copies of the proposed documents may be obtained from Debbie Baillargeon, NCSBCS Secretariat, at (703) 481-2022.

The proposed rules are intended to establish uniform procedures and standards pursuant to which the Industrialized Buildings Commission will issue certification labels and grant reciprocity for industrialized buildings produced in or shipped into the states that are parties to the compact. At present, these states are New Jersey, Minnesota and Rhode Island.

Individuals may provide written or oral testimony. Written testimony must be submitted, in triplicate, to the Secretariat by May 27, 1993. Individuals wishing to provide oral testimony must so notify the Secretariat by May 27, 1993 and must bring ten copies of their testimony to the hearing. Oral testimony will be limited to five minutes per speaker.

(b)

DIVISION OF HOUSING AND DEVELOPMENT
Uniform Construction Code
Notice of Code Change Proposal Hearing

Take notice that the Construction Code Element of the Division of Housing and Development, Department of Community Affairs, has, pursuant to N.J.S.A. 52:27D-123, scheduled its annual code change proposal **hearing** for the building, fire protection, mechanical, electrical, energy and one and two-family dwelling subcodes for Friday, July 30, 1993, beginning at 9:30 A.M., in the first floor conference room of Building No. 3 at 3131 Princeton Pike, Lawrenceville, New Jersey.

Persons wishing to present code change proposals for the respective model codes, which have been adopted by reference as the subcodes of the State Uniform Construction Code, must submit their proposals, in writing, on or before July 9, 1993.

Those in need of further information may telephone the Element at (609) 530-8789.

Proposals may be mailed or faxed to:

"Code Changes"
Department of Community Affairs
Bureau of Technical Services
CN 816
Trenton, New Jersey 08625-0816
FAX (609) 530-8858

EDUCATION

(c)

STATE BOARD OF EDUCATION
Notice of Public Testimony Session
June 16, 1993

Take notice that the following agenda items are scheduled for Notice of Proposal in the August 16, 1993 New Jersey Register and are, therefore, subject to public comment. Pursuant to the policy of the New Jersey State Board of Education, a public testimony session will be held for the purpose of receiving public comment on Wednesday, June 16, 1993 from 3:00 P.M. to 6:00 P.M. in the 15th Floor Conference Room, Capitol Plaza, 240 West State Street, Trenton, New Jersey.

To reserve time to speak call the State Board Office at (609) 292-0739 by 12:00 noon Friday, June 11, 1993.

Rule Proposals:

N.J.A.C. 6:78-1, Marie H. Katzenbach School for the Deaf.
N.J.A.C. 6:22A-1, School Facility Lease Purchase Agreements.

Please note: Publication of the above items are subject to change depending upon the actions taken by the State Board of Education at the July 7, 1993 monthly public meeting.

ENVIRONMENTAL PROTECTION AND ENERGY

(d)

WASTEWATER FACILITIES REGULATION
Notice of Revocation of NJPDES/SIU Permits

Take notice that the New Jersey Department of Environmental Protection and Energy (Department) is terminating the individual New Jersey Pollutant Discharge Elimination System (NJPDES)/Significant Indirect User (SIU) permits previously noticed in 25 N.J.R. 599(b), February 1, 1993.

The subject NJPDES/SIU permits were issued for wastewater discharges to delegated local agencies, which have Departmentally approved industrial pretreatment programs in accordance with 40 CFR 403 and N.J.A.C. 7:14A-13.1(a). The above facilities may continue discharging after this termination in accordance with the delegated local agencies' approved industrial pretreatment program requirements. In addition, the permittee shall be deemed to possess a NJPDES/SIU Permit-by-Rule consistent with requirements as specified in N.J.A.C. 7:14A-13.5.

It was the Department's original intent not to issue individual permits to industries discharging to those local agencies with approved pretreatment programs. However, due to the delegated local agencies' limited permit enforcement authority, the Department issued individual NJPDES/SIU permits to selected SIUs, which the local agencies felt had the potential for the greatest impact on their facilities.

With the passage of the Clean Water Enforcement Act, P.L.1990, c.28, local agencies now have sufficient enforcement powers, and dual permitting is no longer necessary. As a result, the Department is terminating the previously noticed permits pursuant to N.J.A.C. 7:14A-2.13(a)7 and 10.5(g).

This notice is being given to inform the public that the Department is terminating the previously noticed individual NJPDES/SIU permits effective June 1, 1993 in accordance with the "Regulations Concerning the New Jersey Pollutant Discharge Elimination System" (N.J.A.C. 7:14A), which were promulgated pursuant to the authority of the New Jersey "Water Pollution Control Act" (N.J.S.A. 58:10A-1 et seq.).

(e)

OFFICE OF LAND AND WATER PLANNING
Amendment to the Northeast, Upper Raritan, Upper Delaware and Sussex County Water Quality Management Plans
Public Notice

Take notice that the New Jersey Department of Environmental Protection and Energy (NJDEPE) is seeking public comment on a proposed amendment to the Northeast, Upper Raritan, Upper Delaware and Sussex County Water Quality Management (WQM) Plans. This amendment, proposed by the Musconetcong Sewerage Authority (MSA) and the Sussex County Board of Chosen Freeholders, would adopt a Wastewater Management Plan (WMP) for MSA. The WMP identifies a two phase expansion of the MSA Sewage Treatment Plant (STP) and sewer service area. Phase IA would expand the STP to accommodate maximum 30-day average flows of 3.63 million gallons per day (mgd) and expand the sewer service area in Roxbury and Mount Olive Townships. The

expanded sewer service area would include out-of-basin areas in both Roxbury Township and Mount Olive Township (Budd Lake). The service area also includes the Boroughs of Netcong, Stanhope, and Mount Arlington. Phase II would expand the STP to accommodate maximum 30-day average flows of 5.79 mgd. Hopatcong Borough and Jefferson Township sewer service areas would be accommodated with this Phase II expansion. In addition, the Sussex County Board of Chosen Freeholders, as the designated Sussex County WQM Planning Agency, will retain WMP responsibility for the portions of the Sussex County WQM Plan area which are addressed in this WMP.

This notice is being given to inform the public that a plan amendment has been proposed for the Northeast, Upper Raritan, Upper Delaware and Sussex County WQM Plans. All information related to the Sussex County WQM Plan and the proposed amendment is located at the Sussex County Department of Planning and Development, Division of Environmental Resource Planning, County Administration Building, P.O. Box 709, Newton, New Jersey 07860; and the NJDEPE, Office of Land and Water Planning, CN423, 401 East State Street, Trenton, N.J. 08625. All information related to the Northeast, Upper Raritan and Upper Delaware WQM Plans and the proposed amendment is located at the NJDEPE address cited above. This information 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 either the Office of Land and Water Planning at (609) 633-1179 or the Sussex County Department of Planning and Development at (201) 579-0500.

Interested persons may submit written comments on the proposed amendment to the Northeast, Upper Raritan and Upper Delaware WQM Plans to Dr. Daniel J. Van Abs, at the NJDEPE address cited above with a copy sent to Mr. David Hoyt, Musconetcong Sewerage Authority, P.O. Box 416, Stanhope, New Jersey 07874. All comments regarding the proposed amendment to the Northeast, Upper Raritan and Upper Delaware WQM Plans 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 NJDEPE with respect to the amendment request.

Any interested persons may request in writing that NJDEPE 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 NJDEPE 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.

The Sussex County Board of Chosen Freeholders will hold a **public meeting** on the proposed Sussex County WQM Plan amendment at which time all interested persons may appear and shall be given an opportunity to be heard. The public meeting will be held on Wednesday, June 23, 1993 at 6:10 P.M. in the Freeholder meeting room, County Administration Building, Plotts Road, Newton, New Jersey. Interested persons may submit written comments on the amendment to Mr. George Krauss, Sussex County Department of Planning and Development, at the address cited above, with a copy sent to Dr. Van Abs, Office of Land and Water Planning, at the NJDEPE address cited above. All comments must be submitted within 15 days following the public meeting. All comments submitted by interested persons in response to this notice, within the time limit, shall be considered by the Sussex County Board of Chosen Freeholders with respect to the amendment request. In addition, if the amendment is adopted by Sussex County, the NJDEPE must review the amendment prior to final adoption. The comments received in reply to this notice will also be considered by the NJDEPE during its review. Sussex County and the NJDEPE thereafter may approve and adopt this amendment without further notice.

(a)

OFFICE OF LAND AND WATER PLANNING

Amendment to the Mercer County Water Quality Management Plan
Public Notice

Take notice that on April 14, 1993, 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 Mercer County Water Quality Management Plan was adopted by the Department. This amendment will amend the Hopewell Borough and Hopewell Township Wastewater Management Plans. This amendment will add Block 8, Lots 64, 92 and 93 of Hopewell Township to the Stony Brook Regional Sewerage Authority's Hopewell Borough Sewage Treatment Plant sewer service area.

(b)

OFFICE OF LAND AND WATER PLANNING

Amendment to the Ocean County Water Quality Management Plan
Public Notice

Take notice that on April 14, 1993, 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 Ocean County Water Quality Management Plan was adopted by the Department. This amendment adds portions of Cedar Bonnet Island north of Route 72 (Block 297 Lots 1, 2, 3, 4, 4R, 8 and 9) to the sewer service area of the Ocean County Utilities Authority (OCUA) Southern Water Pollution Control Facility as mapped in the Stafford Township Wastewater Management Plan adopted July 3, 1991. The area will be served by the original OCUA interceptor which crosses the island and which was designed to accommodate flow from Cedar Bonnet Island. Proposed development in this area must demonstrate compliance with the Rules on Coastal Zone Management.

HUMAN SERVICES

(c)

DIVISION OF YOUTH AND FAMILY SERVICES

Availability of Grant Funds
Substance Abuse Assessment and Treatment Services in Mercer County

Take notice that, in compliance with N.J.S.A. 52:14-34.4, 34.5 and 34.6, the Department of Human Services announces the following availability of funds:

A. **Name of grant program:** Substance Abuse Assessment and Treatment Services in Mercer County.

B. **Purpose for which the grant program funds shall be used:** Provision of outreach, case assessment and collaboration, substance abuse treatment and counseling services for parents of children at risk of or in foster care placement in Mercer County.

C. **Amount of money in the grant program:** $54,075.00, on an annualized basis.

D. **Organizations which may apply for funding under this program:** All profit and not-for-profit agencies, organizations, corporate bodies, and private or public entities which base the program in Mercer County, New Jersey.

E. **Qualifications needed by an applicant to be considered for funding:** The individual whose salary is funded must be a Certified Drug/Alcohol Counselor. A Bachelor's degree is required, **and** a Master's degree, in the social sciences or education, is preferred.

F. **Procedures for eligible organizations to apply:** Completed Request for Proposals can be obtained by contacting Elizabeth McGovern, DYFS—Central Region, CN 717, Trenton, NJ 08625. Telephone: 609-777-2000.

G. **Address to which applications must be submitted:**
DYFS—Central Region
CN 717
Trenton, NJ 08625 Attention: Dot Blair

H. **Deadline by which applications must be submitted:** 4:30 P.M. on June 11, 1993.

I. **Date by which applicants shall be notified of acceptance or rejection:** June 25, 1993.

LAW AND PUBLIC SAFETY

(a)

DIVISION OF CONSUMER AFFAIRS

Notice of Receipt of Petition for Rulemaking and Action Thereon

Prescription Drug Advertising

N.J.A.C. 13:45A

Petitioner: Garden State Pharmacy Owners, Inc. by William P. Munday, Esq., Lowenstein, Sandler, Kohl, Fisher & Boylan.
Authority: N.J.S.A. 24:6E-2.

Take notice that by letter dated March 18, 1993 and received on or about March 22, 1993, William P. Munday, Esq., on behalf of Garden State Pharmacy Owners, Inc., filed a petition with the Director of the Division of Consumer Affairs requesting promulgation of rules under N.J.S.A. 24:6E-2, the Prescription Drug Price and Quality Stabilization Act, which became effective September 29, 1977. That statute mandates that the Director promulgate rules and regulations governing the advertising of prescription drugs. Petitioner states that the absence of regulations is harming the independent pharmacies represented by petitioner. Large retail pharamcy chains, petitioner claims, violate the statute in order to compete unfairly with its members. Petitioner states that it has a particular interest in seeing regulations drafted under N.J.S.A. 24:6E-2(3), which prohibits the advertising of prescription drugs for sale below their acquisition cost.

Take further notice that prior to receipt of this petition, the Director of the Division of Consumer Affairs had reviewed this matter with other parties and had determined that the legislative intent of N.J.S.A. 24:6E-2 was less than clear, and that the legal issues raised were of such significance as to warrant the request of a formal opinion from the Attorney General. The Director requested the formal opinion on March 3, 1993, and has notified petitioner that Garden State Pharmacy Owners, Inc., will be advised when the opinion is received. The Division cannot predict with certainty when the formal opinion will be issued.

A copy of this notice has been mailed to the petitioner, as required by N.J.A.C. 1:30-3.6.

TRANSPORTATION

(b)

COMMISSIONER
EXECUTIVE DIRECTOR REGIONAL OPERATIONS, REGION V
BUREAU OF OUTDOOR ADVERTISING SERVICES

Notice of Intention to Confer and Consult with Members of the General Public, Outdoor Advertising Experts, Casino Operators, Local Officials and Other Interested Persons Concerning Outdoor Advertising Issues

Take notice that the New Jersey Department of Transportation (NJDOT) anticipates that it may propose amendments to N.J.A.C. 16:41C, Roadside Sign Control and Outdoor Advertising, during 1993 or 1994. The current rules became effective on May 4, 1992. To facilitate in the identification and analysis of outdoor advertising issues, the Department intends to informally confer and consult with members of the general public, outdoor advertising experts, casino operators, local officials, and other interested persons. The Department expects to form two advisory groups, one to focus upon on-premise casino advertising within Atlantic City, and the other to focus upon general outdoor advertising issues. When N.J.A.C. 16:41C was adopted, the Department specifically indicated that additional study and future regulatory changes were possible regarding special standards for casino districts.

Interested persons wishing to provide comments on outdoor advertising issues to the Department, or who wish to participate in an advisory group, should send their comment(s) and/or request, in writing, by June 17, 1993, to:

William Norton, Administrator
Bureau of Outdoor Advertising Services
New Jersey Department of Transportation
1035 Parkway Avenue
CN 600
Trenton, New Jersey 08625

All correspondence, comments, and the records from advisory groups shall be deemed public records and shall be available for public review, by appointment, during normal business hours by contacting the Bureau of Outdoor Advertising Services at (609) 530-3768.

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 April 5, 1993 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.1993 d.1 means the first rule filed for 1993.

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 MARCH 15, 1993

NEXT UPDATE: SUPPLEMENT APRIL 19, 1993

Note: If no changes have occurred in a Title during the previous month, no update will be issued for that Title.

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
24 N.J.R. 1841 and 1932	May 18, 1992	24 N.J.R. 4307 and 4454	December 7, 1992
24 N.J.R. 1933 and 2102	June 1, 1992	24 N.J.R. 4455 and 4606	December 21, 1992
24 N.J.R. 2103 and 2314	June 15, 1992	25 N.J.R. 1 and 218	January 4, 1993
24 N.J.R. 2315 and 2486	July 6, 1992	25 N.J.R. 219 and 388	January 19, 1993
24 N.J.R. 2487 and 2650	July 20, 1992	25 N.J.R. 389 and 616	February 1, 1993
24 N.J.R. 2651 and 2752	August 3, 1992	25 N.J.R. 619 and 736	February 16, 1993
24 N.J.R. 2753 and 2970	August 17, 1992	25 N.J.R. 737 and 1030	March 1, 1993
24 N.J.R. 2971 and 3202	September 8, 1992	25 N.J.R. 1031 and 1308	March 15, 1993
24 N.J.R. 3203 and 3454	September 21, 1992	25 N.J.R. 1309 and 1620	April 5, 1993
24 N.J.R. 3455 and 3578	October 5, 1992	25 N.J.R. 1621 and 1796	April 19, 1993
24 N.J.R. 3579 and 3784	October 19, 1992	25 N.J.R. 1797 and 1912	May 3, 1993
24 N.J.R. 3785 and 4144	November 2, 1992	25 N.J.R. 1913 and 2150	May 17, 1993
24 N.J.R. 4145 and 4306	November 16, 1992		

N.J.A.C. CITATION		PROPOSAL NOTICE (N.J.R. CITATION)	DOCUMENT NUMBER	ADOPTION NOTICE (N.J.R. CITATION)
ADMINISTRATIVE LAW—TITLE 1				
1:13A-1.2, 18.1, 18.2	Lemon Law hearings: exceptions to initial decision	24 N.J.R. 1843(a)		
	Most recent update to Title 1: TRANSMITTAL 1992-5 (supplement November 16, 1992)			
AGRICULTURE—TITLE 2				
2:1-4	Disability discrimination grievance procedure regarding compliance with Americans with Disabilities Act (ADA)	25 N.J.R. 1314(a)		
2:6	Animal health: biological products for diagnostic or therapeutic purposes	24 N.J.R. 2974(a)		
2:6	Animal health: extension of comment period regarding biological products for diagnostic or therapeutic purposes	24 N.J.R. 3981(a)		
2:23	Gypsy moth suppression program	25 N.J.R. 1627(a)		
2:34-2.1, 2.2	Equine Advisory Board rules	25 N.J.R. 740(a)		
2:71	Grades and standards	25 N.J.R. 1801(a)		
2:72	Bonding requirement of commission merchants, dealers, brokers, agents	25 N.J.R. 1802(a)		
2:74	Controlled atmosphere storage apples	25 N.J.R. 1803(a)		
2:76-2.1, 2.2, 2.3, 2.4	Recommendation of agricultural management practices	25 N.J.R. 622(a)	R.1993 d.223	25 N.J.R. 1963(a)
2:76-3.12, 4.11	Farmland preservation programs: deed restrictions on enrolled lands	25 N.J.R. 222(a)	R.1993 d.181	25 N.J.R. 1866(a)
2:76-6.2-6.11, 6.13, 6.16, 6.17	Farmland Preservation Program: acquisition of development easements	25 N.J.R. 1804(a)		
2:76-6.15	Agriculture Retention and Development Program: lands permanently deed restricted	25 N.J.R. 223(a)	R.1993 d.182	25 N.J.R. 1867(a)
2:76-10	Farmland Appraisal Handbook Standards	25 N.J.R. 1811(a)		
	Most recent update to Title 2: TRANSMITTAL 1993-2 (supplement February 16, 1993)			
BANKING—TITLE 3				
3:1-2.3, 2.5, 2.21	Depository charter applications and branch applications	25 N.J.R. 1033(a)		
3:1-14.5	Revolving credit equity loans	25 N.J.R. 1033(b)	R.1993 d.218	25 N.J.R. 1965(a)
3:2-1.4	Mortgage banker non-servicing	25 N.J.R. 1035(a)		
3:3-3	Disability discrimination grievance procedure regarding compliance with Americans with Disabilities Act (ADA)	25 N.J.R. 1314(b)		
3:18-3.2, 5.1, 5.3, 8.1	Secondary mortgage loans	25 N.J.R. 1033(b)	R.1993 d.218	25 N.J.R. 1965(a)
3:38-1.1, 1.10, 5.1	Mortgage banker non-servicing	25 N.J.R. 1035(a)		
3:41-2.1, 11	Cemetery Board: location of interment spaces and path access	25 N.J.R. 623(a)		
3:42	Pinelands Development Credit Bank	25 N.J.R. 223(b)	R.1993 d.151	25 N.J.R. 1511(a)
	Most recent update to Title 3: TRANSMITTAL 1993-2 (supplement February 16, 1993)			
CIVIL SERVICE—TITLE 4				
	Most recent update to Title 4: TRANSMITTAL 1992-1 (supplement September 21, 1992)			
PERSONNEL—TITLE 4A				
4A:1-5	Disability discrimination grievance procedure regarding compliance with Americans with Disabilities Act (ADA)	25 N.J.R. 1314(c)		

N.J.A.C. CITATION		PROPOSAL NOTICE (N.J.R. CITATION)	DOCUMENT NUMBER	ADOPTION NOTICE (N.J.R. CITATION)
4A:4	Selection and appointment	25 N.J.R. 1085(b)		
4A:4-6.4, 6.6	Selection and placement appeals	24 N.J.R. 4467(a)	R.1993 d.162	25 N.J.R. 1511(b)
	Most recent update to Title 4A: TRANSMITTAL 1993-2 (supplement February 16, 1993)			
COMMUNITY AFFAIRS—TITLE 5				
5:5	Disability discrimination grievance procedure regarding compliance with Americans with Disabilities Act (ADA))	25 N.J.R. 1315(a)		
5:18-1.5, 2.4, 2.5, 2.7, 3.1–3.5, 3.7, 3.13, 3.17, 3.20, 3.30, App. 3A, 4.7, 4.9, 4.11, 4.12, 4.19	Uniform Fire Code	25 N.J.R. 393(a)	R.1993 d.197	25 N.J.R. 1868(a)
5:18-2.9, 2.12, 2.14, 2.16, 2.17	Uniform Fire Code: enforcement and penalties for violations	25 N.J.R. 397(a)	R.1993 d.195	25 N.J.R. 1872(a)
5:18-3.2, 3.3, 3.13, 3.19, App. 3A	Fire Prevention Code: junk yards, recycling centers, and other exterior storage sites	25 N.J.R. 1315(b)		
5:18-4.3, 4.7	Fire Safety Code: fire suppression systems in hospitals and nursing homes	25 N.J.R. 1316(a)		
5:18A-4.6	Fire Code enforcement: review of proposed action against certified fire official	25 N.J.R. 399(a)	R.1993 d.196	25 N.J.R. 1874(a)
5:18C-4.2, 5.2, 5.3, 5.4	Fire service training and certification	25 N.J.R. 1846(a)		
5:23	Uniform Construction Code: effective date of Model Codes	———	———	25 N.J.R. 1512(a)
5:23-1.6, 2.15, 4.18	Uniform Construction Code: prototype plan review	25 N.J.R. 1629(a)		
5:23-2.17, 8	Asbestos Hazard Abatement Subcode	24 N.J.R. 1422(a)		
5:23-3.4, 4.4, 4.18, 4.20, 5.3, 5.5, 5.19A, 5.21, 5.22, 5.23, 5.25	Uniform Construction Code: mechanical inspector license and mechanical inspections	25 N.J.R. 624(a)	R.1993 d.187	25 N.J.R. 1875(a)
5:23-9.7	Uniform Construction Code: manufacturing, production and process equipment exemption	24 N.J.R. 3458(a)	R.1993 d.132	25 N.J.R. 1512(b)
5:25-1.3	Definition of State New Home Warranty Security Plan: administrative change	———	———	25 N.J.R. 1755(a)
5:30	Local Finance Board rules	25 N.J.R. 1630(a)		
5:80-23	Housing and Mortgage Finance Agency: Housing Incentive Note Purchase Program	25 N.J.R. 1847(a)		
5:80-32	Housing and Mortgage Finance Agency: project cost certification	24 N.J.R. 2208(a)		
5:91-14	Council on Affordable Housing: interim procedures	25 N.J.R. 1118(a)		
5:92-1.1	Council on Affordable Housing: substantive rules	25 N.J.R. 1118(a)		
5:93	Council on Affordable Housin: substantive rules	25 N.J.R. 1118(a)		
	Most recent update to Title 5: TRANSMITTAL 1993-3 (supplement March 15, 1993)			
MILITARY AND VETERANS' AFFAIRS—TITLE 5A				
5A:7-1	Disability discrimination grievance procedure regarding compliance with Americans with Disabilities Act (ADA)	25 N.J.R. 1317(a)		
	Most recent update to Title 5A: TRANSMITTAL 1992-2 (supplement September 21, 1992)			
EDUCATION—TITLE 6				
6:3	School districts	25 N.J.R. 1095(a)		
6:9	Educational programs for pupils in State facilities	25 N.J.R. 400(a)	R.1993 d.194	25 N.J.R. 1889(b)
6:11-3.2	Professional licensure and standards: fees	25 N.J.R. 1111(a)		
6:21-12	Use of school buses	25 N.J.R. 1095(a)		
6:28-1.1, 1.3, 2.3, 2.6, 2.7, 3.2, 3.7, 4.1–4.4, 7.5, 8.4, 9.2, 10.1, 10.2, 11.2, 11.4, 11.9	Special education	25 N.J.R. 1318(a)		
6:28-8.1, 8.3, 8.4	Educational programs for pupils in State facilities	25 N.J.R. 400(a)	R.1993 d.194	25 N.J.R. 1889(b)
6:29-1.7, 9, 10	Eye protection in schools; reporting of child abuse allegations; safe and drug free schools	25 N.J.R. 1095(a)		
6:30	Adult education programs	25 N.J.R. 1112(a)		
	Most recent update to Title 6: TRANSMITTAL 1993-3 (supplement March 15, 1993)			
ENVIRONMENTAL PROTECTION AND ENERGY—TITLE 7				
7:0	Well construction and sealing: request for public comment regarding comprehensive rules	24 N.J.R. 3286(a)		
7:0	Green glass marketing and recycling: request for public input on feasibility study	25 N.J.R. 1654(a)		
7:0	Regulated Medical Waste Management Plan: public hearing and opportunity for comment	25 N.J.R. 1654(b)		

N.J.A.C. CITATION		PROPOSAL NOTICE (N.J.R. CITATION)	DOCUMENT NUMBER	ADOPTION NOTICE (N.J.R. CITATION)
7:1G-1–5, 7	Worker and Community Right to Know	25 N.J.R. 1631(a)		
7:1G-1.2, 6.1–6.11, 6.13-6.16	Worker and Community Right to Know Act: trade secrets and definitions	25 N.J.R. 858(a)		
7:1I	Processing of damage claims under Sanitary Landfill Facility Contingency Fund Act	25 N.J.R. 741(a)		
7:1K-1.5, 3.1, 3.4, 3.9-3.11, 4.3, 4.5, 4.7, 5.1, 5.2, 6.1, 6.2, 7.2, 7.3, 9.2-9.5, 9.7, 12.6-12.9	Pollution Prevention Program requirements	25 N.J.R. 1849(a)		
7:1K-6.1	Pollution Prevention Plan progress reporting: administrative correction	———	———	25 N.J.R. 1549(a)
7:1K-7.2	Priority industrial facilities and facility-wide permitting: administrative correction	———	———	25 N.J.R. 1876(a)
7:3	Bureau of Forestry rules	25 N.J.R. 1348(a)		
7:4B	Historic Preservation Revolving Loan Program	25 N.J.R. 748(a)		
7:5A	Natural Areas System	25 N.J.R. 1350(a)		
7:5B	Open lands management	25 N.J.R. 1354(a)		
7:6-1.45	Seven Presidents Park, Long Branch: boating restrictions within jetty areas	25 N.J.R. 57(a)	R.1993 d.158	25 N.J.R. 1516(a)
7:7A-1.4, 2.7	Freshwater Wetlands Protection Act rules: definition of project	25 N.J.R. 1642(a)		
7:7A-1.4, 2.7, 8.10	Freshwater wetlands protection: project permit exemptions; hearings on contested letters of interpretation	24 N.J.R. 912(b)	R.1993 d.159	25 N.J.R. 1755(b)
7:7E-7.4	Coastal zone management: Outer Continental Shelf oil and gas exploration and development	25 N.J.R. 5(a)		
7:7E-7.5	Alternative traffic reduction programs in Atlantic City	24 N.J.R. 1986(a)	R.1993 d.140	25 N.J.R. 1549(a)
7:9-4	Surface water quality standards: request for public comment on draft Practical Quantitation Levels	24 N.J.R. 4008(a)		
7:9-4 (7:9B)	Surface water quality standards; draft Practical Quantitation Levels; total phosphorus limitations and criteria: extension of comment periods and notice of roundtable discussion	25 N.J.R. 404(a)		
7:9-4 (7:9B-1), 6.3	Surface water quality standards	24 N.J.R. 3983(a)		
7:9-4.5, 4.14, 4.15	Surface water quality standards	25 N.J.R. 405(a)		
7:9-4.14 (7:9B-1.14)	NJPDES program and surface water quality standards: request for public comment regarding total phosphorous limitations and criteria	24 N.J.R. 4008(b)		
7:9-4.14, 4.15 (7:9B-1.14, 1.15)	Surface water quality standards: administrative corrections to proposal	24 N.J.R. 4471(a)		
7:9-6.4, 6.8, Table 1	Ground water quality standards: administrative corrections	———	———	25 N.J.R. 1552(a)
7:9A-1.1, 1.2, 1.6, 1.7, 2.1, 3.3, 3.4, 3.5, 3.7, 3.9, 3.10, 3.12, 3.14, 3.15, 5.8, 6.1, 8.2, 9.2, 9.3, 9.5, 9.6, 9.7, 10.2, 12.2–12.6, App. A, B	Individual subsurface sewage disposal systems	24 N.J.R. 1987(a)		
7:11	New Jersey Water Supply Authority: policies and procedures	25 N.J.R. 1036(a)		
7:11-2.2, 2.3, 2.9	Delaware and Raritan Canal-Spruce Run/Round Valley Reservoir System: rates for sale of water	24 N.J.R. 4472(a)		
7:11-4.3, 4.4, 4.9	Manasquan Reservoir Water Supply System: rates for sale of water	24 N.J.R. 4474(a)		
7:13-7.1	Flood plain redelineation of Green Brook in Scotch Plains and Watchung	24 N.J.R. 4475(a)	R.1993 d.160	25 N.J.R. 1556(a)
7:14A	NJPDES Program: opportunity for interested party review of permitting system	25 N.J.R. 411(a)		
7:14A	NJPDES Program: extension of comment period for interested party review of permitting system	25 N.J.R. 1863(a)		
7:14A-1.8	NJPDES Program fees	25 N.J.R. 1358(a)		
7:14A-1.9, 3.14	Surface water quality standards	24 N.J.R. 3983(a)		
7:14A-4.7	Handling of substances displaying the Toxicity Characteristic	25 N.J.R. 753(a)		
7:14B-1.6, 2.2, 2.6, 2.7, 2.8, 3.1–3.8	Underground Storage Tanks Program fees	25 N.J.R. 1363(a)		

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7:22-3.4, 3.7, 3.8, 3.9, 3.11, 3.17, 3.20, 3.26, 3.27, 3.32, 3.34, 3.37, 4.4, 4.7, 4.8, 4.9, 4.11, 4.13, 4.17, 4.20, 4.26, 4.29, 4.32, 4.34, 4.37, 4.46, 5.4, 5.11, 5.12, 6.17, 6.27, 10.2, 10.3, 10.8, 10.9, 10.11, 10.12	Financial assistance programs for wastewater treatment facilities	24 N.J.R. 4310(b)		
7:22-9.1, 9.2, 9.4, 9.11–9.15, 10.1, 10.2, 10.4, 10.5, 10.6	Sewage Infrastructure Improvement Act grants: interconnection and cross-connection abatement	25 N.J.R. 1643(a)		
7:22A-1.4, 1.5, 1.7, 1.12, 1.15, 1.16, 2.4, 2.5, 2.6, 2.8, 3.4, 4.2, 4.5, 4.8, 4.11, 6.1–6.9, 6.11, 6.12, 6.14, 6.15, 7	Sewage Infrastructure Improvement Act grants: interconnection and cross-connection abatement	25 N.J.R. 1643(a)		
7:25-5.13	1992-93 Game Code: administrative correction regarding migratory birds	_____	_____	25 N.J.R. 2001(c)
7:25-6.13	1993-94 Fish Code: harvest of largemouth and smallmouth bass	25 N.J.R. 224(a)	R.1993 d.139	25 N.J.R. 1556(b)
7:25-7.13, 14.1, 14.2, 14.4, 14.6, 14.7, 14.8, 14.11, 14.12, 14.13	Crab management	25 N.J.R. 1371(a)		
7:25-11	Introduction of imported or non-native shellfish or finfish into State's marine waters	24 N.J.R. 3660(a)		
7:25-18.12	Weakfish management: administrative changes	_____	_____	25 N.J.R. 2001(d)
7:25-18.16	Taking of horseshoe crabs	24 N.J.R. 2978(a)	R.1993 d.185	25 N.J.R. 1876(b)
7:25A-1.2, 1.4, 1.9, 4.3	Oyster management	25 N.J.R. 754(a)		
7:26-1.4, 9.3	Hazardous waste management: satellite accumulation areas	25 N.J.R. 1864(a)		
7:26-2.11, 2.13, 2B.9, 2B.10, 6.2, 6.8	Solid waste flow through transfer stations and materials recovery facilities	24 N.J.R. 3286(c)		
7:26-4A.6	Hazardous waste program fees: annual adjustment	24 N.J.R. 2001(a)		
7:26-6.6	Procedure for modification of waste flows	25 N.J.R. 991(a)		
7:26-7.6	Hazardous waste facility operator responsibilities: administrative correction	_____	_____	25 N.J.R. 1556(c)
7:26-8.8, 8.12, 8.19	Handling of substances displaying the Toxicity Characteristic	25 N.J.R. 753(a)		
7:26-8.13, 8.16, 8.19	Hazardous waste listings: F024 and F025	25 N.J.R. 755(a)		
7:26-8.20	Used motor oil recycling	24 N.J.R. 2383(a)		
7:26-12.3	Hazardous waste management: interim status facilities	24 N.J.R. 4253(a)		
7:26A-6	Used motor oil recycling	24 N.J.R. 2383(a)		
7:26B-1.3, 1.5, 1.6, 1.8, 1.9	Environmental Cleanup Responsibility Act rules	25 N.J.R. 100(a)	R.1993 d.137	25 N.J.R. 1557(a)
7:26B-1.3, 1.10, 1.11, 1.12	Environmental Cleanup Responsibility Act Program fees	25 N.J.R. 1375(a)		
7:26B-7, 9.3	Remediation of contaminated sites: Department oversight	24 N.J.R. 1281(b)	R.1993 d.186	25 N.J.R. 2002(a)
7:26C	Remediation of contaminated sites: Department oversight	24 N.J.R. 1281(b)	R.1993 d.186	25 N.J.R. 2002(a)
7:26E	Technical requirements for contaminated site remediation	24 N.J.R. 1695(a)		
7:27-8.1, 8.3, 8.27	Air pollution control: requirements and exemptions under facility-wide permits	24 N.J.R. 4323(a)		
7:27-19	Control and prohibition of air pollution from oxides of nitrogen	25 N.J.R. 631(a)		
7:27-26	Low Emissions Vehicle Program	25 N.J.R. 1381(a)		
7:27A-3.5, 3.10	Control and prohibition of air pollution from oxides of nitrogen: civil administrative penalties	25 N.J.R. 631(a)		
7:28-15, 16.2, 16.8	Medical diagnostic x-ray installations; dental radiographic installations	25 N.J.R. 7(a)		
7:28-15, 16.2, 16.8	Medical diagnostic x-ray installations; dental radiographic installations; extension of comment period	25 N.J.R. 1039(a)		
7:29-1.1, 1.2, 2	Determination of noise from stationary sources: extension of comment period	25 N.J.R. 1425(a)		
7:29-1.1, 1.5, 2	Determination of noise from stationary sources	25 N.J.R. 1040(a)		

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7:31	Toxic Catastrophe Prevention Act Program	25 N.J.R. 1425(b)		
7:32	Energy conservation in State buildings	25 N.J.R. 1655(a)		
7:36	Green Acres Program: opportunity to review draft rule revisions	25 N.J.R. 1473(a)		
7:36-9	Green Acres Program: nonprofit land acquisition	24 N.J.R. 2405(a)		
7:50-4.1, 4.70	Pinelands Comprehensive Management Plan: expiration of development approvals and waivers	25 N.J.R. 225(a)	R.1993 d.211	25 N.J.R. 2119(a)
7:61	Commissioners of Pilotage: licensure of Sandy Hook pilots	24 N.J.R. 3477(a)		
7:61-3	Board of Commissioners of Pilotage: Drug Free Workplace Program	25 N.J.R. 625(a)	R.1993 d.212	25 N.J.R. 2123(a)
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8:2	Creation of birth record	24 N.J.R. 4325(a)		
8:2	Creation of birth record: reopening of comment period	25 N.J.R. 660(a)		
8:21-3.13	Repeal (see 8:21-3A)	24 N.J.R. 3100(a)		
8:21-3A	Registration of manufacturers and wholesale distributors of non-prescription drugs, and manufacturers and wholesale distributors of devices	24 N.J.R. 3100(a)		
8:24	Packing of refrigerated foods in reduced oxygen packages by retail establishments: preproposal	25 N.J.R. 660(b)		
8:24	Retail food establishments and food and beverage vending machines	25 N.J.R. 662(a)	R.1993 d.201	25 N.J.R. 1965(b)
8:25	Youth Camp Safety Act standards	25 N.J.R. 756(a)		
8:31B-2, 3.70	Hospital reimbursement: bill-patient data submissions; revenue cap monitoring	25 N.J.R. 1660(a)		
8:33-3.11	Certificate of Need process for demonstration and research projects	24 N.J.R. 3104(a)		
8:33A-1.2, 1.16	Hospital Policy Manual: applicant preference; equity requirement	24 N.J.R. 4476(a)		
8:35A-1.2, 3.4, 3.6, 4.1, 5.3	Maternal and child health consortia: fiscal management and staffing	25 N.J.R. 1116(a)		
8:39	Long-term care facilities: licensing standards	25 N.J.R. 1474(a)		
8:39-13.4, 27.1, 27.8, 29.4, 33.2, 45, 46	Long-term care facilities: use of restraints and psychoactive drugs; pharmacy supplies; Alzheimer's and dementia care services	24 N.J.R. 4228(a)		
8:41	Mobile intensive care programs	24 N.J.R. 3255(b)		
8:43	Licensure of residential health care facilities	25 N.J.R. 25(a)		
8:43	Licensure of residential health care facilities: public hearing	25 N.J.R. 757(a)		
8:43A	Ambulatory care facilities: public meeting and request for comments regarding Manual of Standards for Licensure	24 N.J.R. 3603(a)		
8:43A	Licensure of ambulatory care facilities	25 N.J.R. 757(b)		
8:42B	Drug treatment facilities: standards for licensure	25 N.J.R. 1476(a)		
8:43G-5.10	Acute care hospital participation in New Jersey Poison Control Information and Education System	25 N.J.R. 792(a)	R.1993 d.229	25 N.J.R. 1969(a)
8:43G-5.10	Hospital payments to maternal and child health consortia	Emergency (expires 5-1-93)	R.1993 d.138	25 N.J.R. 1295(a)
8:43G-5.10, 19.1, 19.20	Hospital licensing standards: funding for regionalized services; obstetric services structural organization	25 N.J.R. 1117(a)		
8:44-2.2, 3	Limited purpose laboratories	25 N.J.R. 668(a)	R.1993 d.200	25 N.J.R. 1969(b)
8:59-1, 2, 5, 6, 9, 11, 12	Worker and Community Right to Know Act rules	25 N.J.R. 864(a)		
8:59-3.1, 3.2, 3.3, 3.5-3.9, 3.11, 3.13-3.17	Worker and Community Right to Know Act: trade secrets and definitions	25 N.J.R. 858(a)		
8:59-App. A, B	Worker and Community Right to Know Act: preproposal concerning Hazardous Substance List and Special Health Hazard Substance List	25 N.J.R. 792(a)		
8:70	List of Interchangeable Drug Products: evaluation and acceptance criteria	25 N.J.R. 1814(a)		
8:71	Interchangeable drug products (24 N.J.R. 2559(a))	24 N.J.R. 1673(a)		
8:71	Interchangeable drug products (see 24 N.J.R. 2557(b), 3173(a), 4260(b); 25 N.J.R. 582(a))	24 N.J.R. 1674(a)	R.1993 d.226	25 N.J.R. 1970(b)
8:71	Interchangeable drug products (see 24 N.J.R. 3174(c), 3728(a), 4262(a))	24 N.J.R. 2414(b)	R.1993 d.67	25 N.J.R. 583(a)
8:71	Interchangeable drug products (see 24 N.J.R. 4261(a); 25 N.J.R. 582(b))	24 N.J.R. 2997(a)	R.1993 d.225	25 N.J.R. 1970(a)
8:71	Interchangeable drug products	24 N.J.R. 4009(a)	R.1993 d.64	25 N.J.R. 580(b)
8:71	Interchangeable drug products (see 25 N.J.R. 1221(a))	25 N.J.R. 55(a)	R.1993 d.228	25 N.J.R. 1969(c)
8:71	Interchangeable drug products	25 N.J.R. 875(a)	R.1993 d.227	25 N.J.R. 1970(c)
8:71	Interchangeable drug products	25 N.J.R. 1814(b)		
8:71	Interchangeable drug products	25 N.J.R. 1815(a)		

N.J.A.C. CITATION		PROPOSAL NOTICE (N.J.R. CITATION)	DOCUMENT NUMBER	ADOPTION NOTICE (N.J.R. CITATION)
8:100	State Health Planning Board: public hearings on draft chapters of State Health Plan	24 N.J.R. 3788(a)		
8:100	State Health Plan: draft chapters	24 N.J.R. 3789(a)		
8:100	State Health Plan: draft chapters on AIDS, and preventive and primary care	24 N.J.R. 4151(a)		
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9:1-5.11	Regional accreditation of degree-granting proprietary institutions	24 N.J.R. 3207(a)		
9:2-11	Disability discrimination grievance procedure regarding compliance with Americans with Disabilities Act (ADA)	25 N.J.R. 1323(a)		
9:4-1.12	County college construction projects	25 N.J.R. 668(b)	R.1993 d.224	25 N.J.R. 1971(a)
9:4-3.12	Noncredit courses at county colleges	25 N.J.R. 227(a)	R.1993 d.172	25 N.J.R. 1763(a)
9:7-1.2, 2.11, 4.2	Student Assistance Programs: administrative corrections	_____	_____	25 N.J.R. 1513(a)
9:11-1.1, 1.2, 1.4, 1.6, 1.10, 1.22, 1.23	Educational Opportunity Fund: student eligibility for undergraduate grants	25 N.J.R. 1663(a)		
	Most recent update to Title 9: TRANSMITTAL 1993-2 (supplement March 15, 1993)			
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10:1-2	Public comments and petitions regarding Department rules (recodify as 10:1A)	25 N.J.R. 1042(a)		
10:4	Disability discrimination grievance procedure regarding compliance with Americans with Disabilities Act (ADA)	25 N.J.R. 1323(b)		
10:14	Statewide Respite Care Program Manual	25 N.J.R. 876(a)		
10:15-1.2	Child care services: payment rates and co-payment fees	25 N.J.R. 1692(a)		
10:15A-1.2	Child care services: payment rates and co-payment fees	25 N.J.R. 1692(a)		
10:15B-1.2, 2.1	Child care services: payment rates and co-payment fees	25 N.J.R. 1692(a)		
10:15C-1.1	Child care services: payment rates and co-payment fees	25 N.J.R. 1692(a)		
10:31-1.4, 2.1, 2.2, 2.3, 8.1, 9.1	Screening and Screening Outreach Programs: mental health services	25 N.J.R. 1324(a)		
10:37-5.46–5.50, 12	Community mental health services: children's partial care programs	25 N.J.R. 669(a)		
10:38A	Pre-Placement Program for patients at State psychiatric facilities	24 N.J.R. 4326(a)		
10:41-2.3, 2.8, 2.9	Division of Developmental Disabilities: access to client records and record confidentiality	25 N.J.R. 432(a)		
10:51	Pharmaceutical Services Manual	24 N.J.R. 3053(a)		
10:51-1.1	Hospital services reimbursement methodology	Emergency (expires 5-10-93)	R.1993 d.154	25 N.J.R. 1582(a)
10:52-1.9, 1.13	Reimbursement methodology for distinct units in acute care hospitals and for private psychiatric hospitals	24 N.J.R. 4477(a)		
10:52-1.17	Out-of-state inpatient hospital services: administrative correction	_____	_____	25 N.J.R. 1513(b)
10:52-1.23	Inpatient hospital services: adjustments to Medicaid payer factors	24 N.J.R. 4478(a)		
10:52-5, 6, 7, 8, 9	Hospital services reimbursement methodology	Emergency (expires 5-10-93)	R.1993 d.154	25 N.J.R. 1582(a)
10:53-1.1	Reimbursement methodology for special hospitals	24 N.J.R. 4477(a)		
10:63-3.3, 3.8	Long-term care services: eliminatioin of salary regions	25 N.J.R 433(a)		
10:69	Hearing Aid Assistance to the Aged and Disabled Eligibility Manual	25 N.J.R. 228(a)		
10:69-5.8; 69A-5.4, 5.6, 6.12, 7.2; 69B-4.13	HAAAD, PAAD, and Lifeline programs: fair hearing requests, prescription reimbursement, benefits recovery	24 N.J.R. 4329(a)		
10:69A	Pharmaceutical Assistance to the Aged and Disabled Eligibility Manual	24 N.J.R. 4479(a)	R.1993 d.175	25 N.J.R. 1764(a)
10:69A-2.1, 4.1–4.4, 5.3, 5.5	PAAD prescription copayment	24 N.J.R. 4328(a)	R.1993 d.155	25 N.J.R. 1514(a)
10:71-4.8, 5.4, 5.5, 5.6, 5.9	Medicaid Only: eligibility computation amounts	25 N.J.R. 1818(a)		
10:72-1.1, 4.1, 4.5	New Jersey Care—Special Medicaid Manual: specified low-income Medicare beneficiaries	25 N.J.R. 1042(b)		
10:81-11.4, 11.16A, 11.20	Public Assistance Manual: closing criteria for IV-D cases; application fee for non-AFDC applicants	25 N.J.R. 881(a)		
10:81-11.5, 11.7, 11.9, 11.20, 11.21	Public Assistance Manual: child support and paternity services	24 N.J.R. 2328(a)		
10:81-14.18A	Child care services: payment rates and co-payment fees	25 N.J.R. 1692(a)		
10:82-5.3	Child care services: payment rates and co-payment fees	25 N.J.R. 1692(a)		
10:83-1.11	Supplemental Security Income (SSI) payment levels	25 N.J.R. 434(a)	R.1993 d.166	25 N.J.R. 1764(b)
10:84	Administration of public assistance programs: agency action on public hearing	24 N.J.R. 4480(a)		

N.J.A.C. CITATION		PROPOSAL NOTICE (N.J.R. CITATION)	DOCUMENT NUMBER	ADOPTION NOTICE (N.J.R. CITATION)
10:84-1	Administration of public assistance programs	24 N.J.R. 4480(b)		
10:85-1.1, 3.1, 3.2, 4.2, 7.2	Eligibility for employable GA recipients	25 N.J.R. 1714(a)		
10:86-10.2, 10.6	Child care services: payment rates and co-payment fees	25 N.J.R. 1692(a)		
10:122C-2.5	Approval of foster homes: administrative correction	_____	_____	25 N.J.R. 1514(b)
10:123-3.4	Personal needs allowance for eligible residents of residential health care facilities and boarding houses	24 N.J.R. 3088(a)		
10:123-3.4	Personal needs allowance for eligible residents of residential health care facilities and boarding houses: annual adjustment	25 N.J.R. 229(a)	R.1993 d.152	25 N.J.R. 1515(a)
10:124-5.1	Children's shelter facilities and homes: local government physical facility requirements	24 N.J.R. 4482(a)	R.1993 d.156	25 N.J.R. 1515(b)
10:127	Residential child care facilities: manual of requirements	25 N.J.R. 1716(a)		
10:133A-1.1	DYFS initial response: administrative correction	_____	_____	25 N.J.R. 1514(b)
10:140	Disability discrimination grievance procedure regarding compliance with Americans with Disabilities Act (ADA)	25 N.J.R. 1326(a)		
	Most recent update to Title 10: TRANSMITTAL 1993-3 (supplement March 15, 1993)			
CORRECTIONS—TITLE 10A				
10A:1-2.2	"Division of Operations", "indigent inmate" defined	25 N.J.R. 1043(a)		
10A:1-3	Disability discrimination grievance procedure regarding compliance with Americans with Disabilities Act (ADA)	25 N.J.R. 1326(b)		
10A:3-3.7	Use of chemical agents	25 N.J.R. 1044(a)	R.1993 d.219	25 N.J.R. 1971(b)
10A:31-5.1, 5.2, 5.3	Adult county correctional facilities: staff training	25 N.J.R. 1817(a)		
10A:71-3.2, 3.21	State Parole Board: calculation of parole eligibility terms	25 N.J.R. 1665(a)		
10A:71-3.47	Inmate parole hearings: victim testimony process	24 N.J.R. 4483(a)		
10A:71-6.4, 7.3	State Parole Board: conditions of parole	25 N.J.R. 435(a)		
	Most recent update to Title 10A: TRANSMITTAL 1992-7 (supplement December 21, 1992)			
INSURANCE—TITLE 11				
11:1-3	Disability discrimination grievance procedure regarding compliance with Americans with Disabilities Act (ADA)	25 N.J.R. 1327(a)		
11:1-7	New Jersey Property-Liability Insurance Guaranty Association: plan of operation	25 N.J.R. 1045(a)		
11:1-31	Surplus lines insurer eligibility	25 N.J.R. 1819(a)		
11:1-32.4	Automobile insurance: limited assignment distribution servicing carriers	24 N.J.R. 519(a)	R.1992 d.371	24 N.J.R. 3414(a)
11:1-32.4	Workers' compensation self-insurance	24 N.J.R. 1944(a)	R.1993 d.157	25 N.J.R. 1526(a)
11:1-32.4	Workers' compensation self-insurance: extension of comment period	24 N.J.R. 2708(b)		
11:1-33	Public Advocate reimbursement disputes	24 N.J.R. 2706(a)	R.1993 d.179	25 N.J.R. 1764(c)
11:1-34	Surplus lines: exportable list procedures	24 N.J.R. 4331(a)		
11:2-33	Workers' compensation self-insurance	24 N.J.R. 1944(a)	R.1993 d.157	25 N.J.R. 1526(a)
11:2-33	Workers' compensation self-insurance: extension of comment period	24 N.J.R. 2708(b)		
11:2-33.3, 33.4	Workers' compensation self-insurance: administrative corrections	_____	_____	25 N.J.R. 1877(a)
11:2-34	Surplus lines: allocation of premium tax and surcharge	25 N.J.R. 1827(a)		
11:3-2.8, 33.2, 34.4, 44	Automobile insurance: provision of coverage to all applicants who qualify as eligible persons	Emergency (expires 4-30-93)	R.1993 d.135	25 N.J.R. 1290(a)
11:3-3	Limited assignment distribution servicing carriers	25 N.J.R. 1327(b)		
11:3-16.7	Automobile insurance: rating programs for physical damage coverages	24 N.J.R. 3604(a)		
11:3-16.12	Automobile insurance: filings reflecting paid, apportioned MTF expenses and losses	24 N.J.R. 4486(a)	R.1993 d.148	25 N.J.R. 1543(a)
11:3-16.12	Automobile insurance: public hearing and extension of comment period regarding filings reflecting paid, apportioned MTF expenses and losses	25 N.J.R. 56(a)		
11:3-19.3, 34.3	Automobile insurance eligibility rating plans: incorporation of merit rating surcharge	24 N.J.R. 2332(a)		
11:3-20.5, 20A.1	Automobile insurers: reporting apportioned share of MTF losses in excess profits reports; ratio limiting the effect of negative excess investment income	25 N.J.R. 1829(a)		
11:3-28.8	Reimbursement of excess medical expense benefits paid by insurers	24 N.J.R. 3215(a)	R.1993 d.178	25 N.J.R. 1769(a)
11:3-29.2, 29.4, 29.6	Automobile insurance PIP coverage: medical fee schedules	25 N.J.R. 229(b)		
11:3-29.6	Automobile PIP coverage: physical therapy services	24 N.J.R. 2998(a)		
11:3-33.2	Appeals from denial of automobile insurance: failure to act timely on written application for coverage	24 N.J.R. 2128(b)		

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11:3-35.5	Automobile insurance rating: eligibility points of principal driver	24 N.J.R. 2331(a)		
11:5-1.9	Real Estate Commission: transmittal of funds to lenders	24 N.J.R. 4268(a)		
11:5-1.23	Real Estate Commission: transmittal by licensees of written offers on property	24 N.J.R. 3486(a)		
11:5-1.36	Real Estate Guaranty Fund assessment	25 N.J.R. 56(b)	R.1993 d.153	25 N.J.R. 1548(a)
11:5-1.38	Real Estate Commission: pre-proposal regarding buyer-brokers	24 N.J.R. 3488(b)		
11:6-2	Workers' compensation managed care organizations	25 N.J.R. 1330(a)		
11:13-7.4, 7.5	Commercial lines: exclusions from coverage; refiling policy forms	25 N.J.R. 1053(a)		
11:13-8	Commercial lines: prospective loss costs filing procedures	25 N.J.R. 1047(a)		
11:15-3	Joint insurance funds for local government units providing group health and term life benefits	25 N.J.R. 436(a)		
11:17	Producer licensing	25 N.J.R. 883(a)	R.1993 d.206	25 N.J.R. 1972(a)
11:17-1.2, 2.3–2.15, 5.1–5.6	Insurance producer licensing	24 N.J.R. 3216(a)		
11:17A-1.2, 1.3, 1.4, 1.5, 4.6	Insurance producers and limited insurance representatives: licensure and registration	25 N.J.R. 446(a)	R.1993 d.199	25 N.J.R. 1878(a)
11:17A-1.2, 1.7	Appeals from denial of automobile insurance: failure to act timely on written application for coverage; premium quotation	24 N.J.R. 2128(b)		
11:17A-1.2, 1.7	Automobile insurance: provision of coverage to all applicants who qualify as eligible persons	Emergency (expires 4-30-93)	R.1993 d.135	25 N.J.R. 1290(a)
11:19-3	Financial Examination Monitoring System: data submission by surplus lines producers and insurers	24 N.J.R. 3003(a)	R.1993 d.232	25 N.J.R. 1972(b)
	Most recent update to Title 11: TRANSMITTAL 1993-3 (supplement March 15, 1993)			
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12:7	Disability discrimination grievance procedure regarding compliance with Americans with Disabilities Act (ADA)	25 N.J.R. 1334(a)		
12:18	Temporary Disability Benefits Program	25 N.J.R. 262(a)	R.1993 d.141	25 N.J.R. 1515(c)
12:18-1.1, 2.4, 2.27, 2.40, 2.43, 2.48, 3.1, 3.2, 3.3	Temporary Disability Benefits Program: extension of comment period	25 N.J.R. 1335(a)		
12:18-1.1, 2.4, 2.27, 2.40, 2.43, 2.48, 3.1, 3.2, 3.3	Temporary Disability Benefits Program	25 N.J.R. 1515(c)		
12:23	Workforce Development Partnership Program: application and review process for customized training services	25 N.J.R. 449(a)		
12:23-3	Workforce Development Partnership Program: application and review process for individual training grants	25 N.J.R. 884(a)		
12:23-4	Workforce Development Partnership Program: application and review process for approved training	25 N.J.R. 886(a)		
12:23-5	Workforce Development Partnership Program: application and review process for additional unemployment benefits during training	25 N.J.R. 887(a)		
12:23-6	Workforce Development Partnership Program: application and review process for employment and training grants for services to disadvantaged workers	25 N.J.R. 1054(a)		
12:58-1.2	Child labor: student learner in cooperative vocational education program	25 N.J.R. 889(a)	R.1993 d.183	25 N.J.R. 1881(a)
12:60	Prevailing wages for public works	25 N.J.R. 453(a)	R.1993 d.164	25 N.J.R. 1771(a)
12:60-3.2, 4.2	Prevailing wages on public works contracts: telecommunications worker	24 N.J.R. 2689(a)		
12:60-3.2, 4.2	Prevailing wages on public works contracts: extension of comment period	24 N.J.R. 3015(b)		
12:60-3.2, 4.2	Prevailing wages for public works: extension of comment period	24 N.J.R. 3607(a)		
12:100-4.1, 4.2	Public employee safety and health: Process Safety Management of Highly Hazardous Chemicals; employer defined	25 N.J.R. 890(a)	R.1993 d.184	25 N.J.R. 1882(a)
12:100-4.2	Public employee safety and health: occupational exposure to bloodborne pathogens	24 N.J.R. 3607(b)		
12:100-4.2	Public employee safety and health: exposure to hazardous chemicals in laboratories	25 N.J.R. 453(b)		
12:100-4.2	Public employee safety and health: exposure to formaldehyde	25 N.J.R. 455(a)	R.1993 d.171	25 N.J.R. 1771(b)
12:195	Carnival-amusement rides safety	25 N.J.R. 1832(a)		

N.J.A.C. CITATION		PROPOSAL NOTICE (N.J.R. CITATION)	DOCUMENT NUMBER	ADOPTION NOTICE (N.J.R. CITATION)
12:195-2.1, 3.22, 6.1, 7	Carnival and amusement rides: bungee jumping	Emergency (expires 7-2-93)	R.1993 d.244	25 N.J.R. 2128(a)
	Most recent update to Title 12: TRANSMITTAL 1993-2 (supplement February 16, 1993)			
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12A:1	Disability discrimination grievance procedure regarding compliance with Americans with Disabilities Act (ADA)	25 N.J.R. 1335(b)		
12A:9	Development of small businesses and women and minority businesses: waiver of sunset provision of Executive Order No. 66(1978)	25 N.J.R. 1335(c)		
12A:9	Development of small businesses and women and minority businesses	25 N.J.R. 1752(a)		
12A:11	Certification of women-owned and minority-owned businesses	25 N.J.R. 1056(a)		
12A:11	Certification of women-owned and minority-owned businesses: extension of comment period	25 N.J.R. 1753(a)		
12A:31-1.4	New Jersey Development Authority: interest rate on direct loans	25 N.J.R. 891(a)		
	Most recent update to Title 12A: TRANSMITTAL 1993-2 (supplement March 15, 1993)			
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7:6-1.45	Boat Regulation Commission: restrictions within Seven Presidents Park jetty areas	25 N.J.R. 57(a)	R.1993 d.158	25 N.J.R. 1516(a)
13:1	Police Training Commission rules	25 N.J.R. 1336(a)		
13:1C	Disability discrimination grievance procedure regarding compliance with Americans with Disabilities Act (ADA)	25 N.J.R. 1338(a)		
13:2-14.2, 14.7, 20.6, 21.4	Alcoholic beverage control: permits, insignia and fees	25 N.J.R. 1341(a)		
13:3	Amusement games control	25 N.J.R. 891(b)	R.1993 d.233	25 N.J.R. 1987(a)
13:19-1.1, 1.7	Driver Control Service: administrative hearings applicability	25 N.J.R. 893(a)		
13:28	Board of Cosmetology and Hairstyling rules	25 N.J.R. 893(b)		
13:20-37	Motor vehicles with modified chassis height	24 N.J.R. 3662(a)		
13:20-37	Motor vehicles with modified chassis height: extension of comment period	24 N.J.R. 4333(b)		
13:20-38	Dimensional standards for automobile transporters	25 N.J.R. 1342(a)		
13:26	Transportation of bulk commodities	25 N.J.R. 1343(a)		
13:27-2.2 through 13:45A-26.4	Division of Consumer Affairs: administrative changes to various licensing board and committee rules	————	————	25 N.J.R. 1516(b)
13:29-1.13	Board of Accountancy: biennial renewal fee for inactive or retired licensees	25 N.J.R. 1665(b)		
13:30-8.5	Board of Dentistry: complaint review procedures	24 N.J.R. 2800(a)		
13:30-8.6	Board of Dentistry: professional advertising	24 N.J.R. 2801(a)		
13:30-8.7	Board of Dentistry: patient records	25 N.J.R. 1833(a)		
13:30-8.18	Continuing dental education	25 N.J.R. 1344(a)		
13:33-1.35, 1.36	Ophthalmic dispensers and technicians: referrals; space rental agreements	24 N.JR. 4010(a)		
13:33-1.41, 1.43	Licensed ophthalmic dispensers: continuing education	25 N.J.R. 57(b)	R.1993 d.173	25 N.J.R. 1771(c)
13:35-6.13, 9	Acupuncture Examining Board: practice of acupuncture	24 N.J.R. 4013(a)		
13:35-6.13, 10.9	Board of Medical Examiners: fee schedule; athletic trainer registration fee	25 N.J.R. 1058(a)		
13:35-6.18	Board of Medical Examiners: control of anabolic steroids	24 N.J.R. 4012(a)		
13:35-10	Practice of athletic trainers	25 N.J.R. 265(a)		
13:37	Certification of homemaker-home health aides: open public forum	24 N.J.R. 1861(a)		
13:37	Board of Nursing rules	25 N.J.R. 455(b)		
13:37-13.1, 13.2	Nurse anesthetist: conditions for practice	24 N.J.R. 4020(a)		
13:38-1.2, 1.3, 2.5	Practice of optometry: permissible advertising	24 N.J.R. 4237(a)		
13:39-1.3	Board of Pharmacy: fee schedule	25 N.J.R. 1666(a)		
13:39-5.2	Board of Pharmacy: information on prescription labels	25 N.J.R. 1667(a)		
13:39-7.14	Board of Pharmacy: patient profile record system and patient counseling by pharmacist	25 N.J.R. 266(a)		
13:40A-6.1, 7	Board of Real Estate Appraisers: apprentice program	25 N.J.R. 267(a)	R.1993 d.177	25 N.J.R. 1773(a)
13:41-2.1	Board of Professional Planners: professional misconduct	24 N.J.R. 3221(a)		
13:44C	Audio and Speech-Language Pathology Advisory Committee rules	25 N.J.R. 1668(a)		
13:45A-24	Toy and bicycle safety	24 N.J.R. 3019(b)		
13:45A-24	Toy and bicycle safety: extension of comment period	24 N.J.R. 3666(a)		
13:46-23.5, 23A	State Athletic Control Board: standards of ethical conduct	24 N.J.R. 4489(a)		

N.J.A.C. CITATION		PROPOSAL NOTICE (N.J.R. CITATION)	DOCUMENT NUMBER	ADOPTION NOTICE (N.J.R. CITATION)
13:70-12.4	Thoroughbred racing: claimed horse	25 N.J.R. 1059(a)		
13:70-14A.8	Thoroughbred racing: possession of drugs or drug instruments	25 N.J.R. 1060(a)		
13:70-29.50	Thoroughbred racing: daily triple payoff in dead heat for win	25 N.J.R. 1671(a)		
13:71-23.3A	Harness racing: pre-race blood gas analyzing machine testing program	25 N.J.R. 269(a)	R.1993 d.174	25 N.J.R. 1775(a)
13:71-23.9	Harness racing: possession of drugs or drug instruments	25 N.J.R. 1061(a)		
13:75-1.7	Violent Crimes Compensation Board: reimbursement for funeral expenses	25 N.J.R. 674(a)		
13:75-1.12	Violent Crimes Compensation Board: attorney's fees requiring affidavit of service	25 N.J.R. 674(b)		
13:76	Arson investigators: training and certification	25 N.J.R. 896(a)	R.1993 d.208	25 N.J.R. 1987(b)
13:81-1.2, 2.1	Statewide 9-1-1 emergency telecommunications system	24 N.J.R. 4493(a)	R.1993 d.209	25 N.J.R. 1987(c)
	Most recent update to Title 13: TRANSMITTAL 1993-3 (supplement March 15, 1993)			
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14:3-3.6	Discontinuance of service to multi-family dwellings	25 N.J.R. 1346(a)		
14:3-5.1	Relocation or closing of utility office	24 N.J.R. 2132(a)		
14:3-6.5	Public records	24 N.J.R. 1966(a)		
14:3-7.15	Discontinuance of services to customers: notification of municipalities and others	24 N.J.R. 3023(a)		
14:3-10.15	Solid waste collection: customer lists	24 N.J.R. 3286(c)		
14:6-5	Natural gas service: inspection and operation of master meter systems	24 N.J.R. 4494(a)		
14:9B	Private domestic wastewater treatment facilities	24 N.J.R. 1863(a)		
14:10-5	Competitive telecommunications services	24 N.J.R. 1868(a)		
14:10-7	Telephone access to adult-oriented information	24 N.J.R. 1238(a)	R.1993 d.180	25 N.J.R. 1882(b)
14:11-7.10	Solid waste disposal facilities: initial tariff for special in lieu payment	24 N.J.R. 3286(c)		
14:11-8	Natural gas pipelines	25 N.J.R. 897(a)		
14:18-2.11	Cable television: pre-proposal regarding disposition of on-premises wiring	24 N.J.R. 4496(a)		
14:18-2.11	Cable television: change in hearing date and comment period for pre-proposal regarding disposition of on-premises wiring	25 N.J.R. 270(a)		
14:18-9.2, 10.1-10.5	Cable television: testing of service and technical standards for system operation	24 N.J.R. 4497(a)		
	Most recent update to Title 14: TRANSMITTAL 1993-3 (supplement March 15, 1993)			
ENERGY—TITLE 14A				
	Most recent update to Title 14A: TRANSMITTAL 1993-1 (supplement February 16, 1993)			
STATE—TITLE 15				
15:1	Disability discrimination grievance procedure regarding compliance with Americans with Disabilities Act (ADA)	25 N.J.R. 1347(a)		
15:2	Commercial recording filing and expedited service	25 N.J.R. 901(a)	R.1993 d.193	25 N.J.R. 1884(a)
	Most recent update to Title 15: TRANSMITTAL 1993-1 (supplement January 19, 1993)			
PUBLIC ADVOCATE—TITLE 15A				
	Most recent update to Title 15A: TRANSMITTAL 1990-3 (supplement August 20, 1990)			
TRANSPORTATION—TITLE 16				
16:1B	Disability discrimination grievance procedure regarding compliance with Americans with Disabilities Act (ADA)	25 N.J.R. 1478(a)		
16:13	Rural Secondary Road Systems Aid: repealed	25 N.J.R. 59(b)	R.1993 d.149	25 N.J.R. 1517(a)
16:20	Federal Aid Urban Systems: repealed	25 N.J.R. 60(a)	R.1993 d.150	25 N.J.R. 1517(b)
16:25A	Soil erosion and sediment control standards	25 N.J.R. 1479(a)		
16:28	Speed limits for State highways	25 N.J.R. 1479(b)		
16:28-1.41	Speed limit zones along U.S. 9 in Berkeley Township and Pine Beach Borough	25 N.J.R. 1834(a)		
16:28-1.108	School zone along Route 82 in Union Township	25 N.J.R. 1061(b)	R.1993 d.214	25 N.J.R. 1988(a)
16:28A	Restricted parking and stopping	25 N.J.R. 1479(b)		
16:28A-1.6, 1.9, 1.38	Restricted parking along Route 7 in Belleville, Route 17 in North Arlington, and Route 71 in Bradley Beach	25 N.J.R. 1062(a)	R.1993 d.213	25 N.J.R. 1988(b)
16:28A-1.18, 1.65	Parking restrictions along Route 27 in Linden and Route 15 in Dover	25 N.J.R. 675(a)	R.1993 d.168	25 N.J.R. 1776(a)
16:28A-1.19, 1.98	Parking restrictions along Route 28 in Somerville and Route 56 in Pittsgrove Township	25 N.J.R. 1836(a)		
16:28A-1.36, 1.41	Parking restrictions along Route 57 in Warren County and Route 77 in Bridgeton	25 N.J.R. 1835(a)		

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16:28A-1.41	No stopping or standing zones along Route 77 in Bridgeton	25 N.J.R. 1063(a)	R.1993 d.216	25 N.J.R. 1989(a)
16:29	No passing	25 N.J.R. 1479(b)		
16:30	Miscellaneous traffic rules	25 N.J.R. 1479(b)		
16:30-6.3	Weight limit restriction for trucks using Route 173 in Bloomsbury, Hunterdon County	25 N.J.R. 1838(a)		
16:30-10.1	Midblock crosswalk on Route 28 in Somerville	25 N.J.R. 1838(b)		
16:31	Turns	25 N.J.R. 1479(b)		
16:31-1.31	Turning restrictions along U.S. 1 Business in Lawrence Township	25 N.J.R. 1064(a)	R.1993 d.215	25 N.J.R. 1989(b)
16:31A	Prohibited right turns on red	25 N.J.R. 1479(b)		
16:47-3.8, 3.16, 4.3, 4.6, 4.7, 4.13-4.16, 4.19, 4.27, 4.30, 4.33, 4.41, 5.2, App. B, C, D, E, N, N-1, N-2	State Highway Access Management Code: access standards; permits	25 N.J.R. 903(a)	R.1993 d.210	25 N.J.R. 1990(a)
16:49-1.3, 1.5, 2.1, App.	Transportation of hazardous materials	25 N.J.R. 1065(a)		
16:53-3.2	Autobus dimensions	25 N.J.R. 459(a)	R.1993 d.190	25 N.J.R. 1885(a)
16:53-7.25, 7.26, 7.27	Autobus trolleys: safety standards	24 N.J.R. 4500(a)	R.1993 d.191	25 N.J.R. 1885(b)
16:53C	Rail freight program	25 N.J.R. 1481(a)		
16:54	Licensing of aeronautical and aerospace facilities	24 N.J.R. 2542(a)		
16:54	Licensing of aeronautical and aerospace facilities: extension of comment period	24 N.J.R. 3026(a)		
16:54	Licensing of aeronautical and aerospace facilities: extension of comment period	24 N.J.R. 4025(a)		
16:55	Licensing of aeronautical activities	25 N.J.R. 1483(a)		
16:60	Office of Aviation: issuance of summons and designation of law enforcement officer	25 N.J.R. 1484(a)		
16:61	Aircraft accidents	25 N.J..R 1485(a)		

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TREASURY-GENERAL—TITLE 17

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19:46-1.18, 1.19	Pai gow poker: dealing from the hand	24 N.J.R. 4247(a)	R.1993 d.192	25 N.J.R. 1887(b)
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19:53	Equal employment opportunity	25 N.J.R. 684(b)	R.1993 d.221	25 N.J.R. 2000(a)
19:53	Equal employment opportunity: public hearing	25 N.J.R. 1509(a)		
19:53	Equal employment and business opportunity	25 N.J.R. 1675(a)		
19:54	Tax obligations of casino licensees	25 N.J.R. 280(a)	R.1993 d.146	25 N.J.R. 1524(a)

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