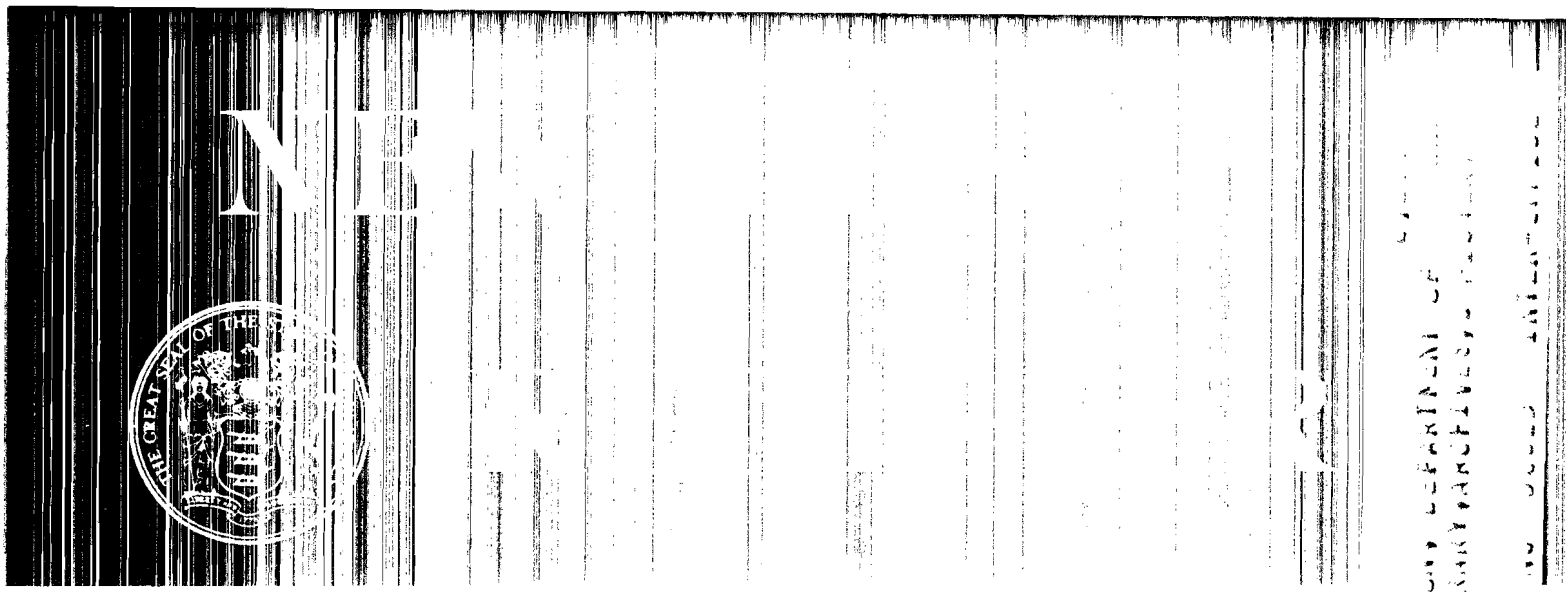

THE JOURNAL OF STATE AGENCY RULEMAKING

VOLUME 25 NUMBER 23

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(Includes adopted rules filed through November 10, 1993)

MOST RECENT UPDATE TO NEW JERSEY ADMINISTRATIVE CODE: SEPTEMBER 20, 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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EXECUTIVE ORDERS

(a)

OFFICE OF THE GOVERNOR
Governor Jim Florio
Executive Order No. 109(1993)
Task Force for the Review of the Farmland Assessment Program

Issued: October 25, 1993.
Effective: October 25, 1993.
Expiration: Indefinite.

WHEREAS, the New Jersey Farmland Assessment program was created by the voters through a constitutional amendment in 1963 to reduce the economic impact of local property taxes on farming activities in New Jersey; and

WHEREAS, the Legislature enacted the Farmland Assessment Act of 1964 to implement and administer this constitutional provision; and

WHEREAS, these actions were prompted by a concern that the economic viability of the farming community, especially family-owned and family-operated farms, could be threatened by rapidly rising property taxes; and

WHEREAS, agriculture is a unique industry that contributes income, employment, economic diversity and environmental benefits to improve the quality of life experienced by New Jersey citizens; and

WHEREAS, New Jersey farms rank in the top ten states nationally in production of cranberries, blueberries, peaches, tomatoes and nursery plants, and over eight thousand farms covering more than one million acres produce over 150 different JERSEY FRESH products, which are distributed to feed millions throughout the nation and worldwide; and

WHEREAS, the Farmland Assessment program has enormous importance for the State's economy and environment, since approximately one-quarter of all land in New Jersey has qualified for property tax treatment pursuant to this program; and

WHEREAS, the Farmland Assessment program has provided an economic benefit to landowners of land on which farming occurs, and provided financial incentives for the continuation of these farming operations; and

WHEREAS, the Farmland Assessment program, by exempting qualifying farmlands from normal property taxation rates, has altered the property tax base of New Jersey municipalities, while at the same time limiting the growth in demand for certain municipal services and infrastructure that could be triggered by increased development; and

WHEREAS, almost thirty years have passed since the establishment of the Farmland Assessment program, a periodic review is needed to quantify and evaluate the uniformity, consistency and effectiveness in the interpretation, application and administration of Farmland Assessment requirements and procedures, and the overall impacts of this program on the State's economy and environment;

NOW, THEREFORE, I, JIM 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. The creation of the Task Force for the Review of the Farmland Assessment Program (hereinafter "Task Force") to conduct a comprehensive review of the Farmland Assessment program. This Task Force shall perform the following tasks:

a. The Task Force shall gather financial and technical information on the Farmland Assessment program and quantify and analyze the effectiveness and impacts of the program. In particular, the Task Force shall study the following program impacts:

i. the economic impact in strengthening the viability and continued existence of the farming community in New Jersey, including shifts in farmland ownership patterns and farming practices;

ii. the financial impact of the program on the property tax base of New Jersey municipalities, including an analysis of both the program's effect on property tax revenues available to municipalities and the demand for municipal services and infrastructure that would otherwise result from more intensive development;

b. The Task Force shall identify possible options for revising requirements to qualify land for farmland assessment, and analyze the effectiveness and impacts of each option;

c. The Task Force shall evaluate the State, county and municipal administration of the program, and identify possible options for improving the administration of the program.

2. The Task Force, which shall be chaired by an individual selected by the Governor from among the public members, shall be constituted as follows:

a. the Secretary of the New Jersey Department of Agriculture, or his designee;

b. the Treasurer of the State of New Jersey, or his designee;

c. the Commissioner of the Department of Environmental Protection and Energy, or her designee;

d. the President of the New Jersey State Board of Agriculture, or the Vice President, if so designated by the President;

e. the President of the New Jersey Farm Bureau;

f. ten public members to be appointed by the Governor who shall broadly reflect an experience and interest in agriculture, taxation, environment, county and local government, economic development and such other areas which are appropriate to the work of the Task Force, provided, however, that at least five such members shall be individuals currently owning and/or operating a New Jersey farm.

3. The Department of Agriculture, the Treasury Department, the Department of Environmental Protection and Energy, the New Jersey Agricultural Experiment Station, and all other State departments and agencies are hereby directed to cooperate with the Task Force and to furnish it with any information, staffing support or other assistance as necessary to accomplish the purposes of this Order.

4. The Task Force shall provide a report of its analysis to the Governor no later than May 1, 1994.

5. This Order shall take effect immediately.

(b)

OFFICE OF THE GOVERNOR
Governor Jim Florio
Executive Order No. 110(1993)
New Jersey Division of Vocational Rehabilitation Services Rehabilitation Advisory Council

Issued: October 29, 1993.
Effective: October 29, 1993.
Expiration: Indefinite.

WHEREAS, pursuant to the Rehabilitation Act of 1973, as amended by the Rehabilitation Act Amendments of 1992, enacted on October 29, 1992, and known as Public Law 102-569, the State of New Jersey is mandated to establish a State Rehabilitation Advisory Council composed of concerned citizens with disabilities, and is to be consumer-controlled so as to provide individuals with disabilities a stronger and more substantive role in shaping the programs and services established to support their employment goals and aspirations; and

WHEREAS, the Advisory Council must be in place in order for a state to receive Federal funds under Title I of the Act for the vocational rehabilitation and the client assistance programs under Part B, and the innovation and expansion program under Part C; and

WHEREAS, pursuant to the Rehabilitation Act of 1973, as amended by the Rehabilitation Act Amendments of 1992 enacted on October 29, 1992, and known as Public Law 102-569, the State of New Jersey shall name and establish the New Jersey Division of Vocational Rehabilitation Services Rehabilitation Advisory Council to carry out the duties set forth in Title I, Part A, Section 101(a)(36) and 105 of Public Law 102-569;

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. The New Jersey Advisory Board for Vocational Rehabilitation of the Division of Vocational Rehabilitation Services shall hereby be reconstituted and henceforth be known as the New Jersey Division of Vocational Rehabilitation Services Rehabilitation Advisory Council, hereinafter referred to as the "Council." The Council shall be established as a separate entity, apart from any State agency, and this Council shall responsibly carry out the duties set forth in Title I, Part A, sections

101(a)(36) and 105 of Public Law 102-569. The Council shall be established as a separate entity in, but not of, the New Jersey Department of Labor.

2. The New Jersey Division of Vocational Rehabilitation Services in the Department of Labor, hereinafter referred to as the "Division," shall be the designated state unit in New Jersey providing vocational rehabilitation services to persons with disabilities, with the exception of those who are blind and visually impaired, pursuant to Title I section 105(a)(2) of Rehabilitation Act Amendments of 1992.

3. The Council shall consist of no more than 23 members appointed by the Governor. The composition shall reflect a majority of qualified persons with disabilities representing the interest of New Jersey's cross-disabilities population. All members, including those from the business, disability, and advocacy communities, shall have knowledge of vocational rehabilitation concepts, programs, policies, and services.

a. The Council shall consist of:

(1) A majority of individuals with disabilities, the majority are not to be employed by the designated state unit;

(2) A least one representative of the Statewide Independent Living Council;

(3) At least one representative of a parent training and information center established pursuant to section 631(c)(9) of the Individuals with Disabilities Act (20 U.S.C. 1431(c)(9));

(4) At least one representative of the Client Assistance Program;

(5) Vocational rehabilitation counselors with knowledge of and experience with vocational rehabilitation programs, who, if employed by the State agency, shall serve as *ex officio,* nonvoting members of the Council;

(6) At least one representative of community rehabilitation program service providers;

(7) Four representatives of business, industry, and labor;

(8) Representatives of disability advocacy groups representing a cross section of individuals with disabilities, and parents, family members, guardians, advocates, or authorized representatives of individuals with disabilities who have difficulty in or are unable to represent themselves due to their disabilities;

(9) Current or former applicants for, or recipients of Division vocational rehabilitation services; and

(10) The Director of the Division is to be an *ex officio,* nonvoting member of the Council.

4. The Council member shall serve for a term of three (3) years, except for those first appointed, five shall serve for a term of one (1) year, five shall serve for a term of two (2) years, and the remainder shall serve for a term of three (3) years. Council vacancies from among the members shall be filled by appointment by the Governor or his designee for the remainder of the unexpired term.

a. Each member of the Council is to serve for a term of not more than three (3) years, except that:

b. A member appointed to fill a vacancy occurring prior to the expiration of a member's term is to be appointed for the remainder of the term;

c. The terms of service of the member initially appointed are to be set by the appointing authority so that expiration of terms will occur on a staggered basis;

d. No member of the Council can serve more than two consecutive full terms;

e. Any vacancy occurring in the membership of the Council is to be filled in the same manner as an original appointment, and the vacancy is not to affect the power of the remaining members to execute the duties of the Council (Section 105(b)(6) and (7) of the Act); and

f. The Council shall designate the Chairperson of the Council.

5. The overall function of the Council is advisory in nature and specific functions identified in the Amendments include:

a. Review, analyze, and advise the Division regarding the performance of its responsibilities under Title I, particularly responsibilities relating to:

(1) Eligibility (including order of selection for services);

(2) Extent, scope, and effectiveness of services provided; and

(3) Functions performed by the Division that affect the ability of individuals with disabilities in achieving rehabilitation goals and objectives under Title I;

b. Advise the Division, and, at the discretion of the Division, assist in the preparation of applications, the State plan for vocational rehabilitation services, the strategic plan, and amendments to the plans; reports, needs assessments, and evaluations required by Title I;

c. Conduct, to the extent feasible, a review and analysis of the effectiveness of and consumer satisfaction with:

(1) The performance of functions of the Division and other public and private entities responsible for performing functions for individuals with disabilities; and

(2) Vocational rehabilitation services provided or paid for from funds made available under the Act or through other public or private entities responsible for providing vocational rehabilitation services to individuals with disabilities;

d. Prepare and submit an annual report to the Governor, the Commissioner of the Department of Labor, and Director of the Division on the status of vocational rehabilitation programs operated within the State, and make the report available to the public;

e. Coordinate with other councils within the State, including the Statewide Independent Living Council, the advisory panel established under section 613(a)(12) of the Individuals with Disabilities Education Act, the State Developmental Disabilities Planning Council, and the State Mental Health Planning Council;

f. Advise the Division and provide for coordination and the establishment of working relationships between the Division and the Statewide Independent Living Council and centers for independent living within the State; and

g. Perform such other functions consistent with the purpose of Title I, as the Council determines to be appropriate and that are comparable to the other functions performed by the Council (Section 105(c) of the Act).

6. The Council, in performing its duties, may consult with existing agencies in planning, coordination, and delivery of vocational rehabilitation services to persons with disabilities and their families at the State, county, and local levels.

7. No member of the Council is to vote on any matter that would provide direct financial benefit to the member or otherwise give the appearance of a conflict of interest under State law (Section 105(e) of the Act).

8. The Council, consistent with State law, is to supervise and evaluate staff and other personnel as may be necessary to carry out its functions. While assisting the Council in carrying out its responsibilities, staff and other personnel are not to be assigned duties by the Division or any other agency or office of the State that would create a conflict of interest.

9. The Council is to convene at least four meetings a year in such places as it determines to be necessary to conduct Council business. It may also convene forums or hearings as it determines appropriate and necessary to carryout its duties.

10. Public meetings are to be announced and open and accessible to the general public, unless there is a valid reason for an executive session (Section 105(f) of the Act).

11. This Order shall take effect immediately.

RULE PROPOSALS

ADMINISTRATIVE LAW

(a)

OFFICE OF ADMINISTRATIVE LAW

Special Hearing Rules
Division of Consumer Affairs
Lemon Law Hearings
Proposed Readoption with Amendment: N.J.A.C. 1:13A

Authorized By: Jaynee LaVecchia, Director, Office of Administrative Law.
Authority: N.J.S.A. 52:14F-5(e), (f) and (g).
Proposal Number: PRN 1993-627.

Submit written comments by January 5, 1994 to:
Jeff S. Masin, Deputy Director
Office of Administrative Law
Quakerbridge Plaza, Bldg. 9, CN 049
Quakerbridge Road
Trenton, New Jersey 08625

The agency proposal follows:

Summary

Pursuant to Executive Order No. 66(1978), the special rules for lemon law hearings, N.J.A.C. 1:13A, expire on April 3, 1994.

The lemon law, N.J.S.A. 56:12-29, establishes a dispute resolution system for aggrieved purchasers or lessees of automotive "lemons." These rules establish a summary hearing process for cases arising under that law. These rules must be read in conjunction with the Division of Consumer Affairs' rules on dispute resolution, N.J.A.C. 13:45A-26.1 through 26.17. Aspects of the hearing which are not covered by these special rules are controlled by the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

These rules track the provisions of the lemon law and implement the goal of that Act to provide consumers with a prompt and summary hearing. The Office of Administrative Law has reviewed these rules and has determined them to be necessary, reasonable, and adequate for the purpose for which they were originally promulgated.

The case must be transmitted to the OAL immediately upon acceptance by the Division without any settlement attempts by that agency. Upon acceptance of a complaint, a summary hearing date will be scheduled within 20 days unless the consumer agrees to a later date.

Procedures have been tailored to this statutory requirement for a prompt hearing date. Discovery is limited to the consumer's application, the required attachments and the manufacturer's response which should provide adequate information about the allegations of each party. Prehearing conferences will not be scheduled. Other than adjournment motions with the consumer's consent, motions are not permitted prior to the hearing. Posthearing submissions are not permitted except for good cause and shall not, in any case, extend the deadline for issuing an initial decision.

The lemon law authorizes the OAL to issue subpoenas in these cases. Subpoenas may be signed by *pro se* parties, attorneys and non-lawyer representatives, in addition to the clerk or a judge.

Pursuant to the statute, a prevailing consumer may be awarded attorney's fees and costs; therefore, the consumer must be prepared to present proofs of those costs at the hearing.

These rules recently have been amended several times. As initially adopted, the rules prohibited the filing of exceptions and cross-exceptions. This prohibition was imposed because of the extremely brief time for issuance of a final agency decision, ten days. However, parties attempted to submit exceptions regardless of the rule and it was the experience of the Division that these submissions often contained useful information. Therefore, the rule was amended to permit the filing of exceptions, but to require that these exceptions be filed promptly, no later than eight days after mailing of the initial decision, and limiting the exceptions to three pages in length.

The rules were also amended to conform to statutory changes which lengthen the time for issuance of initial and final decisions from 15 to 20 days and from 10 to 15 days respectively.

The sole proposed amendment to this readoption is found at N.J.A.C. 1:13A-11.1(a), which provides for the issuance of subpoenas. The rule currently states that subpoenas can compel attendance of a person or production of books, documents or other objects at a hearing or a deposition. Since discovery is not permitted in lemon law cases, this language is inaccurate and misleading. See N.J.A.C. 1:13A-10.1. Therefore, OAL proposes to delete the language which permits issuance of a subpoena for a deposition.

Social Impact

The rules are based upon the process created by the lemon law, N.J.S.A. 56:12-29, and have provided consumers with an avenue for rapid resolution of their complaints by creating a prompt and efficient hearing process. Readoption of these rules will ensure continuation of that process.

Economic Impact

The rules provide a straightforward process for the resolution of disputes between consumers and manufacturers and will continue to provide the parties with a low cost alternative to more lengthy and expensive proceedings.

Regulatory Flexibility Analysis

While consumers, as parties to lemon law hearings, may be small businesses, as that term is defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., these rules essentially require only that a consumer prove his or her case. If they prevail, consumers may seek recoupment of their hearing preparation costs, and any party may file exceptions to an initial decision. While a party may retain legal representation, such is not required. As the lemon law dispute resolution process is designed to benefit consumers, and their burden of proof is a fundamental element of fairness in that process, no lesser requirements or exceptions can be provided based on a consumer's status as a small business.

Full text of the readoption may be found in the New Jersey Administrative Code at N.J.A.C. 1:13A.

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

1:13A-11.1 Subpoenas

(a) Subpoenas may be issued by the Clerk of the OAL or a judge or *pro se* parties, attorneys-at-law or non-lawyer representatives, if any, in the name of the Clerk to compel the attendance of a person to testify or to produce books, papers, documents or other objects at a hearing [or a deposition].

(b) (No change.)

AGRICULTURE

(b)

DIVISION OF ANIMAL HEALTH
Disease Control Program
Proposed Readoption: N.J.A.C. 2:2

Authorized By: Arthur R. Brown, Jr., Secretary; and State Board of Agriculture.
Authority: N.J.S.A. 4:5-1 et seq.
Proposal Number: PRN 1993-643.

Submit comments by January 5, 1994 to:
Ernest W. Zirkle, DVM
Director, Division of Animal Health
N.J. Department of Agriculture
CN 330
Trenton, New Jersey 08625
Telephone: (609) 292-3965

The agency proposal follows:

Summary

N.J.A.C. 2:2, Disease Control Program, which expires on January 17, 1994, was internally reviewed in August and September of 1993 in compliance with Executive Order No. 66(1978) and found to be necessary, reasonable and adequate, efficient, understandable and responsive to the purpose that it was originally promulgated. The readoption of the first eight subchapters is necessary because they describe various segments of disease control for New Jersey's livestock. Subchapters 9 and 10 are to remain in a reserved status.

Subchapter 1 enumerates those reportable diseases designated as a particular and dangerous menace to animal health in the State of New Jersey; provides for declaring epidemics of emergent proportion; and provides for the indemnification of livestock ordered sent to slaughter to prevent the spread of disease.

Subchapter 2 deals with the control and eradication of brucellosis in cattle by establising requirements for the vaccination, testing, identification, and quarantine of cattle, and disposition and indemnification of brucellosis reactors. The disease is not only important to the economy of New Jersey's cattle industry, but also protection of public health.

Subchapter 3 contains general requirements relative to the control and eradication of tuberculosis in cattle by establising requirements for testing, identification and quarantine of cattle and disposition and indemnification of cattle slaughtered to prevent the spread of disease. Tuberculosis is also a major economic concern in the bovine industry and is transmissible to humans.

Subchapter 4 contains requirements relative to the control of disease in swine. It establishes requirements for sheltering and feeding swine and the identification, quarantine, disposition and indemnification of swine infected with hog cholera.

Subchapter 5 establishes requirements to conduct a bovine leukosis program for the eradication of the leukemia virus in cattle.

Subchapter 6 adopts and incorporates by reference the rules and regulations of Title 9 CFR 85.1-85.13 APHIS, USDA for the control of pseudorabies virus in swine. The subchapter also explains how to obtain copies of the rules.

Subchapter 7 contains general requirements for the control of disease in poultry, to include testing, reporting, quarantine and disposition of poultry infected with pullorum-typhoid.

Subchapter 8 regulates the activities of cattle, sheep and swine dealers by establishing requirements for recordkeeping.

Subchapters 9 and 10 are reserved.

Social Impact

The prevention and control of disease by the regulation of programs necessary to prevent, and in the event it does occur to eliminate, such disease from New Jersey's livestock population, is a key element to the viability of animal agriculture. The rules set requirements for the socially beneficial programs that prevent the introduction of diseases which may be harmful to the health of the animal husbandry industry and to humans.

The maintenance of rules to protect New Jersey's livestock from infectious and contagious diseases not only affects livestock owners and producers, but also prevents the spread of these diseases to humans.

Since these rules are proposed for readoption, without amendments, there should be no negative impact or reaction.

Economic Impact

The burden of these rules falls upon the farmer, consumer and the intermediaries between the two. Compliance imposes minimal costs to farmers and dealers as a result of processing paperwork and treating any diseases found. However, even these costs are outweighed by the safety of the products produced, the protection of human health and a higher economic return from the product as a result of compliance with the rules. In general, a larger and healthier supply of animals get to market, command a better price, and the consumer benefits by receiving a safe and nutritious food product.

Regulatory Flexibility Analysis

While most farmers are small businesses as that term is defined by the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., the rules proposed for readoption do not impose any new or increased recordkeeping and/or other compliance requirements beyond those already mandated by the authorizing statutes.

Without the promulgation of these rules, New Jersey livestock farmers would not be permitted to participate in interstate and international commerce. In addition, these rules are established to control the spread of disease and protect the public health, welfare and safety; therefore, no varying standards or requirements based on business size are offered. The New Jersey Department of Agriculture has carefully attempted to balance the need for disease control with the impact on the citizen.

Full text of the proposed readoption may be found in the New Jersey Administrative Code at N.J.A.C. 2:2.

COMMUNITY AFFAIRS

(a)

DIVISION OF HOUSING AND DEVELOPMENT

Uniform Construction Code
Industrialized/Modular Buildings

Proposed Amendments: N.J.A.C. 5:23-2.22, 4.18, 4.20, 4.26, and 4A.1
Proposed Repeals: N.J.A.C. 5:23-4.22, 4.29, 4.31, 4.39, and 4A.13 through 4A.27
Proposed New Rules: N.J.A.C. 5:23-4B and 4C
Proposed Repeals and New Rules: N.J.A.C. 5:23-4A.2 through 4A.5, and 4A.7 through 4A.12

Authorized By: Stephanie R. Bush, Commissioner, Department of Community Affairs.

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

Proposal Number: PRN 1993-634.

Submit comments by January 5, 1994 to:

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The agency proposal follows:

Summary

Pursuant to the "Interstate Compact on Industrialized/Modular Buildings" (adopted in New Jersey pursuant to P.L. 1991, c.457), the Department is revising the State Uniform Construction Code (UCC) to reflect the implementation of the new administrative procedures adopted by the Industrialized Buildings Commission (IBC), the agency created by the participating states to administer the compact. Currently, the participating states are New Jersey, Rhode Island and Minnesota; discussions underway as well with other states that have indicated a possible interest in joining the compact.

The IBC adopted Model Rules and Regulations and Uniform Administrative Procedures on July 9, 1993. The member states must then take the necessary measures to adopt these Model Rules and Regulations. For New Jersey, this will require the revision of various subchapters and sections of the UCC. The Department has used this opportunity to review both the code requirements applicable both to the Industrialized Building Program and the Manufactured Housing Program and has proposed to revise N.J.A.C. 5:23-4A for the IBC implementation and to create a new N.J.A.C. 5:23-4B for manufactured housing and manufactured home add-on units which are not part of the IBC program but require a label before they can be sited in New Jersey.

The revision of N.J.A.C. 5:23-4A will allow industrialized buildings to be built to various model codes that are recognized as equivalent to those adopted as subcodes of the Uniform Construction Code. This is necessary because these codes are used in other states that are, or may become, members of the compact. Minor changes include requiring that labels contain data on thermal transmittance values and date of manufacture, in addition to information already required, and requiring four copies of all documents being submitted instead of the six copies now required. Otherwise, there is no substantial difference between current rules and the revised subchapter.

The new subchapters at N.J.A.C. 5:23-4B and N.J.A.C. 5:23-4C are essentially recodifications of existing requirements found at N.J.A.C. 5:23-4.22, 4.26, 4.29 and 4.31 and at N.J.A.C. 5:23-4.29, respectively. There is a minor change providing that final hearing decisions are to

be issued by the Commissioner. The existing monitoring inspection fee of $19.00 required under H.U.D. rules is continued.

The Department has also proposed amendments intended to make clear the proper fees for on-site work subject to the normal UCC construction process by limiting the fee calculation to the costs of on-site construction rather than a combination of volume and cost calculations.

The rules concerning State enforcement of Federal manufactured home standards, currently N.J.A.C. 5:23-4.39, are proposed to be recodified as a new N.J.A.C. 5:23-4C.

Social Impact

Housing affordability is an issue that affects all New Jersey residents. The IBC program is designed to offer the producers, sellers and consumers of industrialized/modular construction, which is a growing segment of the nation's affordable housing and commercial building stock, a uniform administrative process under which units can be manufactured, shipped, and erected in a cost-effective manner.

The regulation of industrialized/modular buildings currently varies from state to state and from locality to locality. This creates confusion and burdens both building officials and the industrialized/modular building industry. Consequently, the cost of these units increases unnecessarily due to the need to meet the varying regulations, including both manufacturing and on-site requirements. The IBC program is specifically designed to establish a uniform set of regulations for the industry to meet and thus to allow cost-savings to be implemented at the manufacturing level.

The continued manufacture of industrialized/modular buildings to appropriate codes will assure the presence of affordable units for sale in New Jersey, while also assuring the quality of the units that are erected here. Like the UCC itself, the IBC program requires uniformity in code application while allowing new technologies to be implemented.

Economic Impact

The uniform regulation of the production of industrialized buildings by manufacturers in the compacting states will result in a reduction in the costs of manufacture since the member states have agreed to allow the siting of units in their states without the imposition of any regulatory requirements other than those outlined in the Model Rules and Regulations. Thus, a manufacturer can take advantage of economies of scale, with fewer special requirements to meet, and should realize savings in both design and manufacturing costs.

The label fee as proposed by the IBC is $48.00 per module or $24.00 per building component, while the current New Jersey fees are $140.00 per unit and $70.00 per component. Therefore, for the average two module unit, there will be a fee savings of $44.00. A savings of $46.00 will be realized for each component installed in this State.

N.J.A.C. 5:23-4B carries over an existing charge of $70.00 for each manufactured home add-on unit, while N.J.A.C. 5:23-4C retains the existing $19.00 monitoring inspection fee required by H.U.D. rules.

Regulatory Flexibility Analysis

By making the code requirements for industrialized construction the same in New Jersey and in other states participating in the compact, the compact and these implementing rules will make it easier for "small businesses," which must, by statutory definition (see N.J.S.A. 52:14B-16 et seq.), be New Jersey-based, to produce industrialized buildings for a multi-state market. Also deriving benefit from the compact and implementing rules will be those "small businesses" that are engaged in erection and installation of industrialized buildings and may now be able to obtain units at a lower cost because of savings that the manufacturers will be able to pass along.

The proposed amendments, repeals and new rules would not impose any additional compliance requirements upon these "small businesses." New Jersey manufacturers of industrialized buildings would be able to ship their products into other participating states without having to comply with additional requirements in those states. The amount of money saved by elimination of this paperwork will depend on the volume of shipments of units between participating states, but it is likely to be substantial, and to become more substantial as more states join the compact. No additional professional services will be required as a result of these amendments and new rules. There is no basis for any differential requirements for small businesses because all producers in participating states are entitled to benefit from improved procedures and no lesser degree of code compliance can be accepted from "small businesses" because public health, safety and welfare requirements are the same regardless of who constructs or markets the buildings.

Full text of the proposed repeals may be found in the New Jersey Administrative Code at N.J.A.C. 5:23-4.22, 4.29, 4.31, 4.39, 4A.2, 4A.5, and 4A.7 through 4A.27.

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

5:23-2.22 Premanufactured [systems] **construction**

(a) Premanufactured construction [approved by the department and bearing the department's seal, and an inspection approval label issued by an in-plant inspection agency approved by the department, pursuant to the regulations,] **certified in accordance with N.J.A.C. 5:23-4A or 4B, and carrying an appropriate label,** shall be accepted as conforming to the requirements of the regulations to the extent provided for by the **particular** label for purposes of local construction inspection approval.

1. Prior to accepting the unit, the appropriate subcode official [shall] **may** require the performance of nondestructive tests [required by the regulations and shall inspect the unit for visible signs of damage].

2. In the case of visible signs of damage **and/or any visible code violations,** the construction official shall [withhold approval of the assembly and] **consider the seriousness of the nonconformance or damage and accordingly issue a Temporary Certificate of Occupancy or Certificate of Occupancy or deny such Certificate. If a Temporary Certificate is issued or a Certificate is denied, the construction official** shall request that the label-issuing agency reaffirm in writing that the assembly still conforms to the regulations **and notify the Department in writing.**

3. No inspection requiring disassembly, damage to, or destruction of certified premanufactured construction shall be conducted.

(b) (No change.)

5:23-4.18 Standards for municipal fees

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

(c) Basic construction fee: The basic construction fee shall be computed on the basis of the volume of the building, or in the case of alterations, the estimate construction cost, and the number and type of plumbing, electrical and fire protection fixtures or devices as herein provided.

1. Volume or cost: Fees for new construction or alterations shall be as follows:

i. Fees for renovations, alterations, reroofing [and], repairs, and [for the installation and foundation system of] **site construction associated with** premanufactured construction and the external utility connections for premanufactured construction, shall be based upon the estimated cost of the work. The fee shall be computed as a unit rate per $1,000 of estimated cost.

ii.-vii. (No change.)

2.-5. (No change.)

(d)-(k) (No change.)

5:23-4.20 Department fees

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

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

1. (No change.)

2. The basic construction fee shall be the sum of the parts computed on the basis of the volume or cost of construction, the number of plumbing fixtures and pieces of equipment, the number of electrical fixtures and devices and the number of sprinklers, standpipes and detectors (smoke and heat) at the unit rates provided herein plus any special fees. The minimum fee for a basic construction permit covering any or all of building, plumbing, electrical, or fire protection work shall be $46.00.

i. Building volume or cost: The fees for new construction or alteration are as follows:

(1) (No change.)

(2) Fees for renovations, alterations and repairs **or site construction associated with premanufactured construction and the external utility connection for premanufactured construction** shall be based upon the estimated cost of work. The fee shall be in the amount of $24.00 per $1,000. From $50,001 to and including $100,000, the

additional fee shall be in the amount of $18.00 per $1,000 of estimated cost above $50,000. Above $100,000, the additional fee shall be in the amount of $15.00 per $1,000 of estimated cost above $100,000. For the purpose of determining estimated cost, the applicant shall submit to the Department such cost data as may be available produced by the architect or engineer of record, or by a recognized estimating firm, or by the contractor. A bona fide contractor's bid, if available, shall be submitted. The Department shall make the final decision regarding estimated cost.

(3)-(4) (No change.)

ii.-iv. (No change.)

3.-9. (No change.)

5:23-4.26 Certification of [manufactured homes,] building elements [and manufactured home add-on units]

(a) [Manufactured homes, building] **Building** elements [and manufactured home add-on units] shall be certified in accordance with the following provisions:

[1. Manufactured Home (formerly called mobile home): Single family dwelling built in accordance with the Federal Manufactured Home Construction and Safety Standards and bearing a Federal insignia of certification.]

[2.]**1.** Building elements, such as trusses, fire walls, fire separation walls, wall panels, pre-stressed/prefabricated floor or roof panels and pre-engineered structural frames, built in accordance with the New Jersey Uniform Construction Code, may be approved by any of the following options:

i. Approval for both design and construction by a nationally recognized laboratory **or a product certification agency.** The local municipal subcode official has the authority to accept such approvals based on the evidence, test and/or documentation presented to him or her.

ii. Approval for both design and construction by a professional engineer licensed either in the State of New Jersey or in the state of manufacture. The local municipal subcode official has the authority to accept such approvals based on the evidence, of test and/or documentation presented to him or her.

[iii. Approval for both design and construction by a New Jersey inplant inspection agency. The evidence of such approval shall be in the form of premanufactured component insignia of certification attached to the component(s) as provided in N.J.A.C. 5:23-4A.

3. Manufactured (Mobile) Home Add-on Units: Built in accordance with the New Jersey Uniform Construction Code; certified by an approved inplant inspection agency and bearing mobile home add-on units insignia of certification as provided in N.J.A.C. 5:23-4.31(f)5.]

5:23-4A.1 Purpose

(a) [The purposes of this subchapter are to establish uniformity in compliance requirements, to promote the use of new technologies, techniques and materials, and to increase the availability of safe, decent and affordable housing and other types of buildings.] **The purpose of this subchapter is to implement P.L. 1991, c. 457, which made New Jersey a party to the Interstate Compact on Industrialized/Modular Buildings. The adoption of this subchapter, which is identical in content to implementing rules adopted by the other states participating in the compact, will result in uniformity in state compliance requirements, thereby promoting the use of new technologies, techniques, and materials and increasing the availability of safe, decent and affordable construction, both for housing and non-housing uses.**

(b) (No change.)

5:23-4A.2 Findings; functions of the Commission

(a) The Department, as the administrative agency for the State of New Jersey under the Interstate Compact on Industrialized/Modular Buildings, finds that:

1. Industrialized/modular buildings are constructed in factories in various states and are a growing segment of the nation's affordable housing and commercial building stock.

2. The regulation of industrialized/modular buildings varies from state to state and from locality to locality. This creates confusion and burdens state and local building officials and the industrialized/modular buildings industry.

3. Regulation by multiple jurisdictions imposes additional costs, which are ultimately borne by the owners and users of industrialized/modular buildings and which restrict market access and discourage the development and incorporation of new technologies.

(b) The Industrialized Buildings Commission shall:

1. Provide the states regulating the design and construction of industrialized/modular buildings and building components with a system for coordinating and uniformly administering their rules and regulations for such buildings, all in a manner that will assure mutual acceptance of industrialized/modular buildings and building components; and

2. Provide to Congress assurances that would preclude the need for a voluntary preemptive Federal regulatory system for industrialized/modular housing, as outlined in Section 572 of the Housing and Community Development Act of 1987, including development of model standards for industrialized/modular housing construction, such that design and performance will insure quality, durability and safety, will be in accordance with cost-effective energy conservation standards and will promote the lowest total construction and operating costs over the life of such housing.

5:23-4A.3 Scope

(a) This subchapter shall govern the design, manufacture, handling, storage, delivery, and installation of industrialized/modular buildings and building components intended for installation in this State. Industrialized/modular buildings or building components certified pursuant to this subchapter may be sold for, delivered to, or installed on, building sites located in the State. Industrialized/modular buildings that are not required to be labeled or comply with code approval under this chapter are exempt from the requirements of this subchapter.

(b) Industrialized/modular buildings or building components certified pursuant to this subchapter shall be deemed to comply with all requirements of this chapter.

(c) Except as otherwise specifically provided, this subchapter shall not apply to requirements concerning land use and zoning, building set-backs, side and rear yards, property lines and on-site development, construction and inspection; provided, however, that such requirements shall not be more stringent than those imposed on other types of buildings in the same zone or area.

5:23-4A.4 Definitions

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

"Act" means the State Uniform Construction Code Act, P.L. 1975, c.217, as supplemented by P.L. 1991, c.457 and the Interstate Compact on Industrialized/Modular Buildings ratified thereby.

"Approved" means approved by the Industrialized Buildings Commission, a participating state or a designated evaluation/inspection agency.

"Building component" means any subsystem, sub-assembly or other system of closed construction that is designed for use in, or as part of, a structure. "Building component" may include structural, electrical, mechanical, plumbing and fire protection systems and other systems affecting health and safety.

"Building system" means a method of constructing a type of industrialized/modular building or building component that is described by plans, specifications and other documentation that together establish a set of limits meeting the requirements of this subchapter for that type of industrialized/modular building or building component. This may include structural, electrical, mechanical, plumbing and fire protection systems and other systems affecting health and safety.

"Certification" means the process whereby participating states and local building inspection agencies are assured that elements of closed construction that it is not practical to inspect at the building site conform to the applicable codes.

"Certification label" means an approved insignia or seal evidencing certification in accordance with the Uniform Administrative Procedures of the Industrialized Buildings Commission.

"Closed construction" means any building, building component, assembly or system manufactured in such a manner that concealed parts or processes of manufacture cannot be inspected at the building site without disassembly, damage or destruction. This definition shall not include products, such as structural, electrical and plumbing fixtures and equipment that are tested, listed, labeled and certified by a nationally recognized testing laboratory.

"Code" means the codes, standards, specifications and requirements adopted pursuant to N.J.A.C. 5:23-4A.5.

"Commission" means the Industrialized Buildings Commission.

"Compliance assurance documents" means approved building system documents, an approved compliance assurance manual and approved on-site installation instructions.

"Compliance assurance program" means the policies and procedures that assure that industrialized/modular buildings and building components, including their manufacture, storage, delivery, assembly, handling and installation, conform with this subchapter and with the Uniform Administrative Procedures.

"Designated" means selected by the Commission to perform one or more of the inspection and/or evaluation functions described under the Uniform Administrative Procedures.

"Evaluation agency" means a designated person or organization, private or public, determined by the Commission to be qualified by reason of facilities, personnel, experience and demonstrated reliability and independence of judgment, to investigate and evaluate industrialized/modular buildings, building components, building systems or compliance assurance programs.

"Independence of judgment" means not being affiliated with, or influenced or controlled by, building manufacturers or producers, suppliers or vendors of products or equipment used in industrialized/modular buildings and building components, in any manner that is likely to affect capacity to render reports and findings objectively and without bias.

"Industrialized/modular building" means any building of closed construction, including, but not limited to, modular housing that is factory-built single-family and multi-family housing (including closed wall panelized housing) and other modular, nonresidential buildings. "Industrialized/modular building" does not include any structure subject to the requirements of the National Manufactured Home Construction and Safety Standards Act of 1974.

"Inspection agency" means a designated person or organization, private or public, that is determined by the Commission to be qualified by reason of facilities, personnel, experience and demonstrated reliability and independence of judgment, to monitor compliance assurance programs.

"Installation" means the process of affixing, or assembling and affixing, industrialized/modular building or building components on the building site.

"Interim reciprocal agreement" means a formal reciprocity agreement as defined in P.L. 1991, c.457, the statute ratifying the Interstate Compact on Industrialized/Modular Buildings.

"Module" means a closed wall structure or substantial part of a closed wall structure incorporating one or more rooms used as habitable, occupiable or mechanical/equipment space.

"Nonconformance" means the failure to adhere to the requirements of an approved building system or, where the building system is not specific, to the code.

"Participating state" means any compacting state or any noncompacting state acting under an interim reciprocal agreement.

5:23-4A.5 Standards

(a) Building systems shall comply with all applicable provisions of the State Uniform Construction Code.

(b) The Commissioner has determined that industrialized buildings and building components built to the following codes are consistent with the basic purposes of the State Uniform Construction Code Act and this chapter and that these codes are therefore acceptable, in lieu of the comparable subcodes adopted pursuant to this chapter, for industrialized/modular construction:

1. Building codes:
i. Uniform Building Code, ICBO, Whittier, CA;
ii. Standard Building Code, SBCCI, Birmingham, AL.
2. Plumbing codes:
i. Uniform Plumbing Code, IAPMO, Los Angeles, CA;
ii. National Plumbing Code, BOCA;
iii. Standard Plumbing Code, SBCCI.
3. Mechanical codes:
i. Uniform Mechanical Code, ICBO;
ii. Standard Mechanical Code, SBCCI;
iii. Standard Gas Code, SBCCI.
4. Energy codes:
i. Model Energy Code, CABO;
ii. Regulations of any participating state.
5. Barrier-free codes:
i. Americans With Disabilities Act regulations;
ii. National Building Code, BOCA—Article 31.

(c) Variations: The provisions of this subchapter are not intended to prevent the use of any technologies, techniques or materials not specifically prescribed by the codes, standards, specifications and requirements, provided any such alternative has been approved.

1. Applications for such variations shall be filed in writing with the evaluation agency. The application shall contain the current requirements of the codes, standards or specifications from which a variation is sought and a statement of how the proposed alternative would adequately protect the health, safety and welfare of both the occupants and the public.

2. The evaluation agency may approve any such alternative, provided that it determines that the proposed design is satisfactory and that the material, method or work offered is, for the purpose intended, consistent with the adopted codes and standards as to quality, strength, effectiveness, fire resistance, durability and safety. The evaluation agency shall require that sufficient evidence or proof be submitted to substantiate any claim that may be made regarding the use of any such alternative. The evaluation agency shall notify the applicant of the determination. If the application is denied, the notification shall state the reasons for the denial.

5:23-4A.7 Certification required

No person or agency shall deliver, sell, lease or install any industrialized/modular building or building component in the State unless such building or building component is certified in accordance with this subchapter.

5:23-4A.8 Product control and identification

(a) The following information shall be typewritten on a smudgeproof, permanent manufacturer's data plate located in the vicinity of the certification label:

1. The name and address of the manufacturer;
2. The serial (manufacturer's identification) number(s);
3. The manufacturer's plan approval designation (model number/name);
4. The certification label number(s);
5. The construction classification;
6. The occupancy classification (use group);
7. The seismic zone;
8. The wind velocity load;
9. The roof and floor live load;
10. The fire rating for exterior walls;
11. The thermal transmittance values;
12. The date of manufacture; and
13. The name and date of each code complied with.

(b) The manufacturer shall apply a serial number to each unit at the beginning of the production process. The serial number shall not be applied to a feature of the industrialized building or building component that is readily removable. The location of the serial number(s) shall be identified in the manufacturer's compliance assurance program.

5:23-4A.9 Compliance assurance documents

(a) The manufacturer shall not start production of any industrialized/modular building or building component unless the building systems documents, compliance assurance program and on-

site installation instructions for each such building or building component have been approved by an approved evaluation agency.

(b) The building systems documents shall consist of plans, specifications, calculations, test results and/or other documents that describe in detail the product and the manufacturing processes employed to produce industrialized/modular buildings or building components. The documents need only show details for equipment provided by the manufacturer. The documents shall be comprehensively indexed and shall treat the material listed below in detail. For the building systems to be evaluated, the following shall be provided:

1. General requirements:

i. All plans, specifications and other documentation shall be submitted in four copies.

ii. All documents submitted with the application shall be identified to indicate the manufacturer's name.

iii. A clear space shall be provided on all sheets of plans near the title box for the stamp(s) of approval.

iv. Manufacturers shall submit plans showing all elements relating to specific systems on properly identifiable sheets.

v. Structural connections and connections of systems, equipment and appliances to be performed on-site shall be identified, detailed and distinguished from work to be performed in the manufacturing facility.

vi. The method of interconnection between the industrialized/modular buildings or building components and the location of connections shall be indicated.

vii. Design calculations and/or test reports shall be submitted when required by the evaluation agency. The manufacturer shall cross-reference all designs to the appropriate calculations and/or test reports.

viii. Documents shall indicate the location of the certification label(s).

ix. Drawings shall be dated and identified and shall include an index that can be used to determine whether the package is complete.

x. Documents shall provide or show, as appropriate, occupancy or use, area, height and number of stories, type of construction and loads (wind, floor, snow and seismic).

2. Documents for industrialized/modular buildings or building components shall provide or show, as appropriate, the details listed in (b)2i through vi below. Only the minimum documentation necessary to demonstrate each alternative possible within the system shall be required.

i. General information as follows:

(1) Details and methods of installation of industrialized/modular buildings or building components on foundations and/or attachment to each other;

(2) Floor plan(s) and typical elevation(s);

(3) Cross-sections necessary to identify major building components;

(4) Details of flashing, such as at openings and at penetrations through roofs and subcomponent connections, including flashing material and gauge to be used;

(5) Attic access and attic ventilation, when required by the code;

(6) Exterior wall, roof and soffit material;

(7) Interior wall and ceiling material;

(8) Barrier-free provisions, if applicable;

(9) Sizes, locations and types of doors and windows;

(10) Suggested foundation plans, vents and underfloor access; and

(11) Details of any elevator or escalator system, including method of emergency operation, when provided.

ii. Fire safety details;

(1) Details of fire-rated assemblies, including reference listing or test report for all stairway enclosures, doors, walls, floors, ceiling partitions, columns, roofs and other enclosures;

(2) Means of egress, including details of aisles, exits, corridors, passageways and stairway enclosures;

(3) The flame spread and smoke-developed classification of interior materials;

(4) The location of required draftstops and firestops;

(5) Opening protectives in fire resistance-rated systems and assemblies; and

(6) Drawings of fire suppression systems, standpipe, fire alarms and detection systems, when required.

iii. Structural details, as follows:

(1) Calculations of structural members and/or test results, where appropriate, except where compliance can be demonstrated through code tables, accepted handbooks and listing documents;

(2) Details of structural elements, including framing details, spacing, size and connections;

(3) The grade, species and specifications of materials;

(4) Typical foundation plans, details and assumed design soil-bearing value;

(5) A schedule of roof, floor, wind and seismic loads upon which designing is based; and

(6) The column loads and column schedule.

iv. Mechanical details, as follows:

(1) The location of all equipment, appliances and baseboard radiation units;

(2) Energy conservation calculations;

(3) Input/output rating of all equipment and appliances, as appropriate;

(4) Duct and register locations, sizes and materials, as appropriate;

(5) The method of providing combustion air, if required;

(6) The method of providing ventilation air, if required;

(7) The method of providing make-up air, if required; and

(8) The location of flues, vents and chimneys and clearances from air intakes, combustible materials and other vents and flues.

v. Plumbing details as follows:

(1) A schematic drawing of the plumbing layout, including, but not limited to: size of piping, fittings, traps and vents, closeouts and valves and gas, water and drainage systems; and

(2) Plumbing materials and location of all equipment, appliances and safety controls to be used, including indication of the rating and capacity of equipment and appliances.

vi. Electrical details, as follows:

(1) Details of any service equipment provided by the manufacturer;

(2) The method of grounding service equipment;

(3) Load calculations for service and feeders;

(4) Sizes of branch circuit conductors;

(5) The size, rating and location of main disconnect and overcurrent protective devices;

(6) The location of outlets, junction boxes, fixtures and appliances; and

(7) A single line diagram of the entire electrical installation (not required for one and two family dwellings).

(c) The compliance assurance program is a system employed by the manufacturer to assure conformance with the approved building systems documents. The compliance assurance manual shall be comprehensively indexed and shall treat the material listed below in detail. The program shall consist of the following:

1. Organizational requirements, as follows:

i. The manufacturer's name and corporate office address and the address of each manufacturing facility shall be indicated in the compliance assurance manual;

ii. The compliance assurance manual shall have a table of contents with the evaluation agency's dated stamp of approval on the cover sheet and any revised pages;

iii. An organizational mechanism for implementing and maintaining the compliance assurance program and its functional relationship to other elements of the organizational structure of the manufacturer shall be indicated. This mechanism shall not be a part of the production department. Employees in charge of the compliance assurance program must be identified and their training and qualifications specified;

iv. There shall be a uniform system of monitoring and evaluation to ensure program effectiveness;

v. There shall be a serial numbering system of monitoring and evaluation to ensure program effectiveness;

vi. There shall be requirements for issuance, possession of, attachment of and accounting for all certification labels to assure that certification labels are attached only to buildings or building components manufactured pursuant to an approved building system and inspected pursuant to an approved compliance assurance program; and

vii. There shall be a system to document production changes in accordance with other provisions of this subchapter.

2. Materials control, as follows:

i. There shall be procedures for inspection of materials, supplies and other items at the point of receipt;

ii. There shall be a method of protection of materials, supplies and other items at the point of receipt; and

iii. Provision shall be made for disposal of rejected materials, supplies and other items.

3. Production control, as follows:

i. There shall be procedures for timely remedial and preventive measures to assure product quality;

ii. There shall be procedures for provision, maintenance and use of testing and inspection equipment to assure compliance with the approved building system;

iii. There shall be procedures regarding frequency of sampling inspections;

iv. Provision shall be made to establish necessary authority to reject defective work and carry out compliance assurance functions, notwithstanding any conflict with production department goals and needs;

v. There shall be a description of the manufacturing process showing the inspection and check points for mandatory inspection characteristics;

vi. Inspection and test procedures, including accept and reject criteria and mandatory inspection characteristics, shall be indicated; and

vii. Provision shall be made for disposition of rejects.

4. Finished product control, as follows:

i. Procedures for handling and storing all finished industrialized/modular buildings or building components at the manufacturing plant or other storage point shall be indicated;

ii. Procedures for packing, packaging and shipping operations and related inspections shall be indicated.

(d) The on-site installation instructions consist of specific installation procedures provided by the manufacturer that specify the materials and procedures required to install the building in conformance with the code and applicable standards. The specific installation procedure provided by the manufacturer shall include:

1. Connection details of industrialized/modular buildings or building components to the foundation;

2. Structural connections between industrialized/modular buildings and/or building components;

3. Connections required to complete the mechanical and/or utility systems;

4. Any special conditions affecting other structural elements.

5:23-4A.10 Uniform Administrative Procedures

(a) The Uniform Administrative Procedures of the Industrialized Building Commission, hereby incorporated by reference, shall constitute the procedures by which the Department shall assure itself and the Commission of the compliance of industrialized/modular building construction with the State Uniform Contruction Code, assess the adequacy of the building systems and verify and assure the competency and performance of evaluation and inspection agencies.

(b) Copies of the Uniform Administrative Procedures may be obtained from the Industrialized Building Commission, Suite 210, 505 Huntmar Park Drive, Herndon, VA 22070.

(c) The Department shall approve those evaluation or inspection agencies that the Commission designates as meeting the requirements of Part VI, Section 1 of the Uniform Administrative Procedures and that the Commission finds otherwise qualified to perform the functions delegated to it.

(d) The Department shall take such enforcement action against a manufacturer, inspection agency or evaluation agency as recommended by the Commission if, pursuant to the Uniform Administrative Procedures, the Commission determines that such manufacturer, inspection agency or evaluation agency has failed to fulfill its responsibilities under the Uniform Administrative Procedures.

(e) Any notice or order issued pursuant to this subchapter shall be in writing and shall be served upon the respondent party by certified mail, return receipt requested.

5:23-4A.11 Appeals

(a) Any person, firm or corporation acting on behalf of itself or a class adversely affected by any notice, order, ruling, decision or action of any evaluation and inspection agency or of the Commissioner may file an appeal.

(b) An application for a hearing must be filed within 20 business days of receipt by the applicant of the notice, order, decision or action complained of.

(c) The notice of appeal may be filed either in person or by mail and shall be addressed to the Hearing Coordinator, Division of Housing and Development, CN 802, Trenton, New Jersey 08625.

(d) The application shall be in writing and shall set forth the rule under which the appeal is being brought and the facts and circumstances of the case.

(e) The application shall include, where appropriate, the following information and documentation:

1. A copy of the notice, order, ruling, decision or action that is the subject of the appeal;

2. A copy of the building system, compliance assurance program or other document involved;

3. A description of the industrialized/modular building or building component affected;

4. A statement of the relief sought by the appellant; and

5. In the event of an appeal from an action or decision of an evaluation and inspection agency, the application shall contain a copy or, if that is unavailable, a written statement, of the prior decision or other action of the agency being appealed.

6. In the event of any appeal from an action or decision of the Commission where a hearing has already been conducted pursuant to the Uniform Administrative Procedures the application shall contain a copy of the prior decision or other action of the Commission on such appeal.

5:23-4A.12 Conduct of hearings

Hearings in contested cases shall be conducted by the Office of Administrative Law pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

SUBCHAPTER 4B. MANUFACTURED HOMES AND MANUFACTURED HOME ADD-ON UNITS NOT SUBJECT TO FEDERAL REGULATION

5:23-4B.1 Scope

(a) This subchapter shall govern the design, manufacture and installation of manufactured homes, and manufactured home add-on units, not subject to the Federal Manufactured Home Construction and Safety Standards, intended for installation in this State.

(b) Manufactured homes and manufactured home add-ons may be sold for, delivered to, or installed on building sites located in any jurisdiction of this State, if they have been approved and certified pursuant to this subchapter.

5:23-4B.2 Applicability

Approval of evaluation and inspection agencies, documents submission, review and approval, construction control, and inspection and certification of manufactured home add-on units shall, additionally be governed by the applicable requirements of the Federal Manufactured Home Construction and Safety Standards.

5:23-4B.3 Standards

(a) Manufactured (mobile) homes, as defined in N.J.A.C. 5:23-1.4, shall:

1. Comply with all the applicable provisions of the Federal Manufactured Home Construction and Safety Standards; and

2. Be approved or certified in accordance with the said Federal standards.

(b) Manufactured home add-on units shall:

1. Comply with the applicable provisions of N.J.A.C. 5:23; and

2. Be certified pursuant to N.J.A.C. 5:23-4B.7.

5:23-4B.4 Administration and enforcement

(a) The Department shall administer and enforce all provisions of this subchapter. The Department shall have responsibility for evaluating and approving building systems and for inspecting and certifying manufactured home add-on units for compliance with this subchapter. The Department shall allow the use in the State of New Jersey of manufactured home add-on units labeled and certified by approved evaluation and inspection agencies in accordance with this subchapter.

(b) The Department shall approve building systems for manufactured home add-on units and shall approve compliance assurance programs that comply with the requirements of this subchapter. The Department may delegate to approved evaluation agencies all or part of the evaluation of building systems and compliance assurance programs.

5:23-4B.5 Acceptability

(a) Manufactured (mobile) homes built in accordance with the Federal Manufactured Home Construction and Safety Standards and bearing a Federal label of certification shall be accepted as conforming to the requirements of this chapter for purposes of local construction inspection approval.

(b) Manufactured (mobile) home add-on units built in accordance with the new Jersey Uniform Construction Code and bearing a manufactured home add-on label of certification shall be accepted as conforming to the requirements of this chapter for the purpose of local construction inspection approval.

5:23-4B.6 Approvals of building systems and compliance assurance program

(a) Approved evaulation agencies shall be permitted to approve building systems and compliance assurance program for manufactured home add-on units.

(b) Building systems shall be evaluated and approved in accordance with this subchapter.

(c) Compliance assurance programs shall be evaluated and approved in accordance with this subchapter.

5:23-4B.7 Certification

(a) Manufactured home add-on units accepted by the Department or by an approved inspection agency as having been manufactured according to an approved building system and an approved compliance assurance program shall be certified by the Department as complying with the requirements of this chapter.

(b) The Department may delegate to evaluation and inspection agencies all or part of the inspection or the issuance or attachment of labels to manufactured home add-on units.

(c) A Department label of certification for each manufactured home add-on unit that is certified pursuant to this subchapter shall be permanently attached thereto in an accessible and visible location. The location of the label shall be indicated on the approved building system documentation.

1. An approved label for a manufactured home add-on unit shall bear the following information:

i. State of New Jersey—Department of Community Affairs—approved mobile home add-on unit—N.J.A.C. 5:23; and

ii. A label serial number.

5:23-4B.8 Labels; fees

(a) An approved evaluation and inspection agency requesting the Department to issue labels of certification for manufactured home add-on units shall pay a fee of $70.00 for each label.

(b) One manufactured home add-on unit label of certification shall be required for each manufactured home add-on unit.

5:23-4B.9 Requirements for submission of compliance assurance documents

(a) The manufacturer shall not start production of any manufactured home add-on unit unless the building systems documents, compliance assurance program and on-site installation instructions have been approved in accordance with this subchapter.

(b) The building systems documents consist of plans, specifications, calculations, test results and/or other documents that describe in detail the product and manufacturing processes employed to produce manufactured home add-on units. The documents need only show details for equipment provided by the manufacturer. The documents shall be comprehensively indexed and shall meet the requirements of this subchapter.

(c) The compliance assurance program is a system employed by the manufacturer to assure conformance with the approved building system documents. The compliance assurance manual shall be comprehensively indexed and shall meet the requirements of this subchapter.

(d) The on-site installation instructions shall consist of specific installation procedures provided by the manufacturer that specify the materials and procedures required to install the unit in conformance with the code and applicable standards. Specific installation procedures provided by the manufacturer shall include:

1. Details for connection of manufactured home add-on units to the foundation;

2. Structural connections as required;

3. Connections required to complete the mechanical and/or utility systems; and

4. Any special conditions affecting other structural elements.

5:23-4B.10 Appeals

(a) Any person, firm or corporation acting on behalf of itself or a class adversely affected by any notice, order, ruling, decision or action of any evaluation and inspection agency or of the Commissioner may file an appeal.

(b) An application for a hearing must be filed within 20 business days of receipt by the appellant of the notice, order, ruling, decision or action complained of.

(c) The notice of appeal may be filed either in person or by mail and shall be addressed to the Hearing Coordinator, Division of Housing and Development, CN 802, Trenton, New Jersey 08625.

(d) The application shall be in writing and shall set forth the rule under which the appeal is being brought and the facts and circumstances of the case.

(e) The application shall include, where appropriate, the following information and documentation:

1. A copy of the notice, order, ruling, decision or action that is the subject of the appeal;

2. A copy of the building system, compliance assurance program or other document involved;

3. A description of the industrialized/modular building or building component affected;

4. A statement of the relief sought by the appellant; and

5. In the event of an appeal from an action or decision of an evaluation and inspection agency, the application shall contain a copy or, if that is unavailable, a written statement, of the prior decision or other action of the agency being appealed.

5:23-4B.11 Conduct of hearings

Hearings in contested cases shall be conducted by the Office of Administrative Law pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

SUBCHAPTER 4C. ENFORCEMENT OF FEDERAL MANUFACTURED HOME STANDARDS

5:23-4C.1 Delegation of authority

The authority of the Department of Community Affairs as the State Administrative Agency to enforce Federal manufactured home

construction and safety standards is hereby delegated to the Bureau of Code Services (the "Bureau"), CN 816, Trenton, New Jersey 08625.

5:23-4C.2 Relation to Federal law

(a) This subchapter incorporates the Federal regulations found at 24 C.F.R. Sections 3282.152, 3282.153, 3282.309 and 3282.401 et seq. (Subpart I), including all subsequent amendments and supplements to these sections. These sections are hereby incorporated by reference.

(b) Every manufacturer who produces manufactured homes in this State shall comply with all applicable requirements of 24 C.F.R. Section 3282.401 et seq. (Subpart I).

(c) The Bureau shall monitor manufacturer compliance with the requirements of 24 C.F.R. Section 3282.401 et seq. (Subpart I) primarily by checking records required to be kept by manufacturers in the State pursuant to 24 C.F.R. Section 3282.404(b) at least once annually.

(d) Nothing in this chapter shall be read to conflict with any provision of the Federal Manufactured Housing Construction and Safety Standards Act of 1974 (P.L. 93-383) as amended or Federal regulations promulgated thereunder (42 U.S.C. Section 5401 et seq.). Whenever it shall appear that a provision of this chapter is in conflict with any Federal standard or requirement under the Federal Manufactured Housing Construction and Safety Standards Act, Federal law shall govern.

5:23-4C.3 Complaint procedure

(a) Complaints or other information concerning an imminent safety hazard or a failure to conform with applicable standards of any manufactured home manufactured, sold, leased, introduced, imported or delivered in this State may be made to the Bureau.

(b) When a consumer complaint or other information indicating the possible existence of an imminent safety hazard or a failure to conform to applicable standards is received by the Bureau, the Bureau shall forward the complaint or other information to the manufacturer of the manufactured home in question.

(c) When it appears from the complaint or other information that more than one manufactured home may be involved, the Bureau shall send a copy of the complaint or other information to the State Administrative Agency of the state where the manufactured home was manufactured or, if there is no such State Administrative Agency, to the Secretary of the United States Department of Housing and Urban Development (the "Secretary") and, when it appears that an imminent safety hazard or serious defect may be involved, simultaneously send a copy to the Secretary.

5:23-4C.4 Hearing and appeal procedures

(a) When the Bureau is the appropriate agency to hold a hearing for presentation of views as provided for at 24 C.F.R. Sections 3282.405 and 3282.407, the Bureau shall follow the procedures set forth in 24 C.F.R. Sections 3282.152 and 3282.153, with the Bureau acting as the Secretary would otherwise act under that section. Where 24 C.F.R. Section 3282.152 requires publication in the Federal Register, the Bureau shall provide equivalent notice throughout the State by publication in the New Jersey Register.

(b) Any person who is aggrieved by any determination issued by the Bureau pursuant to 24 C.F.R. Section 3282.407, or who is aggrieved by application of this subchapter, may request and shall be granted a hearing on the matter pursuant to the Administrative Procedure Act before the Office of Administrative Law.

1. Such person shall file a written petition requesting such hearing, which shall set forth a brief statement of the grounds therefor, with the Hearing Coordinator of the Division of Housing and Development, CN 802, Trenton, New Jersey 08625, within 15 days of receipt of the ruling, action, notice or order complained of.

2. The final decision in each such case shall be issued by the Commissioner.

3. Any determination of the Bureau that is not appealed to a hearing before the Office of Administrative Law shall be considered the final determination of the Bureau and of the Department of Community Affairs upon the expiration of the 15 day period for submission of a hearing request.

4. When a final determination by the Bureau and the Department of Community Affairs has become effective, or when notice has been given to a manufacturer of the final decision of the Commissioner, that a defect or noncompliance exists, the manufacturer may, within 10 days of the effective date of such final determination or receipt of notice of such final decision, appeal to the Secretary.

(c) Any party in a proceeding held pursuant to 24 C.F.R. Section 3282.407, including, specifically, owners of affected manufactured homes, states in which affected manufactured homes are located, consumer groups representing owners, manufacturers and parties with similar substantial interest, may appeal to the Secretary in writing any final determination or final decision of the Bureau or of the Commissioner that is adverse to the interest of that party. This appeal shall be made within 30 days of the effective date of the final determination by the Bureau or of notice of the final decision of the Commissioner, as the case may be.

5:23-4C.5 Monitoring inspection fee

There is hereby established a monitoring inspection fee of $19.00 which is to be paid by manufacturers for each manufactured home manufactured in New Jersey.

ENVIRONMENTAL PROTECTION AND ENERGY

(a)

ENFORCEMENT

Water Pollution Control Act
Civil Administrative Penalties and Requests for Adjudicatory Hearings
Financial Assurance for Penalty Payment Schedules
Proposed Amendment: N.J.A.C. 7:14-8.3

Authorized By: Jeanne M. Fox, Acting Commissioner, Department of Environmental Protection and Energy.
Authority: N.J.S.A. 58:10A-4 and 58:10A-10.
DEPE Docket Number: 58-93-10/282.
Proposal Number: PRN 1993-648.

Submit written comments by January 5, 1994 to:
Janis E. Hoagland, Esq.
Department of Environmental Protection and Energy
Office of Legal Affairs
CN 402
Trenton, New Jersey 08625-0402

The agency proposal follows:

Summary

On August 5, 1991, the Department of Environmental Protection and Energy (Department) promulgated amendments to its rules governing civil administrative penalties for violations of the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., as amended by the Clean Water Enforcement Act, P.L. 1990, c.28 (CWEA). The August 1991 rule amendments included a requirement that persons seeking to pay a civil administrative penalty over a period of more than 90 days must post financial assurance with the Department in the full amount of the penalty. N.J.A.C. 7:14-8.3(g). The CWEA does not mandate the Department obtain financial assurance in the full amount of the penalty in all such cases.

The Department's experience in implementing this requirement has shown that it is impracticable to require this amount of financial assurance. Generally, a person who lacks the financial resources to pay a penalty in a lump sum is similarly unable to post financial assurance in the full amount of the penalty. For example, if the person cannot pay the full amount of a penalty then the person also cannot deposit the full amount of the penalty into a fully funded trust. Similarly, the person is unlikely to have creditworthiness or collateral of sufficient value to induce a financial institution to issue a letter of credit, because the same collateral or creditworthiness would enable the person to obtain a loan making full payment of the penalty possible.

The Department also expects the financial assurance of less than the full amount of the penalty in certain circumstances will provide sufficient

assurance that the penalty will be paid. In reaching this conclusion, the Department recognizes that its position as a governmental agency collecting a penalty differs from the position of a financial institution in the business of extending credit and collecting repayment with interest. The financial institution must obtain security adequate to ensure that it will not suffer a loss in the event of a default, because the avoidance of such losses is central to the success of its business. In contrast, protection against defaults on penalty payments is an important part of an enforcement effort, but one that the Department can sacrifice if necessary to achieve more important goals such as bringing about compliance with environmental laws.

Accordingly, the proposed amendments revise N.J.A.C. 7:14-8.3(g) to make it clear that the Department can accept financial assurance in less than the full amount of a penalty when it agrees to accept payment of a penalty in installments over time. The standard set forth in the proposed amendments is based on N.J.S.A. 13:1D-9(u), which authorizes the Department to accept a performance bond or other security from "any person subject to a lawful order of the Department, which provides for a period of time during which such person subject to the order is permitted to correct a violation." The statute specifies that the security "need not be for the full amount of the estimated cost ... but may be in such amount as will tend to insure good faith compliance with said order."

The proposed amendments list several factors that the Department may consider in determining the amount of financial assurance that will tend to ensure good faith compliance with a payment schedule. As the amount of the penalty increases, the amount of financial assurance necessary to encourage compliance with the payment schedule also increases. For this reason, the amount of the penalty is one relevant factor. Two other important factors are the amount and frequency of the installments due under the payment schedule; those factors are relevant to the Department's ability to draw upon the financial assurance for full payment of the installments coming due while the Department is pursuing other remedies to collect the remaining amount of the penalty. The duration of the payment schedule is also relevant; a smaller amount of financial assurance would be associated with a very short payment schedule, because the risk of default is generally less as the term of the payment schedule grows shorter.

The nature of the other remedies that the Department can pursue is also relevant to determining how much financial assurance is necessary. If those other remedies can effectively deter a default under the compliance schedule, the need for financial assurance to serve that purpose decreases.

The person seeking the payment schedule may have entered into other payment schedules with the Department in the past. A good record of compliance with those previous payment schedules may help to establish a lesser need for financial assurance for the payment schedule in question.

The Department recognizes that the financial assurance requirement reduces the funds that the person seeking the payment schedule can spend on pollution prevention or pollution control measures. To avoid that result, the proposed amendments allow the Department to consider whether the person has agreed to implement such measures. In addition, a record of recent investments in such measures shows an effort to comply that the Department might be able to encourage further by considering those measures in connection with the financial assurance requirement. The proposed amendments allow for such consideration.

Finally, other circumstances of the person seeking the payment schedule may be relevant to the tendency of the financial assurance to ensure compliance with the payment schedule. Those circumstances can also indicate the extent to which financial assurance is necessary to ensure compliance with the payment schedule. Those circumstances are likely to have been considered in the Department's decision to agree to the payment schedule, and should also be considered in arriving at specific terms of that agreement such as the amount of financial assurance.

The existing rules exempt local agencies from the financial assurance requirement. N.J.A.C. 7:14-8.2. The proposed amendments continue this exemption.

The proposed amendments also reorganize and revise the language of the existing rules, for purposes of clarity.

Social Impact

The Department does not expect the proposed amendments to have any significant social impact. The proposed amendments concern specific terms of penalty payment schedules, an issue that is likely to affect a relatively small number of persons.

Economic Impact

The proposed amendments will have a positive economic impact upon persons agreeing with the Department to pay penalties in installments over time for violations of water pollution control laws and regulations. The proposed amendments will make such payment schedules more feasible and less expensive to implement. The specific economic impact in any particular case depends upon the terms of the payment schedule and the amount of the financial assurance required.

Environmental Impact

The proposed amendments are likely to have a positive environmental impact. Some persons cited for violations of water pollution control laws and regulations may not have the financial resources to invest in environmental improvements and simultaneously pay lump sum penalties. In making it more feasible and less expensive for such persons to enter into payment schedules, the proposed amendments may make some additional resources available for investments that can benefit the environment.

Regulatory Flexibility Statement

The proposed amendments do not impose compliance, recordkeeping or reporting obligations upon small businesses, as defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The proposed amendments reduce compliance obligations associated with payment schedules for water pollution control penalties. Accordingly, no regulatory flexibility analysis is necessary.

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

7:14-8.3 Procedures for assessment, payment and settlement of civil administrative penalties, and affirmative defenses

(a)-(f) (No change.)

(g) [Any violator, except a local agency, who is seeking a civil administrative penalty payment schedule of more than 90 days shall, as a precondition of that schedule in lieu of full payment upon the civil administrative penalty becoming due and owing, post] **In its discretion the Department may enter into an agreement with a violator, in which the Department agrees to accept payment of a civil administrative penalty in installments over time. Such an agreement shall be in writing. The Department shall not enter into any such agreement if payment in full is due more than 90 days after execution of the agreement unless:**

1. The violator is a local agency; or

2. The violator posts financial assurance with the Department **upon execution of the agreement** [for the full amount of the civil administrative penalty] pursuant to one of the financial assurance mechanisms in Appendix [A] **D** or in another form the Department individually approves in writing for this purpose. **The financial assurance shall be in an amount that the Department reasonably determines will tend to ensure good faith compliance with the agreement. In determining the amount, the Department may consider any or all of the following factors:**

i. The amount of the penalty;

ii. The amount and frequency of the installment payments due under the agreement;

iii. The duration of the agreement;

iv. Other remedies, aside from drawing upon the financial assurance, that the Department may exercise under the agreement if an installment payment is not timely made or if some other requirement of the agreement is not satisfied, and the extent to which such other remedies will tend to ensure compliance with the agreement;

v. The violator's history of compliance, including without limitation its history of compliance with other schedules for the payment of penalties assessed by the Department;

vi. Expenditures that the violator has made or has agreed to make for purposes of pollution control and/or pollution prevention; and

vii. Other specific circumstances of the violator relating to the tendency of the financial assurance to ensure compliance with the agreement or indicating the extent to which financial assurance is necessary to ensure compliance with the agreement.

(h)-(i) (No change.)

(a)

DIVISION OF FISH, GAME AND WILDLIFE

Marine Fisheries
General Net Regulations
Delaware Bay Gill Net Permits
Weakfish Management
Proposed Amendments: N.J.A.C. 7:25-18.5, 18.6 and 18.12

Authorized By: Jeanne M. Fox, Acting Commissioner, Department of Environmental Protection and Energy.
Authority: N.J.S.A. 23:2B-6.
DEPE Docket Number: 59-93-10/256.
Proposal Number: PRN 1993-649.

Submit written comments by January 5, 1994 to:
Richard McManus
Office of Legal Affairs
Department of Environmental Protection and Energy
CN 402
Trenton, NJ 08625

The agency proposal follows:

Summary

The proposed amendment to N.J.A.C. 7:25-18.6 will provide the opportunity for individuals returning from active military service after August 2, 1991 to obtain a permit at a later date if they are otherwise eligible. The military service provision was suggested at the public hearing on the original Delaware Bay Gill Net Permits (N.J.A.C. 7:25-18.6 through 18.11). In addition, the Marine Fisheries Council recommended this provision be incorporated into the rule. The Department agreed with the recommendation that provisions could be made for those individuals on active duty. However, because it was determined to be a substantive change the Department could not incorporate it into the rule adoption (see 23 N.J.R. 1972(a)) but had to propose it as an amendment to allow for additional public comment.

This amendment also addresses renewal of the Delaware Bay Gill Net Permits (DBGNP's). The original intent of the DBGNP was to reduce the number of nets through attrition while at the same time allowing historical participants in the fishery to maintain their past level of participation. In the last two years, some DBGN permittees have failed to renew licenses for the number of nets authorized under that permit, indicating to the Department that these persons have reduced their level of participation in the fishery. The proposed rule amendment will alter the current system by requiring persons leaving the fishery or reducing their level of activity to relinquish their unused net allocations. If a DBGN permittee purchases no net licenses, that permit shall be considered invalid and a new application for a DBGNP must be filed if that person ever wishes to enter the fishery again. If a DBGN permittee purchases fewer licenses than those allocated to that permit during the calendar year in which these amendments become effective, the number of net licenses allowed under that individual's DBGNP will be permanently reduced to the number of nets licensed. DBGN permittees must annually purchase the number of licenses authorized under their DBGNP in subsequent calendar years or the nets authorized under their permit will be reduced to the number of nets licensed. This will assist the Department in ensuring that those licensed are actually using the resource and that those persons on the waiting lists for nets are delayed no longer than absolutely necessary from participating in the fishery.

In March of 1992, a delayed entry program for gill net licenses was implemented Statewide. The intention of the program is to protect the commercial industry by preventing people from getting into the fishery only during times of high resource abundance. Under this program, an applicant for a gill net license who did not possess a gill net license in one of the two prior years must file an application, in person, with the Department in each of two consecutive years during the month of January. The proposed amendment to N.J.A.C. 7:25-18.5(g) deletes the requirement that the application be filed in January. The Department has determined that this artificial deadline was unnecessary to administer the delayed entry program since the two year waiting period ensures that at least 13 months elapse before an application qualifies for a license.

N.J.A.C. 7:25-18.5(g)6v and vi, regarding the use of staked gill nets in Delaware Bay and its tributaries, permit the use of 2.75 inch stretched mesh nets from February 1 through the end of February. The Department proposes to amend these provisions to allow the use of staked gill nets with a stretched mesh not less than 2.75 inches nor greater than 3.25 inches in Delaware Bay within one half mile of the mean high water line (MHWL) and in the tributaries of Delaware Bay from January 1 through the end of February to provide a greater opportunity for participation in the white perch fishery. This recommendation was suggested at a Marine Fisheries Council committee meeting by a commercial fisherman and the committee and the Department believes that the season can be opened in January without any adverse impacts on the fisheries resources.

Currently, N.J.A.C. 7:25-18.5(g)5 sets the minimum mesh size of 2.75 inches for drifting gill nets from March 1 through December 15 in the Delaware Bay within two nautical miles of the MHWL. The Department proposes to amend this provision to allow this size mesh to be used for fishing in the Atlantic Ocean as well, within two nautical miles of the MHWL, subject to the following conditions: (1) a maximum of 200 fathoms of net in the water at any time; (2) nets may be a maximum of eight feet deep while fishing; and (3) nets may only be fished between sunrise and sunset. To participate in the new Small Mesh Fishery Program, N.J.A.C. 7:25-18.5(g)5vii requires individuals to apply for and receive a Gill Net Mesh Exemption Permit and submit monthly reports of catch and effort on forms provided by the Department.

When the Department implemented weakfish regulations in March, 1992 (see 24 N.J.R. 1113(a)) the minimum mesh size for gill nets was increased to 3.25 inches. Fishermen in Delaware Bay indicated that the 3.25 inch mesh would adversely impact their fishery for other species. As a result, an exemption to the mesh size was included for nearshore areas of Delaware Bay upon adoption of the rule. Subsequent to the adoption of the weakfish regulations, fishermen fishing in the Atlantic Ocean expressed the same concern regarding the 3.25 inch mesh. As a result, the Marine Fisheries Council established a committee including representative fishermen to review this concern. Through a series of committee meetings, the provisions of the amendment to N.J.A.C. 7:25-18.12(e) regarding a small mesh fishery were developed and subsequently approved by the Marine Fisheries Council.

Social Impact

The Department proposes to amend N.J.A.C. 7:25-18.6 to extend an opportunity to apply for a DBGNP to those individuals who otherwise qualify for a permit, but who were unable to apply within the 60-day application period ending August 2, 1991 due to active military service. The proposed amendment allows these persons 60 days following their discharge in which to submit a completed application for a permit. This amendment shall have a positive social impact of affording military personnel the same opportunity to participate in the industry as that extended to civilians. This amendment compliments N.J.A.C. 7:25-18.5 which currently ensures that those persons desiring gill net licenses who were on active military service are given the same opportunity to apply for and receive gill net licenses as that available to civilians.

The proposed amendment to N.J.A.C. 7:25-18.6 restricts permanently the number of nets fished under any given permit to the number of gill net licenses purchased by the applicant during the calendar year in which these amendments become effective and invalidates the DBGNP of any permittee who fails to purchase at least one gill net license during that same calendar year. The amendment further reduces the number of nets authorized on a permittee's DBGNP if they fail to maintain licenses for the number of nets authorized in subsequent calendar years. Since the Department cannot issue any more gill net permits pursuant to N.J.A.C. 7:25-18.6(c) until the numbers of nets is reduced to 800 staked or anchored gill nets or 200 drifting gill nets within the Delaware Bay, the Department has an obligation to ensure that the nets it licenses are actually in use. This proposed amendment will have a beneficial social impact by increasing the likelihood that the permits issued by the Department are actually being used, thereby also reducing the delay in obtaining licenses for wait-listed net license applicants. The amendment also ensures that the Department's licensing program will more accurately reflect the true demand for and drain upon the resource. In 1991, 33 DBGNP permittees did not purchase any gill net licenses at all. Other permittees bought fewer net licenses than the number to which they were entitled under their permit. Out of 1,897 nets authorized under the DBGNP System, 172 available net allocations went unlicensed. Thus, there was an obvious need for the revision reflected in the proposed regulations.

The proposed deletion of the annual January deadline for net license applications in N.J.A.C. 7:25-18.5 will have the positive social impact of

simplifying license program administration without compromising the goal of the delayed entry permit program. The Department implemented this program in March, 1992 to shelter commercial permittees, who have had to endure seasonal and gear restrictions on their fishing activity for resource management purposes, from the effects of raiding by opportunistic or amateur entrants into the fisheries at times of greatest abundance. Under the current program, an applicant for a gill net license who did not possess a license in one of the two years preceding the year of application would have to apply for a license during the month of January. Thus, an applicant who missed the January deadline and applied for a gill net license in February to enter spring shad fishery, for example, would be forced to wait 35 months (or three fishing seasons) to enter the fishery. The Department has determined that the artificially imposed January deadline can unfairly penalize otherwise qualified applicants by forcing them to wait longer than envisioned when the delayed entry program was implemented. The proposed amendment eliminating the January deadline will have a positive social impact by reducing waiting time to a more reasonable period of at least 13 months (at least a two fishing season wait) while preserving the integrity of the delayed entry program.

The proposed amendment of N.J.A.C. 7:25-18.5(g)6 has a positive social impact by lengthening the white perch season in the Delaware Bay and its tributaries within one-half mile of the MHWL by one month over the current regulatory season. By allowing entry into fisheries in January rather than delaying entry until February, the Division hopes to minimize any adverse economic consequences for permittees arising from variations in fish migration patterns or inclement weather commonly encountered in the late winter and early spring months.

The proposed amendments at N.J.A.C. 7:25-18.5 extending the 2.75 inch mesh exemption to include the Atlantic Ocean within two nautical miles of the MHWL will have a positive social impact as well, allowing harvesting of commercially desirable smaller-size fish species which have historically been a small but important part of the landings. This fishery was substantially decreased when the minimum mesh size was increased from 2.75 inches to 3.25 inches in 1992, for the protection and management of the weakfish resource. The Gill Net Mesh Exemption Permit and associated recordkeeping mandated under N.J.A.C. 7:25-18.5(g)5vii will enable the Department to better monitor this fishery in both the Delaware Bay and the ocean to assess potential adverse impacts to the weakfish resource and to adjust the regulations accordingly.

The penalties contained in the proposed amendment for failure to report or failure to file accurate reports are required to ensure accurate, timely reporting under the small net mesh exemptions program. Without such timely, accurate reports of catch and effort, the Department cannot fulfill its regulatory obligations under the weakfish management plan and prove that the small mesh net exemption allows New Jersey to meet its obligations under the weakfish program. The penalty provisoins are intended to ensure that all program participants who reap the benefits of the small mesh net program provide the data critical to the continued existence of that program.

Economic Impact

The economic impact of the proposed amendments although not great, will be positive. Allowing fishermen to use gill nets smaller than 3.25 inches stretched mesh in the nearshore ocean waters will have a positive economic impact by allowing them to fish for smaller species, such as spot, butterfish, and kingfish. Fisheries for these species suffered economically when the minimum gill net mesh size was increased from 2.75 inches to 3.25 inches as part of the weakfish management rule. Likewise, the amendment to N.J.A.C. 7:25-18.5 will have a positive economic impact by permitting the use of 2.75 to 3.25 inch stretched mesh gill nets in Delaware Bay and its tributaries beginning January 1 instead of February 1. This will allow fishermen an opportunity to fish for white perch at a time of year when few if any other species are available.

The delayed entry program implemented at N.J.A.C. 7:25-18.5 was designed to provide a level of economic protection to those individuals in the fishery who had to endure restrictions to their fishing activity for resource management purposes by delaying new applicants from entering the fishery for a two year period. The Department has since discovered that the January application requirement has caused a nearly three year delay for individuals who have narrowly missed the application period. The deletion of the January deadline will have a positive economic impact for those applicants while still providing reasonable protection to those in the fishery from opportunistic individuals who would enter a fishery only during times of greatest abundance. In most cases, such individuals would still have to wait two fishing seasons to enter the fishery of choice. For example, if an individual wished to enter the fall gill net fishery for southerly migrating bluefish and weakfish in 1993, that individual could apply in 1993, miss the 1993 and 1994 fall seasons and obtain a license to fish in 1995.

The amendment of N.J.A.C. 7:25-18.6 to allow those on active military duty during the 60 day application period for permits which elapsed August 2, 1991 to apply for a gill net permit shall have a positive economic impact on those who apply and receive permits, although the Division anticipates few applications as a result of the amendment. Conversely, the Department does not anticipate any material adverse economic consequences to the regulatory community at large as a result of this exemption.

Environmental Impact

The environmental impact of the amendment should be beneficial. While a few individuals may qualify to enter the Delaware Bay fishery under the military exemption in N.J.A.C. 7:25-18.6(c), the total number of nets permitted in Delaware Bay will remain stable or, more likely, decrease due to the effect of the amendment at N.J.A.C. 7:25-18.6(d), whereby the number of nets authorized under a DBGNP will be decreased to the number of licenses actually purchased in the calendar year these regulations take effect. The small mesh nearshore ocean fishery featured in N.J.A.C. 7:25-18.5 is likely to return the landings of species such as kingfish and scup to 1991 levels which the Department considers reasonable. The increased winter fishing period for white perch in the Delaware Bay proposed in N.J.A.C. 7:25-18.5 has been restricted to the traditional non-mechanized small vessel fishery and should result in slightly increased landings with minimal negative impact to this healthy resource.

Elimination of the January application requirement of the delayed entry program, as discussed above, will not reduce the protection against immediate exploitation that delayed entry has offered. The requirement to obtain a Gill Net Mesh Exemption Permit to fish smaller mesh in the Delaware Bay and Atlantic Ocean and to provide monthly reports of that activity will provide the Department with an improved method to monitor these fisheries and to ensure that the smaller mesh net size is not delaying recovery of the weakfish stocks under the coastwide weakfish plan. The Department anticipates no negative environmental impact as a result of this amendment.

Regulatory Flexibility Analysis

The amendments to N.J.A.C. 7:25-18.5(g)5 requiring a Gill Net Mesh Exemption Permit and monthly catch and effort data will affect those small businesses in the industry as defined by the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. These requirements shall impose no additional capital costs upon small business nor require any professional services and the recordkeeping requirement shall not, by itself, impose any significant cost upon the businesses. Since New Jersey is a member of the Atlantic States Marine Fisheries Commission, it is required to pass regulations implementing a Weakfish Management Plan, one of the goals of which is to stabilize weakfish populations and reduce their rate of harvest. Thus, any exemption from the Weakfish Plan, such as the proposed Small Mesh Net Permit program, must keep New Jersey in compliance with the Weakfish Plan of controlling weakfish catch. Accordingly, the Department is required to collect catch and effort data to prove that it can afford the industry the advantage of the Small Mesh Net Program and still comply with the Weakfish Management Plan. In an effort to minimize any inconvenience the reporting requirement may pose for the regulated community, the Department shall devise a short form on which the data may be recorded. The only cost to the businesses affected by these regulations will be the time to record the daily record and postage for the form. The economic advantages of the small mesh net program will unquestionably offset these negligible costs. The penalties contained in the proposed rule for failure to report or failure to file accurate reports are required to ensure accurate, timely reporting under the small net mesh exemption program. Without such timely, accurate reports of catch and effort, the Department cannot fulfill its regulatory obligations under the weakfish management plan.

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

7:25-18.5 General net regulations

(a)-(f) (No change.)

(g) Individuals intending to take fish with a net in the marine waters of this State pursuant to N.J.S.A. 23:5-24.2 shall, as required,

apply to the Commissioner for a license and/or permit. To be eligible to purchase a 1992 license for a drifting, staked or anchored gill net the applicant shall have purchased a gill net license during 1990, 1991 or a 1992 license prior to May 1, 1992 or provide documented proof of active military service within one year of application. An applicant who does not meet the above requirements must file an application, in person, with the Department in each of two consecutive years [during the month of January]. Such an applicant shall be eligible for gill net licenses in the following calendar year. Beginning in the license year (January 1-December 31) 1993 an applicant for a gill net license must have possessed a gill net license in one of the two previous years. Failure to purchase a gill net license in one of the prior two years shall subject the applicant to the two year waiting period described above. Availability of Delaware Bay Gill Net Permits shall be determined pursuant to N.J.A.C. 7:25-18.6 through 18.11. Upon receipt of the application, and the prescribed license fee, the Commissioner may, in his or her discretion, issue single season licenses and/or permits as specified for each net type for the taking of fish with nets only as follows:

1.-4. (No change.)

5. Drifting gill nets shall be used only in the Atlantic Ocean, Delaware Bay, and the tributaries of Delaware Bay. The smallest mesh of any drifting gill net shall be not less than five inches stretched beginning February 12 through February 29. From March 1 through December 15 the smallest mesh of any drifting gill net, shall be not less than 3.25 inches stretched except in the tributaries of Delaware Bay and in Delaware Bay **and the Atlantic Ocean** within two nautical miles of the mean high water line where the smallest mesh shall be not less than 2.75 inches stretched and subject to the [additional conditions specified] **permitting and reporting requirements specified in (g)5vii below and** in N.J.A.C. 7:25-18.12. These nets shall not individually exceed 200 fathoms in length. Individual drifting gill nets shall not be fastened together to form a series of nets exceeding 400 fathoms in length beginning February 12 through May 15 or exceeding 200 fathoms in length beginning May 16 through December 15. Drifting gill nets may be used for all species except those specifically protected.

i.-ii. (No change.)

iii. Drifting gill nets shall be used in the Atlantic Ocean only from February 12 through December 15. Drifting gill nets shall not be used in the Atlantic Ocean within 100 fathoms of the marked channel of any inlet. **Drifting gill nets between 2.75 inches stretched mesh and 3.25 inches stretched mesh shall be subject to the permitting and reporting requirements specified in (g)5vii below, and**

(1) Shall only be fished within two miles of the MHWL;

(2) Shall only be fished between the hours of sunrise and sunset;

(3) Shall be no higher than eight feet (off the bottom) while fishing; and

(4) A maximum of 200 fathoms per licensed fisherman shall be in the water at any one time;

iv.-vi. (No change.)

vii. Individuals utilizing drifting, staked or anchored gill nets less than 3.25 inches stretched mesh in the Atlantic Ocean or in the Delaware Bay after February 29 in any calendar year shall possess a Gill Net Mesh Exemption Permit.

(1) An individual shall apply annually for the permit.

(2) All permittees shall submit monthly reports of their catch and effort and other information as may be determined by the Department on forms provided by the Department. These reports shall be filed with the Division of Fish, Game and Wildlife no later than 10 calendar days after each monthly reporting period. If no fishing activity was conducted under this permit during the month, a report to that effect shall be provided. Gill Net Mesh Exemption permittees shall be personally responsible for guaranteeing the timely delivery of reports to the Division as well as the accuracy of all information contained therein. The Department may demand that a permittee provide proof of the truth of any data contained in any report submitted to the Division under this program. If the permittee fails to file a true, complete monthly report with the Division by the 15th day of any month, the Division, in its discretion, may contact the permittee by the most expeditious method available in order to secure a complete report.

(3) If the Division is unable to secure a true, complete monthly report from the permittee by such informal means or the Division has credible evidence that the data on any report is false, the Division shall notify the permittee in writing of the Division's intention to revoke the permittee's Mesh Exemption privilege for the reasons stipulated in the notice, effective 20 business days after the date on the written notice (excluding the date on the notice) and of the Division's suspension of the permittee's Mesh Exemption privileges in the interim, effective on a date stipulated in the notice but no sooner than 10 business days after the date of the notice (excluding the date on the notice).

(4) The permittee may request a hearing to contest a proposed revocation of Mesh Exemption privileges 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. The request for an administrative hearing must be received in writing by the Department within 20 business days from the date on the Division's notice of suspension and intention to revoke, excluding the date on the notice. However, if a timely request for a hearing is not received by the Department, any allegation contained in the notice shall be deemed admitted by the permittee and Mesh Exemption privileges shall be revoked as of the date stipulated in the notice, without any further action by the Division.

(5) The Division Director may, in his or her sole discretion, stay the suspension of Mesh Exemption privileges pending a hearing on the notice of proposed revocation of Mesh Exemption privileges for any good cause set forth in a written petition from the permittee, including sworn statements from the permittee or other persons with knowledge relevant to the allegations on which the Division action is based. The petition and its supporting statements and documentation shall be made available to the court and all parties in advance of any hearing.

(6) The Division shall reinstate Mesh Exemption privileges suspended for late or incomplete reports, but no more than three times per permittee in any single permit year, if that permittee personally delivers any missing reports, completed, along with a credible written explanation for the delay and/or omissions to the Division within 20 business days from the date on the notice of suspension.

(7) Any permittee who has had a Mesh Exemption privilege revoked shall be disqualified from exercising any privilege associated with a Mesh Exemption permit for 24 months following:

(A) The effective date of an uncontested notice of proposed revocation of privileges;

(B) The date of the Commissioner's Final Decision affirming revocation of Mesh Exemption privileges; or

(C) The filing date of the court order affirming the Commissioner's Final Decision revoking Mesh Exemption privileges, whichever is applicable.

(8) The Division shall issue a Mesh Exemption permit to an applicant pending resolution of a contested Division proposal to revoke that applicant's Mesh Exemption privilege, but that permittee shall not exercise or enjoy any Mesh Exemption privilege if the Division has already suspended that permittee's Mesh Exemption privilege pending resolution of a proposed revocation until:

(A) The Division Director lifts the suspension of that permittee's Mesh Exemption privileges;

(B) The Commissioner issues a Final Decision reinstating that permittee's Mesh Exemption privileges; or

(C) A court of competent jurisdiction orders reinstatement of that permittee's Mesh Exemption privileges, as the case may be.

6. Staked and anchored gill nets shall be used only in the Atlantic Ocean, Raritan Bay, Sandy Hook Bay, and the Delaware Bay and its tributaries. Staked or anchored gill nets shall not be fastened together to form a series of nets exceeding 400 fathoms in length from the beginning of the season through May 15 or exceeding 200 fathoms in length beginning May 16 through December 15, subject to the additional conditions specified in N.J.A.C. 7:25-18.12.

i.-iv. (No change.)

v. Staked gill nets may be used in the tributaries of Delaware Bay for any species except those specifically protected only beginning

[February] **January** 1 through May 15 and July 15 through December 15, where individual gill net length shall not exceed 30 fathoms. The mesh of any such net used in the tributaries of Delaware Bay shall **not** be **less than** 2.75 inches stretched **nor greater than 3.25 inches stretched beginning January** [February] 1 through February 29 and **no mechanical means shall be utilized to retrieve such net. The mesh of any net** shall not be less than 2.75 inches from March 1 through May 15 and July 15 through December 15. No net shall be set across any tributary or mouth of any tributary, nor shall any net be set in a manner that impedes navigation;

vi. Staked gill nets may be used in Delaware Bay only from February 1 through December 15, except as further [limited] **defined** by statute and/or rule. Individual staked gill net length shall not exceed 30 fathoms. The mesh of any such net used in Delaware Bay shall be 2.75 inches stretched beginning February 1 through February 29 **except that staked gill nets of a mesh not less than 2.75 inches stretched or greater than 3.25 inches stretched may be used within one half nautical mile of the MHWL from January 1 through February 29 provided no mechanical means are utilized to retrieve such nets.** From March 1 through December 15 the smallest mesh of any staked gill net shall not be less than 3.25 inches stretch except within two nautical miles of the mean high water line where the smallest mesh shall not be less than 2.75 inches stretched and subject to the [additional conditions specified in] **permitting and reporting requirements specified in (g)5vii above and** N.J.A.C. 7:25-18.12. Staked gill nets shall not be used in that portion of Delaware Bay known as the Brandywine Shoal Restricted Area as defined in (g)5v above;

vii.-ix. (No change.)

7.-12. (No change.)

(h) (No change.)

7:25-18.6 Delaware Bay commercial and non-commercial gill net permit

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

(c) No new Delaware Bay commercial or non-commercial gill net permits shall be issued after August 2, 1991 until the combined number of Delaware Bay commercial and non-commercial gill net permits falls below either 800 for staked or anchored gill nets or 200 for drifting gill nets, **except as provided in (c)1 below.**

1. Individuals returning from active military service after August 2, 1991, who were on active duty during the application period (June 3, 1991 through August 2, 1991) and who meet the requirements in N.J.A.C. 7:25-18.7(a) or (b) below, shall have 60 days from their date of discharge to apply for a permit to cover the number of licenses for which they qualify, upon submission of official documentation indicating duration of military service and date of discharge and a notarized statement from the applicant that said documentation is accurate.

(d) An individual possessing a Delaware Bay Gill Net Permit shall obtain the number of gill net licenses authorized by the Delaware Bay Gill Net Permit in each calendar year. Failure to do so will result in the number of licenses authorized by the permit being reduced to the number of nets actually obtained in that calendar year beginning in the calendar year in which these regulations become effective, or in the event no licenses are purchased, invalidation of the permit immediately following the end of that calendar year.

7:25-18.12 Weakfish management

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

(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 (d) above or as modified by the Commissioner by notice [except as follows] **unless such person has obtained a Gill Net Mesh Exemption Permit as specified in N.J.A.C. 7:25-18.5(g)5vii and such net is one of the following:**

1. [The use of drifting] **Drifing,** staked or anchored nets with a stretched mesh not less than 10 inches [is permitted];

2. [The use of drifting] **Drifiting,** staked or anchored nets with a stretched mesh not less than 5.5 inches [is permitted] south of Loran C42800;

3. [The use of drifitng] **Drifting,** staked or anchored nets with a stretched mesh not less than 2.75 inches or greater than 3.0 inches [is permitted] in Delaware Bay within two nautical miles of the mean high water line.

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

(a)

OFFICE OF AIR QUALITY MANAGEMENT

Enhanced Inspection and Maintenance Program

Proposed Amendments: N.J.A.C. 7:27-15.1 and 15.4, 7:27A-3.10, and 7:27B-4.1, 4.5 and 4.6

Proposed New Rule: N.J.A.C. 7:27B-4.9

Authorized By: Jeanne M. Fox, Acting Commissioner, Department of Environmental Protection and Energy.

Authority: N.J.S.A. 13:1B-3(e), 13:1D-9, 26:2C-8 et seq., specifically 26:2C-8 and 8.1 through 8.5., and sections of P.L.1993, c.69.

DEPE Docket Number: 56-93-10/340.

Proposal Number: PRN 1993-653.

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

Wednesday, December 22, 1993, 10:00 A.M. at:
New Jersey Department of Environmental Protection and Energy
Hearing Room, 1st Floor
401 East State Street
Trenton, NJ 08625

The public is invited to present oral comments at the public hearing and to submit written comments, identified by DEPE docket number, by January 5, 1994 to:

Janis Hoagland
Office of Legal Affairs
New Jersey Department of Environmental Protection and Energy
CN 402
Trenton, N.J. 08625-0402

These amendments will become operative 180 days after adoption by the Commissioner (see N.J.S.A. 26:2C-2).

The agency proposal is set forth below. It contains six major components: a "Summary" section which describes the purpose and scope of proposed amendments and rule, a "Social Impact" section which describes the anticipated social effects of the proposed amendments and rule, an "Economic Impact" section which sets forth the anticipated costs and benefits of the proposed amendments and rule, an "Environmental Impact" section which sets forth the anticipated emission reductions to be obtained, a "Regulatory Flexibility Analysis" which examines the effect of the proposed amendments and rule on small businesses, and a full statement of the text of the proposed amended and new rules.

Summary

The Department of Environmental Protection and Energy (the Department) is proposing amendments and new rules at N.J.A.C. 7:27-15 (Subchapter 15, Control and Prohibition of Air Pollution from Gasoline-Fueled Motor Vehicles), N.J.A.C. 7:27A-3.10, Civil Administrative Penalties for Violations of Rules Adopted Pursuant to the Act, and N.J.A.C. 7:27B-4 (Subchapter 4, Air Test Method 4: Testing Procedures for Motor Vehicles), its rules governing standards, corresponding penalties, and testing procedures for the inspection of motor vehicles.

The new rule and amendments set forth herein will supplement the amendments and new rules proposed by the Department on August 2, 1993 at 25 N.J.R. 3322(a). On August 2, 1993, the Department of Law and Public Safety, Division of Motor Vehicles (the DMV) also published a related pre-proposal of new rules at N.J.A.C. 13:20-43 (Subchapter 43, Enhanced Motor Vehicle Inspection and Maintenance Program) at 25 N.J.R. 3418(a). The Department and the DMV jointly held a public hearing on September 17, 1993 on the proposed amendments and new rules and the pre-proposal. These agencies accepted written comment on the proposal and pre-proposal, respectively, until the close of the comment period on September 24, 1993.

The United States Environmental Protection Agency (the EPA) has set forth the performance standard that an enhanced Inspection and Maintenance (I/M) program must meet at 40 C.F.R. § 51.351. The goal of the Department and the DMV has been to adopt an enhanced I/M emission test that would meet EPA's performance requirement while yielding a throughput rate of at least 15 vehicles per hour in a biennial inspection program. The EPA had developed a test procedure, the IM240, which, as part of EPA's model program design, met the required performance standard. However, the throughput rate for the IM240 would not have exceeded 12.5 vehicles per hour. A full description of the EPA-recommended IM240 exhaust emission and purge tests, incorporated by reference by the Department, can be found in an EPA report released in July of 1993 entitled "High-Tech I/M Test Procedures, Emission Standards, Quality Control Requirements, and Equipment Specifications." Interested parties may inspect a copy of this document at the Department's Public Access Center at 401 East State Street, First Floor, Trenton, New Jersey 08625 and/or obtain a copy of this document by contacting the Environmental Protection Agency, Office of Mobile Sources, Motor Vehicle Emission Laboratory, 2565 Plymouth Road, Ann Arbor, Michigan, 48105.

Consequently, the Department's August 2, 1993 proposal set forth two alternative emission testing procedures. Alternative Exhaust Test A is a shortened version of the IM240. Alternative Exhaust Test B is a steady-stated loaded test known as the Acceleration Simulation Mode (ASM) 5015.

At the September 17, 1993 public hearing, the EPA announced the release of the finalized version of its "fast-pass/fast-fail" algorithm, which would lead to early termination of the IM240 exhaust emission test and the EPA-recommended purge test for those vehicles which would clearly pass or fail the full 240-second emission test and the purge test. The purge test, which is designed to check the proper functioning of the vehicle's evaporative emission purge system, is performed simultaneously with the IM240 exhaust emission test, which measures the levels of hydrocarbons, carbon monoxide, and oxides of nitrogen in the vehicle's exhaust. As reported by the EPA, application of this algorithm would shorten the EPA's average test time from 240 seconds to approximately 115 seconds and would increase the throughput rate to 20 vehicles per hour. In a letter from Eugene J. Tierney, Chief of the Inspection/Maintenance Section of the Office of Mobile Sources for the EPA, to the states dated September 13, 1993, the EPA has indicated its intent to promulgate regulations to formally adopt the "fast-pass/fast-fail" algorithm, by proposing to amend 40 C.F.R. with a new section, 85.2205(a)(4)-(5).

At the time of the Department's original proposal, the EPA's "fast-pass/fast-fail" algorithm was in developmental stages at the EPA and unavailable to the Department. In view of these actions by the EPA, the Department is proposing herein to set forth at N.J.A.C. 7:27B-4.5 a third alternative exhaust emission test procedure utilizing the EPA's "fast-pass/fast-fail" algorithm, herein referred to as Alternative Exhaust Test C and to set forth at N.J.A.C. 7:27B-4.6, a third alternative purge test procedure utilizing the EPA's "fast-pass/fast-fail" algorithm, herein referred to as Alternative Purge Test C. Alternative Exhaust Test C is EPA's IM240 test incorporating the "fast-pass/fast-fail" algorithm for the exhaust test. Alternative purge Test C is identical to Alternative Purge Test B except that it applies the portion of "fast-pass/fast-fail" algorithm the EPA has developed for its recommended purge test. Over the next few months, the DMV, in conjunction with the Department, will be evaluating the throughput that can be obtained through the use of the IM240 exhaust emission test using this new algorithm in a demonstration lane at the DMV's Wayne inspection facility.

The Department will take into consideration the results of this testing, and findings of any other studies underway relevant to the effectiveness of the EPA-recommended alternative exhaust test procedures or to the effectiveness of the Department's previously proposed Alternative Exhaust Test A and B. In addition, all data obtained on any of the three alternative purge tests will be considered by the Department. This material, as well as relevant information submitted to the Department as part of the public comment on the August 2, 1993 proposal, will be used by the Department in making the determination as to which of the alternative exhaust and purge test methods to adopt.

Thus, the Department is soliciting comments on the EPA-recommended alternative procedures. **In addition, the Department is reopening the comment period for N.J.A.C. 7:27B-4.5 as proposed on August 2, 1993, which set forth Alternative Exhaust Tests A and B, and reopening the comment period for N.J.A.C. 7:27B-4.6 as proposed on August 2, 1993, which set forth Alternative Purge Tests A and B. The new and reopened comment periods will close on January 5, 1994.** A full description of the Department's previously proposed Alternative Exhaust Tests A and B and Alternative Purge Tests A and B can be found in 25 N.J.R. 3322(a).

The Department published a Public Notice in the New Jersey Register on November 15, 1993, indicating the Department's intent to publish this notice of proposed rule amendments in this issue of the New Jersey Register, as well as setting forth the time and place of the public hearing to be held on this proposal, and reopening the comment period for N.J.A.C. 7:27B-4.5 and N.J.A.C. 7:27B-4.6, as proposed on August 2, 1993.

The specific provisions of the proposal are discussed in more detail below:

N.J.A.C. 7:27B-15.1 Definitions

The Department is proposing to add definitions for Light-Duty Gasoline Truck 1 (LDGT1), Light-Duty Gasoline Truck 2 (LDGT2) and Tier 1 Standards, which are terms reflected in the Tables set forth at Regulatory Appendix 1 and are not defined elsewhere in these rules. These terms are used to differentiate among vehicles in setting the "fast-pass/fast-fail" standards to be used as part of Alternative Exhaust Test C.

N.J.A.C. 7:27B-15.4 Motor vehicle inspection standards

In subsection (h), the Department is proposing procedures to be used with Alternative Exhaust Test C to determine if a vehicle passes or fails. These procedures, as drafted by the EPA, are set forth in the Regulatory Appendix 1 and include tables setting forth "fast-pass/fast-fail" standards developed by the EPA for use with the IM240 exhaust test. At this time, the EPA has developed and made available to the Department the interim "fast-pass/fast-fail" standards (to be used from January 1, 1995 through December 31, 1997) for light-duty gasoline vehicles for: (A) model years 1983-1990; (B) model years 1991-1995, not including 1994 and 1995 vehicles certified to Tier 1 standards; and (C) model years 1994-1995 certified to Tier 1 standards and all 1996 and newer vehicles. EPA has also developed and made available to the Department the final "fast-pass/fast-fail" standards (to be used from January 1, 1998 and forward) for light-duty gasoline vehicles for model years 1983-1995, not including 1994 and 1995 vehicles certified to Tier 1 standards. These standards are reflected in Tables 1A, 1B, 1C, and 4A, respectively. The EPA has indicated that it will develop interim "fast-pass/fast-fail" standards to be used for light-duty gasoline trucks 1 and 2; final "fast-pass/fast-fail" standards to be used for light-duty gasoline vehicles for model years 1994-1995 certified to Tier 1 standards and all 1996 and newer vehicles; and final "fast-pass/fast-fail"standards to be used for light-duty gasoline trucks 1 or 2. Accordingly, the Department has reserved Tables 2, 3, 4B, 5, and 6, respectively, for those standards. If the Department determines to adopt Alternative Exhaust Test C, the Department intends to propose for adoption these additional "fast-pass/fast-fail" standards as soon as they are made available by the EPA. The EPA has advised the Department that it will be able to make these standards available to the Department within the next several months.

The use of the "fast-pass/fast-fail" algorithm allows a vehicle to pass or fail the exhaust emissions test without completing the full 240 second driving cycle if the vehicle exhibits emissions levels that are clearly above or below the standards. Otherwise, the test is run for the entire 240 second duration to determine whether the vehicle passes or fails.

While the Department has set forth the entire algorithm developed by the EPA in regulatory Appendix 1 in the proposed new rule and amendments, it would be the Department's intent, if Alternative Exhaust Test C is adopted, to delete this appendix and the references to the appendix in the rule, and incorporate by reference the EPA rule, once the EPA has adopted the "fast-pass/fast-fail" algorithm as part of its rules at 40 C.F.R. §85.2205(a)(4)-(5), to make it clear that the Department fully relies on the EPA "fast-pass/fast-fail" algorithm.

N.J.A.C. 7:27A-3.10 Civil administrative penalties for violations of rules adopted pursuant to the Act

The Department is proposing amendments to N.J.A.C. 7:27A-3.10 to establish penalties for the leasing and for the offering for sale or lease of tampered vehicles, that is, vehicles in which the emission control apparatus has been disconnected, detached, deactivated, or in any other way rendered inoperable or less effective than originally designed. These penalties would be identical to those imposed for the sale of vehicles

with tampered emission control devices. The prohibition of leasing or offering for sale or lease of such vehicles was proposed on August 2, 1993, at N.J.A.C. 7:27-15.5(c).

The Department is also proposing amendments to N.J.A.C. 7:27A-3.10 to establish penalties for new provisions at N.J.A.C. 7:27-15.5(d) proposed on August 2, 1993, which would prohibit the sale or offering for sale of emission control defeat devices. The sale of a device or component that is intended to defeat a motor vehicle's emission control apparatus, or render it inoperative or less effective, has the same potential for causing increased emissions and environmental degradation as the sale or lease of a tampered vehicle. Since the severity of the actions is virtually indistinguishable, the Department has concluded that comparable penalty assessments are appropriate. Therefore, the Department is proposing penalties for N.J.A.C. 7:27-15.5(d) equal to those already established for N.J.A.C. 7:27-15.5(c).

In addition, the inclusion of these penalties requires modification of the introductory language at N.J.A.C. 7:27A-3.10(e)15 to make clear that the civil administrative penalty amounts for each violation of N.J.A.C. 7:27-15.5(d) would be imposed per device or per component.

N.J.A.C. 7:27B-4.1 Definitions

The Department is proposing to add definitions for Light-Duty Gasoline Truck 1 (LDGT1), Light-Duty Gasoline Truck 2 (LDGT2) and Tier 1 Standards, which are terms reflected in the Tables set forth at Regulatory Appendix 1 and are not defined elsewhere in these rules. These terms are used to differentiate among vehicles in setting the "fast-pass/fast-fail" standards to be used as part of Alternative Exhaust Test C.

N.J.A.C. 7:27B-4.5 Exhaust emission testing procedure for gasoline-fueled motor vehicles subject to inspection by the State of New Jersey

The Department is proposing a third alternative exhaust emission test procedure, Alternative Exhaust Test C, the "fast-pass/fast-fail" IM240. This test is identical, in terms of procedures and equipment requirements, to Alternative Exhaust Test A, previously proposed on August 2, 1993 at 25 N.J.R. 3322(a), except that Alternative Exhaust Test C uses the full IM240 driving cycle with the "fast-pass/fast-fail" algorithm.

As has been proposed for Alternative Exhaust Test A, under Alternative Exhaust Test C, pre-1986 model year vehicles, as well as those vehicles not amenable to dynamometer testing, would be tested with a two speed idle test, performed according to official EPA procedures. Full time four-wheel drive vehicles, for example, would not be amenable to dynamometer testing, since conventional dynamometers can only accommodate two drive wheels. The two speed idle test is similar to the current idle test, with the addition of a 2500 RPM, high idle test mode. The vehicle must meet the specified exhaust concentration cut-points for HC and carbon monoxide (CO) both at idle and at 2500 RPM. As states are not required to measure oxides of nitrogen (NO_x) emissions from vehicles in these categories under the Clean Air Act, this test has not been designed to measure NO_x emissions.

N.J.A.C. 7:27B-4.6 Gasoline-fueled motor vehicle emission control apparatus compliance examination procedure

The Department is proposing a third alternative purge test procedure, Alternative Purge Test C. This test differs from the Department's Alternative Purge Test B (the EPA-recommended purge test, previously proposed by the Department on August 2, 1993 at 25 N.J.R. 3322(a)) only in that it would use a "fast-pass/fast-fail" algorithm. This procedure, as drafted by the EPA, is set forth in the Description portion of Regulatory Appendix 1. Table 7 of Regulatory Appendix 1 sets forth the "fast-pass/fast-fail" standards developed by the EPA for use with Alternative Purge Test C.

Alternative Purge Test C, unlike Alternative Purge Tests A and B, is specifically linked to Alternative Exhaust Test C, as the "fast-pass/fast-fail" standards used with Alternative Purge Test C reflect the driving cycle employed by Alternative Exhaust Test C, only. Thus, it cannot be performed in conjunction with either Alternative Exhaust Test A or Alternative Exhaust Test B. If the Department chooses not to adopt Alternative Exhaust Test C, then it cannot choose Alternative Purge Test C in combination with either of the other two alternative exhaust tests. However, Alternative Purge Test A or B may be used with either Alternative Exhaust Test A, B or C, whichever exhaust test is adopted.

N.J.A.C. 7:27B-4.9 On-road exhaust emission testing procedures for gasoline-fueled motor vehicles subject to inspection by the State of New Jersey

The Department is updating the Agency Note as proposed in the August 2, 1993 proposal to indicate that Alternative On-Road Test A would be used in conjunction with Alternative Exhaust Test A, B or C, whichever exhaust emission test is adopted. As previously proposed, Alternative On-Road Test B would only be used in conjunction with Alternative Exhaust Test B.

Social Impact

The proposed amendments and new rule will have a positive social impact on the State. They are designed to aid the State in attaining and maintaining the National Ambient Air Quality Standards (NAAQS) for CO and ozone by reducing the emission of air contaminants from motor vehicles through an approvable, Federally-mandated enhanced I/M program.

Though manufacturers of motor vehicles have progressively reduced the air contaminants produced by motor vehicles, vehicles continue to contribute 27 percent of the volatile organic compounds (VOCs) and 38 percent of the NO_x emissions (both of which contribute to the formation of ambient ozone), and 66 percent of the carbon monoxide released into New Jersey air. Motor vehicles are also a major contributor to the air toxins present in the atmosphere. For a more detailed discussion of the social impact of the proposed enhanced I/M program in general, please refer to 25 N.J.R. 3322(a) and 3418(a).

The proposed amendments and new rule would add an additional alternative exhaust emission test proposal to the two previously proposed by the Department. Whichever test is finally adopted, there would be substantial changes for the motorist and the repair industry. Specifically, Alternative Exhaust Test C would be significantly different from the emission test currently conducted and would include an additional test to detect NO_x problems, as well as tests to more effectively determine hydrocarbons (HCs) and CO emissions than the current test. An anticipated result of the use of any of the alternative enhanced emission tests proposed would be that more motorists would be required to make repairs on vehicles for emission-related defects that are not identifiable under the current program. Identification and correction of these defects would significantly reduce emissions and result in improved air quality.

The Department is also proposing to add an additional alternative purge test to the two purge tests already proposed on August 2, 1993. Regardless of the purge test chosen by the Department, an evaporative purge test would result in significant changes for the motoring public, since this type of testing procedure is not currently conducted in New Jersey. The purge test would test the vehicle's evaporative system for functional problems, which could lead to an increased likelihood of failure. Thus, as with the enhanced exhaust tests, any purge test would result in more motorists being required to make repairs of emission-related defects that were not identifiable under the current test. However, identification and correction of evaporative emission defects would significantly reduce emissions and result in improved air quality.

The proposed addition of penalties at N.J.A.C. 7:27A-3.10 to enforce compliance with the proposed prohibition of leasing or offering for sale or lease of tampered vehicles at N.J.A.C. 7:27-15.5(c) and the proposed prohibition of selling or offering for sale emission control defeat devices at N.J.A.C. 7:27-15.5(d) would also, to a lesser degree, have a social impact similar to that described above. To the extent that these penalties would further the goals of the enhanced I/M program, they would advance the positive social impact of the program as a whole, described above.

Economic Impact

Implementation of the proposed enhanced I/M program will result in both positive and negative economic impacts for the State. While implementation of the amendments and new rule will entail initial capital costs and subsequent associated operating costs, the program will also result in improved air quality, thereby reducing the substantial cost to the State associated with air pollution. Compliance with Federal air quality standards will also avoid Federal sanctions, which would have adverse economic impacts on the State.

The Division of Motor Vehicles, prior to receipt of the "fast-pass/fast-fail" algorithm, had estimated that implementation of a centalized emission inspection program would require New Jersey to make an initial capital investment of between $95 and $250 million, depending on the type of emission test and evaporative tests ultimately adopted. In order

to assure an efficient system that provides convenient service to the motoring public of this State, the vehicle inspection network of 85 lanes that currently exists would need to be modified and expanded.

The need for this expansion would be a direct result of the longer duration of the emission tests to be implemented. Since the Department's new rules call for the separation of test and repair within the same facility and the cost of test equipment under the enhanced I/M program would be greater than the cost of current test equipment, it is anticipated that a portion of the approximately 3,900 test-and-repair stations that currently perform approximately 20 percent of the State's required vehicle inspections would choose to continue their repair operations only, and discontinue inspection. This loss of additional inspection stations would also result in the need for State inspection lane expansion. For a more detailed discussion of the economic impact of the proposed enhanced I/M program in general, please refer to 25 N.J.R. 3322(a) and 3418(a).

The EPA has reported that Alternative Exhaust Test C, in conjunction with Alternative Purge Test C, would provide a throughput rate of 20 vehicles per hour. The DMV and the Department will evaluate the use of the EPA's entire "fast-pass/fast-fail" algorithm in an experimental inspection lane at the Wayne inspection station. If, indeed, a 20 vehicle per hour throughput rate could be achieved with the "fast-pass/fast-fail" algorithm, the economic impact would be less than previously anticipated for an enhanced I/M program, as fewer additional inspection lanes would be required. This would reduce the cost to the State in terms of the initial capital costs, as well as operating costs, of the enhanced I/M program.

The proposed addition of penalties at N.J.A.C. 7:27a-3.10 to enforce compliance with the proposed prohibition of leasing or offering for sale or lease of tampered vehicles at N.J.A.C. 7:27-15.5(c) and the proposed prohibition of selling or offering for sale emission control defeat devices at N.J.A.C. 7:27-15.5(d) would also, to a lesser degree, have an economic impact similar to that described above. To the extent that these penalties would further the goals of the enhanced I/M program, they would advance the positive economic impact of the program as a whole, described above.

Environmental Impact

The implementation of the proposed amendments and new rule will have a positive impact on the environment, by reducing the emissons of VOCs, CO, and NO_x, thereby reducing the formation of ground-level ozone. Ground-level ozone has the potential to adversely affect human health and well-being. Ozone can adversely affect wildlife and vegetation. The amendments and new rule would also reduce carbon dioxide (CO_2) emissions which, along with other trace gases, have been identified as contributing to global warming. For a more detailed discussion of the environmental impact of the proposed I/M program in general, please refer to 25 N.J.R. 3322(a) and 3418(a).

The EPA has presented the IM240 exhaust emission test and EPA recommended purge test with the "fast/pass-fast/fail" algorithm as an administratively feasible test, in terms of throughput and cost, that would not sacrifice environmental benefit. Upon the recommendation of the EPA, the Department has chosen to propose the addition of these test procedures as additional alternatives to those previously proposed. The Department believes, by including Alternative Exhaust Test C, as well as Alternative Exhaust Tests A and B, in its proposed enhanced I/M program, it would meet the EPA performance standard and provide a comprehensive enhanced I/M program to the citizens of New Jersey.

It should be noted that, regardless of which alternative emission or purge test is finally adopted, the EPA's approval of the Department's proposed enhanced I/M program would be based upon the demonstration that, taken collectively, all design elements of the enhanced I/M program are able to meet the performance standard established by the EPA.

Demonstration of whether an enhanced I/M program meets the EPA's performance standard shall be made by computer modelling using the EPA's MOBILE5a mobile source emission factor model. To the extent that a state is unable to meet the performance standard through a demonstration using computer modelling based on operating assumptions acceptable to the EPA, the remainder of the emission reductions may, pursuant to 40 C.F.R. §51.351(d), be obtained through other program design elements approvable by the EPA, which may increase the cost of compliance.

The proposed addition of penalties at N.J.A.C. 7:27A-3.10 to enforce compliance with the proposed prohibition of leasing or offering for sale or lease of tampered vehicles at N.J.A.C. 7:27-15.5(c) and the proposed prohibition of selling or offering for sale emission control defeat devices at N.J.A.C. 7:27-15.5(d) would also, to a lesser degree, have an environmental impact similar to that described above. To the extent that these penalties would further the goals of the enhanced I/M program, they would advance the positive environmental impact of the program as a whole, described above.

Regulatory Flexibility Analysis

In accordance with the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., the Department has determined that the proposed amendments and new rule would not impose additional reporting or recordkeeping requirements on small business (as defined in the Regulatory Flexibility Act). It would, however, impose compliance requirements on small business, in that such businesses would be required (as much as they are currently required under the existing rules) to undertake the inspection and maintenance of motor vehicles that they own. The difference in compliance, of course, is that the amendments and new rule provide for the application of stricter emissions standards and the use of more sophisticated equipment and test procedures designed to identify and fail high emitters, some of which are currently not being identified and repaired. The Department believes that, due to their reliance on gasoline-fueled motor vehicles, the majority of small businesses in the State would be affected by the amendments and new rule due to the fact that most own vehicles.

The anticipated adverse economic impact that this requirement would have on such businesses relates directly to the increased cost of motor vehicle inspection and the additional and more costly repairs to those vehicles which might have otherwise passed inspection and not have been required to have such repairs. According to the EPA, the overall average repair cost for motor vehicles failing enhanced I/M, predicted to be nearly 30 percent of those tested, would be unlikely to exceed $300.00 per vehicle.

The resultant fuel economy benefits would, at least partially, offset the cost of repairs. The EPA reports that vehicles that failed the IM240 test at the established cutpoints were found to exhibit a fuel economy improvement of 12.6 percent as a result of repairs. These fuel economy improvements generally continue beyond the year of the test. The resultant health benefits and reduction in property losses from the improvement in air quality should also, at least partially, offset these anticipated costs to small businesses.

In addition, there may be a significant impact on those small businesses that choose to own and operate private inspection centers (PICs) in New Jersey under the proposed enhanced I/M program. It is unclear at this time how many of the approximately 3,900 PICs would choose to discontinue the repair side of their operations and continue as test only. However, those that do would face a loss of revenues from the repair work previously performed, as well as increased equipment costs generated by the adoption of one of the three alternative exhaust emission test procedures. The increased equipment cost of Alternative Exhaust Test C would be essentially equivalent to those of Alternative Exhaust Test A, which the EPA initially estimated to be approximately $140,000 per facility. The EPA has subsequently informally advised the State that it believes a more current estimate may be in the range of $100,000. The increased equipment cost of Alternative Purge Test C would be essentially equivalent to that of Alternative Purge Test B, which the Department estimates would be about $500.00. Some smaller facilities may be unable to generate the capital needed for this equipment and, therefore, would lose the option to be licensed as a test-only facility, and would retain only the option of doing repairs.

The proposed penalties to be imposed for the lease, or offer for sale or lease, of tampered vehicles would likely impact a number of car dealers. In a like manner, the proposed penalties to be imposed for the sale or offer for sale of emission control defeat devices would likely impact many manufacturers and installers of high performance aftermarket components in New Jersey. Clearly, however, to make exceptions for any such small businesses would defeat the purpose of these rules.

For a more detailed discussion of the regulatory flexibility impact of the proposed enhanced I/M program in general, please refer to 25 N.J.R. 3322(a) and 3418(a).

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

7:27-15.1 Definitions

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

...

"Light-Duty Gasoline Truck 1 (LDGT1)" means a light-duty gasoline truck with a GVWR of 6,000 pounds or less.

"Light-Duty Gasoline Truck 2 (LDGT2)" means a light-duty gasoline truck with a GVWR of more than 6,000 pounds.

...

"Tier 1 Standards" means standards prescribed at section 202(g) of the Clean Air Act, 42 U.S.C.A. §7521(g), for model years 1994 and later, LDGT 1s, and LDGVs.

...

7:27-15.4 Motor vehicle inspection standards

(a) (No change.)

AGENCY NOTE: Paragraph b(2), below, will reference Table 2A, 2B or the tables set forth in Regulatory Appendix 1, depending upon which Alternative Exhaust Test, A, B, or C, as described in N.J.A.C. 7:27-15.4, below, is adopted; the appropriate reference will, therefore, be inserted upon adoption.

(b) Any light-duty or heavy-duty, gasoline-fueled motor vehicle which is subject to inspection by the State of New Jersey in accordance with the provisions of N.J.S.A. 39:8, as a condition of compliance with said inspection, shall not emit carbon monoxide (CO) or hydrocarbons (HC) in the exhaust emissions in excess of **the following standards:**

1. The standards set forth in Table [1] **1A**, when measured using an approved exhaust gas analytical system and the inspection test procedure established at N.J.A.C. 7:27B-4.5; **and**

2. The standards set forth at N.J.A.C. 7:27-15.4 in Table 1B and (see Agency Note, above: 2A or 2B or the tables set forth at Regulatory Appendix 1), in accordance with the following schedule:

i. On and after January 1, 1995, the requirements of this paragraph shall apply to no less than 30 percent of all gasoline-fueled vehicles subject to inspection pursuant to N.J.A.C. 13:20-43.2, such 30 percent to be identified by the Division of Motor Vehicles in accordance with its procedures; and

ii. On and after January 1, 1996, the requirements of this paragraph shall apply to all gasoline-fueled vehicles subject to inspection pursuant to N.J.A.C. 13:20-43.2.

(c) (No change.)

(d)-(g) (Reserved)

AGENCY NOTE: Paragraph (h), below, would only be used in conjunction with ALTERNATIVE EXHAUST TEST C and does not apply if either ALTERNATIVE EXHAUST TEST A or B is adopted. See N.J.A.C. 7:27B-4.5(a) in this proposal and in the August 2, 1993 proposal at 25 N.J.R. 3322(a).

Citation	Class	First Offense	Second Offense	Third Offense	Fourth and Each Subsequent Offense
N.J.A.C. 7:27-15.5(a)	Owner of less than three vehicles	$400	$800	$2,000	$6,000
	All other (e.g. Fleet, Motor Vehicle Dealer & Repair/Service Center)	$1,000	$2,000	$5,000	$15,000
N.J.A.C. 7:27-15.5(b)	Passenger Vehicle Registration	$500	$1,000	$2,500	$7,500
	Commercial Vehicle Registration	$1,000	$2,000	$5,000	$15,000
N.J.A.C. 7:27-15.5(c)	Sale/**Offer for Sale; Lease/Offer for Lease**	$2,000	$4,000	$10,000	$30,000
N.J.A.C. 7:27-15.5(d)	**Offer for Sale/Sale of Device/Component**	**$2,000**	**$4,000**	**$10,000**	**$30,000**
N.J.A.C. 7:27-15.6(a)	Passenger Vehicle Registration	$100	$200	$500	$1,500
	Commercial Vehicle Registration	$200	$400	$1,000	$3,000
	Property Owner	$200	$400	$1,000	$3,000

16.-25. (No change.)

7:27B-4.1 Definitions

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

...

(h) The procedures to be used to determine whether a vehicle passes or fails the exhaust emissions tests set forth at N.J.A.C. 7:27B-4.5(a)3 are those to be codified at 40 C.F.R. §85.2205(a)(4)-(5) and incorporated herein by reference, once the U.S. Environmental Protection Agency (EPA) has amended that section to include the fast-pass/fast-fail algorithm, described in Regulatory Appendix 1. Until EPA has so amended that section accordingly, the procedures to be used shall be those described in Regulatory Appendix 1, "Description of the IM240/Purge Fast-Pass/Fast-Fail Algorithm," incorporated herein by reference. In Regulatory Appendix 1, the fast-pass/fast-fail standards that are to be used from January 1, 1995 through December 31, 1997 are set forth in tables as follows:

Vehicle Type	Table No.
LDGV	**1A, 1B, 1C**
LDGT1	**2A, 2B, 2C, 2D, 2E**
LDGT2	**3A, 3B, 3C, 3D, 3E**

Also, in Regulatory Appendix 1, the fast-pass/fast-fail standards that are in effect on and after January 1, 1998 are set forth in tables as follows:

Vehicle Type	Table No.
LDGV	**4A, 4B**
LDGT1	**5A, 5B, 5C, 5D**
LDGT2	**6A, 6B, 6C, 6D**

7:27A-3.10 Civil Administrative Penalties for Violations of Rules Adopted Pursuant to the Act

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

(e) The Department shall determine the amount of civil administrative penalty for offenses described in this section on the basis of the provision violated and the frequency of the violation. Footnotes 3, 4, and 8 set forth in this subsection and (f) below are intended solely to put violators on notice that in addition to any civil administrative penalty assessed the Department may also revoke the violator's operating certificate or variance. These footnotes are not intended to limit the Department's discretion in determining whether or not to revoke an operating certificate or variance, but merely indicate the situations in which the Department is most likely to seek revocation. The number of the following subsections corresponds to the number of the corresponding subchapter in N.J.A.C. 7:27.

1.-14. (No change.)

15. The violations of N.J.A.C. 7:27-15, Control and Prohibition of Air Pollution from Gasoline-fueled Motor Vehicles, and the civil administrative penalty amounts for each violation, per vehicle **or, with respect to N.J.A.C. 7:27-15.5(d), per device/component**, are set forth in the following table:

Citation	Class	First Offense	Second Offense	Third Offense	Fourth and Each Subsequent Offense
N.J.A.C. 7:27-15.5(a)	Owner of less than three vehicles	$400	$800	$2,000	$6,000
	All other (e.g. Fleet, Motor Vehicle Dealer & Repair/Service Center)	$1,000	$2,000	$5,000	$15,000
N.J.A.C. 7:27-15.5(b)	Passenger Vehicle Registration	$500	$1,000	$2,500	$7,500
	Commercial Vehicle Registration	$1,000	$2,000	$5,000	$15,000
N.J.A.C. 7:27-15.5(c)	Sale/**Offer for Sale; Lease/Offer for Lease**	$2,000	$4,000	$10,000	$30,000
N.J.A.C. 7:27-15.5(d)	**Offer for Sale/Sale of Device/Component**	**$2,000**	**$4,000**	**$10,000**	**$30,000**
N.J.A.C. 7:27-15.6(a)	Passenger Vehicle Registration	$100	$200	$500	$1,500
	Commercial Vehicle Registration	$200	$400	$1,000	$3,000
	Property Owner	$200	$400	$1,000	$3,000

"Light-Duty Gasoline Truck 1 (LDGT1)" means a light-duty gasoline truck with a GVWR of 6,000 pounds or less.

"Light-Duty Gasoline Truck 2 (LDGT2)" means a light-duty gasoline truck with a GVWR of more than 6,000 pounds.

...

"Tier 1 Standards" means standards prescribed at section 202(g) of the Clean Air Act, 42 U.S.C.A. §7521(g), for model years 1994 and later, LDGT 1s, and LDGVs.

. . .

7:27B-4.5 Exhaust emission testing procedure for gasoline-fueled motor vehicles subject to inspection by the State of New Jersey

(a) The exhaust emission testing procedure for gasoline-fueled motor vehicles to determine compliance with N.J.A.C. 7:27-15.2(b), and 15.4(a) and (b) shall be the following:

1.-2. (No change.)

AGENCY NOTE: In addition to the two alternative exhaust emission test procedures proposed on August 2, 1993 at 25 N.J.R. 3322(a), the Department is proposing a third exhaust emission test procedure. This additional test procedure is referred to herein as ALTERNATIVE EXHAUST TEST C.

ALTERNATIVE EXHAUST TEST C

3. Except as provided in (a)4 below, the IM240 emission test shall be performed on all post-1985 model year vehicles in accordance with the exhaust test procedures as specified in the EPA report EPA-AA-EPSD-IM-93-1, entitled High-Tech I/M Test Procedures, Emission Standards, Quality Control Requirements, and Equipment Specifications, and incorporating all subsequent revisions thereto, incorporated herein by reference. The standards to be applied to determine if a vehicle passes or fails shall be those specified at N.J.A.C. 7:27-15.4(h).

4. If the vehicle to be tested employs full-time four-wheel drive, has a GVWR in excess of 8,500 pounds, or is of a model year prior to 1986, a two speed idle test shall be performed on the vehicle in accordance with the procedures specified at Appendix B to Subpart S of 40 CFR Part 51, entitled Test Procedures (II) Two Speed Idle Test, and incorporating all subsequent revisions thereto, incorporated herein by reference. The standards to be applied to determine if a vehicle passes or fails shall be those specified for the idle mode in Table 1A at N.J.A.C. 7:27-15.4 and those specified for the 2500 RPM mode in Table 1B at N.J.A.C. 7:27-15.4.

7:27B-4.6 Gasoline-fueled motor vehicle emission control apparatus compliance examination procedure

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

(c) An evaporative purge test shall be conducted as follows:

AGENCY NOTE: In addition to the two alternative purge test procedures proposed on August 2, 1993 at 25 N.J.R. 3322(a), the Department is proposing a third purge test procedure. This additional test procedure is referred to herein as ALTERNATIVE PURGE TEST C. ALTERNATIVE PURGE TEST C, below, would only be used in conjunction with ALTERNATIVE EXHAUST TEST C and the Department will not adopt ALTERNATIVE PURGE TEST C if either ALTERNATIVE EXHAUST TEST A or B is adopted.

ALTERNATIVE PURGE TEST C

1. The evaporative purge test shall be performed on all post-1985 vehicles equipped with an evaporative emissions control system that are subject to the exhaust emission testing set forth at N.J.A.C. 7:27B-4.5(a)3. The evaporative purge test shall be performed in accordance with the purge test procedures as specified in the EPA report EPA-AA-EPSD-IM-93-1, entitled High-Tech I/M Test Procedures, Emission Standards, Quality Control Requirements, and Equipment Specifications, and incorporating all subsequent revisions thereto, incorporated herein by reference. The procedure to be used to determine whether a vehicle passes or fails the evaporative purge test are those to be codified at 40 CFR 85.2205(a)(4)-(5) and incorporated herein by reference, once the U.S. Environmental Protection Agency (EPA) has amended that section to include the fast-pass/fast-fail algorithm, described in Regulatory Appendix 1. Until EPA has so amended that section accordingly, the procedures to be used shall be those described in Regulatory Appendix 1, "Description of the IM240/Purge Fast-Pass/Fast-Fail Algorithm," incorporated herein by reference. In Regulatory Appendix 1, the fast-pass/fast-fail standards for the evaporative purge test procedure are set forth in Table 7.

7:27B-4.9 On-road exhaust emission testing procedures for gasoline-fueled motor vehicles subject to inspection by the State of New Jersey

AGENCY NOTE: The Department proposed two different on-road exhaust emission test procedures on August 2, 1993 at 25 N.J.R. 3322(a). They are referred to as ALTERNATIVE ON-ROAD TEST A and ALTERNATIVE ON-ROAD TEST B. ALTERNATIVE ON-ROAD TEST A would be used in conjunction with ALTERNATIVE EXHAUST TEST A, ALTERNATIVE EXHAUST TEST B or with ALTERNATIVE EXHAUST TEST C, whichever exhaust test is adopted. ALTERNATIVE ON-ROAD TEST B would only be used in conjunction with ALTERNATIVE EXHAUST TEST B.

(a)-(b) (Reserved)

APPENDIX 1

Description of the IM240/Purge Fast-Pass/Fast-Fail Algorithm

Pass and fail decisions are made by measuring the vehicle's cumulative emissions of each pollutant in each second, and comparing them to cumulative emission fast-pass and fast-fail standards for each pollutant for the second of the test under consideration. In general, if the vehicle's cumulative emissions are above a given level for any pollutant the vehicle fails, if they are below a given level for all pollutants the vehicle passes. Testing continues until decisions are made for each pollutant and for purge. Measurements of all constituents shall continue to be taken as long as the test continues, including those constituents for which a decision has already been made.

The fast-pass and fast-fail standards are derived from the Arizona data which included 3,718 tests. Fast-fail standards for each second represent the highest cumulative emission levels in that second obtained for vehicles passing the IM240 using two-ways-to pass criteria (which are more lenient standards than the composite test), based on composite test cutpoints of 0.80 grams per mile (gpm) HC, 15.0 gpm CO, 2.0 gpm NO_x, and 1.0 liter of purge, and Phase 2 cutpoints of 0.50 gpm HC, and 12.0 gpm CO. Hence, vehicles that exceed this level are showing higher cumulative emissions at that point in the test than the dirtiest vehicles passing the full test and therefore fail. Fast-pass standards for each second represent the tenth lowest cumulative emission levels in that second obtained for vehicles failing the IM240 using the two-ways-to-pass criteria. Hence, vehicles that fall below this level are showing lower cumulative emissions at that point in the test than the cleanest vehicles failing the full test and therefore pass. Fast-pass/fast-fail determinations begin at second 30 of the IM240 cycle. The second-by-second standards are depicted in the tables which accompany this description. EPA is continuing to collect data and may revise the standards in the future to further optimize the algorithm.

Beginning at second 94, pass/fail decisions for HC and CO are based upon analysis of cumulative emissions in Phase 2, the portion of the test beginning at second 94, as well as emission levels cumulated from the beginning of the test (the "composite" test). Fast-pass and fast-fail standards are derived for Phase 2 of the test as described above; however, they are used somewhat differently to determine fast-fail conditions. Since we do not have two-ways-to-pass standards for NO_x, there are no Phase 2 NO_x fast-pass/fast-fail standards, and Phase 2 cumulative NO_x emissions are not measured.

The fast-pass/fast-fail algorithm for purge is essentially the same as for tailpipe emissions. Second-by-second cumulative purge levels are compared with second-by-second cumulative purge pass/fail standards. Fast-pass standards correspond to the tenth highest cumulative purge levels for failing vehicles. Fast-fail standards correspond to the lowest cumulative purge levels for passing vehicles. There are no Phase 2 standards for purge.

A vehicle passes the IM240/purge test if the cumulative composite NO_x emissions are below the cumulative composite NO_x fast-pass standard, if cumulative composite purge is above the cumulative composite purge fast-pass standard, and if any of the following four conditions occur:

- **cumulative composite emissions of both HC and CO are below the composite fast-pass standards;**

- cumulative Phase 2 emissions of both HC and CO are below the Phase 2 fast-pass standards;
- Phase 2 HC emissions are below the Phase 2 HC fast-pass standard and composite CO emissions are below the composite CO fast-pass standard; or
- Phase 2 CO emissions are below the Phase 2 CO fast-pass standard and composite HC emissions are below the composite HC fast-pass standard.

A vehicle fails for a given pollutant prior to second 94 if its cumulative emissions for that pollutant exceed the cumulative composite fast-fail standard. The same failure condition applies for NO_x after second 94. For a vehicle to fast-fail for HC or CO after second 94 two conditions must be satisfied simultaneously: The vehicle's cumulative composite emissions must be above a standard representing the minimum cumulative composite emission level for failing vehicles at the end of the test; and, the vehicle's Phase 2 cumulative emissions must be above a standard representing the maximum cumulative Phase 2 emission level for passing vehicles for the second under consideration.

A vehicle fails for purge if its cumulative composite purge level is below the cumulative composite fast-fail standard. Note that there is no fast-fail standard prior to second 212 of the test. This is because some passing vehicles do not begin purging until this point in the test.

Despite this constraint, EPA's data indicate that average test times using these algorithms are about 115 seconds. A little more than 20 percent of vehicles complete the test at 30 seconds. Fifty percent of vehicles complete the test at or before 120 seconds. By about 180 seconds, 75 percent of vehicles have completed the test, and 95 percent complete the test before 220 seconds.

Terms

Scores

HC_t = cumulative composite HC at time = t seconds
CO_t = cumulative composite CO at time = t seconds
NOx_t = cumulative composite NOx at time = t seconds
P_t = cumulative composite purge at time = t seconds
HC_{bt} = cumulative Phase 2 HC at time = t seconds
CO_{bt} = cumulative Phase 2 CO at time = t seconds
Cumulative composite scores represent the cumulative grams of emissions from t = 0 seconds
Cumulative Phase 2 scores represent the cumulative grams of emissions from t = 94 seconds

Fast-Pass Standards

HC_{pt} = composite HC fast-pass standard at time = t seconds
CO_{pt} = composite CO fast-pass standard at time = t seconds
NOx_{pt} = composite NOx fast-pass standard for failing vehicles at time = t seconds
P_{pt} = composite purge fast-pass standard at time = t seconds
HC_{pbt} = Phase 2 HC fast-pass standard at time = t seconds
CO_{pbt} = Phase 2 CO fast-pass standard at time = t seconds

Fast-Fail Standards

HC_{ft} = composite HC fast-fail standard at time = t seconds
CO_{ft} = composite CO fast-fail standard at time = t seconds
NOx_{ft} = composite NOx fast-fail standard at time = t seconds
P_{ft} = composite purge fast-fail standard at time = t seconds
HC_{ff} = minimum final cumulative composite HC for vehicles failing two-ways-to-pass
CO_{ff} = minimum final cumulative composite CO for vehicles failing two-ways-to-pass
HC_{fbt} = Phase 2 HC fast-fail standard at time = t seconds
CO_{fbt} = Phase 2 CO fast-fail standard at time = t seconds

Fast-Pass Conditions

For $t \geq 30$ seconds, the vehicle shall pass if:

$HC_t < HC_{pt}$ and $CO_t < CO_{pt}$, $NO_{x_t} < NO_{x_{pt}}$; and $P_t > P_{pt}$

additionally, for $t \geq 94$ seconds, the vehicle shall pass if:

$HC_{bt} < HC_{pbt}$ and $CO_{bt} < CO_{pbt}$ $NO_{x_t} < NO_{x_{pt}}$, and $P_t > P_{pt}$, or
$HC_t < HC_{pt}$ and $CO_{bt} < CO_{pbt}$ $NO_{x_t} < NO_{x_{pt}}$, and $P_t > P_{pt}$, or
$HC_{bt} < HC_{pbt}$ and $CO_t < CO_{pt}$ $NO_{x_t} < NO_{x_{pt}}$, and $P_t > P_{pt}$

Fast-Fail Conditions

For $t \geq 30$ seconds, the vehicle shall fail if:

$NO_{x_t} > NO_{x_{ft}}$, and fast-pass or fast-fail conditions have been satisfied for each of the other pollutants and for purge

$P_t < P_{ft}$ and fast-pass or fast-fail conditions have been satisfied for each of the other pollutants

For t = 30 to 93 seconds, the vehicle shall fail if:

$HC_t > HC_{ft}$, and/or $CO_t > CO_{ft}$, and fast-pass or fast-fail conditions have been satisfied for each of the other pollutants and for purge

For $t \geq 94$ seconds, the vehicle shall fail if:

$HC_t > HC_{ff}$ and $HC_{bt} > HC_{fbt}$, and/or $CO_t > CO_{ff}$ and $CO_{bt} > CO_{fbt}$, and fast-pass or fast-fail conditions have been satisfied for each of the other pollutants and for purge

Table 1A: Light-Duty Gasoline Vehicles
IM240 Fast-Pass/Fast-Fail Standards
To be used from January 1, 1995 through December 31, 1997
Model Years 1983-1990

Sec IM 240	HC Fail Composite-2.00/1.25	HC Pass Composite-2.00/1.25	HC Fail Phase 2-2.00/1.25	HC Pass Phase 2-2.00/1.25	CO Fail Composite-30.0/24.0	CO Pass Composite-30.0/24.0	CO Fail Phase 2-30.0/24.0	CO Pass Phase 2-30.0/24.0	NO_x Fail-3.0	NO_x Pass-3.0
30	1.621	0.407	N/A	N/A	30.061	3.804	N/A	N/A	1.422	0.419
31	1.665	0.415	N/A	N/A	30.842	3.985	N/A	N/A	1.453	0.425
32	1.697	0.423	N/A	N/A	31.347	4.215	N/A	N/A	1.510	0.431
33	1.732	0.436	N/A	N/A	31.761	4.440	N/A	N/A	1.585	0.449
34	1.771	0.451	N/A	N/A	32.131	4.579	N/A	N/A	1.658	0.476
35	1.812	0.464	N/A	N/A	32.521	4.688	N/A	N/A	1.717	0.497
36	1.851	0.468	N/A	N/A	33.180	4.749	N/A	N/A	1.760	0.515
37	1.889	0.475	N/A	N/A	34.280	4.783	N/A	N/A	1.792	0.516
38	1.915	0.487	N/A	N/A	35.180	4.813	N/A	N/A	1.817	0.519
39	1.934	0.506	N/A	N/A	36.062	4.876	N/A	N/A	1.836	0.527
40	1.950	0.530	N/A	N/A	36.870	5.104	N/A	N/A	1.852	0.542
41	1.973	0.549	N/A	N/A	37.479	5.217	N/A	N/A	1.866	0.560
42	2.001	0.569	N/A	N/A	38.026	5.383	N/A	N/A	1.875	0.598
43	2.014	0.588	N/A	N/A	38.432	5.571	N/A	N/A	1.883	0.616
44	2.025	0.609	N/A	N/A	38.598	5.888	N/A	N/A	1.909	0.645
45	2.038	0.621	N/A	N/A	38.761	6.199	N/A	N/A	1.960	0.670
46	2.054	0.636	N/A	N/A	38.852	6.245	N/A	N/A	2.014	0.691
47	2.070	0.649	N/A	N/A	38.891	6.318	N/A	N/A	2.056	0.716
48	2.095	0.666	N/A	N/A	38.909	6.418	N/A	N/A	2.092	0.735
49	2.136	0.679	N/A	N/A	38.916	6.540	N/A	N/A	2.133	0.765
50	2.191	0.696	N/A	N/A	38.922	6.690	N/A	N/A	2.178	0.802

Table 1A: Light-Duty Gasoline Vehicles
IM240 Fast-Pass/Fast-Fail Standards
To be used from January 1, 1995 through December 31, 1997
Model Years 1983-1990

Sec IM 240	HC Fail Composite-2.00/1.25	HC Pass Composite-2.00/1.25	HC Fail Phase 2-2.00/1.25	HC Pass Phase 2-2.00/1.25	CO Fail Composite-30.0/24.0	CO Pass Composite-30.0/24.0	CO Fail Phase 2-30.0/24.0	CO Pass Phase 2-30.0/24.0	NO_x Fail-3.0	NO_x Pass-3.0
51	2.247	0.712	N/A	N/A	38.924	6.875	N/A	N/A	2.219	0.836
52	2.314	0.727	N/A	N/A	38.928	7.029	N/A	N/A	2.252	0.868
53	2.360	0.745	N/A	N/A	38.932	7.129	N/A	N/A	2.275	0.890
54	2.399	0.760	N/A	N/A	38.934	7.359	N/A	N/A	2.288	0.918
55	2.434	0.776	N/A	N/A	38.938	7.722	N/A	N/A	2.294	0.936
56	2.479	0.797	N/A	N/A	38.944	8.017	N/A	N/A	2.296	0.947
57	2.509	0.814	N/A	N/A	39.271	8.249	N/A	N/A	2.336	0.958
58	2.526	0.826	N/A	N/A	39.932	8.425	N/A	N/A	2.397	0.970
59	2.539	0.837	N/A	N/A	40.541	8.563	N/A	N/A	2.452	0.982
60	2.550	0.849	N/A	N/A	41.204	8.686	N/A	N/A	2.501	0.994
61	2.560	0.862	N/A	N/A	41.972	8.804	N/A	N/A	2.541	1.019
62	2.569	0.872	N/A	N/A	42.815	8.916	N/A	N/A	2.570	1.042
63	2.577	0.887	N/A	N/A	43.614	9.025	N/A	N/A	2.589	1.049
64	2.585	0.895	N/A	N/A	44.238	9.138	N/A	N/A	2.602	1.058
65	2.593	0.903	N/A	N/A	44.769	9.250	N/A	N/A	2.612	1.062
66	2.600	0.925	N/A	N/A	45.434	9.354	N/A	N/A	2.622	1.064
67	2.608	0.933	N/A	N/A	46.180	9.457	N/A	N/A	2.637	1.070
68	2.616	0.945	N/A	N/A	46.981	9.575	N/A	N/A	2.657	1.077
69	2.624	0.959	N/A	N/A	47.803	9.728	N/A	N/A	2.684	1.085
70	2.631	0.970	N/A	N/A	48.627	9.938	N/A	N/A	2.716	1.092
71	2.637	0.980	N/A	N/A	49.393	10.140	N/A	N/A	2.751	1.101
72	2.642	0.988	N/A	N/A	50.034	10.222	N/A	N/A	2.789	1.111
73	2.647	0.997	N/A	N/A	50.584	10.261	N/A	N/A	2.831	1.121
74	2.653	1.022	N/A	N/A	51.210	10.278	N/A	N/A	2.872	1.131
75	2.661	1.037	N/A	N/A	51.993	10.290	N/A	N/A	2.907	1.141
76	2.667	1.051	N/A	N/A	52.889	10.715	N/A	N/A	2.933	1.159
77	2.671	1.064	N/A	N/A	53.841	10.790	N/A	N/A	2.951	1.164
78	2.676	1.075	N/A	N/A	54.823	10.844	N/A	N/A	2.969	1.186
79	2.681	1.087	N/A	N/A	55.835	10.921	N/A	N/A	3.000	1.221
80	2.685	1.097	N/A	N/A	56.846	11.010	N/A	N/A	3.054	1.260
81	2.689	1.105	N/A	N/A	57.721	11.090	N/A	N/A	3.126	1.268
82	2.694	1.114	N/A	N/A	58.200	11.136	N/A	N/A	3.205	1.272
83	2.698	1.136	N/A	N/A	58.355	11.136	N/A	N/A	3.279	1.277
84	2.702	1.160	N/A	N/A	58.469	11.165	N/A	N/A	3.341	1.288
85	2.706	1.182	N/A	N/A	58.639	11.191	N/A	N/A	3.387	1.310
86	2.710	1.201	N/A	N/A	58.834	11.205	N/A	N/A	3.417	1.319
87	2.715	1.217	N/A	N/A	59.049	11.211	N/A	N/A	3.436	1.320
88	2.721	1.233	N/A	N/A	59.274	11.211	N/A	N/A	3.449	1.337
89	2.726	1.248	N/A	N/A	59.516	11.211	N/A	N/A	3.458	1.348
90	2.731	1.262	N/A	N/A	59.759	11.211	N/A	N/A	3.465	1.361
91	2.735	1.271	N/A	N/A	59.990	11.220	N/A	N/A	3.471	1.366
92	2.738	1.279	N/A	N/A	60.205	11.294	N/A	N/A	3.476	1.369
93	2.741	1.287	N/A	N/A	60.430	11.332	N/A	N/A	3.481	1.373
94	2.744	1.295	0.026	0.001	60.665	11.355	0.474	0.000	3.486	1.375
95	2.747	1.302	0.088	0.002	60.907	11.383	0.974	0.000	3.491	1.377
96	2.751	1.309	0.135	0.003	61.185	11.410	1.646	0.001	3.497	1.379
97	2.767	1.316	0.159	0.004	61.541	11.433	2.343	0.006	3.503	1.381
98	2.782	1.325	0.188	0.008	62.023	11.516	2.954	0.020	3.509	1.383
99	2.787	1.339	0.213	0.015	62.718	11.820	3.512	0.051	3.515	1.385
100	2.790	1.356	0.234	0.021	63.715	12.104	5.137	0.092	3.522	1.399
101	2.794	1.365	0.265	0.026	64.910	12.344	7.560	0.131	3.530	1.405
102	2.798	1.378	0.288	0.039	65.778	12.781	10.112	0.200	3.541	1.466
103	2.809	1.397	0.308	0.044	66.170	13.472	12.308	0.307	3.559	1.485
104	2.816	1.420	0.329	0.055	66.572	14.405	14.009	0.582	3.589	1.546
105	2.819	1.445	0.343	0.094	67.259	14.808	14.939	0.800	3.626	1.623
106	2.823	1.470	0.354	0.110	67.941	14.965	15.506	0.925	3.658	1.699
107	2.829	1.491	0.386	0.116	68.427	15.121	15.972	0.973	3.685	1.760
108	2.835	1.506	0.410	0.132	68.586	15.372	16.305	1.091	3.711	1.788
109	2.839	1.517	0.427	0.151	68.615	15.530	16.540	1.113	3.732	1.798
110	2.843	1.528	0.443	0.159	68.642	15.687	16.770	1.213	3.746	1.842
111	2.850	1.542	0.461	0.172	68.673	16.018	16.869	1.344	3.755	1.864
112	2.859	1.559	0.469	0.186	68.690	16.527	16.946	1.399	3.760	1.888
113	2.867	1.578	0.491	0.199	68.699	16.810	17.160	1.520	3.763	1.905
114	2.874	1.594	0.538	0.207	68.703	16.961	17.417	1.640	3.768	1.920
115	2.880	1.605	0.562	0.216	68.710	17.120	17.555	1.684	3.778	1.926
116	2.886	1.615	0.575	0.229	68.711	17.135	17.607	1.693	3.790	1.939
117	2.895	1.625	0.584	0.235	68.715	17.249	17.636	1.786	3.801	1.958

Table 1A: Light-Duty Gasoline Vehicles
IM240 Fast-Pass/Fast-Fail Standards
To be used from January 1, 1995 through December 31, 1997
Model Years 1983-1990

Sec IM 240	HC Fail Composite-2.00/1.25	HC Pass Composite-2.00/1.25	HC Fail Phase 2-2.00/1.25	HC Pass Phase 2-2.00/1.25	CO Fail Composite-30.0/24.0	CO Pass Composite-30.0/24.0	CO Fail Phase 2-30.0/24.0	CO Pass Phase 2-30.0/24.0	NO_x Fail-3.0	NO_x Pass-3.0
118	2.908	1.642	0.592	0.240	68.720	17.451	17.652	2.007	3.809	1.972
119	2.920	1.670	0.599	0.245	68.725	17.509	17.739	2.084	3.813	1.981
120	2.927	1.694	0.610	0.261	68.729	17.605	17.953	2.179	3.815	1.987
121	2.931	1.705	0.620	0.267	68.732	17.734	18.277	2.264	3.817	1.991
122	2.933	1.717	0.635	0.277	68.733	18.049	18.647	2.328	3.819	1.996
123	2.936	1.732	0.652	0.287	68.735	18.447	18.971	2.375	3.822	2.012
124	2.940	1.747	0.668	0.298	68.737	18.592	19.217	2.437	3.826	2.040
125	2.943	1.763	0.682	0.308	68.740	18.657	19.423	2.543	3.831	2.060
126	2.946	1.779	0.694	0.316	68.741	18.796	19.663	2.593	3.836	2.069
127	2.949	1.795	0.706	0.322	68.746	18.952	19.848	2.641	3.840	2.092
128	2.952	1.810	0.716	0.329	68.748	19.137	19.960	2.663	3.844	2.114
129	2.955	1.823	0.725	0.338	68.750	19.329	20.044	2.672	3.847	2.132
130	2.959	1.835	0.734	0.346	68.752	19.519	20.117	2.676	3.849	2.144
131	2.963	1.845	0.743	0.354	68.755	19.707	20.241	2.683	3.850	2.152
132	2.969	1.854	0.752	0.356	68.757	19.882	20.806	2.817	3.851	2.157
133	2.975	1.862	0.761	0.357	68.760	19.905	21.458	2.992	3.852	2.160
134	2.984	1.870	0.772	0.359	68.773	20.049	22.044	3.111	3.853	2.163
135	2.994	1.883	0.779	0.362	68.827	20.460	22.424	3.234	3.854	2.165
136	2.998	1.888	0.798	0.364	68.859	20.746	22.844	3.304	3.856	2.168
137	3.000	1.896	0.822	0.368	68.935	21.068	23.034	3.310	3.859	2.171
138	3.003	1.911	0.880	0.378	69.138	21.380	23.164	3.320	3.865	2.186
139	3.005	1.928	0.903	0.391	69.305	21.748	23.324	3.354	3.876	2.235
140	3.007	1.949	0.922	0.402	69.379	22.046	23.443	3.436	3.892	2.298
141	3.010	1.969	0.937	0.408	69.422	22.348	23.481	3.443	3.911	2.333
142	3.014	1.982	0.950	0.422	69.435	22.397	23.505	3.452	3.937	2.373
143	3.018	1.999	0.961	0.428	69.441	22.407	23.569	3.490	3.970	2.406
144	3.021	2.011	0.969	0.432	69.444	22.417	23.602	3.552	3.998	2.416
145	3.024	2.022	0.974	0.434	69.448	22.922	23.613	3.588	4.015	2.420
146	3.026	2.035	0.978	0.439	69.451	22.951	23.683	3.600	4.024	2.424
147	3.028	2.043	0.984	0.450	69.452	22.976	23.794	3.616	4.029	2.435
148	3.030	2.049	0.990	0.460	69.456	23.017	23.846	3.627	4.033	2.455
149	3.031	2.063	0.994	0.467	69.459	23.073	23.862	3.636	4.039	2.471
150	3.033	2.085	0.997	0.472	69.466	23.161	23.874	3.676	4.047	2.484
151	3.040	2.104	1.000	0.480	69.467	23.218	23.894	3.882	4.054	2.495
152	3.047	2.117	1.003	0.491	69.470	23.253	23.937	4.011	4.058	2.509
153	3.054	2.127	1.008	0.503	69.474	23.337	24.078	4.047	4.061	2.522
154	3.061	2.138	1.022	0.505	69.481	23.425	24.241	4.067	4.064	2.533
155	3.069	2.152	1.030	0.515	69.486	23.534	24.347	4.081	4.069	2.541
156	3.080	2.168	1.039	0.522	69.493	23.652	24.433	4.116	4.074	2.552
157	3.137	2.186	1.049	0.527	69.639	23.739	24.640	4.251	4.078	2.589
158	3.178	2.205	1.055	0.537	70.087	24.606	25.052	5.099	4.080	2.631
159	3.229	2.224	1.063	0.549	70.505	25.615	25.176	5.383	4.084	2.704
160	3.271	2.242	1.070	0.568	71.026	26.073	25.275	6.362	4.102	2.758
161	3.328	2.266	1.085	0.586	71.793	28.496	25.339	7.926	4.150	2.802
162	3.376	2.308	1.095	0.610	72.553	29.772	25.433	8.429	4.212	2.904
163	3.420	2.352	1.121	0.648	73.266	31.056	25.539	9.201	4.267	2.960
164	3.465	2.406	1.140	0.677	73.753	33.351	25.634	10.825	4.314	3.027
165	3.491	2.421	1.153	0.699	74.121	34.890	25.717	12.291	4.357	3.127
166	3.517	2.435	1.165	0.720	74.630	35.937	26.037	13.366	4.403	3.187
167	3.548	2.470	1.177	0.738	74.956	37.012	26.305	14.428	4.474	3.306
168	3.585	2.501	1.191	0.767	75.297	37.892	26.350	15.318	4.539	3.384
169	3.626	2.537	1.228	0.828	75.928	39.028	26.417	15.699	4.598	3.467
170	3.679	2.571	1.248	0.855	76.740	40.406	27.743	16.073	4.658	3.565
171	3.716	2.625	1.262	0.869	77.353	41.379	28.496	16.475	4.719	3.640
172	3.738	2.657	1.272	0.885	77.684	42.033	28.713	17.158	4.770	3.718
173	3.753	2.683	1.280	0.900	77.825	42.432	28.757	17.532	4.806	3.781
174	3.764	2.701	1.290	0.941	77.861	42.742	28.773	17.965	4.829	3.827
175	3.774	2.717	1.305	0.979	77.870	43.399	28.786	18.242	4.843	3.852
176	3.782	2.732	1.321	1.002	77.873	43.895	28.798	18.283	4.855	3.903
177	3.793	2.756	1.338	1.025	77.879	44.227	28.823	18.480	4.871	3.930
178	3.800	2.781	1.356	1.047	77.883	44.926	28.914	19.576	4.893	3.970
179	3.807	2.811	1.375	1.065	77.932	45.256	28.967	20.015	4.917	4.015
180	3.815	2.853	1.395	1.089	78.158	45.553	28.983	20.203	4.936	4.074
181	3.822	2.898	1.416	1.109	78.507	45.753	28.991	20.433	4.948	4.159
182	3.828	2.946	1.437	1.133	79.057	46.210	29.004	21.025	4.955	4.230
183	3.833	2.988	1.459	1.158	79.568	47.017	29.108	21.882	5.006	4.286
184	3.839	3.023	1.485	1.184	79.891	48.185	29.443	22.204	5.071	4.334

Table 1A: Light-Duty Gasoline Vehicles
IM240 Fast-Pass/Fast-Fail Standards
To be used from January 1, 1995 through December 31, 1997
Model Years 1983-1990

Sec IM 240	HC Fail Composite-2.00/1.25	HC Pass Composite-2.00/1.25	HC Fail Phase 2-2.00/1.25	HC Pass Phase 2-2.00/1.25	CO Fail Composite-30.0/24.0	CO Pass Composite-30.0/24.0	CO Fail Phase 2-30.0/24.0	CO Pass Phase 2-30.0/24.0	NO_x Fail-3.0	NO_x Pass-3.0
185	3.844	3.057	1.509	1.209	80.242	48.741	29.843	22.859	5.151	4.388
186	3.849	3.076	1.519	1.222	80.839	49.462	29.999	23.533	5.216	4.447
187	3.856	3.101	1.525	1.231	81.590	50.313	30.034	24.281	5.244	4.505
188	3.861	3.120	1.530	1.239	82.220	51.285	30.074	25.078	5.257	4.561
189	3.865	3.136	1.534	1.254	82.669	52.076	30.130	25.276	5.270	4.625
190	3.873	3.151	1.537	1.278	82.954	52.857	30.517	25.578	5.290	4.696
191	3.880	3.163	1.539	1.300	83.104	52.876	30.831	25.859	5.312	4.731
192	3.886	3.209	1.541	1.313	83.207	53.067	30.905	25.985	5.334	4.780
193	3.892	3.223	1.544	1.324	83.385	53.777	30.955	26.153	5.358	4.837
194	3.897	3.237	1.547	1.340	83.643	54.242	31.033	26.582	5.385	4.876
195	3.902	3.263	1.550	1.367	83.983	54.489	31.076	27.067	5.411	4.928
196	3.906	3.302	1.553	1.387	84.312	54.601	31.089	27.456	5.440	4.972
197	3.910	3.338	1.556	1.402	84.682	54.912	31.092	27.805	5.470	5.025
198	3.917	3.372	1.559	1.417	85.036	55.588	31.095	28.070	5.504	5.104
199	3.924	3.390	1.562	1.432	85.208	56.266	31.107	28.590	5.539	5.189
200	3.929	3.428	1.565	1.446	85.249	56.617	31.164	28.914	5.567	5.275
201	3.933	3.470	1.568	1.460	85.262	56.863	31.201	29.063	5.588	5.336
202	3.947	3.493	1.571	1.477	85.267	57.204	31.209	29.502	5.599	5.366
203	3.959	3.509	1.573	1.492	85.271	57.371	31.222	29.697	5.604	5.387
204	3.966	3.522	1.575	1.501	85.275	57.487	31.411	29.713	5.607	5.427
205	3.975	3.533	1.576	1.510	85.280	57.728	31.517	29.783	5.608	5.444
206	3.986	3.550	1.582	1.522	85.298	58.097	31.570	29.942	5.610	5.447
207	3.991	3.578	1.593	1.561	85.317	58.572	31.596	30.284	5.618	5.477
208	3.995	3.607	1.604	1.585	85.332	59.024	31.694	30.755	5.636	5.520
209	3.999	3.630	1.615	1.597	85.409	59.321	31.988	31.287	5.664	5.560
210	4.002	3.658	1.624	1.607	85.562	59.715	32.299	31.549	5.692	5.603
211	4.005	3.701	1.635	1.627	85.908	60.045	32.622	31.820	5.727	5.657
212	4.008	3.745	1.647	1.645	86.430	60.453	32.749	32.250	5.782	5.698
213	4.011	3.778	1.658	1.656	86.854	60.935	32.879	32.546	5.813	5.762
214	4.014	3.814	1.669	1.663	87.154	61.307	32.999	32.808	5.827	5.836
215	4.018	3.825	1.678	1.669	87.440	61.666	33.060	33.142	5.849	5.944
216	4.021	3.835	1.686	1.674	87.745	62.148	33.204	33.529	5.884	6.008
217	4.024	3.844	1.694	1.685	87.897	62.532	33.341	33.763	5.908	6.040
218	4.027	3.853	1.700	1.705	87.927	62.546	33.414	33.921	5.921	6.072
219	4.031	3.864	1.704	1.711	87.935	62.559	33.514	33.961	5.931	6.089
220	4.035	3.874	1.706	1.735	87.938	62.570	33.640	33.983	5.939	6.101
221	4.038	3.891	1.709	1.752	87.942	62.846	33.692	34.007	5.947	6.118
222	4.041	3.928	1.711	1.760	87.944	63.097	33.711	34.032	5.952	6.126
223	4.044	3.966	1.714	1.774	87.947	63.150	33.733	34.054	5.955	6.139
224	4.047	4.008	1.718	1.778	87.948	63.150	33.770	34.061	5.957	6.145
225	4.052	4.010	1.721	1.797	87.952	63.150	33.796	34.082	5.959	6.148
226	4.057	4.012	1.723	1.802	87.954	63.150	33.810	34.100	5.961	6.150
227	4.060	4.016	1.726	1.804	87.957	63.150	33.821	34.109	5.963	6.151
228	4.064	4.019	1.729	1.806	87.960	63.150	33.839	34.129	5.966	6.152
229	4.067	4.057	1.731	1.810	87.964	63.150	33.865	34.284	5.971	6.153
230	4.069	4.065	1.733	1.814	87.968	63.150	33.894	34.397	5.977	6.154
231	4.071	4.072	1.735	1.827	87.971	63.150	33.918	34.463	5.984	6.156
232	4.073	4.081	1.743	1.833	87.971	63.150	33.944	34.465	5.990	6.157
233	4.075	4.104	1.749	1.837	87.974	63.150	33.985	34.466	5.997	6.159
234	4.077	4.124	1.753	1.841	87.974	63.153	34.014	34.468	6.004	6.160
235	4.079	4.128	1.757	1.845	87.978	63.159	34.032	34.470	6.012	6.162
236	4.081	4.132	1.762	1.851	87.980	63.173	34.051	34.471	6.024	6.163
237	4.083	4.137	1.767	1.855	87.985	63.193	34.067	34.472	6.037	6.164
238	4.084	4.147	1.772	1.857	87.987	63.214	34.079	34.472	6.049	6.166
239	4.085	4.158	1.776	1.860	87.991	63.233	34.085	34.473	6.060	6.168

Table 1B: Light-Duty Gasoline Vehicles
IM240 Fast-Pass/Fast-Fail Standards
To be used from January 1, 1995 through December 31, 1997
Model Years 1991-1995, not including 1994 and 1995 vehicles certified to Tier 1 standards

Sec IM 240	HC Fail Composite-1.25/0.75	HC Pass Composite-1.25/0.75	HC Fail Phase 2-1.25/0.75	HC Pass Phase 2-1.25/0.75	CO Fail Composite-20.0/16.0	CO Pass Composite-20.0/16.0	CO Fail Phase 2-20.0/16.0	CO Pass Phase 2-20.0/16.0	NO_x Fail-2.5	NO_x Pass-2.5
30	1.193	0.247	N/A	N/A	20.563	1.502	N/A	N/A	1.422	0.262
31	1.207	0.253	N/A	N/A	21.487	1.546	N/A	N/A	1.453	0.275
32	1.221	0.258	N/A	N/A	22.382	1.568	N/A	N/A	1.510	0.301
33	1.234	0.263	N/A	N/A	22.997	1.582	N/A	N/A	1.585	0.317
34	1.246	0.268	N/A	N/A	23.355	1.593	N/A	N/A	1.658	0.327
35	1.258	0.277	N/A	N/A	23.663	1.602	N/A	N/A	1.717	0.330
36	1.270	0.283	N/A	N/A	23.946	1.621	N/A	N/A	1.760	0.332
37	1.281	0.293	N/A	N/A	24.204	1.631	N/A	N/A	1.792	0.334
38	1.292	0.297	N/A	N/A	24.637	1.702	N/A	N/A	1.817	0.336
39	1.303	0.298	N/A	N/A	25.522	1.784	N/A	N/A	1.836	0.337
40	1.313	0.313	N/A	N/A	26.535	1.879	N/A	N/A	1.852	0.354
41	1.323	0.320	N/A	N/A	27.547	2.162	N/A	N/A	1.866	0.366
42	1.332	0.327	N/A	N/A	28.745	2.307	N/A	N/A	1.875	0.410
43	1.341	0.342	N/A	N/A	29.937	2.343	N/A	N/A	1.883	0.414
44	1.350	0.360	N/A	N/A	30.606	2.376	N/A	N/A	1.909	0.438
45	1.359	0.376	N/A	N/A	30.909	2.406	N/A	N/A	1.960	0.477
46	1.367	0.389	N/A	N/A	31.209	2.433	N/A	N/A	2.014	0.506
47	1.375	0.408	N/A	N/A	31.695	2.458	N/A	N/A	2.056	0.518
48	1.383	0.423	N/A	N/A	32.575	2.483	N/A	N/A	2.092	0.522
49	1.390	0.434	N/A	N/A	33.560	2.774	N/A	N/A	2.133	0.526
50	1.397	0.444	N/A	N/A	34.500	2.844	N/A	N/A	2.176	0.554
51	1.404	0.454	N/A	N/A	35.378	2.900	N/A	N/A	2.219	0.574
52	1.411	0.465	N/A	N/A	36.105	2.936	N/A	N/A	2.252	0.587
53	1.417	0.472	N/A	N/A	36.809	3.133	N/A	N/A	2.275	0.601
54	1.423	0.478	N/A	N/A	37.446	3.304	N/A	N/A	2.288	0.615
55	1.429	0.485	N/A	N/A	37.998	3.407	N/A	N/A	2.294	0.629
56	1.435	0.493	N/A	N/A	38.503	3.456	N/A	N/A	2.296	0.643
57	1.441	0.500	N/A	N/A	38.962	3.480	N/A	N/A	2.297	0.667
58	1.447	0.505	N/A	N/A	39.353	3.518	N/A	N/A	2.298	0.678
59	1.452	0.514	N/A	N/A	39.750	3.560	N/A	N/A	2.299	0.683
60	1.457	0.537	N/A	N/A	40.193	3.593	N/A	N/A	2.300	0.686
61	1.462	0.540	N/A	N/A	40.648	3.628	N/A	N/A	2.301	0.689
62	1.467	0.543	N/A	N/A	41.103	3.641	N/A	N/A	2.304	0.699
63	1.472	0.546	N/A	N/A	41.524	3.655	N/A	N/A	2.310	0.703
64	1.477	0.551	N/A	N/A	41.840	3.680	N/A	N/A	2.318	0.707
65	1.482	0.559	N/A	N/A	42.097	3.700	N/A	N/A	2.321	0.711
66	1.487	0.567	N/A	N/A	42.360	3.728	N/A	N/A	2.327	0.716
67	1.492	0.575	N/A	N/A	42.707	3.857	N/A	N/A	2.333	0.721
68	1.497	0.588	N/A	N/A	43.158	3.894	N/A	N/A	2.337	0.726
69	1.502	0.595	N/A	N/A	43.551	3.943	N/A	N/A	2.366	0.742
70	1.507	0.601	N/A	N/A	43.845	3.983	N/A	N/A	2.418	0.759
71	1.511	0.606	N/A	N/A	44.085	4.009	N/A	N/A	2.462	0.773
72	1.515	0.610	N/A	N/A	44.293	4.023	N/A	N/A	2.484	0.784
73	1.519	0.617	N/A	N/A	44.423	4.023	N/A	N/A	2.492	0.790
74	1.523	0.631	N/A	N/A	44.545	4.053	N/A	N/A	2.496	0.794
75	1.527	0.643	N/A	N/A	44.792	4.063	N/A	N/A	2.507	0.799
76	1.531	0.651	N/A	N/A	45.292	4.077	N/A	N/A	2.534	0.809
77	1.535	0.659	N/A	N/A	45.734	4.225	N/A	N/A	2.575	0.821
78	1.539	0.667	N/A	N/A	45.977	4.243	N/A	N/A	2.636	0.833
79	1.543	0.676	N/A	N/A	46.165	4.260	N/A	N/A	2.711	0.839
80	1.547	0.681	N/A	N/A	46.395	4.282	N/A	N/A	2.787	0.844
81	1.551	0.685	N/A	N/A	46.540	4.322	N/A	N/A	2.843	0.857
82	1.555	0.689	N/A	N/A	46.619	4.398	N/A	N/A	2.872	0.870
83	1.559	0.694	N/A	N/A	46.692	4.482	N/A	N/A	2.885	0.883
84	1.562	0.700	N/A	N/A	46.754	4.515	N/A	N/A	2.890	0.894
85	1.565	0.705	N/A	N/A	46.810	4.518	N/A	N/A	2.893	0.902
86	1.568	0.709	N/A	N/A	46.866	4.520	N/A	N/A	2.895	0.907
87	1.571	0.713	N/A	N/A	46.918	4.522	N/A	N/A	2.896	0.910
88	1.574	0.717	N/A	N/A	46.966	4.522	N/A	N/A	2.897	0.912
89	1.577	0.721	N/A	N/A	47.007	4.523	N/A	N/A	2.898	0.913
90	1.580	0.724	N/A	N/A	47.043	4.526	N/A	N/A	2.899	0.914
91	1.583	0.727	N/A	N/A	47.076	4.527	N/A	N/A	2.900	0.915
92	1.586	0.729	N/A	N/A	47.105	4.527	N/A	N/A	2.901	0.916
93	1.589	0.731	N/A	N/A	47.133	4.528	N/A	N/A	2.902	0.917
94	1.592	0.734	0.017	0.000	47.163	4.528	0.474	0.000	2.902	0.918
95	1.594	0.740	0.066	0.000	47.197	4.528	0.974	0.000	2.902	0.919

Table 1B: Light-Duty Gasoline Vehicles
IM240 Fast-Pass/Fast-Fail Standards
To be used from January 1, 1995 through December 31, 1997
Model Years 1991-1995, not including 1994 and 1995 vehicles certified to Tier 1 standards

Sec IM 240	HC Fail Composite-1.25/0.75	HC Pass Composite-1.25/0.75	HC Fail Phase 2-1.25/0.75	HC Pass Phase 2-1.25/0.75	CO Fail Composite-20.0/16.0	CO Pass Composite-20.0/16.0	CO Fail Phase 2-20.0/16.0	CO Pass Phase 2-20.0/16.0	NO_x Fail-2.5	NO_x Pass-2.5
96	1.596	0.748	0.107	0.001	47.270	4.529	1.646	0.000	2.902	0.920
97	1.599	0.759	0.159	0.001	47.555	4.575	2.343	0.000	2.902	0.921
98	1.602	0.771	0.188	0.002	48.132	4.703	2.954	0.002	2.902	0.922
99	1.605	0.783	0.213	0.003	48.596	4.805	3.512	0.005	2.903	0.924
100	1.608	0.793	0.234	0.005	48.867	4.886	3.942	0.010	2.912	0.929
101	1.611	0.810	0.265	0.007	49.466	4.957	4.477	0.017	2.942	0.941
102	1.628	0.823	0.288	0.009	50.233	5.104	5.050	0.052	2.978	0.970
103	1.645	0.836	0.308	0.011	50.655	5.340	5.577	0.085	3.029	1.027
104	1.657	0.853	0.329	0.016	50.922	5.496	6.008	0.094	3.063	1.093
105	1.666	0.871	0.343	0.017	51.076	5.625	6.826	0.122	3.089	1.155
106	1.674	0.887	0.350	0.022	51.124	5.815	7.503	0.151	3.150	1.234
107	1.684	0.899	0.365	0.029	51.169	6.473	8.101	0.191	3.195	1.275
108	1.693	0.931	0.379	0.036	51.695	7.037	8.627	0.234	3.218	1.305
109	1.702	0.947	0.389	0.040	52.230	7.419	9.162	0.246	3.230	1.320
110	1.712	0.957	0.395	0.047	52.746	7.643	9.678	0.257	3.237	1.332
111	1.723	0.965	0.400	0.052	53.122	7.759	10.054	0.286	3.245	1.346
112	1.750	0.971	0.403	0.056	53.586	7.824	10.518	0.379	3.269	1.358
113	1.786	0.977	0.405	0.061	54.077	7.889	11.009	0.425	3.296	1.378
114	1.813	0.983	0.408	0.064	54.467	7.960	11.399	0.457	3.311	1.406
115	1.829	1.003	0.410	0.072	54.801	8.024	11.733	0.477	3.317	1.426
116	1.840	1.030	0.419	0.081	55.058	8.076	11.990	0.494	3.322	1.438
117	1.853	1.041	0.432	0.082	55.341	8.111	12.273	0.504	3.324	1.448
118	1.869	1.050	0.448	0.083	55.615	8.130	12.547	0.512	3.326	1.460
119	1.885	1.052	0.464	0.092	55.781	8.148	12.713	0.519	3.328	1.462
120	1.904	1.055	0.483	0.094	55.956	8.211	12.888	0.529	3.330	1.467
121	1.941	1.061	0.520	0.097	56.039	8.478	12.971	0.529	3.336	1.476
122	1.979	1.071	0.558	0.100	56.100	8.548	13.032	0.530	3.346	1.494
123	2.006	1.081	0.585	0.103	56.177	8.561	13.109	0.531	3.362	1.505
124	2.023	1.091	0.602	0.106	56.212	8.568	13.144	0.532	3.378	1.517
125	2.034	1.102	0.613	0.108	56.220	8.572	13.152	0.533	3.389	1.546
126	2.041	1.110	0.620	0.110	56.245	8.584	13.177	0.548	3.396	1.569
127	2.046	1.116	0.625	0.112	56.348	8.592	13.280	0.610	3.400	1.586
128	2.050	1.121	0.629	0.114	56.480	8.596	13.412	0.614	3.403	1.596
129	2.054	1.125	0.633	0.116	56.588	8.597	13.520	0.622	3.404	1.603
130	2.058	1.128	0.637	0.118	56.678	8.601	13.610	0.631	3.405	1.605
131	2.063	1.130	0.642	0.120	56.765	8.605	13.697	0.640	3.405	1.606
132	2.067	1.132	0.646	0.122	56.881	8.608	13.813	0.646	3.406	1.607
133	2.070	1.134	0.649	0.123	57.070	8.626	14.002	0.650	3.406	1.607
134	2.073	1.135	0.652	0.124	57.169	8.650	14.101	0.652	3.406	1.608
135	2.075	1.143	0.654	0.127	57.192	8.660	14.124	0.738	3.410	1.614
136	2.078	1.147	0.657	0.130	57.199	8.767	14.131	0.754	3.429	1.616
137	2.083	1.156	0.662	0.134	57.209	9.029	14.141	0.780	3.460	1.631
138	2.087	1.163	0.666	0.139	57.218	9.238	14.150	0.795	3.493	1.643
139	2.091	1.186	0.670	0.146	57.219	9.389	14.151	0.804	3.517	1.656
140	2.095	1.253	0.674	0.149	57.227	9.493	14.159	0.810	3.535	1.673
141	2.098	1.262	0.677	0.151	57.290	9.583	14.222	0.815	3.545	1.703
142	2.101	1.271	0.680	0.153	57.378	9.626	14.310	0.818	3.558	1.739
143	2.105	1.277	0.684	0.155	57.434	9.669	14.366	0.821	3.577	1.767
144	2.110	1.283	0.689	0.157	57.453	9.716	14.385	0.825	3.590	1.774
145	2.114	1.291	0.693	0.162	57.458	9.763	14.390	0.840	3.604	1.785
146	2.117	1.294	0.696	0.164	57.458	9.809	14.390	0.847	3.617	1.806
147	2.119	1.296	0.698	0.166	57.458	9.952	14.390	0.855	3.625	1.830
148	2.121	1.298	0.700	0.168	57.470	9.885	14.402	0.865	3.629	1.844
149	2.123	1.303	0.702	0.169	57.536	9.932	14.468	0.874	3.632	1.845
150	2.125	1.316	0.704	0.170	57.609	9.986	14.541	0.891	3.633	1.846
151	2.127	1.330	0.706	0.171	57.665	10.039	14.597	0.914	3.635	1.852
152	2.129	1.342	0.708	0.172	57.699	10.072	14.631	0.929	3.637	1.868
153	2.131	1.348	0.710	0.173	57.712	10.090	14.644	0.937	3.640	1.877
154	2.133	1.353	0.712	0.175	57.714	10.105	14.646	0.942	3.644	1.879
155	2.134	1.362	0.713	0.178	57.714	10.146	14.646	0.949	3.646	1.886
156	2.135	1.365	0.714	0.180	57.913	10.245	14.848	1.375	3.649	1.900
157	2.136	1.366	0.715	0.189	58.241	10.397	14.932	1.576	3.655	1.910
158	2.138	1.373	0.717	0.198	58.916	10.923	14.949	1.943	3.678	1.936
159	2.140	1.397	0.719	0.203	60.120	11.970	15.901	2.820	3.719	1.954
160	2.142	1.423	0.721	0.207	60.940	13.421	17.261	3.281	3.779	1.986
161	2.145	1.440	0.724	0.214	61.396	15.289	17.854	3.483	3.854	2.050

Table 1B: Light-Duty Gasoline Vehicles
IM240 Fast-Pass/Fast-Fail Standards
To be used from January 1, 1995 through December 31, 1997
Model Years 1991-1995, not including 1994 and 1995 vehicles
certified to Tier 1 standards

Sec IM 240	HC Fail Composite-1.25/0.75	HC Pass Composite-1.25/0.75	HC Fail Phase 2-1.25/0.75	HC Pass Phase 2-1.25/0.75	CO Fail Composite-20.0/16.0	CO Pass Composite-20.0/16.0	CO Fail Phase 2-20.0/16.0	CO Pass Phase 2-20.0/16.0	NO_x Fail-2.5	NO_x Pass-2.5
162	2.149	1.452	0.728	0.221	61.655	15.912	17.988	3.620	3.921	2.131
163	2.154	1.465	0.736	0.229	61.864	16.530	18.046	4.168	3.960	2.235
164	2.159	1.509	0.743	0.247	62.194	17.622	18.133	4.338	3.998	2.320
165	2.164	1.533	0.750	0.274	62.455	18.366	18.179	4.682	4.041	2.395
166	2.169	1.555	0.756	0.309	62.675	19.869	18.233	5.633	4.091	2.488
167	2.175	1.576	0.783	0.318	62.876	20.711	18.558	6.137	4.144	2.563
168	2.181	1.598	0.810	0.322	63.051	22.319	20.062	6.853	4.187	2.645
169	2.187	1.618	0.827	0.333	63.178	23.751	20.978	7.136	4.227	2.746
170	2.193	1.636	0.836	0.343	63.231	24.842	21.211	7.320	4.261	2.778
171	2.199	1.666	0.843	0.356	63.300	25.410	21.267	7.685	4.288	2.792
172	2.205	1.685	0.851	0.385	63.525	25.798	21.288	8.052	4.303	2.810
173	2.211	1.726	0.857	0.409	63.766	26.122	21.298	8.344	4.309	2.847
174	2.217	1.742	0.861	0.433	63.912	26.353	21.305	8.602	4.314	2.874
175	2.222	1.756	0.864	0.453	64.046	26.638	21.320	8.898	4.321	2.905
176	2.226	1.769	0.867	0.463	64.188	27.219	21.384	9.251	4.329	2.950
177	2.230	1.784	0.870	0.507	64.315	27.279	21.428	10.253	4.340	3.001
178	2.234	1.802	0.875	0.523	64.432	27.320	21.442	10.828	4.352	3.047
179	2.238	1.822	0.882	0.528	64.553	27.352	21.447	10.933	4.363	3.104
180	2.241	1.843	0.886	0.541	64.683	27.822	21.451	11.060	4.376	3.173
181	2.244	1.864	0.890	0.549	64.819	28.763	21.455	11.188	4.393	3.238
182	2.247	1.884	0.893	0.559	64.963	29.402	21.460	11.345	4.409	3.302
183	2.250	1.896	0.896	0.571	65.123	29.971	21.464	11.733	4.430	3.372
184	2.253	1.915	0.899	0.584	65.296	30.276	21.469	12.598	4.455	3.452
185	2.256	1.940	0.902	0.598	65.466	30.988	21.473	12.953	4.483	3.545
186	2.260	1.958	0.905	0.613	65.586	31.095	21.477	13.213	4.510	3.648
187	2.264	1.972	0.908	0.624	65.670	31.314	21.482	14.131	4.532	3.701
188	2.268	1.985	0.910	0.629	65.743	31.833	21.485	14.839	4.551	3.759
189	2.273	1.991	0.914	0.629	65.817	32.239	21.488	15.137	4.563	3.821
190	2.284	1.993	0.916	0.638	65.899	32.547	21.491	15.138	4.572	3.870
191	2.298	1.995	0.918	0.648	65.999	32.855	21.494	15.141	4.580	3.892
192	2.307	2.001	0.920	0.659	66.117	33.153	21.512	15.595	4.588	3.914
193	2.313	2.015	0.921	0.663	66.236	33.444	21.533	15.658	4.597	3.955
194	2.317	2.031	0.923	0.671	66.345	33.482	21.541	15.704	4.607	3.997
195	2.321	2.047	0.926	0.681	66.453	33.516	21.545	15.729	4.618	4.035
196	2.324	2.063	0.946	0.693	66.565	33.549	21.550	16.058	4.629	4.089
197	2.327	2.079	0.961	0.709	66.680	33.653	21.556	16.987	4.641	4.146
198	2.330	2.094	0.969	0.725	66.782	33.973	21.559	17.064	4.653	4.206
199	2.334	2.109	0.975	0.740	66.857	34.159	21.563	17.073	4.667	4.243
200	2.337	2.122	0.978	0.754	66.910	34.191	21.567	17.153	4.681	4.295
201	2.340	2.130	0.982	0.767	66.958	34.250	21.571	17.332	4.694	4.351
202	2.343	2.137	0.984	0.775	66.989	34.469	21.575	17.406	4.703	4.398
203	2.346	2.157	0.986	0.787	67.007	34.716	21.587	17.641	4.708	4.410
204	2.349	2.172	0.988	0.795	67.017	34.969	21.607	17.922	4.710	4.419
205	2.352	2.194	0.990	0.803	67.055	35.144	21.635	18.484	4.711	4.426
206	2.354	2.222	0.992	0.854	67.392	35.418	21.655	18.553	4.716	4.429
207	2.356	2.245	0.994	0.859	67.905	35.766	21.699	18.658	4.734	4.453
208	2.358	2.268	0.996	0.872	68.219	35.949	21.848	18.953	4.756	4.486
209	2.360	2.279	0.997	0.892	68.363	36.010	21.981	19.266	4.770	4.542
210	2.362	2.288	0.999	0.896	68.477	36.548	22.044	19.309	4.782	4.598
211	2.366	2.301	1.005	0.903	68.592	37.179	22.169	19.731	4.794	4.638
212	2.372	2.316	1.009	0.924	68.711	37.651	22.284	19.902	4.805	4.715
213	2.377	2.332	1.018	0.938	68.829	38.041	22.382	20.012	4.821	4.774
214	2.381	2.345	1.030	0.941	68.924	38.591	22.457	20.260	4.861	4.829
215	2.385	2.354	1.033	0.951	69.000	38.852	22.499	20.739	4.920	4.872
216	2.388	2.362	1.035	0.966	69.063	38.861	22.514	21.346	4.951	4.931
217	2.391	2.368	1.036	0.979	69.115	38.926	22.571	21.810	4.960	4.981
218	2.394	2.376	1.037	0.980	69.160	39.194	22.613	22.001	4.963	5.017
219	2.397	2.384	1.038	0.981	69.194	39.474	22.625	22.290	4.965	5.029
220	2.400	2.391	1.040	1.005	69.222	39.668	22.637	22.324	4.968	5.033
221	2.404	2.395	1.044	1.016	69.241	39.781	22.647	22.343	4.971	5.037
222	2.407	2.400	1.047	1.022	69.251	39.890	22.655	22.522	4.974	5.047
223	2.410	2.405	1.052	1.028	69.261	39.954	22.661	22.683	4.977	5.057
224	2.412	2.409	1.058	1.035	69.269	39.984	22.666	22.850	4.979	5.061
225	2.414	2.413	1.060	1.041	69.278	39.989	22.667	22.853	4.980	5.062
226	2.415	2.417	1.060	1.045	69.302	39.990	22.668	22.853	4.981	5.063
227	2.417	2.426	1.061	1.051	69.335	39.990	22.669	22.853	4.982	5.063
228	2.419	2.428	1.062	1.055	69.364	39.990	22.670	22.872	4.983	5.063

Table 1B: Light-Duty Gasoline Vehicles
IM240 Fast-Pass/Fast-Fail Standards
To be used from January 1, 1995 through December 31, 1997
Model Years 1991-1995, not including 1994 and 1995 vehicles
certified to Tier 1 standards

Sec IM 240	HC Fail Composite-1.25/0.75	HC Pass Composite-1.25/0.75	HC Fail Phase 2-1.25/0.75	HC Pass Phase 2-1.25/0.75	CO Fail Composite-20.0/16.0	CO Pass Composite-20.0/16.0	CO Fail Phase 2-20.0/16.0	CO Pass Phase 2-20.0/16.0	NO_x Fail-2.5	NO_x Pass-2.5
229	2.420	2.431	1.062	1.059	69.389	39.991	22.671	22.872	4.984	5.063
230	2.421	2.433	1.062	1.064	69.411	40.012	22.671	22.872	4.985	5.064
231	2.423	2.441	1.063	1.069	69.429	40.061	22.672	22.895	4.986	5.065
232	2.425	2.461	1.063	1.071	69.443	40.116	22.673	22.911	4.987	5.066
233	2.427	2.476	1.063	1.072	69.455	40.249	22.673	22.922	4.988	5.067
234	2.429	2.488	1.064	1.073	69.466	40.253	22.673	22.939	4.989	5.068
235	2.430	2.498	1.064	1.081	69.473	40.290	22.674	23.010	4.990	5.069
236	2.431	2.508	1.066	1.083	69.481	40.385	22.675	23.010	4.991	5.070
237	2.432	2.516	1.069	1.084	69.487	40.488	22.675	23.010	4.992	5.070
238	2.433	2.520	1.072	1.085	69.496	40.720	22.675	23.010	4.993	5.070
239	2.434	2.523	1.075	1.086	69.504	40.763	22.677	23.010	4.994	5.070

Table 1C: Light-Duty Gasoline Vehicles
IM240 Fast-Pass/Fast-Fail Standards
To be used from January 1, 1995 through December 31, 1997
Model Years 1991-1995 certified to Tier 1 standards and
all 1996 and newer vehicles

SECS IM240	HC Fail Composite	HC Pass Composite	HC Fail Phase 2	HC Pass Phase 2	CO Fail Composite	CO Pass Composite	CO Fail Phase 2	CO Pass Phase 2	NO Fail	NO Pass
30	>1.193	<0.124	N/A	N/A	>16.540	< 0.693	N/A	N/A	>1.422	<0.167
31	>1.207	<0.126	N/A	N/A	>17.419	< 0.773	N/A	N/A	>1.453	<0.177
32	>1.221	<0.129	N/A	N/A	>18.132	< 0.837	N/A	N/A	>1.510	<0.188
33	>1.234	<0.135	N/A	N/A	>18.601	< 0.851	N/A	N/A	>1.585	<0.214
34	>1.246	<0.140	N/A	N/A	>18.846	< 0.853	N/A	N/A	>1.658	<0.232
35	>1.258	<0.146	N/A	N/A	>18.993	< 0.857	N/A	N/A	>1.717	<0.240
36	>1.270	<0.150	N/A	N/A	>19.083	< 0.900	N/A	N/A	>1.760	<0.243
37	>1.281	<0.153	N/A	N/A	>19.136	< 0.960	N/A	N/A	>1.792	<0.245
38	>1.292	<0.156	N/A	N/A	>19.169	< 1.034	N/A	N/A	>1.817	<0.246
39	>1.303	<0.160	N/A	N/A	>19.196	< 1.070	N/A	N/A	>1.836	<0.246
40	>1.313	<0.165	N/A	N/A	>19.227	< 1.076	N/A	N/A	>1.852	<0.250
41	>1.323	<0.169	N/A	N/A	>19.288	< 1.083	N/A	N/A	>1.866	<0.260
42	>1.332	<0.172	N/A	N/A	>19.376	< 1.102	N/A	N/A	>1.875	<0.277
43	>1.341	<0.173	N/A	N/A	>19.465	< 1.111	N/A	N/A	>1.883	<0.311
44	>1.350	<0.177	N/A	N/A	>19.522	< 1.114	N/A	N/A	>1.909	<0.328
45	>1.359	<0.197	N/A	N/A	>19.590	< 1.157	N/A	N/A	>1.960	<0.343
46	>1.367	<0.200	N/A	N/A	>19.647	< 1.344	N/A	N/A	>2.014	<0.359
47	>1.375	<0.208	N/A	N/A	>19.678	< 1.482	N/A	N/A	>2.056	<0.373
48	>1.383	<0.221	N/A	N/A	>19.695	< 1.530	N/A	N/A	>2.092	<0.383
49	>1.390	<0.232	N/A	N/A	>19.727	< 1.542	N/A	N/A	>2.133	<0.385
50	>1.397	<0.235	N/A	N/A	>20.011	< 1.553	N/A	N/A	>2.178	<0.400
51	>1.404	<0.238	N/A	N/A	>20.510	< 1.571	N/A	N/A	>2.219	<0.410
52	>1.411	<0.240	N/A	N/A	>21.038	< 1.595	N/A	N/A	>2.252	<0.434
53	>1.417	<0.242	N/A	N/A	>21.587	< 1.633	N/A	N/A	>2.275	<0.464
54	>1.423	<0.246	N/A	N/A	>22.148	< 1.685	N/A	N/A	>2.288	<0.472
55	>1.429	<0.249	N/A	N/A	>22.728	< 1.689	N/A	N/A	>2.294	<0.480
56	>1.435	<0.252	N/A	N/A	>23.312	< 1.693	N/A	N/A	>2.296	<0.491
57	>1.441	<0.261	N/A	N/A	>23.869	< 1.700	N/A	N/A	>2.297	<0.500
58	>1.447	<0.271	N/A	N/A	>24.389	< 1.723	N/A	N/A	>2.298	<0.506
59	>1.452	<0.276	N/A	N/A	>24.845	< 1.852	N/A	N/A	>2.299	<0.509
60	>1.457	<0.278	N/A	N/A	>25.217	< 1.872	N/A	N/A	>2.300	<0.512
61	>1.462	<0.280	N/A	N/A	>25.554	< 1.872	N/A	N/A	>2.301	<0.516
62	>1.467	<0.282	N/A	N/A	>25.826	< 1.872	N/A	N/A	>2.304	<0.519
63	>1.472	<0.283	N/A	N/A	>25.973	< 1.900	N/A	N/A	>2.310	<0.523
64	>1.477	<0.284	N/A	N/A	>26.037	< 1.917	N/A	N/A	>2.315	<0.529
65	>1.482	<0.285	N/A	N/A	>26.082	< 1.944	N/A	N/A	>2.320	<0.533
66	>1.487	<0.286	N/A	N/A	>26.122	< 2.000	N/A	N/A	>2.327	<0.535
67	>1.492	<0.288	N/A	N/A	>26.148	< 2.060	N/A	N/A	>2.333	<0.540
68	>1.497	<0.291	N/A	N/A	>26.161	< 2.064	N/A	N/A	>2.337	<0.551
69	>1.502	<0.294	N/A	N/A	>26.168	< 2.076	N/A	N/A	>2.339	<0.563
70	>1.507	<0.296	N/A	N/A	>26.186	< 2.104	N/A	N/A	>2.340	<0.575
71	>1.511	<0.298	N/A	N/A	>26.277	< 2.117	N/A	N/A	>2.341	<0.588
72	>1.515	<0.300	N/A	N/A	>26.414	< 2.125	N/A	N/A	>2.342	<0.600
73	>1.519	<0.302	N/A	N/A	>26.507	< 2.130	N/A	N/A	>2.342	<0.603
74	>1.523	<0.304	N/A	N/A	>26.550	< 2.138	N/A	N/A	>2.342	<0.604
75	>1.527	<0.307	N/A	N/A	>26.568	< 2.152	N/A	N/A	>2.342	<0.613

Table 1C: Light-Duty Gasoline Vehicles
IM240 Fast-Pass/Fast-Fail Standards
To be used from January 1, 1995 through December 31, 1997
Model Years 1991-1995 certified to Tier 1 standards and
all 1996 and newer vehicles

SECS IM240	HC Fail Composite	HC Pass Composite	HC Fail Phase 2	HC Pass Phase 2	CO Fail Composite	CO Pass Composite	CO Fail Phase 2	CO Pass Phase 2	NO Fail	NO Pass
76	>1.531	<0.308	N/A	N/A	>26.570	< 2.170	N/A	N/A	>2.342	<0.624
77	>1.535	<0.308	N/A	N/A	>26.570	< 2.188	N/A	N/A	>2.342	<0.646
78	>1.539	<0.308	N/A	N/A	>27.042	< 2.200	N/A	N/A	>2.342	<0.651
79	>1.543	<0.314	N/A	N/A	>27.456	< 2.212	N/A	N/A	>2.342	<0.659
80	>1.547	<0.320	N/A	N/A	>27.716	< 2.212	N/A	N/A	>2.342	<0.673
81	>1.551	<0.324	N/A	N/A	>27.941	< 2.221	N/A	N/A	>2.342	<0.696
82	>1.555	<0.327	N/A	N/A	>28.110	< 2.222	N/A	N/A	>2.342	<0.706
83	>1.559	<0.329	N/A	N/A	>28.270	< 2.227	N/A	N/A	>2.342	<0.715
84	>1.562	<0.333	N/A	N/A	>28.402	< 2.236	N/A	N/A	>2.343	<0.724
85	>1.565	<0.336	N/A	N/A	>28.516	< 2.243	N/A	N/A	>2.344	<0.737
86	>1.568	<0.339	N/A	N/A	>28.620	< 2.262	N/A	N/A	>2.346	<0.747
87	>1.571	<0.343	N/A	N/A	>28.716	< 2.271	N/A	N/A	>2.348	<0.748
88	>1.574	<0.347	N/A	N/A	>28.805	< 2.284	N/A	N/A	>2.350	<0.748
89	>1.577	<0.350	N/A	N/A	>28.881	< 2.299	N/A	N/A	>2.351	<0.748
90	>1.580	<0.356	N/A	N/A	>28.935	< 2.308	N/A	N/A	>2.351	<0.748
91	>1.583	<0.358	N/A	N/A	>28.993	< 2.326	N/A	N/A	>2.351	<0.748
92	>1.586	<0.360	N/A	N/A	>29.044	< 2.330	N/A	N/A	>2.351	<0.748
93	>1.589	<0.363	N/A	N/A	>29.085	< 2.331	N/A	N/A	>2.352	<0.748
94	>1.592	<0.367	>0.017	<0.000	>29.121	< 2.344	> 0.355	< 0.000	>2.353	<0.748
95	>1.594	<0.370	>0.048	<0.000	>29.171	< 2.347	> 0.974	< 0.000	>2.356	<0.748
96	>1.596	<0.372	>0.093	<0.000	>29.241	< 2.355	> 1.646	< 0.000	>2.361	<0.748
97	>1.599	<0.376	>0.159	<0.000	>29.341	< 2.395	> 2.343	< 0.000	>2.368	<0.748
98	>1.602	<0.388	>0.188	<0.000	>29.376	< 2.451	> 2.954	< 0.000	>2.377	<0.748
99	>1.605	<0.396	>0.213	<0.000	>29.382	< 2.508	> 3.475	< 0.004	>2.387	<0.751
100	>1.608	<0.405	>0.234	<0.001	>29.404	< 2.590	> 3.942	< 0.008	>2.398	<0.764
101	>1.611	<0.410	>0.265	<0.002	>29.474	< 2.660	> 4.477	< 0.015	>2.405	<0.789
102	>1.614	<0.411	>0.288	<0.003	>29.565	< 2.749	> 5.050	< 0.026	>2.409	<0.822
103	>1.617	<0.412	>0.308	<0.006	>29.616	< 2.913	> 5.577	< 0.038	>2.411	<0.867
104	>1.620	<0.413	>0.329	<0.007	>29.669	< 3.162	> 6.008	< 0.038	>2.412	<0.905
105	>1.622	<0.421	>0.343	<0.008	>29.735	< 3.170	> 6.180	< 0.039	>2.447	<0.925
106	>1.624	<0.428	>0.350	<0.009	>29.799	< 3.197	> 6.282	< 0.061	>2.516	<0.955
107	>1.626	<0.430	>0.365	<0.010	>29.818	< 3.288	> 6.384	< 0.062	>2.581	<0.985
108	>1.628	<0.455	>0.379	<0.013	>29.826	< 3.419	> 6.451	< 0.108	>2.627	<0.993
109	>1.630	<0.459	>0.389	<0.015	>29.833	< 3.587	> 6.496	< 0.168	>2.650	<0.995
110	>1.632	<0.462	>0.395	<0.017	>29.834	< 3.595	> 6.526	< 0.173	>2.661	<0.996
111	>1.634	<0.464	>0.400	<0.021	>29.836	< 3.640	> 6.561	< 0.237	>2.667	<1.010
112	>1.636	<0.466	>0.403	<0.024	>29.895	< 3.740	> 6.582	< 0.266	>2.677	<1.028
113	>1.638	<0.468	>0.405	<0.024	>29.938	< 3.868	> 6.596	< 0.280	>2.694	<1.034
114	>1.640	<0.471	>0.408	<0.025	>29.947	< 3.877	> 6.608	< 0.291	>2.708	<1.044
115	>1.642	<0.488	>0.410	<0.026	>29.951	< 3.934	> 6.618	< 0.314	>2.716	<1.059
116	>1.644	<0.513	>0.411	<0.029	>29.955	< 4.015	> 6.625	< 0.331	>2.720	<1.075
117	>1.646	<0.538	>0.413	<0.032	>29.977	< 4.061	> 6.629	< 0.345	>2.723	<1.080
118	>1.648	<0.561	>0.414	<0.035	>29.997	< 4.063	> 6.635	< 0.350	>2.725	<1.080
119	>1.650	<0.577	>0.416	<0.035	>30.019	< 4.079	> 6.641	< 0.356	>2.726	<1.081
120	>1.652	<0.580	>0.417	<0.036	>30.024	< 4.140	> 6.654	< 0.367	>2.730	<1.091
121	>1.653	<0.586	>0.418	<0.038	>30.024	< 4.185	> 6.933	< 0.388	>2.740	<1.096
122	>1.655	<0.594	>0.419	<0.040	>30.024	< 4.199	> 7.278	< 0.407	>2.754	<1.111
123	>1.657	<0.603	>0.420	<0.041	>30.024	< 4.205	> 7.660	< 0.463	>2.771	<1.122
124	>1.660	<0.610	>0.420	<0.042	>30.026	< 4.212	> 7.974	< 0.480	>2.791	<1.135
125	>1.666	<0.615	>0.421	<0.042	>30.026	< 4.232	> 8.210	< 0.506	>2.811	<1.138
126	>1.670	<0.624	>0.422	<0.042	>30.026	< 4.298	> 8.382	< 0.518	>2.827	<1.139
127	>1.673	<0.628	>0.422	<0.045	>30.026	< 4.344	> 8.534	< 0.522	>2.837	<1.139
128	>1.676	<0.632	>0.423	<0.046	>30.026	< 4.361	> 8.661	< 0.525	>2.843	<1.139
129	>1.681	<0.637	>0.423	<0.046	>30.027	< 4.366	> 8.754	< 0.528	>2.847	<1.139
130	>1.686	<0.641	>0.424	<0.049	>30.027	< 4.369	> 8.822	< 0.530	>2.850	<1.139
131	>1.692	<0.643	>0.424	<0.050	>30.027	< 4.372	> 8.877	< 0.530	>2.852	<1.139
132	>1.696	<0.644	>0.425	<0.052	>30.055	< 4.435	> 8.927	< 0.534	>2.853	<1.139
133	>1.700	<0.645	>0.425	<0.054	>30.102	< 4.523	> 8.985	< 0.550	>2.854	<1.139
134	>1.703	<0.647	>0.426	<0.054	>30.103	< 4.524	> 9.076	< 0.554	>2.854	<1.139
135	>1.705	<0.651	>0.426	<0.054	>30.104	< 4.525	> 9.206	< 0.590	>2.856	<1.139
136	>1.709	<0.658	>0.426	<0.055	>30.104	< 4.531	> 9.433	< 0.616	>2.870	<1.160
137	>1.716	<0.663	>0.427	<0.055	>30.124	< 4.534	> 9.773	< 0.639	>2.902	<1.174
138	>1.722	<0.666	>0.427	<0.056	>30.417	< 4.542	>10.066	< 0.653	>2.935	<1.183
139	>1.725	<0.668	>0.428	<0.059	>30.642	< 4.553	>10.291	< 0.662	>2.956	<1.197
140	>1.726	<0.670	>0.428	<0.061	>30.882	< 4.554	>10.531	< 0.683	>2.977	<1.223
141	>1.729	<0.672	>0.429	<0.061	>31.082	< 4.554	>10.731	< 0.696	>2.996	<1.255
142	>1.733	<0.675	>0.429	<0.061	>31.199	< 4.554	>10.848	< 0.708	>3.010	<1.272

Table 1C: Light-Duty Gasoline Vehicles
IM240 Fast-Pass/Fast-Fail Standards
To be used from January 1, 1995 through December 31, 1997
Model Years 1991-1995 certified to Tier 1 standards and all 1996 and newer vehicles

SECS IM240	HC Fail Composite	HC Pass Composite	HC Fail Phase 2	HC Pass Phase 2	CO Fail Composite	CO Pass Composite	CO Fail Phase 2	CO Pass Phase 2	NO Fail	NO Pass
143	>1.736	<0.678	>0.429	<0.063	>31.264	< 4.554	>11.008	< 0.721	>3.019	<1.286
144	>1.738	<0.681	>0.429	<0.064	>31.306	< 4.554	>11.124	< 0.739	>3.024	<1.304
145	>1.740	<0.684	>0.430	<0.065	>31.336	< 4.554	>11.183	< 0.742	>3.028	<1.307
146	>1.742	<0.686	>0.430	<0.066	>31.352	< 4.554	>11.248	< 0.743	>3.032	<1.312
147	>1.745	<0.688	>0.430	<0.067	>31.370	< 4.554	>11.387	< 0.745	>3.038	<1.317
148	>1.747	<0.690	>0.430	<0.068	>31.399	< 4.554	>11.573	< 0.748	>3.046	<1.321
149	>1.749	<0.692	>0.431	<0.069	>31.423	< 4.554	>11.718	< 0.751	>3.052	<1.325
150	>1.751	<0.694	>0.431	<0.070	>31.435	< 4.554	>11.803	< 0.762	>3.056	<1.328
151	>1.755	<0.696	>0.431	<0.071	>31.444	< 4.556	>11.851	< 0.789	>3.058	<1.332
152	>1.757	<0.698	>0.444	<0.072	>31.473	< 4.556	>11.878	< 0.790	>3.060	<1.338
153	>1.759	<0.700	>0.466	<0.073	>31.536	< 4.565	>12.623	< 0.794	>3.065	<1.344
154	>1.762	<0.702	>0.475	<0.073	>31.599	< 4.612	>13.534	< 0.799	>3.074	<1.350
155	>1.764	<0.704	>0.479	<0.074	>31.637	< 4.834	>14.410	< 0.805	>3.082	<1.357
156	>1.766	<0.706	>0.481	<0.077	>31.655	< 5.702	>14.848	< 0.842	>3.088	<1.365
157	>1.768	<0.708	>0.486	<0.079	>32.005	< 5.841	>14.932	< 0.990	>3.096	<1.379
158	>1.770	<0.710	>0.493	<0.082	>34.442	< 6.170	>14.949	< 1.038	>3.118	<1.414
159	>1.772	<0.712	>0.515	<0.082	>36.064	< 6.670	>14.956	< 1.357	>3.153	<1.466
160	>1.774	<0.716	>0.523	<0.086	>36.390	< 7.425	>14.959	< 1.455	>3.192	<1.514
161	>1.779	<0.750	>0.527	<0.095	>36.445	< 8.379	>14.963	< 1.546	>3.227	<1.559
162	>1.782	<0.784	>0.530	<0.107	>36.458	< 9.648	>14.966	< 1.824	>3.252	<1.591
163	>1.785	<0.805	>0.532	<0.115	>36.508	<10.918	>14.969	< 2.746	>3.270	<1.641
164	>1.790	<0.840	>0.535	<0.122	>36.623	<12.157	>14.976	< 3.073	>3.284	<1.719
165	>1.793	<0.853	>0.537	<0.127	>36.881	<12.731	>14.987	< 3.633	>3.302	<1.777
166	>1.796	<0.874	>0.539	<0.159	>37.220	<12.831	>15.574	< 4.505	>3.331	<1.832
167	>1.801	<0.903	>0.541	<0.186	>37.465	<12.892	>15.779	< 4.952	>3.359	<1.919
168	>1.807	<0.910	>0.542	<0.189	>37.593	<12.932	>15.815	< 5.254	>3.385	<1.972
169	>1.810	<0.914	>0.551	<0.200	>37.663	<13.702	>15.826	< 5.730	>3.412	<2.013
170	>1.812	<0.916	>0.561	<0.220	>37.682	<14.139	>15.834	< 6.051	>3.439	<2.100
171	>1.813	<0.919	>0.578	<0.236	>37.805	<14.964	>15.840	< 6.333	>3.465	<2.200
172	>1.815	<0.931	>0.589	<0.247	>37.878	<15.704	>15.881	< 6.490	>3.482	<2.251
173	>1.817	<0.948	>0.598	<0.257	>37.890	<16.253	>15.901	< 6.796	>3.489	<2.270
174	>1.820	<0.983	>0.608	<0.267	>37.896	<16.907	>15.914	< 7.205	>3.493	<2.301
175	>1.823	<1.018	>0.612	<0.283	>37.901	<17.655	>15.923	< 8.151	>3.496	<2.318
176	>1.825	<1.027	>0.620	<0.295	>37.907	<18.020	>15.930	< 8.230	>3.499	<2.335
177	>1.828	<1.035	>0.623	<0.312	>37.907	<18.349	>15.945	< 8.584	>3.504	<2.349
178	>1.830	<1.051	>0.626	<0.318	>37.907	<18.671	>16.001	< 8.800	>3.512	<2.387
179	>1.833	<1.074	>0.632	<0.323	>37.907	<18.972	>16.042	< 8.847	>3.525	<2.423
180	>1.836	<1.084	>0.635	<0.337	>37.907	<19.228	>16.058	< 8.913	>3.538	<2.462
181	>1.838	<1.099	>0.637	<0.345	>37.908	<20.123	>16.066	< 9.122	>3.547	<2.503
182	>1.839	<1.121	>0.638	<0.350	>37.914	<20.405	>16.071	< 9.532	>3.553	<2.545
183	>1.841	<1.132	>0.639	<0.359	>37.927	<20.754	>16.073	<10.256	>3.559	<2.586
184	>1.849	<1.152	>0.642	<0.387	>37.927	<21.684	>16.076	<10,862	>3.570	<2.627
185	>1.877	<1.161	>0.644	<0.398	>37.927	<21.955	>16.079	<10.996	>3.588	<2.673
186	>1.893	<1.168	>0.646	<0.400	>37.927	<22.650	>16.082	<11.206	>3.596	<2.749
187	>1.907	<1.175	>0.648	<0.402	>37.927	<22.989	>16.083	<11.514	>3.601	<2.804
188	>1.919	<1.181	>0.650	<0.405	>37.927	<23.535	>16.084	<11.894	>3.606	<2.851
189	>1.930	<1.188	>0.652	<0.418	>37.927	<23.876	>16.085	<12.019	>3.617	<2.894
190	>1.937	<1.203	>0.653	<0.429	>37.927	<24.018	>16.091	<12.170	>3.631	<2.931
191	>1.942	<1.219	>0.655	<0.442	>37.927	<24.464	>16.255	<12.517	>3.639	<2.971
192	>1.947	<1.233	>0.656	<0.457	>37.927	<24.685	>16.305	<12.598	>3.644	<3.020
193	>1.951	<1.251	>0.657	<0.473	>37.927	<24.931	>16.347	<12.625	>3.657	<3.077
194	>1.955	<1.255	>0.659	<0.487	>37.927	<25.188	>16.357	<12.653	>3.673	<3.132
195	>1.958	<1.258	>0.660	<0.501	>37.927	<25.468	>16.379	<12.777	>3.687	<3.185
196	>1.962	<1.265	>0.661	<0.510	>37.927	<25.627	>16.397	<12.906	>3.704	<3.219
197	>1.965	<1.280	>0.662	<0.512	>37.927	<25.746	>16.406	<12.989	>3.721	<3.268
198	>1.968	<1.293	>0.663	<0.514	>37.927	<25.850	>16.413	<13.060	>3.731	<3.299
199	>1.971	<1.301	>0.664	<0.516	>37.927	<25.974	>16.444	<13.165	>3.739	<3.350
200	>1.974	<1.313	>0.665	<0.518	>37.927	<26.141	>16.444	<13.242	>3.751	<3.406
201	>1.977	<1.324	>0.666	<0.527	>37.927	<26.225	>16.449	<13.412	>3.764	<3.466
202	>1.979	<1.332	>0.667	<0.540	>37.927	<26.338	>16.464	<13.662	>3.775	<3.497
203	>1.984	<1.341	>0.668	<0.547	>37.933	<26.547	>16.464	<13.773	>3.780	<3.514
204	>1.991	<1.357	>0.672	<0.553	>37.940	<26.818	>16.464	<13.942	>3.782	<3.517
205	>1.996	<1.375	>0.676	<0.559	>37.940	<27.052	>16.474	<14.090	>3.783	<3.519
206	>1.999	<1.392	>0.678	<0.563	>37.940	<27.393	>16.477	<14.224	>3.785	<3.523
207	>2.001	<1.408	>0.679	<0.567	>37.940	<27.501	>16.487	<14.426	>3.792	<3.545
208	>2.002	<1.422	>0.680	<0.571	>37.940	<27.632	>16.558	<14.498	>3.808	<3.570
209	>2.004	<1.433	>0.683	<0.575	>37.940	<27.803	>16.611	<14.776	>3.820	<3.600

Table 1C: Light-Duty Gasoline Vehicles
IM240 Fast-Pass/Fast-Fail Standards
To be used from January 1, 1995 through December 31, 1997
Model Years 1991-1995 certified to Tier 1 standards and
all 1996 and newer vehicles

SECS IM240	HC Fail Composite	HC Pass Composite	HC Fail Phase 2	HC Pass Phase 2	CO Fail Composite	CO Pass Composite	CO Fail Phase 2	CO Pass Phase 2	NO Fail	NO Pass
210	>2.006	<1.443	>0.689	<0.579	>37.940	<27.953	>16.632	<14.907	>3.834	<3.619
211	>2.008	<1.453	>0.691	<0.595	>37.940	<28.205	>16.634	<14.916	>3.858	<3.639
212	>2.010	<1.463	>0.692	<0.605	>37.940	<28.543	>16.634	<15.014	>3.879	<3.686
213	>2.012	<1.468	>0.693	<0.614	>37.940	<28.997	>16.636	<15.221	>3.893	<3.732
214	>2.015	<1.470	>0.694	<0.622	>37.940	<29.000	>16.648	<15.472	>3.918	<3.791
215	>2.017	<1.474	>0.695	<0.627	>37.940	<29.005	>16.650	<15.555	>3.944	<3.833
216	>2.020	<1.478	>0.696	<0.638	>37.940	<29.081	>16.650	<15.652	>3.970	<3.890
217	>2.021	<1.481	>0.696	<0.643	>37.940	<29.281	>16.732	<15.969	>3.990	<3.932
218	>2.023	<1.484	>0.697	<0.643	>37.975	<29.483	>16.813	<16.028	>4.004	<3.960
219	>2.028	<1.487	>0.698	<0.645	>38.120	<29.734	>16.829	<16.375	>4.013	<3.997
220	>2.033	<1.490	>0.698	<0.651	>38.204	<29,803	>16.845	<16.487	>4.018	<4.013
221	>2.037	<1.493	>0.699	<0.655	>38.207	<29.821	>16.861	<16.524	>4.020	<4.035
222	>2.039	<1.504	>0.699	<0.663	>38.207	<29.847	>16.878	<16,578	>4.024	<4.038
223	>2.041	<1.522	>0.700	<0.671	>38.207	<29.862	>16.888	<16.684	>4.031	<4.050
224	>2,042	<1,547	>0.701	<0.675	>38.207	<29.873	>16.892	<16.755	>4.035	<4.066
225	>2.044	<1.549	>0.701	<0.684	>38.207	<30.008	>16.892	<16.770	>4.037	<4.070
226	>2.045	<1.562	>0.701	<0.694	>38.207	<30.126	>16.893	<16.805	>4.038	<4.072
227	>2.056	<1.574	>0.702	<0.701	>38.207	<30.127	>16.894	<16.865	>4.039	<4.072
228	>2.067	<1.579	>0.704	<0.702	>38.207	<30.127	>16.894	<16.960	>4.040	<4.073
229	>2.071	<1.584	>0.706	<0.708	>38.207	<30.208	>16.894	<16.960	>4.042	<4.073
230	>2.074	<1.589	>0.707	<0.708	>38.207	<30.314	>16.894	<16.962	>4.043	<4.073
231	>2.076	<1.590	>0.708	<0.709	>38.207	<30.323	>16.895	<16.988	>4.044	<4.073
232	>2.081	<1.596	>0.709	<0.710	>38.207	<30.325	>16.895	<17.072	>4.045	<4.074
233	>2.086	<1.598	>0.710	<0.710	>38.207	<30.368	>16.895	<17.094	>4.046	<4.074
234	>2.089	<1.604	>0.710	<0.711	>38.207	<30.411	>16.895	<17.184	>4.046	<4.075
235	>2.091	<1.610	>0.710	<0.712	>38.207	<30.416	>16.896	<17.187	>4.047	<4.075
236	>2.092	<1.612	>0.711	<0.712	>38.207	<30.428	>16.899	<17.188	>4.048	<4.076
237	>2.093	<1.613	>0.711	<0.712	>38.207	<30.430	>16.907	<17.189	>4.050	<4.076
238	>2.095	<1.614	>0.711	<0.713	>38.207	<30.452	>16.920	<17.241	>4.055	<4.076
239	>2.096	<1.615	>0.711	<0.716	>38.207	<30.488	>16.932	<17.370	>4.058	<4.076

Table 2A: Light-Duty Gasoline Truck 1
IM240 Fast-Pass/Fast-Fail Standards
To be used from January 1, 1995 through December 31, 1997
Model Years 1984-1987

(Reserved)

Table 2B: Light-Duty Gasoline Truck 1
IM240 Fast-Pass/Fast-Fail Standards
To be used from January 1, 1995 through December 31, 1997
Model Years 1988-1990

(Reserved)

Table 2C: Light-Duty Gasoline Truck 1
IM240 Fast-Pass/Fast-Fail Standards
To be used from January 1, 1995 through December 31, 1997
Model Years 1991-1995, not including 1994 and 1995 vehicles
certified to Tier 1 standards

(Reserved)

Table 2D: Light-Duty Gasoline Truck 1
IM240 Fast-Pass/Fast-Fail Standards
To be used from January 1, 1995 through December 31, 1997
Model Years 1994-1995 certified to Tier 1 standards and all 1996
and newer vehicles with a loaded vehicle weight less than or
equal to 3,750 pounds

(Reserved)

Table 2E: Light-Duty Gasoline Truck 1
IM240 Fast-Pass/Fast-Fail Standards
To be used from January 1, 1995 through December 31, 1997
Model Years 1994-1995 certified to Tier 1 standards and all 1996
and newer vehicles with a loaded vehicle weight greater than
3,750 pounds

(Reserved)

Table 3A: Light-Duty Gasoline Truck 2
IM240 Fast-Pass/Fast-Fail Standards
To be used from January 1, 1995 through December 31, 1997
Model Years 1984-1987

(Reserved)

Table 3B: Light-Duty Gasoline Truck 2
IM240 Fast-Pass/Fast-Fail Standards
To be used from January 1, 1995 through December 31, 1997
Model Years 1988-1990

(Reserved)

Table 3C: Light-Duty Gasoline Truck 2
IM240 Fast-Pass/Fast-Fail Standards
To be used from January 1, 1995 through December 31, 1997
Model Years 1991-1995, not including 1994 and 1995 vehicles certified to Tier 1 standards

(Reserved)

Table 3D: Light-Duty Gasoline Truck 2
IM240 Fast-Pass/Fast-Fail Standards
To be used from January 1, 1995 through December 31, 1997
Model Years 1994-1995 certified to Tier 1 standards and all 1996 and newer vehicles with a loaded vehicle weight less than or equal to 5,750 pounds

(Reserved)

Table 3E: Light-Duty Gasoline Truck 2
IM240 Fast-Pass/Fast-Fail Standards
To be used from January 1, 1995 through December 31, 1997
Model Years 1994-1995 certified to Tier 1 standards and all 1996 and newer vehicles with a loaded vehicle weight greater than 5,750 pounds

(Reserved)

Table 4A: Light-Duty Gasoline Vehicles
IM240 Fast-Pass/Fast-Fail Standards
To be used on and after January 1, 1998
Model Years 1983-1995, not including 1994 and 1995 vehicles certified to Tier 1 standards

SECS IM240	HC Fail Composite	HC Pass Composite	HC Fail Phase 2	HC Pass Phase 2	CO Fail Composite	CO Pass Composite	CO Fail Phase 2	CO Pass Phase 2	NO Fail	NO Pass
30	>1.193	<0.124	N/A	N/A	>16.540	< 0.693	N/A	N/A	>1.422	<0.167
31	>1.207	<0.126	N/A	N/A	>17.419	< 0.773	N/A	N/A	>1.453	<0.177
32	>1.221	<0.129	N/A	N/A	>18.132	< 0.837	N/A	N/A	>1.510	<0.188
33	>1.234	<0.135	N/A	N/A	>18.601	< 0.851	N/A	N/A	>1.585	<0.214
34	>1.246	<0.140	N/A	N/A	>18.846	< 0.853	N/A	N/A	>1.658	<0.232
35	>1.258	<0.146	N/A	N/A	>18.993	< 0.857	N/A	N/A	>1.717	<0.240
36	>1.270	<0.150	N/A	N/A	>19.083	< 0.900	N/A	N/A	>1.760	<0.243
37	>1.281	<0.153	N/A	N/A	>19.136	< 0.960	N/A	N/A	>1.792	<0.245
38	>1.292	<0.156	N/A	N/A	>19.169	< 1.034	N/A	N/A	>1.817	<0.246
39	>1.303	<0.160	N/A	N/A	>19.196	< 1.070	N/A	N/A	>1.836	<0.246
40	>1.313	<0.165	N/A	N/A	>19.227	< 1.076	N/A	N/A	>1.852	<0.250
41	>1.323	<0.169	N/A	N/A	>19.288	< 1.083	N/A	N/A	>1.866	<0.260
42	>1.332	<0.172	N/A	N/A	>19.376	< 1.102	N/A	N/A	>1.875	<0.277
43	>1.341	<0.173	N/A	N/A	>19.465	< 1.111	N/A	N/A	>1.883	<0.311
44	>1.350	<0.177	N/A	N/A	>19.522	< 1.114	N/A	N/A	>1.909	<0.328
45	>1.359	<0.197	N/A	N/A	>19.590	< 1.157	N/A	N/A	>1.960	<0.343
46	>1.367	<0.200	N/A	N/A	>19.647	< 1.344	N/A	N/A	>2.014	<0.359
47	>1.375	<0.208	N/A	N/A	>19.678	< 1.482	N/A	N/A	>2.056	<0.373
48	>1.383	<0.221	N/A	N/A	>19.695	< 1.530	N/A	N/A	>2.092	<0.383
49	>1.390	<0.232	N/A	N/A	>19.727	< 1.542	N/A	N/A	>2.133	<0.385
50	>1.397	<0.235	N/A	N/A	>20.011	< 1.553	N/A	N/A	>2.178	<0.400
51	>1.404	<0.238	N/A	N/A	>20.510	< 1.571	N/A	N/A	>2.219	<0.410
52	>1.411	<0.240	N/A	N/A	>21.038	< 1.595	N/A	N/A	>2.252	<0.434
53	>1.417	<0.242	N/A	N/A	>21.587	< 1.633	N/A	N/A	>2.275	<0.464
54	>1.423	<0.246	N/A	N/A	>22.148	< 1.685	N/A	N/A	>2.288	<0.472
55	>1.429	<0.249	N/A	N/A	>22.728	< 1.689	N/A	N/A	>2.294	<0.480
56	>1.435	<0.252	N/A	N/A	>23.312	< 1.693	N/A	N/A	>2.296	<0.491
57	>1.441	<0.261	N/A	N/A	>23.869	< 1.700	N/A	N/A	>2.297	<0.500
58	>1.447	<0.271	N/A	N/A	>24.389	< 1.723	N/A	N/A	>2.298	<0.506

Table 4A: Light-Duty Gasoline Vehicles
IM240 Fast-Pass/Fast-Fail Standards
To be used on and after January 1, 1998
Model Years 1983-1995, not including 1994 and 1995 vehicles
certified to Tier 1 standards

SECS IM240	HC Fail Composite	HC Pass Composite	HC Fail Phase 2	HC Pass Phase 2	CO Fail Composite	CO Pass Composite	CO Fail Phase 2	CO Pass Phase 2	NO Fail	NO Pass
59	>1.452	<0.276	N/A	N/A	>24.845	< 1.852	N/A	N/A	>2.299	<0.509
60	>1.457	<0.278	N/A	N/A	>25.217	< 1.872	N/A	N/A	>2.300	<0.512
61	>1.462	<0.280	N/A	N/A	>25.554	< 1.872	N/A	N/A	>2.301	<0.516
62	>1.467	<0.282	N/A	N/A	>25.826	< 1.872	N/A	N/A	>2.304	<0.519
63	>1.472	<0.283	N/A	N/A	>25.973	< 1.900	N/A	N/A	>2.310	<0.523
64	>1.477	<0.284	N/A	N/A	>26.037	< 1.917	N/A	N/A	>2.315	<0.529
65	>1.482	<0.285	N/A	N/A	>26.082	< 1.944	N/A	N/A	>2.320	<0.533
66	>1.487	<0.286	N/A	N/A	>26.122	< 2.000	N/A	N/A	>2.327	<0.535
67	>1.492	<0.288	N/A	N/A	>26.148	< 2.060	N/A	N/A	>2.333	<0.540
68	>1.497	<0.291	N/A	N/A	>26.161	< 2.064	N/A	N/A	>2.337	<0.551
69	>1.502	<0.294	N/A	N/A	>26.168	< 2.076	N/A	N/A	>2.339	<0.563
70	>1.507	<0.296	N/A	N/A	>26.186	< 2.104	N/A	N/A	>2.340	<0.575
71	>1.511	<0.298	N/A	N/A	>26.277	< 2.117	N/A	N/A	>2.341	<0.588
72	>1.515	<0.300	N/A	N/A	>26.414	< 2.125	N/A	N/A	>2.342	<0.600
73	>1.519	<0.302	N/A	N/A	>26.507	< 2.130	N/A	N/A	>2.342	<0.603
74	>1.523	<0.304	N/A	N/A	>26.550	< 2.138	N/A	N/A	>2.342	<0.604
75	>1.527	<0.307	N/A	N/A	>26.568	< 2.152	N/A	N/A	>2.342	<0.613
76	>1.531	<0.308	N/A	N/A	>26.570	< 2.170	N/A	N/A	>2.342	<0.624
77	>1.535	<0.308	N/A	N/A	>26.570	< 2.188	N/A	N/A	>2.342	<0.646
78	>1.539	<0.308	N/A	N/A	>27.042	< 2.200	N/A	N/A	>2.342	<0.651
79	>1.543	<0.314	N/A	N/A	>27.456	< 2.212	N/A	N/A	>2.342	<0.650
80	>1.547	<0.320	N/A	N/A	>27.716	< 2.212	N/A	N/A	>2.342	<0.673
81	>1.551	<0.324	N/A	N/A	>27.941	< 2.221	N/A	N/A	>2.342	<0.696
82	>1.555	<0.327	N/A	N/A	>28.110	< 2.222	N/A	N/A	>2.342	<0.706
83	>1.559	<0.329	N/A	N/A	>28.270	< 2.227	N/A	N/A	>2.342	<0.715
84	>1.562	<0.333	N/A	N/A	>28.402	< 2.236	N/A	N/A	>2.343	<0.724
85	>1.565	<0.336	N/A	N/A	>28.516	< 2.243	N/A	N/A	>2.344	<0.737
86	>1.568	<0.339	N/A	N/A	>28.620	< 2.262	N/A	N/A	>2.346	<0.747
87	>1.571	<0.343	N/A	N/A	>28.716	< 2.271	N/A	N/A	>2.348	<0.748
88	>1.574	<0.347	N/A	N/A	>28.805	< 2.284	N/A	N/A	>2.350	<0.748
89	>1.577	<0.350	N/A	N/A	>28.881	< 2.299	N/A	N/A	>2.351	<0.748
90	>1.580	<0.356	N/A	N/A	>28.935	< 2.308	N/A	N/A	>2.351	<0.748
91	>1.583	<0.358	N/A	N/A	>28.993	< 2.326	N/A	N/A	>2.351	<0.748
92	>1.586	<0.360	N/A	N/A	>29.044	< 2.330	N/A	N/A	>2.351	<0.748
93	>1.589	<0.363	N/A	N/A	>29.085	< 2.331	N/A	N/A	>2.352	<0.748
94	>1.592	<0.367	>0.017	<0.000	>29.121	< 2.344	> 0.355	< 0.000	>2.353	<0.748
95	>1.594	<0.370	>0.048	<0.000	>29.171	< 2.347	> 0.974	< 0.000	>2.356	<0.748
96	>1.596	<0.372	>0.093	<0.000	>29.241	< 2.355	> 1.646	< 0.000	>2.361	<0.748
97	>1.599	<0.376	>0.159	<0.000	>29.341	< 2.395	> 2.343	< 0.000	>2.368	<0.748
98	>1.602	<0.388	>0.188	<0.000	>29.376	< 2.451	> 2.954	< 0.000	>2.377	<0.748
99	<1.605	<0.396	>0.213	<0.000	>29.382	< 2.508	> 3.475	< 0.004	>2.387	<0.751
100	>1.608	<0.405	>0.234	<0.001	>29.404	< 2.590	> 3.942	< 0.008	>2.398	<0.764
101	>1.611	<0.410	>0.265	<0.002	>29.474	< 2.660	> 4.477	< 0.015	>2.405	<0.789
102	>1.614	<0.411	>0.288	<0.003	>29.565	< 2.749	> 5.050	< 0.026	>2.409	<0.822
103	>1.617	<0.412	>0.308	<0.006	>29.616	< 2.913	> 5.577	< 0.038	>2.411	<0.867
104	>1.620	<0.413	>0.329	<0.007	>29.669	< 3.162	> 6.008	< 0.038	>2.412	<0.905
105	>1.622	<0.421	>0.343	<0.008	>29.735	< 3.170	> 6.180	< 0.039	>2.447	<0.925
106	>1.624	<0.428	>0.350	<0.009	>29.799	< 3.197	> 6.282	< 0.061	>2.516	<0.955
107	>1.626	<0.430	>0.365	<0.010	>29.818	< 3.288	> 6.384	< 0.062	>2.581	<0.985
108	>1.628	<0.455	>0.379	<0.013	>29.826	< 3.419	> 6.451	< 0.108	>2.627	<0.993
109	>1.630	<0.459	>0.389	<0.015	>29.833	< 3.587	> 6.496	< 0.168	>2.650	<0.995
110	>1.632	<0.462	>0.395	<0.017	>29.834	< 3.595	> 6.526	< 0.173	>2.661	<0.996
111	>1.634	<0.464	>0.400	<0.021	>29.836	< 3.640	> 6.561	< 0.237	>2.667	<1.010
112	>1.636	<0.466	>0.403	<0.024	>29.895	< 3.740	> 6.582	< 0.266	>2.677	<1.028
113	>1.638	<0.468	>0.405	<0.024	>29.938	< 3.868	> 6.596	< 0.280	>2.694	<1.034
114	>1.640	<0.471	>0.408	<0.025	>29.947	< 3.877	> 6.608	< 0.291	>2.708	<1.044
115	>1.642	<0.488	>0.410	<0.026	>29.951	< 3.934	> 6.618	< 0.314	>2.716	<1.059
116	>1.644	<0.513	>0.411	<0.029	>29.955	< 4.015	> 6.625	< 0.331	>2.720	<1.075
117	>1.646	<0.538	>0.413	<0.032	>29.977	< 4.061	> 6.629	< 0.345	>2.723	<1.080
118	>1.648	<0.561	>0.414	<0.035	>29.997	< 4.063	> 6.635	< 0.350	>2.725	<1.080
119	>1.650	<0.577	>0.416	<0.035	>30.019	< 4.079	> 6.641	< 0.356	>2.726	<1.081
120	>1.652	<0.580	>0.417	<0.036	>30.024	< 4.140	> 6.654	< 0.367	>2.730	<1.091
121	>1.653	<0.586	>0.418	<0.038	>30.024	< 4.185	> 6.933	< 0.388	>2.740	<1.096
122	>1.655	<0.594	>0.419	<0.040	>30.024	< 4.199	> 7.278	< 0.407	>2.754	<1.111
123	>1.657	<0.603	>0.420	<0.041	>30.024	< 4.205	> 7.660	< 0.463	>2.771	<1.122
124	>1.660	<0.610	>0.420	<0.042	>30.026	< 4.212	> 7.974	< 0.480	>2.791	<1.135
125	>1.666	<0.615	>0.421	<0.042	>30.026	< 4.232	> 8.210	< 0.506	>2.811	<1.138

Table 4A: Light-Duty Gasoline Vehicles
IM240 Fast-Pass/Fast-Fail Standards
To be used on and after January 1, 1998
Model Years 1983-1995, not including 1994 and 1995 vehicles certified to Tier 1 standards

SECS IM240	HC Fail Composite	HC Pass Composite	HC Fail Phase 2	HC Pass Phase 2	CO Fail Composite	CO Pass Composite	CO Fail Phase 2	CO Pass Phase 2	NO Fail	NO Pass
126	>1.670	<0.624	>0.422	<0.042	>30.026	< 4.298	> 8.382	< 0.518	>2.827	<1.139
127	>1.673	<0.628	>0.422	<0.045	>30.026	< 4.344	> 8.534	< 0.522	>2.837	<1.139
128	>1.676	<0.632	>0.423	<0.046	>30.026	< 4.361	> 8.661	< 0.525	>2.843	<1.139
129	>1.681	<0.637	>0.423	<0.046	>30.027	< 4.366	> 8.754	< 0.528	>2.847	<1.139
130	>1.686	<0.641	>0.424	<0.049	>30.027	< 4.369	> 8.822	< 0.530	>2.850	<1.139
131	>1.692	<0.643	>0.424	<0.050	>30.027	< 4.372	> 8.877	< 0.530	>2.852	<1.139
132	>1.696	<0.644	>0.425	<0.052	>30.055	< 4.435	> 8.927	< 0.534	>2.853	<1.139
133	>1.700	<0.645	>0.425	<0.054	>30.102	< 4.523	> 8.985	< 0.550	>2.854	<1.139
134	>1.703	<0.647	>0.426	<0.054	>30.103	< 4.524	> 9.076	< 0.554	>2.854	<1.139
135	>1.705	<0.651	>0.426	<0.054	>30.104	< 4.525	> 9.206	< 0.590	>2.856	<1.139
136	>1.709	<0.658	>0.426	<0.055	>30.104	< 4.531	> 9.433	< 0.616	>2.870	<1.160
137	>1.716	<0.663	>0.427	<0.055	>30.124	< 4.534	> 9.773	< 0.639	>2.902	<1.174
138	>1.722	<0.666	>0.427	<0.056	>30.417	< 4.542	>10.066	< 0.653	>2.935	<1.183
139	>1.725	<0.668	>0.428	<0.059	>30.642	< 4.553	>10.291	< 0.662	>2.956	<1.197
140	>1.726	<0.670	>0.428	<0.061	>30.882	< 4.554	>10.531	< 0.683	>2.977	<1.223
141	>1.729	<0.672	>0.429	<0.061	>31.082	< 4.554	>10.731	< 0.696	>2.996	<1.255
142	>1.733	<0.675	>0.429	<0.061	>31.199	< 4.554	>10.848	< 0.708	>3.010	<1.272
143	>1.736	<0.678	>0.429	<0.063	>31.264	< 4.554	>11.008	< 0.721	>3.019	<1.286
144	>1.738	<0.681	>0.429	<0.064	>31.306	< 4.554	>11.124	< 0.739	>3.024	<1.304
145	>1.740	<0.684	>0.430	<0.065	>31.336	< 4.554	>11.183	< 0.742	>3.028	<1.307
146	>1.742	<0.686	>0.430	<0.066	>31.352	< 4.554	>11.248	< 0.743	>3.032	<1.312
147	>1.745	<0.688	>0.430	<0.067	>31.370	< 4.554	>11.387	< 0.745	>3.038	<1.317
148	>1.747	<0.690	>0.430	<0.068	>31.399	< 4.554	>11.573	< 0.748	>3.046	<1.321
149	>1.749	<0.692	>0.431	<0.069	>31.423	< 4.554	>11.718	< 0.751	>3.052	<1.325
150	>1.751	<0.694	>0.431	<0.070	>31.435	< 4.554	>11.803	< 0.762	>3.056	<1.328
151	>1.755	<0.696	>0.431	<0.071	>31.444	< 4.556	>11.851	< 0.789	>3.058	<1.332
152	>1.757	<0.698	>0.444	<0.072	>31.473	< 4.556	>11.878	< 0.790	>3.060	<1.338
153	>1.759	<0.700	>0.466	<0.073	>31.536	< 4.565	>12.623	< 0.794	>3.065	<1.344
154	>1.762	<0.702	>0.475	<0.073	>31.599	< 4.612	>13.534	< 0.799	>3.074	<1.350
155	>1.764	<0.704	>0.479	<0.074	>31.637	< 4.834	>14.410	< 0.805	>3.082	<1.357
156	>1.766	<0.706	>0.481	<0.077	>31.655	< 5.702	>14.848	< 0.842	>3.088	<1.365
157	>1.768	<0.708	>0.486	<0.079	>32.005	< 5.841	>14.932	< 0.990	>3.096	<1.379
158	>1.770	<0.710	>0.493	<0.082	>34.442	< 6.170	>14.949	< 1.038	>3.118	<1.414
159	>1.772	<0.712	>0.515	<0.082	>36.064	< 6.670	>14.956	< 1.357	>3.153	<1.466
160	>1.774	<0.716	>0.523	<0.086	>36.390	< 7.425	>14.959	< 1.455	>3.192	<1.514
161	>1.779	<0.750	>0.527	<0.095	>36.445	< 8.379	>14.963	< 1.546	>3.227	<1.559
162	>1.782	<0.784	>0.530	<0.107	>36.458	< 9.648	>14.966	< 1.824	>3.252	<1.591
163	>1.785	<0.805	>0.532	<0.115	>36.508	<10.918	>14.969	< 2.746	>3.270	<1.641
164	>1.790	<0.840	>0.535	<0.122	>36.623	<12.157	>14.976	< 3.073	>3.284	<1.719
165	>1.793	<0.853	>0.537	<0.127	>36.881	<12.731	>14.987	< 3.633	>3.302	<1.777
166	>1.796	<0.874	>0.539	<0.159	>37.220	<12.831	>15.574	< 4.505	>3.331	<1.832
167	>1.801	<0.903	>0.541	<0.186	>37.465	<12.892	>15.779	< 4.952	>3.359	<1.919
168	>1.807	<0.910	>0.542	<0.189	>37.593	<12.932	>15.815	< 5.254	>3.385	<1.972
169	>1.810	<0.914	>0.551	<0.200	>37.663	<13.702	>15.826	< 5.730	>3.412	<2.013
170	>1.812	<0.916	>0.561	<0.220	>37.682	<14.139	>15.834	< 6.051	>3.439	<2.100
171	>1.813	<0.919	>0.578	<0.236	>37.805	<14.964	>15.840	< 6.333	>3.465	<2.200
172	>1.815	<0.931	>0.589	<0.247	>37.878	<15.704	>15.881	< 6.490	>3.482	<2.251
173	>1.817	<0.948	>0.598	<0.257	>37.890	<16.253	>15.901	< 6.796	>3.489	<2.270
174	>1.820	<0.983	>0.608	<0.267	>37.896	<16.907	>15.914	< 7.205	>3.493	<2.301
175	>1.823	<1.018	>0.612	<0.283	>37.901	<17.655	>15.923	< 8.151	>3.496	<2.318
176	>1.825	<1.027	>0.620	<0.295	>37.907	<18.020	>15.930	< 8.230	>3.499	<2.335
177	>1.828	<1.035	>0.623	<0.312	>37.907	<18.349	>15.945	< 8.584	>3.504	<2.349
178	>1.830	<1.051	>0.626	<0.318	>37.907	<18.671	>16.001	< 8.800	>3.512	<2.387
179	>1.833	<1.074	>0.632	<0.323	>37.907	<18.972	>16.042	< 8.847	>3.525	<2.423
180	>1.836	<1.084	>0.635	<0.337	>37.907	<19.228	>16.058	< 8.913	>3.538	<2.462
181	>1.838	<1.099	>0.637	<0.345	>37.908	<20.123	>16.066	< 9.122	>3.547	<2.503
182	>1.839	<1.121	>0.638	<0.350	>37.914	<20.405	>16.071	< 9.532	>3.553	<2.545
183	>1.841	<1.132	>0.639	<0.359	>37.927	<20.754	>16.073	<10.256	>3.559	<2.586
184	>1.849	<1.152	>0.642	<0.387	>37.927	<21.684	>16.076	<10.862	>3.570	<2.627
185	>1.877	<1.161	>0.644	<0.398	>37.927	<21.955	>16.079	<10.996	>3.588	<2.673
186	>1.893	<1.168	>0.646	<0.400	>37.927	<22.650	>16.082	<11.206	>3.596	<2.749
187	>1.907	<1.175	>0.648	<0.402	>37.927	<22.989	>16.083	<11.514	>3.601	<2.804
188	>1.919	<1.181	>0.650	<0.405	>37.927	<23.535	>16.084	<11.894	>3.606	<2.851
189	>1.930	<1.188	>0.652	<0.418	>37.927	<23.876	>16.085	<12.019	>3.617	<2.894
190	>1.937	<1.203	>0.653	<0.429	>37.927	<24.018	>16.091	<12.170	>3.631	<2.931
191	>1.942	<1.219	>0.655	<0.442	>37.927	<24.464	>16.255	<12.517	>3.639	<2.971
192	>1.947	<1.233	>0.656	<0.457	>37.927	<24.685	>16.305	<12.598	>3.644	<3.020

Table 4A: Light-Duty Gasoline Vehicles
IM240 Fast-Pass/Fast-Fail Standards
To be used on and after January 1, 1998
Model Years 1983-1995, not including 1994 and 1995 vehicles certified to Tier 1 standards

SECS IM240	HC Fail Composite	HC Pass Composite	HC Fail Phase 2	HC Pass Phase 2	CO Fail Composite	CO Pass Composite	CO Fail Phase 2	CO Pass Phase 2	NO Fail	NO Pass
193	>1.951	<1.251	>0.657	<0.473	>37.927	<24.931	>16.347	<12.625	>3.657	<3.077
194	>1.955	<1.255	>0.659	<0.487	>37.927	<25.188	>16.357	<12.653	>3.673	<3.132
195	>1.958	<1.258	>0.660	<0.501	>37.927	<25.468	>16.379	<12.777	>3.687	<3.185
196	>1.962	<1.265	>0.661	<0.510	>37.927	<25.627	>16.397	<12.906	>3.704	<3.219
197	>1.965	<1.280	>0.662	<0.512	>37.927	<25.746	>16.406	<12.989	>3.721	<3.268
198	>1.968	<1.293	>0.663	<0.514	>37.927	<25.850	>16.413	<13.060	>3.731	<3.299
199	>1.971	<1.301	>0.664	<0.516	>37.927	<25.974	>16.444	<13.165	>3.739	<3.350
200	>1.974	<1.313	>0.665	<0.518	>37.927	<26.141	>16.444	<13.242	>3.751	<3.406
201	>1.977	<1.324	>0.666	<0.527	>37.927	<26.225	>16.449	<13.412	>3.764	<3.466
202	>1.979	<1.332	>0.667	<0.540	>37.927	<26.338	>16.464	<13.662	>3.775	<3.497
203	>1.984	<1.341	>0.668	<0.547	>37.933	<26.547	>16.464	<13.773	>3.780	<3.514
204	>1.991	<1.357	>0.672	<0.553	>37.940	<26.818	>16.464	<13.942	>3.782	<3.517
205	>1.996	<1.375	>0.676	<0.559	>37.940	<27.052	>16.474	<14.090	>3.783	<3.519
206	>1.999	<1.392	>0.678	<0.563	>37.940	<27.393	>16.477	<14.224	>3.785	<3.523
207	>2.001	<1.408	>0.679	<0.567	>37.940	<27.501	>16.487	<14.426	>3.792	<3.545
208	>2.002	<1.422	>0.680	<0.571	>37.940	<27.632	>16.558	<14.498	>3.808	<3.570
209	>2.004	<1.433	>0.683	<0.575	>37.940	<27.803	>16.611	<14.776	>3.820	<3.600
210	>2.006	<1.443	>0.689	<0.579	>37.940	<27.953	>16.632	<14.907	>3.834	<3.619
211	>2.008	<1.453	>0.691	<0.595	>37.940	<28.205	>16.634	<14.916	>3.858	<3.639
212	>2.010	<1.463	>0.692	<0.605	>37.940	<28.543	>16.634	<15.014	>3.879	<3.686
213	>2.012	<1.468	>0.693	<0.614	>37.940	<28.997	>16.636	<15.221	>3.893	<3.732
214	>2.015	<1.470	>0.694	<0.622	>37.940	<29.000	>16.648	<15.472	>3.918	<3.791
215	>2.017	<1.474	>0.695	<0.627	>37.940	<29.005	>16.650	<15.555	>3.944	<3.833
216	>2.020	<1.478	>0.696	<0.638	>37.940	<29.081	>16.650	<15.652	>3.970	<3.890
217	>2.021	<1.481	>0.696	<0.643	>37.940	<29.281	>16.732	<15.969	>3.990	<3.932
218	>2.023	<1.484	>0.697	<0.643	>37.975	<29.483	>16.813	<16.028	>4.004	<3.960
219	>2.028	<1.487	>0.698	<0.645	>38.120	<29.734	>16.829	<16.375	>4.013	<3.997
220	>2.033	<1.490	>0.698	<0.651	>38.204	<29.803	>16.845	<16.487	>4.018	<4.013
221	>2.037	<1.493	>0.699	<0.655	>38.207	<29.821	>16.861	<16.524	>4.020	<4.035
222	>2.039	<1.504	>0.699	<0.663	>38.207	<29.847	>16.878	<16.578	>4.024	<4.038
223	>2.041	<1.522	>0.700	<0.671	>38.207	<29.862	>16.888	<16.684	>4.031	<4.050
224	>2.042	<1.547	>0.701	<0.675	>38.207	<29.873	>16.892	<16.755	>4.035	<4.066
225	>2.044	<1.549	>0.701	<0.684	>38.207	<30.008	>16.892	<16.770	>4.037	<4.070
226	>2.045	<1.562	>0.701	<0.694	>38.207	<30.126	>16.893	<16.805	>4.038	<4.072
227	>2.056	<1.574	>0.702	<0.701	>38.207	<30.127	>16.894	<16.865	>4.039	<4.072
228	>2.067	<1.579	>0.704	<0.702	>38.207	<30.127	>16.894	<16.960	>4.040	<4.073
229	>2.071	<1.584	>0.706	<0.708	>38.207	<30.208	>16.894	<16.960	>4.042	<4.073
230	>2.074	<1.589	>0.707	<0.708	>38.207	<30.314	>16.894	<16.962	>4.043	<4.073
231	>2.076	<1.590	>0.708	<0.709	>38.207	<30.323	>16.895	<16.988	>4.044	<4.073
232	>2.081	<1.596	>0.709	<0.710	>38.207	<30.325	>16.895	<17.072	>4.045	<4.074
233	>2.086	<1.598	>0.710	<0.710	>38.207	<30.368	>16.895	<17.094	>4.046	<4.074
234	>2.089	<1.604	>0.710	<0.711	>38.207	<30.411	>16.895	<17.184	>4.046	<4.075
235	>2.091	<1.610	>0.710	<0.712	>38.207	<30.416	>16.896	<17.187	>4.047	<4.075
236	>2.092	<1.612	>0.711	<0.712	>38.207	<30.428	>16.899	<17.188	>4.048	<4.076
237	>2.093	<1.613	>0.711	<0.712	>38.207	<30.430	>16.907	<17.189	>4.050	<4.076
238	>2.095	<1.614	>0.711	<0.713	>38.207	<30.452	>16.920	<17.241	>4.055	<4.076
239	>2.096	<1.615	>0.711	<0.716	>38.207	<30.488	>16.932	<17.370	>4.058	<4.076

Table 4B: Light-Duty Gasoline Vehicles
IM240 Fast-Pass/Fast-Fail Standards
To be used on and after January 1, 1998
Model Years 1994-1995 certified to Tier 1 standards and all 1996 and newer vehicles

(Reserved)

Table 5A: Light-Duty Gasoline Truck 1
IM240 Fast-Pass/Fast-Fail Standards
To be used on and after January 1, 1998
Model Years 1984-1987

(Reserved)

Table 5B: Light-Duty Gasoline Truck 1
IM240 Fast-Pass/Fast-Fail Standards
To be used on and after January 1, 1998
Model Years 1988-1995, not including 1994 and 1995 vehicles
certified to Tier 1 standards

(Reserved)

Table 5C: Light-Duty Gasoline Truck 1
IM240 Fast-Pass/Fast-Fail Standards
To be used on and after January 1, 1998
Model Years 1994-1995 certified to Tier 1 standards and all 1996
and newer vehicles with a loaded vehicle weight less than or
equal to 3,750 pounds

(Reserved)

Table 5D: Light-Duty Gasoline Truck 1
IM240 Fast-Pass/Fast-Fail Standards
To be used on and after January 1, 1998
Model Years 1994-1995 certified to Tier 1 standards and all 1996
and newer vehicles with a loaded vehicle weight greater than
3,750 pounds

(Reserved)

Table 6A: Light-Duty Gasoline Truck 2
IM240 Fast-Pass/Fast-Fail Standards
To be used on and after January 1, 1998
Model Years 1984-1987

(Reserved)

Table 6B: Light-Duty Gasoline Truck 2
IM240 Fast-Pass/Fast-Fail Standards
To be used on and after January 1, 1998
Model Years 1988-1995, not including 1994 and 1995 vehicles
certified to Tier 1 standards

(Reserved)

Table 6C: Light-Duty Gasoline Truck 2
IM240 Fast-Pass/Fast-Fail Standards
To be used on and after January 1, 1998
Model Years 1994-1995 certified to Tier 1 standards and all 1996
and newer vehicles with a loaded vehicle weight less than or
equal to 5,750 pounds

(Reserved)

Table 6D: Light-Duty Gasoline Truck 2
IM240 Fast-Pass/Fast-Fail Standards
To be used on and after January 1, 1998
Model Years 1994-1995 certified to Tier 1 standards and all 1996
and newer vehicles with a loaded vehicle weight greater than
5,750 pounds

(Reserved)

Table 7: Purge Fast-Pass/Fast-Fail Standards

SECS IM240	Purge Fail	Purge Pass	SECS IM240	Purge Fail	Purge Pass	SECS IM240	Purge Fail	Purge Pass	SECS IM240	Purge Fail	Purge Pass
30	N/A	>0.14	44	N/A	>0.20	58	N/A	>0.25	72	N/A	>0.29
31	N/A	>0.14	45	N/A	>0.20	59	N/A	>0.25	73	N/A	>0.30
32	N/A	>0.15	46	N/A	>0.21	60	N/A	>0.25	74	N/A	>0.30
33	N/A	>0.15	47	N/A	>0.22	61	N/A	>0.26	75	N/A	>0.30
34	N/A	>0.16	48	N/A	>0.22	62	N/A	>0.26	76	N/A	>0.31
35	N/A	>0.16	49	N/A	>0.22	63	N/A	>0.26	77	N/A	>0.31
36	N/A	>0.16	50	N/A	>0.23	64	N/A	>0.27	78	N/A	>0.32
37	N/A	>0.17	51	N/A	>0.24	65	N/A	>0.27	79	N/A	>0.32
38	N/A	>0.18	52	N/A	>0.24	66	N/A	>0.27	80	N/A	>0.32
39	N/A	>0.18	53	N/A	>0.24	67	N/A	>0.28	81	N/A	>0.32
40	N/A	>0.19	54	N/A	>0.24	68	N/A	>0.28	82	N/A	>0.33
41	N/A	>0.19	55	N/A	>0.24	69	N/A	>0.29	83	N/A	>0.33
42	N/A	>0.19	56	N/A	>0.24	70	N/A	>0.29	84	N/A	>0.34
43	N/A	>0.20	57	N/A	>0.24	71	N/A	>0.29	85	N/A	>0.34

Table 7: Purge Fast-Pass/Fast-Fail Standards

SECS IM240	Purge Fail	Purge Pass	SECS IM240	Purge Fail	Purge Pass	SECS IM240	Purge Fail	Purge Pass	SECS IM240	Purge Fail	Purge Pass
86	N/A	>0.34	124	N/A	>0.49	162	N/A	>0.62	201	N/A	>0.77
87	N/A	>0.35	125	N/A	>0.49	163	N/A	>0.63	202	N/A	>0.77
88	N/A	>0.35	126	N/A	>0.50	164	N/A	>0.63	203	N/A	>0.78
89	N/A	>0.35	127	N/A	>0.50	165	N/A	>0.64	204	N/A	>0.79
90	N/A	>0.36	128	N/A	>0.50	166	N/A	>0.64	205	N/A	>0.79
91	N/A	>0.36	129	N/A	>0.50	167	N/A	>0.64	206	N/A	>0.80
92	N/A	>0.37	130	N/A	>0.51	168	N/A	>0.65	207	N/A	>0.81
93	N/A	>0.37	131	N/A	>0.52	169	N/A	>0.65	208	N/A	>0.81
94	N/A	>0.37	132	N/A	>0.52	170	N/A	>0.66	209	N/A	>0.82
95	N/A	>0.38	133	N/A	>0.52	171	N/A	>0.66	210	N/A	>0.83
96	N/A	>0.38	134	N/A	>0.53	172	N/A	>0.67	211	N/A	>0.83
97	N/A	>0.39	135	N/A	>0.53	173	N/A	>0.67	212	N/A	>0.84
98	N/A	>0.39	136	N/A	>0.54	174	N/A	>0.68	213	N/A	>0.85
99	N/A	>0.39	137	N/A	>0.54	175	N/A	>0.68	214	N/A	>0.85
100	N/A	>0.40	138	N/A	>0.54	176	N/A	>0.68	215	N/A	>0.85
101	N/A	>0.40	139	N/A	>0.55	177	N/A	>0.68	216	N/A	>0.86
102	N/A	>0.40	140	N/A	>0.55	178	N/A	>0.68	217	N/A	>0.86
103	N/A	>0.41	141	N/A	>0.56	179	N/A	>0.68	218	N/A	>0.87
104	N/A	>0.41	142	N/A	>0.56	180	N/A	>0.68	219	N/A	>0.87
105	N/A	>0.41	143	N/A	>0.56	181	N/A	>0.68	220	N/A	>0.88
106	N/A	>0.42	144	N/A	>0.56	182	N/A	>0.68	221	N/A	>0.88
107	N/A	>0.42	145	N/A	>0.57	183	N/A	>0.68	222	N/A	>0.88
108	N/A	>0.43	146	N/A	>0.57	184	N/A	>0.68	223	N/A	>0.89
109	N/A	>0.43	147	N/A	>0.58	185	N/A	>0.68	224	N/A	>0.90
110	N/A	>0.43	148	N/A	>0.58	186	N/A	>0.69	225	N/A	>0.90
111	N/A	>0.44	149	N/A	>0.59	187	N/A	>0.70	226	N/A	>0.91
112	N/A	>0.44	150	N/A	>0.59	188	N/A	>0.72	227	N/A	>0.91
113	N/A	>0.44	151	N/A	>0.59	189	N/A	>0.72	228	N/A	>0.92
114	N/A	>0.44	152	N/A	>0.59	190	N/A	>0.73	229	N/A	>0.92
115	N/A	>0.45	153	N/A	>0.59	191	N/A	>0.73	230	N/A	>0.92
116	N/A	>0.46	154	N/A	>0.59	192	N/A	>0.74	231	N/A	>0.92
117	N/A	>0.46	155	N/A	>0.60	193	N/A	>0.74	232	N/A	>0.93
118	N/A	>0.47	156	N/A	>0.60	194	N/A	>0.74	233	N/A	>0.93
119	N/A	>0.47	157	N/A	>0.61	195	N/A	>0.75	234	N/A	>0.93
120	N/A	>0.47	158	N/A	>0.61	196	N/A	>0.76	235	N/A	>0.93
121	N/A	>0.48	159	N/A	>0.61	197	N/A	>0.76	236	N/A	>0.94
122	N/A	>0.48	160	N/A	>0.61	198	N/A	>0.76	237	N/A	>0.94
123	N/A	>0.48	161	N/A	>0.62	199	N/A	>0.76	238	N/A	>0.94
						200	N/A	>0.77	239	N/A	>0.94

(a)

DIVISION OF ENVIRONMENTAL SAFETY, HEALTH AND ANALYTICAL PROGRAMS

Fees for the Registration of Nonionizing Radiation Producing Sources

Proposed New Rules: N.J.A.C. 7:28-48

Authorized By: Jeanne M. Fox, Acting Commissioner, Department of Environmental Protection and Energy.
Authority: N.J.S.A. 26:2D-1 et seq., specifically N.J.S.A. 26:2D-9(1).
DEPE Docket Number: 60-93-11/142.
Proposal Number: PRN 1993-650.

A **public hearing** concerning this proposal will be held on: Tuesday, January 11, 1994, at 9:30 A.M.

The New Jersey Department of Environmental Protection and Energy's Public Hearing Room
401 East State Street, First Floor
Trenton, New Jersey 08625

Submit written comments, identified by the Docket Number given above, by January 20, 1994 to:

Janis E. Hoagland, Esq.
Administrative Practice Officer
New Jersey Department of Environmental Protection and Energy
Office of Legal Affairs
CN 402
Trenton, New Jersey 08625-0402

The agency proposal follows:

Summary

In 1958, the Radiation Protection Act, N.J.S.A. 26:2D-1 et seq. (hereinafter, the Act), was enacted, creating the New Jersey Commission on Radiation Protection (Commission) and vesting in that body the authority to promulgate rules and regulations as necessary to prohibit and prevent exposure to unnecessary radiation. Pursuant to N.J.S.A. 26:2D-9, the Department of Environmental Protection and Energy (Department) has the statutory authority to administer and enforce the rules promulgated by the Commission, as well as the authority to charge fees to secure the resources necessary to do so.

In July 1984, the Commission adopted rules, N.J.A.C. 7:28-42, entitled Radio Frequency Radiation (see 16 N.J.R. 2120(a)), to provide protection to the general public from exposure to nonionizing radiation produced by devices that radiate radiofrequency radiation in the frequency range of 300 kilohertz (kHz) to 100 Gigahertz (GHz). The limits were derived from American National Standard Institute (ANSI) "Safety Levels With Respect to Human Exposure to Radio Frequency Electromagnetic Fields 300 kHz to 100 GHz," ANSI C95.1-1982. The rules were promulgated in response to growing concern about the potential harmful effects in human beings from exposure to radiofrequency radiation, which had not been addressed by any Federal regulations. The scientific literature supported the need for the rules, including published research findings in the disciplines of immunology, teratology, endocrinology, hematology, neurology, thermoregulation and metabolism, biorhythms and cardiology.

The 1984 rules applied only to non-occupational exposures, that is, exposures of the general public to radiofrequency radiation from radio and television broadcasting antennas, microwave towers and satellite earth station antennas. In 1987 (see 19 N.J.R. 770(a)), the rules were

amended to encompass occupational exposures to radiofrequency radiation. Thus the rules' protection was extended to cover workers who climb broadcasting and communications towers, individuals who service cellular telephone base stations, employees of satellite earth station facilities who work in the vicinity of microwave wave guides and stand in satellite earth station antennas to make repairs or adjustments, operators of radiofrequency and microwave heaters and sealers and microwave disinfection units, and maintenance personnel at private airports who work near radar units and navigational sources.

The standards set forth in N.J.A.C.7:28-42 have not been actively enforced because the Department lacks adequate resources. The Department's activities in the area of radiofrequency radiation protection have been limited to acting primarily as a clearinghouse for scientific information. A small number of inspections have been conducted; however, the Department has turned down numerous inspection requests from the general public, local governments and communities, other State agencies and private companies. Also, the Department has not been able to investigate complaints of suspected overexposures. As a result, it is estimated that many New Jersey citizens have been and continue to be exposed to radiation levels that exceed limits specified in N.J.A.C. 7:28-42. The Department believes that the proposed new rules will benefit public health and safety by generating revenue needed to enforce the existing regulation.

Pursuant to N.J.S.A. 26:2D-9(1), the Department has the authority "to establish and charge fees for any of the services it performs, which fees shall be annual or periodic as the Department shall determine." The proposed fee rules are based on the Department's expenses projected to be incurred in enforcing the Radio Frequency Protection Guides in N.J.A.C. 7:28-42. N.J.S.A. 26:2D-13 gives the Department authority to seek penalties for violations of regulations promulgated pursuant to the Act.

The proposed rules will require the owners of communications, navigational and radar sources that have the potential of exposing either workers of the limits specified in N.J.A.C. 7:28-42 and **all** the owners of radiofrequency and microwave heaters, sealers, and industrial ovens to register those sources with the Department within 60 calendar days after the effective date of the subchapter. The owners of all units that are subject to proposed N.J.A.C. 7:28-48 shall be assessed an initial registration fee and shall be required to provide technical information to the Department. After the first year of this program, the owners of registered units will be assessed an annual renewal fee. Details of the Department's fee and registration program are provided in subsequent paragraphs of this summary and in the Economic Impact statement below.

The amounts of the proposed fees are based on the services to be performed by the Department. These services include, but are not limited to, salary costs for personnel to review technical information, to perform inspections and surveys, to maintain data, and to perform clerical and administrative functions, and non-salary operating costs, such as the purchase of scientific equipment. In addition, the services to be performed by the Department include the development of enforcement documents and the litigation of enforcement cases.

There are two groups of sources selected for fee assessment: (1) communications, navigational and radar sources possessing the potential to expose the general public or members of the work force to levels of radiofrequency radiation in excess of the limits specified in N.J.A.C.7:28-42, and (2) all radiofrequency and microwave heaters, sealers and industrial ovens. In calculating the amounts of the fees, the Department has established five categories of sources within the first group, based on the functions of the particular sources and on the anticipated difficulty of determining whether those sources are in compliance with N.J.A.C. 7:28-42. In addition, the Department has established two categories of radiofrequency and microwave heaters and sealers. The proposed fees for the heaters and sealers are based on the frequency of the radiation they emit and on the difficulty of determining compliance with N.J.A.C. 7:28-42. The Department welcomes comments regarding any sources that have not been addressed in this rule but that have the potential to exceed the limits specified in N.J.A.C. 7:28-42.

A group of sources for which fees will not be assessed under the proposed rules at this time is amateur radio antennas. Although the Department is aware that some amateur radio antennas may expose members of the general public to levels of radiofrequency radiation in excess of the limits specified in N.J.A.C. 7:28-42, there is not enough information currently available to predict accurately the intensity and the pattern of radiation emitted by these sources. The Department welcomes comments concerning the regulation of amateur radio antennas. At some point in the future, the Department may study the feasibility of requiring the registration of amateur radio sources.

Radiofrequency Radiation Sources With Potential To Exceed Radiation Limits In N.J.A.C. 7:28-42

To assist the owners of radiofrequency radiation sources in determining whether a particular source radiating between the frequencies of 300 kHz to 100 GHz has the potential of exceeding the limits set forth in N.J.A.C. 7:28-42, the Department has divided these sources into the following five categories:

1. Radio and television station broadcasting antennas. This category includes approximately 220 primary broadcasting antennas, encompassing amplitude modulated (AM) and frequency modulated (FM) radio stations, and ultra high frequency (UHF) and very high frequency (VHF) television stations. Since some companies may own both an AM and an FM station, this category may affect only 150 companies. According to information provided by the Federal Communications Commission (FCC), some of the following sources may have the potential to exceed the radiation limits specified in N.J.A.C. 7:28-42: experimental broadcast stations, automatic relay stations, FM radio and television translator stations, FM radio and television booster stations, intercity relay stations, instructional television fixed service and multipoint distribution service, radio and television auxiliary broadcast stations, low power television stations, low power auxiliary broadcast stations and remote pickup broadcast base stations.

Broadcast sources are usually located near densely populated areas so that the signals can be received by large audiences. The radiation patterns from broadcast antennas are not as highly collimated as are those from other sources of radiofrequency radiation, such as aperture antennas used in microwave and satellite communications. Therefore, the exposure of persons to main-beam radiation intensities near the radiating antennas is possible, especially if individuals are at eye level with the antenna bays, as may be the case for residents of high-rise buildings.

An extensive United States Environmental Protection Agency (EPA) research program conducted from 1973 to 1983 assessed the environmental radiofrequency radiation to which the public is exposed. The results of that research indicated that broadcast antennas, in particular, FM radio and VHF television antennas, contributed to the majority of the public's exposure to radiofrequency radiation. Some of the radiation levels found were 20 times greater than the limits specified in N.J.A.C. 7:28-42.4. Public access to broadcasting antennas is normally restricted so that individuals cannot be exposed to the high-intensity fields that can exist near an antenna. However, maintenance workers are occasionally required to climb antenna structures for such purposes as painting, repairs, or beacon replacement. In such cases, it is possible for a worker to be exposed to levels of radiofrequency radiation greater than the limits specified in N.J.A.C. 7:28-42 if the antenna is energized. In cities, broadcasting antennas may be located on the roofs of buildings and thus building maintenance personnel may unknowingly be exposed to radiofrequency radiation. Therefore, the Department believes that the radiation levels present not only at locations accessible to the public but also those locations accessible to a worker should be considered in determining whether a broadcasting antenna has the potential to exceed the radiation limits set forth in N.J.A.C. 7:28-42.4.

If multiple broadcasting sources are present at one site, the initial registration and annual renewal fees will depend on whether the broadcasting antennas are similar or dissimilar from one another. FM radio and television broadcasting antennas are considered similar sources. For example, since the radiation patterns for FM radio and television broadcasting antennas are similar, the Department may calculate radiation levels and perform radiation surveys for sites with multiple FM radio or television antennas at a cost that does not significantly increase for each additional FM radio or television antenna. However, AM radio waves propagate in a manner which is quite different from FM radio or television waves and a different survey strategy with possibly different equipment may be used to measure the AM radio waves than will be used for the FM or television waves. Also, a different method is used to calculate radiation levels from AM radio waves. As a result, both the initial registration fee and the annual renewal fees will be substantially higher if the additional sources are dissimilar.

2. Transmitting satellite earth station antennas. The Department estimates that there are approximately 50 satellite earth stations in New Jersey, the majority of which have three or more transmitting antennas

or "satellite dishes," as they are sometimes called. Some companies may own more than one earth station; therefore, this category may include a total of 45 businesses.

The function of a satellite earth station antenna is to electronically transmit information to satellites orbiting the earth. The main beam of a satellite earth station antenna may contain radiofrequency radiation levels in excess of the limits specified in N.J.A.C. 7:28-42. Workers have been injured accidentally while standing in the reflector when an antenna was transmitting. Therefore, the determination of whether the radiation emitted exceeds the limits specified in N.J.A.C. 7:28-42 should be made by assessing the radiation levels in the area between the feedhorn and the subreflector. Federal agencies have estimated that the level of radiofrequency radiation between the antenna feedhorn and the subreflector always exceeds the limits specified in NJ.A.C. 7:28-42. Since this area of the earth station antenna can be accessed by workers, the Department expects that all transmitting satellite earth station antennas will be required to be registered.

There are many satellite antennas that only receive electronic data, as in the case of satellite antennas purchased by homeowners and small businesses for viewing television programs. Because "receive-only" satellite antennas do not emit radiation, they **will not** have to be registered.

3. Transmitting point-to-point microwave communications antennas. These antennas are also commonly referred to as microwave dishes or microwave relay towers. (Wavelengths in the range of 300 Megahertz to 300 Gigahertz within the radiofrequency radiation spectrum are designated "microwaves.") The Department estimates that there are approximately 2,000 microwave dishes, located on 200 towers, in New Jersey.

Microwave point-to-point communications antennas transmit and/or receive electronic information over relatively short distances (within the line of sight). These sources are similar to satellite earth station antennas in that the beam of radiofrequency radiation emitted is highly directional. Microwave antennas are usually mounted on 100 foot towers. Workers may be required to climb the towers and thus may accidentally access the main beam when repairing fabric covers on the antennas or when performing other maintenance tasks. Microwave antennas may also be mounted on the rooftops of buildings, and maintenance personnel may be exposed unknowningly to microwave radiation, as may occupants of adjacent buildings if they are close in elevation to the antenna.

In general, the radiation levels in the main beam of these sources is far below the limits specified in N.J.A.C. 7:28-42. Therefore, the Department estimates that only 20 dishes on 10 towers, owned by two companies, will be required to be registered with the Department. As in the case of satellite earth station antennas, some microwave antennas are "receive-only," and **will not** have to be registered.

4. Fixed antennas of land-mobile communications systems. Mobile communications are in common use in both business and personal applications. A typical mobile communications system uses both stationary and portable sources of radiofrequency radiation to transmit information. Since N.J.A.C. 7:28-42 regulates fixed, not mobile, sources of radiofrequency radiation, only base stations belonging to a land-mobile system are subject to proposed N.J.A.C. 7:28-48. The Department has received information indicating that cellular radio (more commonly known as "cellular telephone") cell-site base station antennas have the greatest potential of the sources in the land-mobile category to exceeed the radiation limits specified in N.J.A.C. 7:28-42. Many base stations are mounted on 100 foot masts and workers climbing such masts can easily access the antennas during routine maintenance. Base stations are also mounted on rooftops and may therefore pose a hazard to workers performing maintenance on the antennas, to building maintenance personnel and to the public. (Many high-rise apartment buildings allow tenants to use the roof for limited recreational activities, such as sunbathing.) The Department estimates that there are approximately 100 cellular radio cell-site base stations, owned by three companies, in New Jersey.

To determine whether a source should be registered pursuant to these proposed new rules, an owner should consider whether workers or members of the public would be exposed to levels of radiation in excess of the limits in N.J.A.C. 7:28-42 if they stood next to an antenna or antenna array when all channels are operational at maximum power.

5. Navigational aids and radar. This category includes any fixed source of radiofrequency radiation used to control, assist or provide information concerning traffic on land, at sea or in the air. It also includes radars used in meteorological or research activities. Among the sources that may be included in this category are air route surveillance radars, air traffic control radars, height-finder radars, acquisition and tracking radars, instrument landing systems, microwave landing systems, glide slope/glide path UHF transmitters, nondirectional radio beacons, VHF omnidirectional range (VOR) navigational aids, marker beacons and radars used for weather prediction (doppler radars). **Excluded** are mobile sources such as traffic radar systems used by police to determine the speed of vehicles and airplane-mounted or boat-mounted navigational sources. As in the case of satellite earth station and microwave antennas, any navigational sources that are "receive-only" **will not** have to be registered.

The majority of the sources in this category are located at private airports or along the coast. The Department has chosen to regulate only non-military and non-Federally owned sources; therefore, it estimates that only 10 such sources, owned by eight companies at eight facilities, will be required to be registered. The Department estimates that only a small number of these sources are capable of exceeding the limits specified in N.J.A.C. 7:28-42. To determine whether a source has the potential to exceed the limits in N.J.A.C. 7:28-42, an owner should consider whether workers or members of the general public would be exposed to levels of radiation in excess of the limits in N.J.A.C. 7:28-42 if they stood near one of these sources when it is transmitting.

Radiofrequency and Microwave Heaters, Sealers and Industrial Ovens

Radiofrequency and microwave radiation sources, such as radiofrequency and microwave heaters, sealers and industrial ovens, may expose their operators to continuous nonionizing radiation fields that exceed the limits in N.J.A.C. 7:28-42 on a daily basis. Based on information from Federal agencies, the Department believes that these sources, which are used in manufacturing processes and for scientific analysis, are likely to be in violation of the provisions of N.J.A.C. 7:28-42 and need to be inspected. Therefore, the Department is requiring that all of these sources be registered.

According to the Food and Drug Administration's (FDA) Center for Devices and Radiological Health (CDRH), the majority of radiofrequency heater and sealers operate between the frequencies of three and 100 MHz and often expose their operators to time-averaged electric and magnetic fields 10 to 100 times higher than the radiation limits in N.J.A.C. 7:28-42. Many operators are women of child-bearing age. If a woman is in the first or second trimester of a pregnancy, her fetus would be most sensitive to radiation in the frequency range of 80 to 100 MHz, which is the range in which the human body is resonant and the maximum amount of energy can be absorbed. Enhanced energy absorption by the fetus also occurs in the microwave portion of the spectrum. The extent of the energy absorption depends on the shape and size of the mother and fetus during late pregnancy. As a result of this potential danger to the mother and the fetus, the Department believes that both radiofrequency and microwave heaters, sealers and industrial ovens should be registered.

It is the understanding of the Department that there exists no Federal reporting mechanism to help locate these sources. The Department has reviewed several State and Federal documents indicating that, during the period of approximately 1960 through 1980, the FCC required purchasers of various kinds of radiofrequency equipment to file a form with it, noting the name and address of the purchaser and which of several broad classes of equipment had been purchased. However, the Department has discovered that there is no Federal program under which these sources are actively sought out and inspected for radiation leakage.

Since these sources expose their operators to high radiation levels and since there is no well-developed State or Federal inspection program, the Department feels that radiofrequency and microwave heaters, sealers and industrial ovens present a significant radiation hazard to New Jersey's citizens. Therefore, all of these sources will be required to be registered. The Department is dividing this large group of radiofrequency and microwave heaters, sealers and industrial ovens into two categories, based on the frequency of the radiation emitted.

1. Radiofrequency heaters and sealers. The Department estimates that there are 2,000 of these sources owned and operated by 400 companies at 500 facilities in New Jersey. These sources operate between the frequencies of 300 kHz and 299 MHz, and are known as RF heat sealers, fusers, molders, fasteners or embossers; high-frequency sealers or dryers; and electronic or electromagnetic sealers or welders. Specific uses of radiofrequency heaters and sealers include the manufacture of many plastic products such as toys, vinyl loose-leaf binders, rain apparel and packaging material; wood lamination and veneer processes; embossing

and drying operations in the textile, paper, plastic and leather industries; and the curing of various materials, including plasticized polyvinyl chloride, wood resins, polyurethane foam, concrete binder materials, rubber tires and epoxy resins. A few of these sources may be used in industrial or academic research.

In a May 1985 bulletin, the FDA's Center for Devices and Radiological Health reported that radiofrequency heaters and sealers may expose their operators to time-averaged fields 10 to 100 times higher than the radiation limits specified in N.J.A.C. 7:28-42. The National Institute for Occupational Safety and Health (NIOSH) has reported that in certain cases workers' hands have been exposed to radiation greater than 8,000 times the limits specified in N.J.A.C. 7:28-42.

Many of these sources can be operated within the limits specified in N.J.A.C. 7:28-42 (that is, safely) if the appropriate shielding is in place. However, even a small gap in the shielding can result in significant increases in radiation leakage. Many units are manufactured so that they meet the radiation limits in N.J.A.C. 7:28-42, but they are customized by their owners after they leave the manufacturer. These modified units often increase operators' exposure to radiofrequency radiation. Some sources are enclosed in shielded rooms in order to meet FCC electromagnetic interference requirements, but they may expose their operators to even higher radiation fields because the electromagnetic waves are trapped and reflected inside the room. From information provided by Federal agencies, the Department suspects that at least half of all of the radiofrequency heaters and sealers in use are being operated without proper shielding.

2. Microwave heaters, sealers and industrial ovens. This category includes sources which operate between the frequencies of 300 MHz and 100 GHz. Some of these sources are used to process and prepare food. Others are used to dry, cure, sanitize, disinfect, and change the chemical composition of wood and dyes. Some of these sources are used in applications similar to those of radiofrequency heaters and sealers, and they may also be used in industrial and academic research. Microwave disinfection units are now being used by hospitals to treat medical waste.

These sources, as a group, are less likely than radiofrequency heaters and sealers to expose workers to radiation levels in excess of the limits specified in N.J.A.C. 7:28-42 because of the way that electromagnetic waves interact with human body tissues at higher (microwave) frequencies. Nevertheless, many microwave sources may be out of compliance with N.J.A.C. 7:28-42, and their operators may work in close proximity to these sources for eight hours a day. Therefore, the Department is requiring all microwave heaters, sealers and industrial ovens to be registered with the Department, with the exception of microwave ovens used to cook food for customers' consumption, for instance, in restaurants, canteens, and other eating establishments, and microwave ovens purchased by consumers for use in the home.

Process for Registering Nonionizing Radiation Producing Sources

An owner who has determined that a particular source has the potential to exceed the radiofrequency radiation limits set forth in N.J.A.C. 7:28-42 or who owns a radiofrequency or microwave heater, sealer or industrial oven is required under the proposed rules to call or write to the Department to obtain a registration form. The owner must then return the completed form to the Department within 60 calendar days of the effective date of this subchapter. After the expiration of this initial 60 day period, an owner who takes possession of a source that is subject to this subchapter will have to complete and return the registration form to the Department within 30 calendar days of the date of possession. Since the proposed rules will establish a new registration program, the Department has decided to give owners a 60-day period within which to obtain, complete and return to the Department the registration form. After the start-up of the program, the Department believes that 30 days will give an owner sufficient time to comply with the initial registration requirements.

The registration form will be a simple one-page document containing basic information, including, but not limited to, the name and address of the owner of the source(s), number of source(s), location of the source(s), type of source(s), and frequency or frequency range of radiation emitted from each source. Upon its receipt of the completed registration form, the Department will issue a bill to the owner for the initial registration fee. (The calculation of the initial registration fee is described in detail in the Economic Impact statement below.) For each subsequent year, the Department will mail to each owner a bill for the annual renewal fee. (The calculation of the annual renewal fee is also described in detail in the Economic Impact statement below.) Payment of either the initial registration fee or the annual renewal fee will be due within 30 calendar days of the owner's receipt of the bill.

At the time an owner requests a registration form from the Department, the Department will send the owner a Radiation Assessment Document form. The owner shall complete and return the Radiation Assessment Document form to the Department no later than 60 calendar days after the owner receives the bill for the initial registration fee. While the Department anticipates that the Radiation Assessment Document will need to be completed only once, the Department reserves the right to request additional information to reflect changes in technology. The information contained in the Radiation Assessment Document will enable the Department to determine which soures are emitting the highest levels of radiation and which sources have the greatest potential of exposing the public or worker to radiation levels in excess of the limits specified in N.J.A.C. 7:28-42. The Radiation Assessment Document may include, but will not be limited to, information such as the name and address of the owner of the source(s), type and number of source(s), the frequency of the radiation emitted, the radiation pattern for each antenna, the effective radiated power, the antenna gain, the duty cycle of the source and the geographic coordinates of each source. If any information on either the registration form or the Radiation Assessment Document changes or becomes outdated, the owner will be required to notify the Department in writing within 30 calendar days of any such change. Failure to complete the registration form and/or Radiation Assessment Document or to submit any amendments thereto required by these proposed rules may result in a penalty action by the Department against the owner pursuant to N.J.S.A. 26:2D-13.

If the Department has reason to believe that a source has the potential to emit nonionizing radiation in excess of the limits in N.J.A.C. 7:28-42, and the owner of the source fails to register it with the Department, the Department may require information from the owner regarding the source, and may conduct an inspection of the source, facility, and any records pertaining thereto.

As a general rule, the registration of a nonionizing radiation producing source is not transferable upon the sale of the source or upon the transfer of a controlling interest in a person who owns the source. However, proposed N.J.A.C. 7:28-48.8 sets up a detailed process by which registration may continue if certain requirements are met. In particular, the registration of a source may continue if the transferee certifies to the Department that it will assume all of the transferor's liabilities connected with the operation of the source, including penalties associated therewith. Alternatively, if the transferor takes the following actions, the registration may continue. The transferor must notify the Department of the proposed sale or transfer prior to the sale or transfer, and the Department may inspect the source or rely upon its own records to determine whether deficiencies exist in the operation of the source. If there are no deficiencies, the Department shall notify the transferor. Conversely, if deficiencies are found, the Department will provide notice to the transferor of all deficiencies, and will provide the transferor with the opportunity to correct them and to pay all penalties, if applicable.

The Department believes that the procedure set up in these proposed rules regarding the sale of a source or the transfer of a controlling interest is fair to the regulated community because it gives it an opportunity to transfer registration without an interruption in business activities. The proposed procedure also provides adequate protection to the public since registration of a source (that is, permission to operate) terminates upon sale of a source or the transfer of ownership unless the transferee or transferor takes the steps outlined in these proposed rules.

Social Impact

The proposed new rules will provide the Department with the financial and informational resources it needs to enforce the radiofrequency radiation protection provisions of N.J.A.C. 7:28-42 and are therefore expected to have a positive social impact. The more familiar applications of radiofrequency radiation are AM and FM radio, television, amateur radio, microwave ovens, radar, microwave point-to-point and ground-to-satellite telecommunications links, and other communications services. Radiofrequency and microwave sources are also widely used in industrial heating and sealing operations. The steady increase in the number of these sources, coupled with a better understanding of their biological effects on human beings, has heightened concerns in the scientific community and in the public about potential adverse health effects from exposure to this type of radiation.

The Department has received reports of the accidental exposure of workers to radiation from radar units at airports and satellite earth station antennas. In addition, the Department has reason to believe that most incidents of overexposure to radiofrequency radiation occur during the operation of radiofrequency heaters and sealers. Many of the operators may be women of child-bearing age. The Department also believes that the public may be unknowingly exposed to radiofrequency radiation in excess of the limits of N.J.A.C. 7:28-42 at various locations accessible to the public.

People living near or working with powerful sources of radiofrequency radiation which expose them to radiation levels in excess of the limits specified in N.J.A.C. 7:28-42 may experience a variety of adverse health effects. The occurrence and degree of harm depends on exposure conditions. In other words, the amount of energy absorbed by the body depends on the intensity, duration, pattern and frequency of the radiation and also on the body's size, shape, and composition (percentages of bone, fat, muscle). An average value of energy absorbed by the whole body can be stated in terms of the specific absorption rate (SAR), expressed as power per unit body weight, that is, watts per kilogram (W/kg). The radiofrequency radiation limits listed in N.J.A.C. 7:28-42 are based on an SAR of 0.4 W/kg. This means that if the limits specified in N.J.A.C. 7:28-42 are enforced, no human being should be exposed to radiofrequency radiation which would result in an energy absorption greater than 0.4 W/kg of body weight.

Many acute and long-term effects of exposure to nonionizing radiation are still under investigation. The most important effect currently under investigation is the ability of this type of radiation to act as a promoter or co-promoter of cancers. Therefore, at this time, it is prudent to assure the compliance of sources with N.J.A.C. 7:28-42 to greatly reduce the exposure of both workers and the general public to radiofrequency radiation.

Economic Impact

Methodology for Determining Types and Costs of Services to be Performed in Inspection and Non-Inspection Activities

The Department has calculated the fees set forth in the proposed rules by making reasonable estimates of the inspection and non-inspection services to be performed, the number of hours required to perform these services, and the costs, including salary and non-salary expenses, expected to be incurred. In preparing these estimates, the Department has assumed that the data will provide a reasonably accurate prediction of the number and types of services to be performed in the future.

As described previously, the Department has divided the regulated community into seven categories of sources, and has estimated the number of hours required to inspect all of the sources located at each facility in any given year, based on the experience gained from previous inspections and also on time estimates provided by Federal agencies. The Department anticipates that the number of hours required to inspect a typical facility in each of the seven source categories will be as follows:

1. Radio and television broadcasting antennas, 64.5 hours.
2. Transmitting satellite earth station antennas, 109.5 hours (assumes three antennas per facility).
3. Transmitting point-to-point microwave communications antennas, 31.5 hours (assumes two antennas per facility).
4. Fixed antennas of land-mobile communications systems, 26.5 hours.
5. Navigational aids and radar, 20.5 hours.
6. Radiofrequency heaters and sealers, 44.5 hours (assumes four sources per facility).
7. Microwave heaters, sealers and industrial ovens, 20.5 hours (assumes two sources per facility).

The Department estimates that there are 1,090 facilities in New Jersey, owned by 800 businesses, with approximately 2,900 sources that will be subject to this proposed subchapter. With the fees collected under these proposed rules, it is anticipated that five individuals will staff this program full-time and that an enforcement specialist and deputy attorney general (DAG) will work with the program part-time. The Department expects to be able to inspect 290 sources, located at 109 facilities, per year. This means that a facility should expect to be inspected by the Department once every 10 years. The Department has broken down the number of facilities to be inspected each year as follows:

1. Radio and television broadcasting station antennas, 22.
2. Transmitting satellite earth station antennas, five.
3. Transmitting point-to-point microwave communications antennas, one.
4. Fixed antennas of land-mobile communications systems, 10.
5. Navigational aids and radar, one.
6. Radiofrequency heaters and sealers, 50.
7. Microwave heaters, sealers and industrial ovens, 20.

Thus, the Department anticipates that it will spend 4,918.5 hours per year inspecting the sources located at the facilities described above.

In addition to inspections, the Department will perform various non-inspection services in administering the proposed subchapter. These services include, but are not limited to, answering public inquiries; providing training and giving presentations to Federal and State employees, professional and technical organizations, citizen groups and students; quality assurance activities; Commission on Radiation Protection activities; regulation development; equipment maintenance; program planning; referrals; personnel actions; purchases or procurements; budget prepararation; attending training sessions and seminars; and legal enforcement activities (including DAG and environmental enforcement specialist services). The Department anticipates that it will spend approximately 5,425.5 hours on these non-inspection services. (Total personnel hours projected to administer this program, 10,344 hours.)

In performing both inspection and non-inspection services, the Department projects that it will incur the following personnel costs:

Staff Costs

Research Scientist I	$ 60,900.00
Radiation Physicist I	54,600.00
Radiation Physicist III	38,850.00
Senior Environmental Specialist	36,750.00
Environmental Specialist (Enforcement) (⅓ of a full-time staff person)	14,700.00
Deputy Attorney General V (1/5 of a full-time staff person)	7,367.00
Technician, Management Information Systems	26,250.00
Total Salaries	$239,417.00
Fringe Benefits	77,451.00
Indirect Costs	102,294.00
Total Personnel Costs for Inspection and Non-inspection Services	$419,162.00

Fringe benefits are calculated as a percentage of the average salary. That percentage (32.35 percent) is set by the Department of Treasury, and is based on costs associated with pensions, health benefits, workers' compensation, disability benefits, unused sick leave and the employer's share of FICA. Indirect costs are calculated as a percentage of the total salary and the fringe dollars for that salary, combined. (Indirect costs for the DAG are calculated differently, see paragraph below.) Indirect costs (32.65 percent) consist of Department management salaries and operating expenses, divisional indirect salaries and related expenses (personnel, fiscal and general support staff), building rent and the Department allocation of indirect costs listed in the Statewide Allocation Plan prepared annually by the Department of Treasury.

In the case of the DAG, the indirect costs are calculated differently. Indirect costs are broken down into two components, operational support and non-salary costs. Operational support is assessed as 10 percent of the DAG's base salary and covers the salaries of personnel providing assistance to the DAG, such as, secretarial staff and paralegals. Non-salary costs include program costs, such as, stationery supplies and computers. That cost is a flat fee ($6,415) per DAG. In the case of the Nonionizing Radiation Program where only one-fifth of a DAG staff person is utilized, the operational support and non-salary costs are added together then multiplied by 20 percent to yield the final indirect dollars.

In administering proposed N.J.A.C. 7:28-48, the Department projects the following program costs:

Program Costs (Other Than Salaries)	Initial	Annual
Printing, posting and office supplies	2,735	2,735
Vehicular	18,000	18,000
Instruments and related supplies	25,496	25,496
Instrument calibration	2,196	4,000
Travel	6,900	6,900
Training	5,750	5,750
Telephones	920	920
Shipping charges	345	345
Professional services	10,000	10,000
Data processing/hardware, software	13,800	6,000
Data processing/maintenance	575	575
Reference books and related literature	2,300	2,300
Office furniture	2,070	0
Photographic supplies	345	345
Total Initial Program Costs	$91,432	
Total Annual Program Costs		$ 83,366
Total Initial Nonionizing Radiation Program Costs To Regulate 800 Businesses or 1,090 Facilities		**$510,594**
Total Annual Nonionizing Radiation Program Costs To Regulate 800 Businesses or 1,090 Facilities		**$502,528**

Methodology for Computing Annual Renewal and Initial Registration Fees

Annual Renewal Fees

The Department has calculated the annual renewal fee by taking into account three components: inspection costs, non-inspection costs and annual program costs. Based on the size, complexity and amount of time expected to be spent on each source category, the Department estimated how much it would spend on inspection and annual program costs. The Department also calculated its anticipated expenditures for non-inspection activities, which the Department believes are not directly related to the complexity of the source. Adding these three components together yielded the annual renewal fee. The Department believes that its method of calculation fairly apportions fees among the sources in proportion to the services that they require.

Inspection costs were calculated for each category of source. The Department divided the regulated community into seven categories of sources (described above), and calculated the anticipated expenditures to be incurred in inspecting each category of source. These projected expenditures included the time to travel to a site, the inspection of all of the sources at a facility, the drafting of the inspection report and the associated administrative expenses (photocopying, paper, mailing). This number was then divided by 10, since each facility is scheduled to be inspected once every 10 years. According to the Department's estimates, an inspection may take from 2.5 days to three weeks to complete, depending on the complexity of the source(s) and its location. This time span was taken into account in establishing the inspection cost component of the fee schedule.

For facilities with multiple sources, the Department calculated the time it anticipates will be required to inspect the additional sources. For example, once an inspector is present at a facility, the Department does not expect there to be significantly more work involved in inspecting the additional sources (that is, assuming the additional sources are similar). (See the Summary, above, for a discussion of multiple broadcasting sources present at one site.) Thus, the increments in inspection costs are based on the additional time, salary expenses, and administrative costs associated with inspecting the additional sources.

The second component of the annual renewal fee is the annual program costs, which include office rent, State vehicles, equipment calibration and computers. The Department believes that there is a direct correlation between the time spent inspecting a particular type of source and the annual program costs. According to the Department's analysis, the more complex sources will require more extensive inspections, and it is expected that there will be a greater use of computers, vehicles and equipment associated with such inspections. Thus, if the Department spends 29 percent of its total inspection time on broadcast antennas each year, broadcast antennas, as a category, should support, through assessed fees, a proportionate share (29 percent) of the annual program costs.

The Department has calculated the amount of time it expects to spend annually inspecting each of the seven categories of sources (expressed as a percentage of the total number of anticipated inspection hours per year) as follows:

1. Radio and television broadcasting station antennas, 1,419/4,918.5 = 0.2885.
2. Transmitting satellite earth station antennas, 547.5/4,918.5 = 0.1113.
3. Transmitting point-to-point microwave communications antennas, 31.5/4,918.5 = 0.0064.
4. Fixed antennas of land-mobile communications systems, 265/4,918.5 = 0.0539.
5. Navigational aids and radar, 20.5/4,918.5 = 0.0042.
6. Radiofrequency heaters and sealers, 2,225/4,918.5 = 0.4524.
7. Microwave heaters, sealers and industrial ovens, 410/4,918.5 = 0.0834.

The Department used the following formula to apportion the annual program costs among the seven categories of sources:

$$\text{Annual program costs} = \frac{\text{PTI} \times \text{APC}}{\text{NS}}$$

where PTI is the percentage of time spent on inspections per category of source; APC is the annual program costs ($83,366); and NS is the total number of sources per category.

The third component of the annual renewal fee is the non-inspection-related expenses, such as answering public inquiries, attending conferences and making presentations on nonionizing radiation, and budget preparation. The non-inspection expenses also include the services of a DAG and an environmental enforcement specialist, who will provide assistance to the Department in enforcing proposed N.J.A.C. 7:28-48. The Department believes that the non-inspection services are general activities and that the amount of time that staff will spend on these activities will be shared equally among the seven categories of sources. The Department, therefore, believes that each regulated source should support, through assessed fees, an equal share of the non-inspection costs. The Department has calculated that the non-inspection costs of administering proposed N.J.A.C. 7:28-48 equals the total non-inspection costs divided by the total number of sources, that is, $219,854 divided by 2,900, to give $75.81 per source. The non-inspection cost is a fixed cost per source, and will be assessed for each regulated source. If the Department determines that the non-inspection costs are not attributed equally to all of the regulated sources, it may revisit the non-inspection calculation at a later date.

The inspection, annual program and non-inspection costs added together equal the annual renewal fee. The Department estimates that the annual renewal fee will generate $504,400, an amount that will be used to enforce the provisions of N.J.A.C. 7:28-42.

A copy of the Department's calculations of the annual renewal fee is available for inspection by the public at the Bureau of Environmental Radiation, 729 Alexander Road, Princeton, New Jersey (609-987-6372). The Department requests that any interested person telephone to make an appointment to review the documents.

Initial Registration Fees

The initial registration fees cover the expenses the Department expects to incur during the first year of the program. These fees are slightly higher than the annual renewal fees because they include the additional personnel time needed to process and review the initial registration form and the Radiation Assessment Document. These fees also reflect the start-up costs of the program, which include, for instance, furniture and computer equipment costs.

The initial registration fees were calculated in a manner similar to that used for the annual renewal fees. In calculating the initial registration fees, the Department took into consideration the following components: registration costs, inspections costs, non-inspection costs and initial program costs. The Department believes that registration, inspection and initial program costs are directly related to the size and complexity of a facility; therefore, the fees assessed on the larger, more complex facilities will be proportionate to the registration, inspection and initial program services that they receive from the Department. Non-inspection costs, on the other hand, include general services that the Department believes will be provided to all of the sources equally. Therefore, the Department has determined that non-inspection costs should be attributed equally to all sources. The Department calculated each of the above-mentioned costs and added them together to determine the initial registration fees.

The Department determined the registration cost component of the initial registration fee by analyzing each category of source and the number of sources located at a particular facility. The fee was based on the time to copy and mail registration forms and Radiation

Assessment Document forms, the cost of copying and mailing the forms, the time for a technical professional to review and evaluate the forms, and the establishment of a file for that facility. The registration fee for each additional source per facility was based on the additional time needed for a technical professional to review source-specific information.

The Department analyzed the number of facilities subject to the proposed rules, and projected the number of hours required to register all of the sources located at these facilities for each source category. The Department estimated that approximately 2,966.3 hours will be spent per year on registration activities, including technical review of the Radiation Assessment Document. Each facility will support, through assessed fees, the registration services that it receives.

The inspection cost component of the initial registration fee is the same as that in the annual renewal fee. The Department calculated it for each of the seven categories of sources, based on the time to travel to a site, conduct an inspection of all of the sources at a facility, draft the inspection report, and perform all of the other administrative activities associated with the inspection.

As in the calculation of the annual renewal fees, the Department believes that the initial program cost component is directly correlated with the amount of time the Department will spend on inspections and registration activities. This correlation is based on the Department's belief that a greater amount of time spent on inspections and registrations for some sources will require greater use of computers, State vehicles and office furniture. For example, if the Department spends 24 percent of its total program time registering and inspecting broadcast antennas, the Department believes that broadcast antennas should support, through assessed fees, 24 percent of the initial program costs. By calculating this portion of the fee in this manner, the Department believes that each category of source will pay its proportionate share of the initial program costs.

The Department calculated the amount of time it expects to spend on registration and inspection activities for the first year for each of the seven categories (expressed as a percentage of the total anticipated number of hours for registering and inspecting sources during the first year) as follows:

1. Radio and television broadcasting antennas, 1,900.14/7,884.83 = 0.2410.
2. Transmitting satellite earth station antennas, 806.85/7,884.83 = 0.1023.
3. Transmitting point-to-point microwave communications antennas, 60.87/7,884.83 = 0.0077.
4. Fixed antennas of land-mobile communications systems, 433.7/7,884.83 = 0.0550.
5. Navigational aids and radar, 42.37/7,884.83 = 0.0054.
6. Radiofrequency heaters and sealers, 3,943.5/7,884.83 = 0.5001.
7. Microwave heaters, sealers and industrial ovens, 697.4/7,884.83 = 0.0884.

The Department used the following formula to apportion the initial program costs among the seven categories of sources:

$$\text{Initial program costs} = \frac{\text{PTIR} \times \text{IPC}}{\text{NS}}$$

where PTIR is the percentage of time spent on inspections and registrations per category of source; IPC is the initial program costs ($91,432); and NS is the total number of sources per category.

The non-inspection component of the initial registration fee was not calculated on a proportional basis because the Department believes that non-inspection services, such as answering public inquiries, attending seminars, preparing budgets, and legal enforcement activities, are general services that are provided equally to all sources. As such, every source will support, through assessed fees, an equal share of these services.

The Department calculated that the non-inspection costs of administering proposed N.J.A.C. 7:28-48 equals the total non-inspection costs divided by the total number of sources, that is, $100,599 divided by 2,900, to give $34.69/source. The non-inspection cost is a fixed cost per source, and will be assessed for each regulated source. If the Department determines that the non-inspection costs are not attributed equally to all of the regulated sources, it may revisit the non-inspection calculations at a later date.

The registration, inspection, initial program and non-inspection costs added together equal the initial registration fee. The Department estimates that the initial registration fee will generate $538,150. In subsequent years, the Department projects this fee program will provide $504,400 per year.

A copy of the Department's calculations of the initial registration fee is available for inspection by the public at the Bureau of Environmental Radiation, 729 Alexander Road, Princeton, New Jersey (609-987-6372). The Department requests that the interested person telephone to make an appointment to review the documents.

Environmental Impact

Nonionizing radiation sources have steadily increased in number and their uses have so diversified that a general increase in radiation levels in the environment has occurred. Extensive radiofrequency radiation measurements made by the EPA have shown that the sources most likely to produce the highest environmental levels are television and radio broadcast stations. Other significant, but less intense, sources of radiofrequency radiation are transmitting satellite earth station antennas, microwave point-to-point communications antennas, cellular telephone cell-site antenna base stations, amateur radio stations, navigational aids and radar. Radiofrequency heaters and sealers are generally located indoors and it is not currently known how intense the radiation emitted by these is outside the buildings in which they are housed. Because the proposed new rules will support a staff to ensure that all of the aforementioned sources are in compliance with the radiation limits set forth in N.J.A.C. 7:28-42, the new rule will have the positive impact of reducing the levels of nonionizing radiation in the environment.

Regulatory Flexibility Analysis

These proposed fee rules will primarily affect businesses in the communications field. However, the plastics industry, which uses radiofrequency and microwave heaters and sealers, will also be affected, as will the rubber, chemical, and textile industries, and food processing plants. The proposed rules will also affect hospitals using microwave disinfection units, and airports using navigational aids and radar units. To ease the financial burden on small businesses, especially in light of the scarcity of data regarding the number of microwave ovens in commercial use that might be in violation of the provisions of N.J.A.C. 7:28-42, the Department will not require the registration of microwave ovens used to cook food for customers' consumption, such as those in restaurants, canteens, and other eating establishments.

The Department estimates that, of the approximately 800 businesses affected by the proposed rules, 400 are "small businesses" as defined in the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The Department does not believe that any of the satellite earth stations, microwave communications towers or cellular telephone cell-site base stations are owned by small businesses.

The Department expects the rules to impose only small financial costs (that is, the initial registration fee and an annual renewal fee) on owners of sources capable of exceeding the radiation limits specified in N.J.A.C. 7:28-42 and on owners of radiofrequency and microwave heaters, sealers and industrial ovens. Recordkeeping is limited to the one-time completion of a registration form and a Radiation Assessment Document. Small businesses should not need any additional staff or consulting services to comply with these rules. The Department has attempted to minimize the burden on small businesses in complying with these rules, and has exempted some classes of small businesses. For example, until more data are available regarding the potential of microwave ovens to exceed the limits specified in N.J.A.C. 7:28-42, restaurant owners will not be assessed fees for such ovens.

The Department does expect that all broadcasting stations will be classified as small businesses. A 1985 report published by the EPA, entitled "An Estimate of the Potential Costs of Guidelines Limiting Public Exposure to Radiofrequency Radiation from Broadcast Sources," estimated that the yearly average taxable income from a broadcasting station ranges from $189,584 to $3,236,800. In light of this estimate and the potential health risks associated with the radiation emitted from these antennas, the Department does not believe that an initial registration fee of $510.00 and annual renewal fee of $450.00 per broadcasting antenna will be burdensome to broadcasting stations. Therefore, no exemption from complying with this rule has been provided for broadcasting antennas.

Based on information provided by FDA's Center for Devices and Radiological Health (CDRH), the United States Department of Labor's Occupational Safety and Health Administrations (OSHA) and National Institute for Occupational Safety and Health (NIOSH), the Department anticipates that 50 percent of all of the companies utilizing radiofrequency and microwave heaters, sealers and disinfection units will be classified as small businesses. Given the average cost of such sources (estimated to be $250,000 per source), the Department believes that an initial

registration fee of $185.00 and the annual renewal fee of $165.00 (for one unit) will not be financially burdensome. CDRH, NIOSH and OSHA also estimate that 50 percent of all the radiofrequency heaters and sealers expose their operators to levels in excess of the limits specified in N.J.A.C. 7:28-42.4. In balancing the need to protect workers from harmful levels of radiation against the economic impact of this proposed rule, the Department believes that exempting small businesses utilizing radiofrequency heaters and sealers would undermine the Department's ability to assure the health and safety of workers.

Full text of the proposed new rules follows:

SUBCHAPTER 48. FEES FOR THE REGISTRATION OF NONIONIZING RADIATION PRODUCING SOURCES

7:28-48.1 Scope, purpose and general provisions

(a)This subchapter establishes initial registration fees and annual renewal fees for fixed nonionizing radiation producing sources (or fixed radiofrequency sources) that have the potential of exceeding the radiation limits in N.J.A.C. 7:28-42 and for all radiofrequency and microwave heaters, sealers and industrial ovens, and imposes reporting requirements on the owners of these sources. The fees collected by the Department will support a program that will assure the compliance of the regulated sources with the applicable provisions of N.J.A.C. 7:28-42.

(b) Each owner of a nonionizing radiation producing source that is subject to this subchapter is responsible for ensuring compliance with all requirements of this subchapter. If there is more than one owner of a nonionizing radiation producing source, each owner is jointly and severally liable for complying with all the requirements of this subchapter.

(c) If an owner fails to comply with any of the Department's requests made pursuant to this subchapter, the Department may assess a penalty in accordance with N.J.S.A. 26:2D-13.

7:28-48.2 Definitions

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

"Antenna array" means a nonionizing radiation producing source composed of two or more discrete antennas, used for the purpose of concentrating the radiating radiofrequency radiation in a desired direction. For the purpose of this subchapter, an antenna array is considered one source of nonionizing radiation.

"Broadcasting antenna" means an antenna whose purpose is to transmit audible and/or visual information over a wide area for the entertainment or informational purposes of an audience. Included in this definition are amplitude modulated (AM) and frequency modulated (FM) radio, and ultra high frequency (UHF) and very high frequency (VHF) television (TV) antennas.

"Controlling interest" means the interest held by the person or persons who owns more than 50 percent of the voting stock or other equity interest in an owner; it also means the interest held by a person or persons who owns 50 percent or less of the voting stock or other equity interest in an owner and who possesses, directly or indirectly, the power to direct or cause the direction of the management and policies in an owner.

"Dispose" or "disposal" means the discarding or destroying of a nonionizing radiation producing source.

"Fixed antenna of a land-mobile communication system" means the fixed antenna and associated electronic components of a land-mobile system used to transmit voice information from mobile telephones or two-way radio via radiofrequency radiation.

"Gigahertz" (GHz) means 1,000,000,000 hertz or cycles per second.

"Kilohertz" (kHz) means 1,000 hertz or cycles per second.

"Meteorological purposes" means the use of a source of nonionizing radiation to detect meteorological targets such as raindrops, cloud droplets, ice particles, snowflakes, atmospheric nuclei, or other airborne targets, such as, but not limited to, insects and birds.

"Megahertz" (MHz) means 1,000,000 hertz or cycles per second.

"Microwave heater, sealer and industrial oven" means any source which uses microwave radiation between the frequencies of 300 MHz and 100 GHz to heat, melt, dry, cure, sanitize, disinfect or alter the chemical composition of materials such as, but not limited to, plastics, rubber, glue, wood, dyes or food.

"Microwave radiation" means, for the purposes of this subchapter, nonionizing radiation between the frequencies of 300 MHz and 100 GHz. (By convention, microwave radiation describes all the frequencies between 300 MHz and 300 GHz. Microwave radiation is a subset of the radiofrequency radiation spectrum.)

"Navigational aids" means sources of nonionizing radiation used for the purpose of regulating or aiding traffic, whether in the air, on land, or in water, and radar sources.

"Nonionizing radiation" means radiation which does not have the capability of ionizing the medium through which it is passing.

"Nonionizing radiation producing source" or "source" means, for the purposes of this subchapter, any equipment, machine, device or antenna capable of emitting nonionizing radiation between the frequencies of 300 kHz and 100 GHz.

"Owner" means a person who has title to a radiation source or who possesses a radiation source as a lessee, bailee or pursuant to the terms of a registration issued by the Department, by a Federal agency, or by any other state.

"Person" includes an individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, municipality, any state or other legal entity; and any legal successor, representative agent, or agency of the foregoing.

"Point-to-point communications antenna" means an antenna which transmits information via radiofrequency radiation to another antenna within line-of-site.

"Radar" means an electronic system that transmits radiofrequency waves through the air and then receives them after they have been reflected by an object in the path of the beam for the purposes of determining one or more of the following characteristics of the object: range, azimuth, elevation, and/or object identification.

"Radiation Assessment Document" means a form or series of forms issued by the Department requiring information such as, but not limited to, radiation frequency, effective radiated power, antenna patterns and geographical coordinates which will be used to predict radiation levels in the areas surrounding nonionizing radiation producing sources.

"Radiofrequency radiation" means, for the purposes of this subchapter, nonionizing radiation between the frequencies of 300 kHz and 100 GHz. (By convention, radiofrequency radiation described all the frequencies below 300 GHz, with microwave radiation as a subset of the radiofrequency radiation spectrum.)

"Radiofrequency heater and sealer" means any source, including induction and dielectric heaters, which uses radiofrequency radiation between the frequencies of 300 kHz and 299 MHz to heat, melt, dry, cure, sanitize, disinfect or alter the chemical composition of materials such as, but not limited to, plastics, rubber, glue, wood, dyes or food.

"Registration" means the submission by the owner and receipt by the Department of the completed registration form and Radiation Assessment Document, and the payment of fees.

"Satellite earth station antenna" means an antenna whose purpose is to transmit radiofrequency radiation from earth to a satellite in space.

"Transferee" means a person who obtains either:

i. Ownership of a nonionizing radiation producing source; or

ii. A controlling interest in the owner of such a source.

"Transferor" means a person who sells or otherwise transfers either:

i. A nonionizing radiation producing source; or

ii. A controlling interest in the owner of such a source.

7:28-48.3 Registration of a nonionizing radiation producing source

(a) No owner shall operate a nonionizing radiation producing source listed in (a)1 through 5 below, which has the potential of exceeding the radiation limits specified in N.J.A.C. 7:28-42, unless the owner completes the registration form and it is received by the

Department 60 calendar days after the effective date of this subchapter. Thereafter, no owner shall operate a nonionizing radiation producing source, which has the potential of exceeding the radiation limits specified in N.J.A.C. 7:28-42, unless the owner completes the registration form and it is received by the Department 30 calendar days after the owner takes possession of any of the sources listed below:

1. Radio and television broadcasting antennas;
2. Transmitting satellite earth station antennas;
3. Transmitting point-to-point communications antennas;
4. Fixed antennas of land-mobile communications systems; or
5. Radar and other sources of nonionizing radiation used for navigational and/or meteorological purposes.

(b) No owner shall operate a nonionizing radiation producing source listed in (b)1 or 2 below unless the owner completes the registration form and it is received by the Department 60 calendar days after the effective date of this subchapter. Thereafter, no owner shall operate the sources listed in (b)1 or 2 below unless the owner completes the registration form and it is received by the Department 30 calendar days after the owner takes possession of any of the sources listed below:

1. Radiofrequency heaters and sealers; or
2. Microwave heaters, sealers and industrial ovens.

(c) An owner shall register on forms made available by the Department. The registration form shall include the following information:

1. The owner's name, address and telephone number;
2. The type of source(s);
3. The number of source(s);
4. The location of source(s);
5. The frequency or frequency range of radiation emitted from each source; and
6. Any additional information which is reasonably necessary to identify the source or the owner of the source.

(d) An owner shall retain a copy of the completed registration form, which has been submitted to the Department, at the facility at which the nonionizing radiation producing source is located.

(e) An owner shall produce immediately, upon request by the Department, a copy of the completed registration form.

(f) If an owner of a nonionizing radiation producing source fails to register that source with the Department, and the Department has reason to believe that the source emits or has the potential to emit nonionizing radiation in excess of the limits set forth in N.J.A.C. 7:28-42, or the source is a radiofrequency or microwave heater, sealer, or industrial oven, the Department may require the owner to provide information on the source and may conduct an inspection of the source, facility and any documents or records pertaining thereto.

7:28-48.4 Amendments to the registration of a nonionizing radiation producing source

An owner shall notify the Department in writing within 30 calendar days of any change in the information on the registration form.

7:28-48.5 Radiation Assessment Document

(a) An owner shall submit to the Department a Radiation Assessment Document, on forms made available by the Department, no later than 60 calendar days after the owner's receipt of the bill for the initial registration fee.

(b) For sources listed in N.J.A.C. 7:28-48.3(a), the Radiation Assessment Document shall include the following information:

1. The owner's name, address and telephone number;
2. The type of antenna(s);
3. The number of antenna(s);
4. The geographical coordinates of each antenna;
5. The frequency or frequency range of radiation emitted from each antenna;
6. The effective radiated power of each antenna;
7. The gain of each antenna; and
8. Any additional information which is reasonably necessary to assess compliance of the antennas with the provisions of N.J.A.C. 7:28-42.

(c) For sources listed in N.J.A.C. 7:28-48.3(b), the Radiation Assessment Document shall include the following information:

1. The owner's name, address and telephone number;
2. The type of source(s);
3. The number of source(s);
4. The location of each source;
5. The frequency or frequency range of radiation emitted from each source;
6. The duty cycle of each source;
7. The source operator's position in relation to each source; and
8. Any additional information which is reasonably necessary to assess compliance of the sources with the provisions of N.J.A.C. 7:28-42.

7:28-48.6 Amendments to Radiation Assessment Documents

An owner shall notify the Department in writing within 30 calendar days of any change in the information contained in the Radiation Assessment Document.

7:28-48.7 Initial registration fee and annual renewal fee for nonionizing radiation producing sources

(a) An owner shall remit to the Department the initial registration fee or annual renewal fee no later than 30 calendar days after the owner's receipt of the bill issued by the Department.

(b) An owner shall pay the fees for initial registration and annual renewal as follows:

Source Category	Initial Registration Fee	Annual Renewal Fee
1. Broadcasting antennas:		
i. For one AM broadcasting antenna array at one location:	$ 510.00	$ 450.00
For each additional AM broadcasting antenna array at the same location, add:	235.00	195.00
For each FM or TV broadcasting antenna at the same location, add:	440.00	400.00
ii. For one FM or TV broadcasting antenna at one location:	510.00	450.00
For each additional FM or TV broadcasting antenna at the same location, add:	235.00	195.00
For each AM broadcasting antenna array at the same location, add:	440.00	400.00
2. Satellite earth station antennas, per location		
One antenna	$ 470.00	$ 405.00
Two antennas	685.00	585.00
Three antennas	1,005.00	875.00
Four antennas	1,315.00	1,150.00
For each additional antenna at the same location, add:	185.00	150.00
3. Point-to-point communications antennas, per tower, installation or location		
One antenna	$ 280.00	$ 220.00
Two antennas	425.00	350.00
Three antennas	570.00	480.00
Four antennas	715.00	605.00
For each additional antenna at the same location, add:	130.00	115.00
4. Fixed antennas of land-mobile communications systems, per location		
For one source (each single antenna, antenna array or base station is considered one source)	$ 285.00	$ 235.00
For each additional source at the same location, add:	145.00	130.00

5. Navigational aids and radar (each antenna or antenna array is considered one source), per location		
One source	$ 295.00	$ 215.00
Two sources	510.00	350.00
Three sources	740.00	535.00
Four sources	935.00	665.00
For each additional source at the same location, add:	185.00	120.00
6. Radiofrequency heaters and sealers, per location		
One source	$ 185.00	$ 165.00
Two sources	310.00	295.00
Three sources	430.00	415.00
Four sources	580.00	565.00
Five sources	700.00	680.00
Six sources	820.00	805.00
Seven sources	950.00	930.00
Eight sources	1,060.00	1,040.00
For each additional source at the same location, add:	100.00	100.00
7. Microwave heaters, sealers and industrial ovens, per location		
One source	$ 140.00	$ 135.00
Two sources	250.00	250.00
Three sources	380.00	370.00
Four sources	490.00	480.00
Five sources	600.00	590.00
Six sources	720.00	700.00
Seven sources	845.00	820.00
Eight sources	960.00	935.00
For each additional source at the same location, add:	90.00	95.00

(c) An owner remitting an initial registration fee or annual renewal fee shall mail a check or money order, payable to "Treasurer, State of New Jersey," to the Department at the following address:

State of New Jersey
Department of Environmental Protection and Energy
Bureau of Revenue
CN-417
Trenton, NJ 08625-0417

(d) An owner who fails to remit the initial registration fee or annual renewal fee within 30 calendar days after the owner's receipt of the bill shall be assessed a late charge, which is 20 percent of the amount of the billed fee.

(e) The registration of an owner who fails to submit an annual renewal fee within 60 calendar days after the owner's receipt of the bill shall be considered expired.

1. Any owner whose registration has expired pursuant to this subsection shall, upon a written request transmitted to the Department within 30 calendar days of the expiration of the registration, be afforded the opportunity for a hearing thereon in the manner provided for contested cases pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

2. Requests for hearings shall be sent to the Office of Legal Affairs, ATTENTION: Adjudicatory Hearing Requests, Department of Environmental Protection and Energy, CN 402, Trenton, NJ 08625-0402.

(f) An owner who allows the registration of a source to expire by failing to remit the annual renewal fee within 60 calendar days after the owner's receipt of the bill shall be required to file a new registration form along with the appropriate initial registration fee listed in (b) above.

(g) Fees submitted to the Department are not refundable.

7:28-48.8 Sale of a nonionizing radiation producing source or transfer of a controlling interest; termination of registration upon sale of nonionizing radiation producing source or upon transfer of controlling interest

(a) A person who sells or otherwise transfers either a nonionizing radiation producing source, or a controlling interest in the owner of such a source, shall notify the Department in writing at least 30 calendar days before the sale or transfer occurs. The transferor shall include the following information in the notice:

1. The name and address of the transferee; and

2. The date of the proposed sale or transfer.

(b) Unless the procedures set forth in either (c) or (d) below are followed, the registration of a nonionizing radiation producing source shall terminate upon the sale of the source or upon the transfer of a controlling interest in the person who owns the source.

(c) The registration of a nonionizing radiation producing source shall not terminate upon the sale of the source or upon the transfer of a controlling interest under (b) above, and shall be transferred to the transferee, if the transferee certifies to the Department in writing that it will assume all of the transferor's liabilities in connection with:

1. Any deficiencies in the operation of source that would result in a violation of any of the provisions of N.J.A.C. 7:28-42; and

2. All penalties arising in connection with the source from occurrences or circumstances existing before the date of the sale or transfer.

(d) The registration of a nonionizing radiation producing source shall not terminate upon the sale of the source or upon the transfer of a controlling interest under (b) above, if the transferor takes the actions required of the transferor under the following procedure:

1. The transferor shall notify the Department in writing of the proposed sale or transfer, prior to the sale or transfer in accordance with (a) above;

2. The Department may, in its discretion, perform an onsite audit of the nonionizing radiation producing source. If the Department performs such an audit, it shall be completed within 90 calendar days after receipt of notice under (d)1 above;

3. Within 45 calendar days after the deadline for completion of the audit in (d)2 above, based on the audit and/or a review of Department records, the Department shall either:

i. Issue to the transferor a notice stating that there are no deficiencies in the operations of the nonionizing radiation producing source and that no violations exist; or

ii. Issue to the transferor a report of all deficiencies and one or more notices of prosecutions or administrative orders; and

4. The transferor corrects all deficiencies and pays all the penalties noted in (d)3 above.

(e) If the registration of a nonionizing radiation producing source continues pursuant to the procedures set forth in either (c) or (d) above, the transferee shall operate its nonionizing radiation producing source in compliance with this subchapter and all applicable provisions of this chapter.

(f) If the registration of a nonionizing radiation producing source terminates pursuant to (b) above, the transferee shall submit an initial registration form and the appropriate initial registration fee within 30 calendar days after it takes possession of the nonionizing radiation producing source or assumes a controlling interest in the owner of such a source, unless it is the intent of the transferee to dispose of the source. If the transferee operates the nonionizing radiation producing source before it submits the completed initial registration form, the transferee shall be in violation of N.J.A.C. 7:28-48.3.

7:28-48.9 Disposal of a nonionizing radiation producing source

(a) Whenever an owner disposes of a nonionizing radiation producing source, as listed in N.J.A.C. 7:28-48.3(a) and (b), the owner shall give written notification to the Department within 30 calendar days after such disposal. The owner shall provide to the Department a complete description of the final disposition of the source.

(b) The registration of a nonionizing radiation producing source shall terminate upon the disposal of the source.

7:28-48.10 Exemption from registration and payment of initial registration fee and annual renewal fee

(a) An owner of a nonionizing radiation producing source is exempt from registration and payment of initial registration and annual renewal fees if:

1. The source is not operational, and does not emit nonionizing radiation;
2. The source is operational, and detects radiofrequency radiation but does not transmit radiofrequency radiation (receive-only sources);
3. The source is operational, but does not transmit radiofrequency radiation in excess of the limits specified in N.J.A.C. 7:28-42;
4. The source is used for display purposes only, and does not emit nonionizing radiation; or
5. The source is possessed, used or stored by the United States Government.

INSURANCE

(a)

DIVISION OF ADMINISTRATION

Public Adjusters' Licensing

Proposed New Rules: N.J.A.C. 11:1-37

Authorized By: Samuel F. Fortunato, Commissioner, Department of Insurance.
Authority: N.J.S.A. 17:1C-6(e) and 17:22B-20.
Proposal Number: PRN 1993-651.

Submit comments by January 5, 1994 to:

Verice M. Mason
Assistant Commissioner
Legislative and Regulatory Affairs
New Jersey Department of Insurance
CN 325
Trenton, NJ 08625

The agency proposal follows:

Summary

These proposed new rules implement the provisions of the Public Adjusters' Licensing Act, P.L. 1993, c.66, (N.J.S.A. 17:22B-1 et seq.) (the "Act") which establishes the procedures by which individuals or entities may become licensed as public adjusters in this State. Unless specifically exempted, anyone which acts on behalf of any insured in the settlement of a claim in this State must be licensed as public adjusters in New Jersey.

This subchapter, therefore, sets forth the procedures and requirements for obtaining a license which includes taking a written examination and filing an application. Certain individuals may be exempted from the examination requirement if either: 1) the individual is licensed as a public adjuster in another state with similar licensing provisions as those set forth in this subchapter and the other state recognizes and accepts public adjusters licensed by this State; or 2) the individual has acted as a public adjuster for five years immediately preceding the effective date of the Act and applies for a license by March 7, 1995. Any individual which may be exempted must, nevertheless, comply with all other applicable provisions of this subchapter.

Corporations, partnerships, firms or associations which have obtained public adjusters licenses may name as sublicensees only the officers, directors or members of the organizations. Each named sublicensee must obtain an individual public adjuster license and is required to take and pass a written public adjuster's examination.

This subchapter also sets forth provisions for the issuance of a temporary license for an individual to act as a public adjuster on behalf of a licensed public adjuster only on the occasion of a catastrophic occurrence. Such a temporary license is valid for 90 days and may be renewed for an additional 90 day period if the Commissioner so determines. The temporary sublicensee must be sponsored by and work directly under the supervision of a permanently licensed public adjuster.

Applicants for public adjuster licenses and temporary sublicenses shall be required to pay application fees and renewal fees in the amounts prescribed by this subchapter.

A bond must be executed by each applicant in the penal sum of $10,000, made to the State of New Jersey for the benefit of any person injured by a willful, malicious or wrongful act by a public adjuster.

A public adjuster shall only be entitled to compensation from an insured where such right is based upon a written memorandum signed by the party to be charged and the public adjuster and which clearly defines the services to be rendered and the extent of the compensation.

N.J.A.C. 11:1-37.11 requires that any moneys held by a public adjuster, on behalf of an insured, shall be deposited in an escrow account.

N.J.A.C.11:1-37.14 sets forth the penalties which may be imposed for any violations under this subchapter, and references N.J.A.C. 11:17D-2.1 which provides for notice and opportunity for a hearing in accordance with the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq., where the Commissioner declines to issue or renew a license or where a license is suspended or revoked.

Social Impact

These proposed new rules establish the procedures to be employed by persons who seek to become licensed as public adjusters and also impose a standard of conduct to which public adjusters must conform. By establishing application and examination requirements and a standard of conduct for public adjusters, the Department of Insurance ("Department") seeks to safeguard the interests of the public by licensing only persons which are trustworthy and competent to act as public adjusters in this State.

Economic Impact

These proposed new rules will have a significant economic impact on the Department because of the increased costs involved in implementing and overseeing such a program. Additional costs will be incurred for developing and administering a public adjuster licensing examination; revising the Department's data processing system to develop all necessary forms required for this program, including, but not limited to, application and renewal forms; tracking and processing information on applicants as well as on licensed public adjusters; reviewing, processing and conducting investigations where necessary on applications; conducting investigations on complaints disputes or appeals received by the Department regarding public adjusters; and expending resources for legal matters including the pursuit of cases through the court system as well as the review and comparison of legal matters regarding this new area of law.

Anyone applying for a license or temporary sublicense will incur the expenses which may be associated with taking the public adjusters' examination, with amounts which are required as application and processing fees and with any amounts associated with the procurement of a bond. These costs are reasonable and necessary to defray the costs associated with the implementation of this Act and the fees and bond are specifically required by the Act.

Insureds may realize an economic benefit from the standards of conduct imposed by this subchapter because they will be made aware, in advance, of any fees associated with the services of public adjusters. Moreover, any moneys recouped by a public adjuster shall be safeguarded for the benefit of the insureds, because the rules require public adjusters to deposit insureds' funds in interest bearing escrow accounts. All such funds, together with the interest which accrues thereon, are the property of the insured unless otherwise agreed by written memorandum between the insured and the public adjuster.

Regulatory Flexibility Analysis

Most public adjusters affected by these proposed new rules are likely to be "small businesses" as defined in the Regulatory Flexibility Act at N.J.S.A. 52:14B-17. These rules establish the responsibilities of all public adjusters regardless of business size. The rules impose recordkeeping requirements on licensees by requiring licensees to maintain records which reflect all insurance-related transactions including the maintenance of claim files, correspondence and agreements or contracts. The rules also impose significant recordkeeping requirements for the maintenance of trust accounts including recording all deposits, disbursements and interest and performing a monthly reconciliation of all trust accounts.

These requirements may generate extra expenses for persons acting as public adjusters. However, the requirements merely impose standards which should be used by a reasonably prudent person who is engaged in a licensed, regulated business. These costs are offset by the overriding need to establish uniform standards to ensure the good character and conduct of persons acting as public adjusters in this State in accordance with the provisions of the Act.

It is not anticipated that a small business will be required to hire outside professional services to comply with these rules.

SUBCHAPTER 37. LICENSING OF PUBLIC ADJUSTERS

11:1-37.1 Purpose and scope

(a) The purpose of this subchapter is to establish procedures for the examination, licensing and conduct of persons acting as public adjusters in this State.

(b) This subchapter applies to any person, who for money, a commission or anything of value, acts or aids in any manner on behalf of an insured in negotiating for or effecting, the settlement of claims; or for money, a commission or anything of value, solicits or adjusts claims, in whole or in part, on behalf of any public adjuster.

(c) This subchapter shall not apply to:

1. Any employee, agent or other representative of any authorized insurer who acts in that capacity in the adjustment of claims, nor to any licensed insurance producer who is designated by the insurer to act as an adjuster for a client of the producer without any compensation for those services as adjuster. Insurance representatives and licensed insurance producers shall not advertise or publicly solicit the adjustment of claims in a manner likely to mislead the public into believing that he or she is offering services as a public adjuster;

2. Any licensed attorney of this State who acts or aids in adjusting insurance claims as an incident to the practice of his or her profession and who does not advertise him or herself as a public adjuster;

3. Any licensed insurance producer who acts as an adjuster with respect to any loss involving insurance contracts under which he or she was the broker of record in placing the insurance, whether or not designated in writing to act for the insured;

4. Any other duly licensed producer who has been designated to act for the insured in writing before a loss occurs; or

5. An auto body repair facility licensed pursuant to N.J.S.A. 39:13-1 et seq. that acts or aids in adjusting a motor vehicle insurance claim as an incident to the performance of duties for which it is licensed.

11:1-37.2 Definitions

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

"Catastrophic loss occurrence" means an occurrence designated by the President of the United States, the Federal Emergency Management Agency, the Governor of New Jersey, the State Office of Emergency Management in the Division of Law and Public Safety, or any other authorized Federal, State or local agency, as an emergency or a disaster and includes, but is not limited to, a flood, hurricane, storm or earthquake.

"Commissioner" means the New Jersey Commissioner of the Department of Insurance.

"Department" means the New Jersey Department of Insurance.

"Financial institution" means a Federal or State chartered bank, savings bank or savings and loan institution which is a member of the Federal Deposit Insurance Corporation (FDIC) or the Federal Savings and Loan Insurance Corporation (FSLIC).

"First time applicant" means a person who has not been licensed as a public adjuster within the 12-month period prior to application.

"Person" means any individual, corporation, organization, firm, association, partnership or other legal entity.

"Public adjuster" or "adjuster" means any individual, firm, association or corporation, except as excluded at N.J.A.C. 11:1-37.1(c), who, or which, for money, commission or any other thing of value, acts or aids in any manner on behalf of an insured in negotiating for, or effecting, the settlement of claims for loss or damage caused by, or resulting from, any accident, incident or occurrence covered under a property insurance policy, including but not limited to, a flood, transit, inland marine or ocean marine policy; or who, or which, advertises for, or solicits employment as an adjuster of those claims. It shall also mean any individual, who, for money, commission or any other thing of value, solicits or adjusts those claims, in whole or in part, on behalf of any public adjuster.

"Resident (of New Jersey)" means a person who either resides in New Jersey or maintains an office in New Jersey where business is transacted.

"Statutory trust" means a trust in accordance with the provisions of N.J.S.A. 17:22B-13.

"Sublicensee" means an individual who is licensed as a public adjuster and is an officer or director of a corporation which is a licensed public adjuster or who is a member of a firm, association or partnership which is a licensed public adjuster.

"Temporary sublicensee" means an individual who, as the result of a catastrophic loss occurrence, is acting as a public adjuster and is sponsored by and works directly under the supervision of a licensed public adjuster in accordance with a temporary sublicense issued by the Commissioner pursuant to N.J.A.C. 11:1-37.7.

11:1-37.3 General licensing requirements

(a) No person shall act as a public adjuster in this State on behalf of an insured unless licensed pursuant to this subchapter.

(b) The Commissioner may issue or renew a public adjuster's license to any individual, firm, association or corporation who complies with the requirements of this subchapter and is competent to act as a public adjuster in a manner so as to safeguard the interests of the people of this State.

(c) A license issued by the Commissioner shall only be valid until the expiration date indicated on the license.

1. For applications filed on or before March 7, 1995, the initial license term shall expire January 31, 1999.

2. For applications filed after March 7, 1995, the standard term of initial and renewal public adjusters licenses shall be 16 licensing quarters. Licensing quarters shall begin on the first day of February, May, August and November of each year. Licenses shall expire in the fourth year on the last day of the quarter before the quarter in which the license was effective.

11:1-37.4 Licensing applications and renewals

(a) A first time applicant for an individual public adjuster license shall submit the following:

1. A properly executed and dated application requesting issuance of a public adjuster license which shall contain the applicant's legal name; trade name, if any; home address; date of birth; business mailing address and location address; home and business telephone numbers; the applicant's State tax identification number; and responses to questions concerning the applicant's character and fitness for licensing. This information together with all requested attachments shall be certified as being accurate by the applicant;

2. Proof that the applicant has taken and passed the State licensing examination within the 12 months preceding the date of application.

i. For applications received on or before March 7, 1995, the licensing examination shall be waived if the applicant provides proof that he or she has been employed or has acted as a public adjuster as his or her principal business for a period of at least five years prior to March 7, 1994. Persons applying for a waiver as provided in this subsection shall submit the information on a form prescribed by the Commissioner together with supporting documentation.

ii. For applications requesting issuance of a license to an individual who is not a resident, the licensing examination may be waived if the applicant provides proof that he or she is currently licensed in his or her home state in which the licensing provisions for public adjusters are substantially similar to the laws of this State;

3. Any documents or statements required to verify or explain responses to questions concerning the applicant's character, fitness or financial responsibility;

4. Fingerprint impressions taken on New Jersey State Police and Federal Bureau of Investigation fingerprint cards, together with the fees required for processing;

5. A bond conforming to the requirements of N.J.A.C. 11:1-37.9, unless the applicant is applying as a sublicensee.

i. If applying as a sublicensee, proof of coverage under the existing bond of the licensed public adjuster for whom the applicant is or shall be a sublicensee;

6. Two passport-size photographs; and

7. A check or money order made payable to State of New Jersey—General Treasury for the license fee, application processing fee and fingerprint form processing fee in accordance with the fees set forth at N.J.A.C. 11:1-37.18.

(b) A first time applicant for a public adjuster license which is a corporation, firm, association or partnership, shall submit the following:

1. A properly executed and dated application requesting issuance of a public adjuster license which shall contain the applicant's legal name; trade name, if any; business mailing address and location address; business telephone number; State tax identification number; and all requested attachments, all of which shall be certified as being accurate;

2. A resident New Jersey corporation, partnership, association or firm shall file with the Commissioner a copy of its Certificate of Incorporation or of the partnership or association documents, stamped "filed" by the Office of the Secretary of State, County Clerk or other applicable authority, confirming that the business name has been properly recorded;

3. A foreign corporation, partnership or association applying for a resident license to open an office in New Jersey shall file with the Commissioner a certificate filed by the Office of the New Jersey Secretary of State authorizing the applicant to transact business in New Jersey;

4. Fingerprint impressions on New Jersey State Police and Federal Bureau of Investigation fingerprint cards, together with required processing fees for all sublicensees; officers, directors and/or partners which are not sublicensees and all owners of five percent or more of the business;

5. A bond in accordance with N.J.A.C. 11:1-37.9 in an amount sufficient to cover the applicant and all sublicensees; and

6. A check or money order made payable to Treasurer of New Jersey for all licensing, application and processing fees.

(c) The application and applicable fees in accordance with N.J.A.C. 11:1-37.18 shall be sent to:

Attention: Public Adjuster Licensing
License Processing Unit
New Jersey Department of Insurance
20 West State Street
CN 327
Trenton, NJ 08625-0325

(d) All licenses shall at all times be the property of the State of New Jersey and upon any suspension, revocation, nonrenewal, expiration or other termination shall no longer be in force and effect.

1. Upon any suspension, revocation or other termination of a license, the licensee or any other person having custody of the license shall immediately deliver it to the Commissioner by personal delivery or by registered or certified mail.

2. Where a license is lost, stolen or destroyed, the Commissioner may accept in lieu of the return of the license, an affidavit of the licensee or other person responsible for the license, setting forth the facts which prevent the return of the license.

3. Failure to pay any requested fee for any reason including, but not limited to, a check being dishonored, shall render a license null and void.

4. A license which was voluntarily cancelled by a licensee may be reinstated for the balance of the license term upon written request of the licensee and payment of the processing fee.

(e) Where a current licensee seeks to renew a license, the licensee shall, at least 15 days before the license expiration date, submit a properly completed renewal application together with a check or money order for the license fee in accordance with N.J.A.C. 11:1-37.18. The renewal application shall be signed, dated and certified to be correct by the licensee or a licensed officer, partner or member of a licensed organization. The licensee shall certify that he, she or it continues to be qualified in accordance with the Act and this subchapter.

1. Failure to submit the renewal application for receipt by the Department by the date of expiration of the license shall be deemed to establish that the license expired on the date shown on the license and that the licensee was not thereafter authorized to engage in any activities for which the license is required.

2. Any licensee who does not desire renewal shall notify the Department by submitting the renewal application marked "Do Not Renew."

3. An application for renewal may be submitted within 12 months of the date of the expiration of the license.

i. Nothing in this section shall be construed to permit a person to engage in the business of public adjuster without a valid license.

11:1-37.5 Denial of license

(a) Where it appears from an application, the attached documents or Department records that an applicant has not demonstrated the qualifications prescribed in the Act or this subchapter, the Department shall advise the applicant in writing that the license request is denied; shall specify the reasons for the denial; and shall advise the applicant of the right to request 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, and of the procedures for filing the request.

1. A request for a hearing shall be filed within 20 days of receipt of the letter denying the request for a license.

2. The request for a hearing shall be forwarded to:

Director of Licensing and Insurance Education
New Jersey Department of Insurance
20 West State Street
CN 325
Trenton, NJ 08625-0325

3. The request for a hearing shall include a statement of the legal and factual basis upon which the applicant disagrees with the denial of a license and all documentation in support thereof.

(b) Upon receipt of a request for a hearing on a license denial, the Department shall review the application and attachments, the Department's records and any additional information submitted and shall determine whether the license will be issued or the matter transmitted to the Office of Administrative Law as a contested case.

11:1-37.6 Sublicensees

(a) Any applicant for a public adjuster license which is a corporation, partnership, firm or association shall have at least one officer, director, partner, or member licensed as a public adjuster.

(b) Only the officers or directors of a corporation or the members of a firm, association or partnership shall be sublicensees.

(c) A licensed public adjuster which is a corporation, firm or association may employ persons as public adjusters who are not sublicensees only where the persons are individually licensed public adjusters or temporary sublicensees and are bonded in accordance with this subchapter.

(d) Each sublicensee shall obtain and maintain an individual public adjuster license in accordance with N.J.A.C. 11:1-37.4.

i. The license document shall indicate that the individual is a sublicensee. The license shall authorize the sublicensee to transact business only for the public adjuster named in the license, that is, the licensee for whom the individual is a sublicensee.

(e) A licensed public adjuster shall file a notice with the Commissioner, which sets forth any change in its sublicensees within 20 days of the change.

1. The notice shall include the name and New Jersey reference number of the sublicensee and the reason for the change, for example, whether an individual was hired, terminated, retired or moved from the State.

i. Where an additional sublicensee is added, the notice shall be signed by an existing sublicensee and the new sublicensee.

ii. Where a sublicensee has been terminated because he or she has violated any of the provisions of this subchapter the reason for the termination shall be described in the notice.

2. The licensed public adjuster shall return a terminated sublicensee's license document together with the notice.

3. The licensed public adjuster shall include a new bond or endorsement whenever the change requires an increase in the principal amount of its bond.

11:1-37.7 Temporary sublicensee

(a) In the event of a catastrophic loss occurrence, a licensed public adjuster may apply to the Commissioner for the issuance of a temporary sublicense for an individual temporarily hired or retained to act as a public adjuster.

1. The licensed public adjuster shall sponsor the temporary sublicensee who shall be its agent and work under its direct supervision.

2. The sponsoring public adjuster shall bear the full responsibility for the actions of its temporary sublicensee undertaken in the course of acting as a public adjuster.

3. The sponsoring public adjuster shall ensure that the temporary sublicensee complies with the Act and this subchapter.

(b) Upon the submission of a properly executed application and the fee required in accordance with N.J.A.C. 11:1-37.18, the Commissioner may issue a temporary sublicense which may be valid for an initial period not to exceed 90 days from the date of the declaration of the catastrophic loss occurrence. In order to evaluate the adequacy and competency of the temporary sublicensee, the following information shall be filed with the Commissioner:

1. Proof of licensing in another state or proof of five years employment experience as a public adjuster in any state; and

2. Evidence that the individual is covered by a bond in accordance with N.J.A.C. 11:1-37.9.

(c) At the discretion of the Commissioner, a temporary sublicense may be renewed for one additional 90-day period upon the submission to the Commissioner of the fee required in accordance with N.J.A.C. 11:1-37.18. The Commissioner shall consider:

1. The nature, duration and/or continuation of the catastrophic loss occurrence;

2. The continued need for temporary sublicensees; and

3. The conduct of the particular temporary sublicensee.

(d) A temporary sublicense shall only be valid for the duration required by the specific catastrophic loss occurrence for which the temporary sublicensee has been issued or as determined by the Commissioner, but in no event for a period longer than that designated in the license.

11:1-37.8 Licensing examination

(a) Except as expressly provided by N.J.A.C. 11:1-37.4(a)2i and ii, all individual applicants, including sublicensee applicants, seeking a public adjuster license shall take and pass the State licensing examination, which may be administered by the Department or by a vendor under contract to the Department.

(b) Examinations shall be administered at such times and places as may be designated by the Commissioner. If a contract vendor is utilized it shall provide the Commissioner with at least 60 days prior notice of the dates and times of the scheduled examinations.

(c) As determined by the Commissioner, at least one examination administration center may be located in the geographical areas comprising North, South and Central New Jersey.

(d) Whenever a contract vendor is utilized it shall:

1. Establish at least one examination administration center within each geographical area designated by the Commissioner;

2. Provide sufficient examination center personnel for the administration of the examination;

3. Collect from applicants taking the examination a fee approved by the Commissioner which covers the costs of developing and administering the examination;

4. Score examinations promptly and provide scored reports to all candidates within 60 days after the test date; and

5. Provide to the Department:

i. Alphabetically arranged lists containing the candidates' names, addresses, identification numbers and scores of passing and failing candidates; and

ii. Summary statistics for each test, indicating the number of candidates registered, tested and absent, and passing or failing.

(e) The Department shall have the sole responsibility for establishing minimum qualification and passing requirements for candidates taking the licensing examination. The qualification and passing requirements shall be on file at the offices of the Department and shall be made available for public inspection.

(f) For good cause shown the Commissioner may, by order, require an applicant for licensure or a licensee to retake the State licensing examination. The order shall specify the factual circumstances upon which it is based. In the case of a licensee, a license shall remain effective pending the results of the new examination unless the license is otherwise subject to revocation or suspension.

1. A licensee or applicant for licensure may appeal the decision of the Commissioner within 10 days of receipt of the order, by filing with the Commissioner a written statement and supporting documentation, if any, disputing with specificity the allegations in the order.

2. Upon a review of the record, the Commissioner shall either rescind the order or require the licensee or applicant for licensure to retake the examination within a prescribed period of time.

i. If a licensee fails to retake the examination within the prescribed period of time, the Commissioner shall issue an Order to Show Cause why the license should not be revoked and shall advise the licensee of his or her right to a hearing pursuant to the provisions of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., as implemented by the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

ii. If an applicant for licensure fails to retake the examination within the prescribed period of time, the Commissioner shall refuse to issue the license for which application is made and shall advise the applicant for licensure of his or her right to a hearing pursuant to the provisions of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., as implemented by the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

11:1-37.9 Bond

(a) An applicant for a public adjuster's license, renewal license or temporary license shall file with the Commissioner a bond, executed by the applicant and by an insurer approved to transact the business of sureties in New Jersey, in the penal sum of $10,000 per licensee. The bond shall be filed with the License Processing Unit at the address set forth at N.J.A.C. 11:1-37.4(c). Where a license names sublicensees, a $10,000 bond shall be required for the licensee and for each sublicensee.

(b) The bond shall be made to the State of New Jersey for the use and benefit of any person injured by a willful, malicious or wrongful act by a public adjuster in connection with the transaction of its business.

(c) The bond shall be in the form set forth in Appendix A to this subchapter which is incorporated herein by reference.

(d) If a bond is cancelled or withdrawn, the licensee shall immediately return its license to the Commissioner. Upon the filing of a new bond and payment of the required fees in accordance with N.J.A.C. 11:1-37.18, the license shall be returned to the licensee. No person shall engage in the business of a public adjuster in New Jersey after its bond is cancelled or withdrawn, until the person is properly relicensed in accordance with this subchapter.

11:1-37.10 Administrative reporting requirements

(a) Licensed public adjusters shall file with the License Processing Unit of the Department:

1. Complete and accurate business and home addresses, and notice of any change thereto within 20 days;

2. Upon a form prescribed by the Commissioner, notice of the opening or closing of any office in this State within 20 days of the action;

3. Notice of a change of business name within 20 days; and

4. Notice of change in ownership of a company or of the officers, directors, partners or sublicensees within 20 days.

(b) An organization licensed as a public adjuster shall maintain copies of all licenses of its sublicensees in at least one office with an address on file with the Department.

11:1-37.11 Escrow accounts

(a) Any public adjuster who receives, accepts or holds any moneys, on behalf of an insured, towards the settlement of a claim for loss or damage, shall deposit such moneys in an escrow or trust account in a financial institution in this State which is insured by an agency of the Federal government.

(b) Any funds held in an escrow or trust account and interest accruing thereon shall be the property of the insured.

1. Such moneys shall be held pursuant to a written agreement signed by the insured and by the public adjuster which shall clearly specify:

i. The services rendered or to be rendered; and

ii. The amount of any services to be paid from the escrowed funds.

(c) In the event of the insolvency and/or bankruptcy of a public adjuster, the claim of an insured for any settlement moneys received, accepted or held by a public adjuster shall constitute a statutory trust as provided at N.J.S.A. 17:22B-13e.

11:1-37.12 Minimum recordkeeping requirements

(a) Each licensee shall maintain accurate files, books and records reflecting all insurance-related transactions in which the licensee or his or her employees take part in accordance with the standards set forth in this subchapter. These records shall be maintained by either separate books of record or by one or more consolidated books of record for a period of five years from the date of the closing of the claim.

1. All books and records shall consist of sequentially numbered pages and shall be maintained in such a manner that they can be produced for examination at any time.

2. Appropriate and required entries shall be made at least once every 30 days.

(b) Each licensee shall maintain a register of all monies received, deposited, disbursed or withdrawn in connection with a transaction with an insured, including, but not limited to: fees, transfers and disbursements from a trust account; and all transactions concerning, including the balance of, all interest bearing accounts. The minimum information required to be maintained in the register includes the following:

1. The name and location of the financial institution in which the funds are deposited;

2. The account number of the trust or escrow account;

3. The date monies are received, deposited, disbursed or withdrawn;

4. The amount of money received, deposited, disbursed or withdrawn;

5. An itemized record of the allocation of the funds;

6. The name of the insured, insurance producer, insurer or other account to or from whom monies are disbursed or received;

7. The claim number;

8. The receipt number, when available; and

9. The method of payment, such as, cash, check, money order or draft.

(c) For each disbursement, the number of the check shall be recorded in the register.

(d) All entries for receipts and disbursements shall be supported by evidential matter as provided in (b) and (c) above. The evidential matter shall be referenced in the entry so that it may be traced for verification.

(e) Each licensee shall prepare and maintain a monthly reconciliation of the trust account.

(f) Each licensee shall maintain a file for each claimant with whom a contractual relationship has been established. The minimum items required to be maintained in the file include:

1. Correspondence received or sent with respect to any insurance or insurance related transaction;

2. All of the client's contracts; and

3. All claim files.

(g) The licensee shall also maintain the following records for a period of five years:

1. Escrow or trust account statements;

2. Names and addresses of all licensees and sublicensees;

3. Copies of all new and renewal applications submitted to the Department by an individual, the company, all sublicensees and temporary sublicenses;

4. All fees received, if not deposited in a trust or escrow account; and

5. All records of transactions with persons or entities owned or controlled by the licensee or its officers and directors, that are construction firms, salvage firms or appraisal firms.

(h) Failure to keep, maintain or make available for inspection by the Commissioner, those records which the Commissioner shall require to be maintained in accordance with this subchapter, or any other violations by a licensee, shall result in the imposition of administrative fines comparable to the fines set forth at N.J.A.C. 11:17D-2.4.

11:1-37.13 Right to compensation

(a) No individual, firm, partnership, association or corporation licensed under this subchapter shall have any right to compensation from any insured for or on account of services rendered to an insured as a public adjuster unless the right to compensation is based upon a written contract or memorandum between the adjuster and the insured and specifying or clearly defining the services to be rendered and the amount or extent of the compensation.

(b) The written memorandum or contract between a licensed public adjuster and an insured:

1. Shall be executed in duplicate and a fully executed copy shall be provided to the insured upon execution;

2. Shall be kept on file by the public adjuster, available at all times for inspection without notice by the Commissioner; and

3. Shall contain the following:

i. The signatures of the insured and the public adjuster;

ii. A list of services to be rendered and the maximum fees to be charged, which fees shall be reasonably related to services rendered;

iii. The date of execution of the contract (day, month, year) by each party; and

iv. Notice that the contract can be cancelled by either party upon 20 days written notice.

(1) A copy of the notice of cancellation shall be forwarded immediately to the insurer;

4. Where a contract is cancelled by an insured, a public adjuster may hold the insured liable for reasonable and necessary out-of-pocket expenses which are paid for and substantiated by the public adjuster.

i. Where the public adjuster chooses to recoup such charges, it shall prominently set forth in the contract the expense for which the insured may remain liable upon cancellation of the contract.

11:1-37.14 Violations and penalties

(a) The Commissioner may deny, suspend, revoke or refuse to renew a public adjuster's license based on any violation of the Act or this subchapter, or for the commission or omission of any act by a public adjuster which demonstrates that the applicant or licensee is not competent or trustworthy to act as a public adjuster, or where the person has:

1. Violated any provision of this State's insurance laws, including any rules promulgated thereunder;

2. Violated any law in the course of acting as a public adjuster;

3. Committed a fraudulent or dishonest act;

4. Demonstrated the licensee's lack of integrity, incompetency, bad faith, dishonesty, financial irresponsibility or untrustworthiness to act as a public adjuster;

5. Aided, abetted or assisted another person in violating any insurance law of this or any other State;

6. Withheld material information or made a material misstatement in the application for the license;

7. Failed to pay any fine or restitution imposed by an order of the Commissioner;

8. Collected from any client any fee other than that agreed to in the employment contract in a form required by N.J.A.C. 11:1-37.3(c);

9. Misappropriated, converted or illegally withheld, money which was received in the conduct of business that belonged to insurers, clients or others;

10. Failed to notify the Commissioner within 30 days of a conviction for any crime, indictment or the filing of any formal criminal charges, or the suspension or revocation of any insurance license

or authority by a state, other than this State, or failed to supply any documentation that the Commissioner may request in connection therewith;

11. Failed to appear in response to any subpoena issued by the Commissioner or his authorized designee; failed to produce any documents or other material requested in a subpoena; or refused or failed to cooperate with an investigation by the Commissioner of the activities of the person or any other licensee;

12. Induced the cancellation of a duly executed written memorandum between an insured and a public adjuster;

13. Made any misrepresentation of facts or advised any person on questions of law in conjunction with the business as a public adjuster;

14. Had any professional license suspended or revoked in this or any other state;

15. Engaged in the business of a public adjuster in New Jersey with an invalid or expired license; or

16. Committed any other act, or omission which the Commissioner determines to be inappropriate conduct by a licensee of this State.

(b) Any person which violates any provision of this subchapter shall, in addition to any other penalties provided by law, be liable for a civil penalty of not more than $2,500 for a first offense and not more than $5,000 for the second and each subsequent offense. Each transaction or statutory violation shall constitute a separate offense.

(c) The procedures for the imposition of administrative penalties shall be governed by N.J.A.C. 11:17D-2.1.

11:1-37.15 Effect of suspension or revocation of public adjuster license

(a) Upon service of any final order suspending or revoking a public adjuster license, the public adjuster shall immediately return to the Commissioner for cancellation any license in the public adjuster's possession.

(b) No other licensed individual or organization shall advertise, display or conduct any business as a public adjuster using the legal or business name of any person whose license has been suspended or revoked.

(c) No person whose public adjuster license has been suspended or revoked shall be entitled to any refund of license fees for the unexpired term of any license issued.

11:1-37.16 Reinstatement after suspension or revocation of a public adjuster license

(a) No individual, firm, association or corporation whose license has been revoked and no firm or association of which the individual is an officer or director, shall be entitled to any license or renewal license under this subchapter for a period of one year after the revocation.

(b) A person whose license has been suspended or revoked may, after one year from the effective date of any order revoking a public adjuster license or upon completion of the period of suspension, apply for reinstatement of the license on the form of application used for initial public adjuster license applicants and shall fulfill all of the requirements set forth therein.

(c) The applicant shall submit with the application a copy of the order of suspension or revocation and an executed affidavit that states:

1. That the period of suspension or revocation has been completed or in the case of a revocation one year has elapsed from the date of the revocation;

2. That all required conditions for reinstatement as described in the order of suspension or revocation have been met;

3. That documents confirming that all conditions have been met, such as receipts for fines or restitution, satisfactions of judgment, etc. are attached to the affidavit; and

4. That the applicant has complied with all restrictions imposed by the order of suspension or revocation.

5. The applicant shall also include with the application an affidavit containing the following information concerning the applicant's activities since suspension or revocation:

i. An employment history;

ii. A statement concerning the other business interests, if any, of the applicant;

iii. The manner of disposition of the applicant public adjuster's business upon suspension or revocation of his or her public adjuster license;

iv. Whether restitution has been made as a result of the activities that led to the suspension or revocation, including the names and addresses of the persons or entities to whom restitution was made and amounts of restitution made;

v. Whether the applicant currently holds any other business, professional or occupational licenses in this or any other state;

vi. Whether the applicant, or any business in which he or she owns five percent or more, is or has been a party to any legal or administrative proceedings in this or any other state and, if so, a statement concerning the nature of the proceedings, the parties and the result or current status; and

vii. A written statement by the applicant describing the manner in which he or she has improved, during the period of suspension or revocation, his or her reputation, character, trustworthiness, competency and worthiness to be an insurance producer.

(d) If any license held by a firm, association or corporation is suspended or revoked, no member or partner of the firm, association or partnership and no officer or director of the corporation shall be entitled to a license or to be named as a sublicensee in a license for the same period of time unless it is demonstrated to the Commissioner that the member or officer or director was not personally responsible in the matter for which the license was suspended or revoked.

(e) If the suspension or revocation was based upon the conviction of a crime or if the applicant was convicted of a crime since the suspension or revocation, the applicant shall submit with his or her application for licensing, a certificate in accordance with N.J.S.A. 2A:168A-3, of the Federal or state parole board or of the chief probation officer of a United States district court or a county who has supervised the applicant's probation, certifying that the applicant has achieved a degree of rehabilitation which indicates that the granting of a license is not incompatible with the welfare of society.

(f) The Commissioner, or his or her designee, shall review the application to determine whether reinstatement is warranted, based on the information provided in (c) through (e) above, and that the applicant has proven that he or she is trustworthy and competent to act as a public adjuster in a manner so as to safeguard the interests of the people in this State. The review of the application may include further investigation or inquiry, may require the applicant to provide additional information, and may further include a conference with Department personnel.

(g) If the Department is satisfied that reinstatement is warranted, the Department shall issue the license. If the Department is not satisfied that reinstatement is warranted, the Department shall deny the license and the applicant shall be given notice and 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.

11:1-37.17 Public records

(a) The following licensee records maintained by the Department shall be public records in accordance with N.J.S.A. 47:1A-1 et seq.:

1. For an individual licensee, his or her name; license reference number; business mailing and location address; date of birth; license authorities; date first licensed; date last licensed or current license expiration date; names and reference numbers of licensed organizations for which the public adjuster is a sublicensee, date became a sublicensee and date terminated, if any; names and reference numbers of employers, date relationship began and terminated; the institution of formal administrative proceedings; and the disposition of any final action taken against the licensee by the Department.

2. For a licensed organization, the legal name of the public adjuster; license reference number; other business name, if any; business mailing and location address; license authorities; date first licensed; date last licensed or current expiration date; names and reference numbers of sublicensees, and reference numbers of

employees, date relationship began and terminated; the institution of formal administrative proceedings; and the disposition of any final action taken against licensed organization by the Department.

(b) The following licensee records are specifically determined to be nonpublic records in accordance with N.J.S.A. 47:1A-1 et seq.;

1. Criminal complaints, indictments, judgments of conviction and other separate documents submitted in connection with a license application concerning whether an applicant is disqualified by reason of conviction of a crime;

2. Criminal history records obtained as the result of any fingerprint check;

3. Copies of judgments, orders or pending actions of any civil penalty or fine or order of restitution, pursuant to any unfair trade practice statute, insurance fraud statute or similar statute consumer fraud or consumer protection statute, in this or any other state or by the Federal government submitted in connection with a license application;

4. Copies of orders of suspension or revocation issued by professional or occupational licensing authorities, and other separate documents submitted in connection with a license application;

5. Records concerning the medical disability of any licensee;

6. Investigative files in any matter pending investigation, or in any completed investigation in which no administrative action was instituted or taken; and

7. Records concerning the contents of the licensing examination questions.

(c) Upon request by any person, the Department may issue a certification of the license status of any currently licensed public adjuster licensed within the preceding four years. Such certification shall contain the licensee's name, date of birth, license reference number, whether currently licensed or expired, whether qualified by examination or the equivalent, and whether any formal disciplinary action was taken during the last four years.

(d) Nothing in this section shall compel the Department to maintain licensee records beyond normal retirement or destruction schedules as approved by the Division of State Library, or to retrieve and provide a copy of any written record required to be filed with the Department when the information requested is available as a certified abstract of information contained in the Department's electronic data processing system.

11:1-37.18 Fees

(a) The following nonrefundable fees shall apply:

1. License fee: $300.00.

2. Temporary sublicense fee: $150.00.

3. Renewal temporary sublicense fee: $150.00.

4. Processing fee: $20.00.

5. Fingerprint processing fees: as currently established by State or Federal jurisdictions.

(b) The examination fee shall be the amount authorized by the Commissioner to be charged by the contract vendor administering the examination on behalf of the Department.

(c) Disabled war veterans of the United States military service may apply to the Commissioner for a waiver of the above licensing and processing fees by submitting proof of a service related disability. Fees for fingerprint processing shall not be waived.

(d) Amendments to the fee schedule set forth in (a) and (b) above may be promulgated subsequent to March 7, 1995.

(e) All checks or money orders shall be made to: State of New Jersey—General Treasury.

APPENDIX
BOND NO. _____
PUBLIC ADJUSTER BOND

We, _____ [licensee], of _____ [street address], city of _____, State of _____, as principal, and _____, a corporation incorporated under the laws of the State of New Jersey, and duly licensed to transact a surety business in the State of New Jersey, as surety, are indebted to the State of New Jersey, obligee, in the penal sum of $_____, for which payment we bind ourselves and our respective heirs, legal representatives, successors, and assigns, jointly and severally.

The principal has applied to the Commissioner of Insurance of the State of New Jersey for issuance of a license under the provisions of the Public Adjusters' Licensing Act, P.L. 1993, c.66, (N.J.S.A. 17:22B-1 et seq.), as a public adjuster.

Pursuant to the Public Adjusters' Licensing Act, P.L. 1993, c.66, (N.J.S.A. 17:22B-1 et seq.), every licensee shall file with the Commissioner of Insurance a surety bond in the penal sum of $_____ applicable to the licensee, and each of the sublicensees named in the license, and any temporary sublicensee sponsored by the licensee, if any, said bond to be issued by an approved surety, conditioned on faithful and honest conduct as a public adjuster, before the license will be issued. The bond must be maintained during the term of the license.

The condition of this bond is that if the principal, licensee, or any sublicensees of the licensee, if any, conducts her, his or its business as a public adjuster faithfully, honestly, and in accordance with law, and if the principal, licensee, or any sublicensees of the licensee, if any, faithfully complies with and abides by the provisions of N.J.S.A. 17:22B-1 et seq., and all rules and regulations promulgated pursuant thereto, and any amendments thereto, and will commit no willful, malicious or wrongful act, and perform all obligations and undertakings when engaging as a public adjuster in this State, and will pay to the State any and all money that may become due and owing to the State under and by virtue of the provisions of N.J.S.A. 17:22B-1 et seq., then this obligation will be null and void; otherwise it shall remain in full force and effect.

This bond is issued subject to the following express conditions, fulfillment of which shall be precedent to all rights of recovery hereunder.

1. This bond shall be deemed continuous in form and shall remain in full force and effect and shall run concurrently with the term for which the license is granted and each and every succeeding term or terms during which the license may be renewed, after which liability shall cease except as to any liability of indebtedness incurred or accrued hereunder.

2. Every person damaged as a result of any willful, malicious or wrongful act of the principal, licensee, or any sublicensees of the licensee, if any, in the conduct as a public adjuster, may bring an action in a proper court on this bond for the amount of such damage.

3. The aggregate liability of the surety shall not exceed the sum set forth above.

4. The State of New Jersey, acting through the Commissioner of Insurance, reserves the right, at any time, to terminate this bond, except as to any liability already incurred or accrued hereunder, by written notice of such termination to surety delivered or mailed by certified or registered mail. On expiration of the period designated in such notice, which period shall not be less than 3 days from the time the notice was mailed, this bond shall terminate and be of no further force or effect except as to any liability incurred or accrued prior to the termination.

5. In the event that the principal and the surety, or either of them, is served by the notice of any action brought against the principal or the surety under this bond, written notice of the filing of such action shall be immediately given by the principal or the surety, as each is served with notice to the action, to the Commissioner of Insurance.

The premium for which this bond is written is $_____.

Executed at this_____ day of _____, 19____, effective immediately.

_____
[Name of Licensee]

signed, sealed this
____ day of _____,
19____, in the presence of

_____
[_____ President—if corp.]

_____
[Individual or Partner]

attest_____
[_____ Secretary—if corp.]
[Witness—if individual or partnership]

_____
[Surety company]

By:_____
[Attorney in Fact]

to
The State of New Jersey
Under the Public Adjusters' Licensing Act
P.L. 1993, c.66 (N.J.S.A. 17:22B-1 et seq.)

Filed _____, 19____

Commissioner of Insurance

LAW AND PUBLIC SAFETY

(a)

DIVISION OF CONSUMER AFFAIRS STATE BOARD OF ARCHITECTS

Scope of Architectural Services

Proposed New Rule: N.J.A.C. 13:27-3.1

Authorized By: State Board of Architects, Kevin Earle, Executive Director.

Authority: N.J.S.A. 45:1-3.2 and 45:3-3 and 7.

Proposal Number: PRN 1993-635.

Submit written comments by January 5, 1994 to:
Kevin Earle, Executive Director
State Board of Architects
Post Office Box 45001
Newark, New Jersey 07101

The agency proposal follows:

Summary

Complaints received by the Board of Architects over the past several years indicate that an increasing number of non-architects are offering the public a variety of services that are being misrepresented as architectural services. The statute regulating the practice of architecture, N.J.S.A. 45:3-1 et seq., provides for restrictions on the use of the word "architect" and other terms which substantially represent to the public that architectural services are being offered. Inappropriate use of certain terms may be in violation of the statute and subject the advertiser to sanctions by the Board.

The proposed new rule, N.J.A.C. 13:27-3.1, was originally intended merely to clarify the confusion associated with the use of certain terms and to aid a prospective advertiser in making decisions as to permissible uses of these terms. Pursuant to a recent amendment to the P.L. 1993, c.35, the proposed rule now also permits builders and home improvement contractors to offer design services within certain parameters.

Subsections (a) through (c) of the new rule define relevant terms, including design services, and state the statutory prohibition against use of the term "architect" or its substantial equivalent by any person other than a licensed New Jersey architect and any person authorized to provide architectural services pursuant to N.J.S.A. 45:3-17.

Subsections (d) through (f) concern permissible advertising by builders or home improvement contractors. Subsection (d) reiterates a recent change in the law which authorizes builders and home improvement contractors to offer "design services" up until the point where a construction permit is required. Subsection (e) provides examples of terms which may be used by advertisers of these services and subsection (f) sets forth the only limitation placed on builders or contractors authorized to provide design services.

Subsection (g) permits a person who may not be authorized to render architectural services to nevertheless offer "space planning" or "interior design services," provided the services advertised, offered or performed comply with four restrictions: the services must be directed at interior space, cannot involve the alteration or modification of any essential element of a building, cannot require or involve the skill, training or expertise of a licensed architect, and do not pertain to the production of construction documents. Finally, subsection (h) states that the rule in no way limits authorized professional engineers from utilizing the terms set forth in subsection (e) in BOCA use groups permitted under the Building Design Services Act (N.J.S.A. 45:4B-1 et seq.).

Social Impact

Reference to the proposed standards for non-licensees should aid a prospective advertiser in making decisions as to whether certain terms may be used or representations made when offering services. The avoidance of Board sanctions for inappropriate advertising is another benefit non-architects may gain from the proposed new rule. Consumers will benefit from the proposal because it mandates clear identification of the advertiser and the services being offered, and helps them distinguish between those architectural/design services which may be performed by licensed architects alone and those which may be performed by builders, home improvement contractors, engineers, or other individuals.

Economic Impact

There will be no adverse economic impact upon any party as a result of this proposed new rule, which merely clarifies the proper relationship between an architect and a client in that it identifies those architectural/design services that architects are uniquely qualified to fulfill. To the extent that the rule helps prospective advertisers avoid the imposition of monetary penalties for inappropriate advertising, the rule may have a positive economic impact on non-licensees, who may also benefit from the rule in that it affirms certain design services that builders and home improvement contractors are allowed to perform.

Regulatory Flexibility Analysis

The proposed new rule will apply to all non-licensees of the Board of Architects, including partnerships or corporations, who offer architectural/design services to the public. Some of these partnerships or corporations may be considered small businesses as defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16.

The rule does not impose any reporting or recordkeeping requirements. This rule, which clarifies those realms in which builders, home improvement contractors or engineers may operate in regard to architectural/design services, is uniformly applicable to all non-licensees without differentiation as to size of business because to do otherwise would defeat its purpose. There are no initial capital costs or other costs of compliance, nor will the rule necessitate the retention of any professional services by small businesses in order to comply.

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

SUBCHAPTER 3. [(RESERVED)] SCOPE OF ARCHITECTURAL SERVICES

13:27-3.1 Scope of architectural services

(a) The following words and terms, when used in this section, shall have the following meanings unless the context clearly indicates otherwise:

1. "Person" means any individual, or any business association or entity.

2. "Advertisement" means any dissemination to the public by means of newspaper, periodical, journal, flyer, radio, telephonic or television communication in which architectural services are offered or by which the availability of architectural services is made known.

3. "Advertiser" means a person offering architectural services in the State of New Jersey by way of an advertisement.

4. "Architectural services" means services in connection with the design, construction, enlargement, or alteration of a building or a group of buildings and the space within or surrounding those buildings, which have as their principal purpose human use or

habitation. These services include site planning, providing preliminary studies, architectural designs, drawings, specifications, other technical documentation, and administration of construction for the purpose of determining compliance with drawings and specifications.

5. "Design services" means conceptual drawings or sketches of floor plans or elevations, the rendering of price quotations or estimates, all of which may be necessary to develop the scope, character and potential cost of a one- to two-family, detached home or improvement thereto.

(b) No person, except an architect licensed in the State of New Jersey, shall use the title "architect" or its substantial equivalent or otherwise represent to the public that the person is licensed to practice architecture in this State.

(c) No advertisement shall include the terms "architect," "architectural," "architect on staff," "architectural services," or the substantial equivalent thereof unless the advertiser is a business association authorized to render architectural services pursuant to N.J.S.A. 45:3-17. Specifically, such services shall only be rendered by:

1. A sole proprietorship of a licensed architect;
2. A partnership of licensed architects;
3. A partnership of closely allied professionals, including at least one licensed architect;
4. A professional service corporation established pursuant to the "Professional Service Corporation Act" (N.J.S.A. 14A:17-1 et seq.); or
5. A general business corporation holding a certificate of authorization from the Board of Architects issued pursuant to the "Building Design Services Act" (N.J.S.A. 45:4B-1 et seq.).

(d) A builder registered to the "New Home Warranty and Builder's Registration Act" (N.J.S.A. 46:3B-1 et seq.) or a home improvement contractor may advertise, offer or perform "design services" either in the construction of one- to two-family homes or in connection with the demolition, enlargement or alteration thereto. A builder or home improvement contractor shall render such services only to the owner-occupant of such dwellings.

(e) An advertisement for design services by a builder or home improvement contractor pursuant to (d) above shall not in any way be limited except as set forth in (f) below, and may contain the following terms or their substantial equivalent:

1. Construction design services;
2. Design;
3. Design services;
4. Design/build;
5. Design/build services; and/or
6. Building design services.

(f) Builders and home improvement contractors shall not advertise, offer, or perform design services that involve the preparation of construction documents, which consist of, but are not limited to, those drawings or specifications necessary to support an application for building or other construction permits.

(g) It shall be permissible for a person not authorized to render architectural services to utilize the terms "space planning," "interior design," "interior design services" or the subsequent equivalent thereof provided that the design services advertised, offered or performed:

1. Are limited to the function of the interior space within an existing or proposed building;
2. Do not involve any alteration or modifications of the building's existing or proposed structure, seismic integrity, or partitions, or its electrical, mechanical, HVAC or plumbing systems;
3. Do not require or involve the skill, training or expertise of a licensed architect; and
4. Do not include the production of construction documents, which consist of, but are not limited to, those drawings or specifications necessary to support an application for a building or other construction permit.

(h) Nothing in this section shall prohibit any person or entity authorized by law to render professional engineering services from utilizing the terms set forth in (e) above in connection with the advertising of professional engineering services.

(a)

DIVISION OF CONSUMER AFFAIRS
STATE BOARD OF ARCHITECTS
Rules of Professional Conduct
Landscape Architects
Proposed Amendment: N.J.A.C. 13:27-8.13

Authorized By: State Board of Architects, Kevin Earle, Executive Director.

Authority: N.J.S.A. 45:1-3.2 and 45:3-3 and 7.

Proposal Number: PRN 1993-636.

Submit written comments by January 5, 1994 to:

Kevin Earle, Executive Director
State Board of Architects
Post Office Box 45001
Newark, New Jersey 07101

The agency proposal follows:

Summary

The State Board of Architects is proposing an amendment, to be codified at N.J.A.C. 13:27-8.13(o), which requires all landscape architects to identify themselves by name and certificate number in all advertisements and public representations.

The requirement is based both on the Board's receipt of numerous consumer inquiries about the certification status of various landscape architects, and on reports by landscape architects that numerous persons present themselves as landscape architects although they are not in fact so certified. The Board has found that telephone directories commonly contain many enterprises improperly and misleadingly listed under the heading of "Landscape Architects." Although such directories may include a boxed warning to consumers to check for a valid certificate when using the services of anyone who advertises him or herself as a landscape architect, the Board believes that unless provided with certificate numbers that will make the inquiry process more convenient, consumers will continue to be generally unlikely to pursue the matter of whether or not they are dealing with certified professionals.

The proposed requirement will enable consumers to distinguish between certified and uncertified persons. Given the realities of production schedules, however, the new provision allows licensees whose advertisements/listings in a telephone or other consumer information directory are not in compliance with the above requirement at the time of adoption to promptly notify the directory publisher of the additional data that needs to be included in the next available directory in which the landscape architect intends to continue such advertisement/listing.

Social Impact

The proposed amendment offers consumers the social benefit of their being more readily able to assess the certificate status of persons advertising or listing themselves as landscape architects in telephone or other consumer information directories. This ability to distinguish between certified and uncertified persons should, in turn, allow consumers to avoid persons engaged in professional misrepresentation.

Economic Impact

There are two groups of individuals who are likely to benefit economically from the proposed amendment. One group consists of consumers who should be better able than ever before to match the needs of a particular project with the skills offered by a certified landscape architect whose known professional status will assure consumers that they have made a cost-efficient choice by hiring a person who meets the heightened statutory requirements to acquire certified status. The other group of individuals who are likely to benefit economically from the proposed amendment consists of certified landscape architects whose known professional status should make their services more attractive to consumers whose projects require advanced skills.

The individuals who may be adversely affected by the proposed amendment are unlicensed persons who have not demonstrated the statutorily required level of minimum competence to acquire certification status. Despite their lack of certification, these persons may continue to provide

landscape architectural services, however, provided that their advertising does not include wording which could be likely to mislead or which is specifically prohibited by law.

Regulatory Flexibility Analysis

If, for the purposes of the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., landscape architects are deemed "small businesses" within the meaning of the statute, the following statement is applicable:

The proposed amendment, which requires all landscape architects to identify themselves by name and certificate number in all advertisements and public representations, will apply equally to all of the approximately 600 currently licensed landscape architects of the Board of Architects. Licensees will be required to retain a copy of the notification that they present to directory publishers should they need to ensure that the next available directory will include both their name and certificate number. No reporting is required, however, nor does the amendment require initial capital costs or the retention of professional services or any other costs of compliance, barring the nominal cost that may be required to add the additional data to any advertisement or listing in a telephone or other consumer information directory.

The Board considers the amendment to be reasonable and to be the minimum necessary for the protection of the public's interest. Therefore, the proposed rule must be uniformly applied without differentiation as to size of practice.

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

13:27-8.13 Rules of professional conduct

(a)-(n) (No change.)

(o) All advertisements and public representations of certificate holders which make specific reference to service as a "landscape architect" shall list the name and certificate number of the landscape architect. If the certificate holder conducts the practice under a corporation or trade name, the advertisement/public representation may list the business name under which the practice is conducted but shall also conspicuously disclose the name and certificate number of at least one of the principal practitioners. This requirement applies to all advertising locations, including, but not limited to: the public media, commercial property, and motor vehicles.

1. Landscape architects, whose advertisements/listings in a telephone or other consumer information directory do not comply with this requirement as of the date of adoption, shall immediately notify the directory publisher of the additional data which shall be published in the next available directory in which the landscape architect intends to continue such advertisement/listing. The certificate holder, personally or through the business entity, shall retain a copy of the notification which shall be made available for inspection at Board request.

[(o)](**p**) (No change in text.)

(a)

DIVISION OF CONSUMER AFFAIRS
STATE BOARD OF MEDICAL EXAMINERS
Professional Fees and Investments; Prohibition of Kickbacks
Proposed Amendment: N.J.A.C. 13:35-6.17

Authorized By: Board of Medical Examiners,
Charles A. Janousek, Executive Director.
Authority: N.J.S.A. 45:9-2 and 45:9-22.5.
Proposal Number: PRN 1993-645.

Submit written comments by January 5, 1994 to:
Charles A. Janousek
Executive Director
New Jersey State Board of Medical Examiners
28 West State Street
Trenton, New Jersey 08608

The agency proposal follows:

Summary

The Board of Medical Examiners has received several inquiries with regard to N.J.A.C. 13:35-6.17, its regulation relating to professional fees and investments. The first, a petition for recision of N.J.A.C. 13:35-6.17(e), was filed by the New Jersey Academy of Ophthalmology and Otolaryngology. The Academy seeks recision of the section which would limit ophthalmologists from charging patients more than 10 percent over the wholesale cost which the doctors pay for eyeglasses or contact lenses. The Academy contends that the cost associated with dispensing eyeglasses and contacts exceeds the ten percent cap and, thus, continued dispensing would result in a financial loss. It maintains that ophthalmologists would be unable to recoup their actual costs by incorporating them into professional service fees since some managed health care plans allow only a specific fixed fee for professional services, separate from the additional reimbursement for the market cost of glasses or contacts. Finally, the Academy contends that the operation of the regulation puts ophthalmologists at an unfair and purportedly "illegal" disadvantage when compared with optometrists whose licensing board does not at present limit those practitioners to the actual cost of goods they themselves prescribe. In order to evaluate the merits of petitioner's contentions, the Academy was asked to document the true costs involved in the dispensing of eyewear. The basic thrust of the Academy's submissions demonstrated considerable variability in how ophthalmologists choose to dispense. However, none was able to demonstrate an allocation of their dispensing costs. The Academy continued to reiterate its desire to have the regulation exempt its membership from operation of the 10 percent cap, which is applicable to all Board licensed professionals.

While considering this petition, the Board also received correspondence from a number of physicians in other specialty areas objecting to the 10 percent limit on various medical supplies (catheters, crutches, braces, splints, etc.). In addition, the Board received correspondence from the Coalition of New Jersey Opticians and the New Jersey Board of Ophthalmic Dispensers and Technicians, each expressing opposition to physician dispensing of eyewear. This sister board also questioned physician delegation of tasks relating to the production, reproduction, mounting and fitting of ophthalmic lenses which that Board suggested are being performed by those who are untrained and unsupervised.

In reviewing all of the materials relating to the Academy's petition, the Board of Medical Examiners has concluded that it is unable to establish a percentage cap which would achieve an equilibrium in costs—that is, a break-even point. Thus, another approach is being proposed. The Board rejects the demand that physicians should be precluded from dispensing. However, the Board reaffirms its support for the philosophical underpinning of this section that physicians ought not to derive a profit on the sale of goods and devices. In light of the variability of the cost bases associated with dispensing, the Board has determined to revise the regulation, deleting the 10 percent cap and substituting regulatory language which prohibits a profit and places an onus on medical providers to establish that no profit has been generated. In this way providers will be able to recoup true and reasonable costs associated with dispensing but must justify those costs upon request.

By letter of May 7, 1992, the New Jersey Hospital Association sought another revision of N.J.A.C. 13:35-6.17 contending that the regulation in its current format impacted on the ability of doctors and hospitals to contract for the performance of administrative responsibilities and referred services. The Association sought an indefinite stay of one sentence of the definitional section of the rule—specifically that language which defines financial interest to encompass contractual relationships with health care facilities. (During the pendency of the Board's review of this rule amendment, the operation of that sentence has been stayed.) The Board immediately advised that it had never construed its rule to bar contracts by which hospitals arrange for the performance of administrative responsibilities. The Board sought further submissions by the Association regarding the issues raised with respect to referred service contracts. The Association subsequently provided specific language delineating those types of contracts which ought to be excluded from the definition of financial interest. The model provided by the Association has been tracked in this rule proposal.

The third matter under consideration by the Board was an inquiry of the Medical Society of New Jersey seeking clarification of one section of the rule which might be read to prohibit physicians from attending continuing medical education programs which meet current national and

other state standards. Specifically, it appears that it is common practice for organizers of continuing medical education programs to accept, from commercial sources, funding which enables the sponsoring entity to defray expenses associated with the program, thus enabling it to lower the cost of registration fees. Herein the Board is proposing language to clarify that such participation is permissible.

Additionally, by this proposed amendment, several other classifications are offered. Home infusion therapy companies are added to the specific list of health care services. The amendment also makes clear that a practitioner professionally affiliated with another practitioner who held a significant beneficial interest on or before July 31, 1991, is obligated to provide the same disclosure to patients that the "grandfathered" practitioner is to provide. This revision also makes clear that the affiliated practitioner who himself secures an interest after July 31, 1991, is subject to the prohibition on referral set forth at N.J.S.A. 45:9-22.5 and does not acquire "grandfather" status by virtue of that association.

Social Impact

All of the amendments set forth in this proposal, with the exception of N.J.A.C. 13:35-6.17(e), are intended to offer clarification to licensees. The amendatory language is being proposed in response to the formal petition for rulemaking submitted by the New Jersey Academy of Ophthalmology and Otolaryngology and the inquiries submitted to the Board by the New Jersey Hospital Association, the New Jersey medical Society, and numerous licensees, attorneys and the public. The Board expects these changes to have a beneficial impact upon licensees and the public in that the revised sections will more specifically delineate for practitioners their obligations and the restrictions upon how they may engage in the practice of medicine.

By the proposed amendment to N.J.A.C. 13:35-6.17(e), the Board is replacing the specific limitation on the charges which a licensee may make for the sale of goods and devices with language which allows practitioners to be reimbursed for true and reasonable costs associated with dispensing. This revision represents a reaffirmation of the Board's original intent which has always been to preclude licensees from charging sums intended to generate a profit from activities peripheral to the rendering of professional services. In the Board's view this limitation will help to assure that the dispensing of goods is motivated by the best interests of the patient. Many commenters have suggested that this rule, as it was initially adopted, would cause some licensees, who elect to engage in dispensing as a convenience to their patients, to incur a loss, since the costs associated with the dispensing may actually exceed the 10 percent cap. This revision would allow for a more flexible approach. It does however squarely place upon the licensee the obligation of justifying the charges made. The Board thus has attempted here to strike the balance in such a way that consumers will still be able to exercise a choice as to where they will purchase these goods, but will be protected against the price gouging which might occur in an inevitably unequally matched vendor-vendee relationship.

Economic Impact

Again, the amendments to N.J.A.C. 13:35-6.17, as contemplated herein, with the exception of subsection (e), are for clarification purposes only. They have no discernable economic impact on consumers or licensees, as they merely clarify the Board's original intent and address some of the questions that have arisen since these provisions were adopted. For example, the amendatory language which sets forth specific types of contracts involving practitioners and health care facilities which would still be deemed permissible and exempt from disclosure requirements, reflects the Board's original intent to exempt these contractual arrangements from disclosure requirements (that is, peer review and medical care for the indigent). Furthermore, the language which makes it clear that participation in continuing medical education programs continues to be appropriate even where registration fees for these may be calculated in consideration of commercial support, promotes and makes economically feasible continuing education programs which are paramount to the rendering of modern health care.

The amendment to N.J.A.C. 13:35-6.17(e) does represent a change which has a potential economic impact on licensees and their patients. Its adoption may cause some practitioners to discontinue the sale of goods ancillary to their practices. No doubt others will continue this activity, even though they may no longer be able to derive a profit on such sales. Indeed, consumers may find that the prices charged by licensees who are subject to this requirement will be more competitive than those available from commercial establishments. Practitioners who choose to continue selling products may find some costs associated with establishing and verifying the propriety of their charges. However, any additional expense will be outweighed by the benefit to the physician in being able to continue offering these services for the true and reasonable cost.

Regulatory Flexibility Analysis

The Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., requires the agency to give a description of the types and estimates of the number of small businesses to which the proposed amendment will apply. This amendment impacts on any Board licensee who dispenses goods and devices ancillary to the rendering of professional medical care. The Board currently licenses approximately 28,000 physicians.

The only additional compliance requirement imposed is that which pertains to N.J.A.C. 13:35-6.17(e). The amendments made to the remaining sections of the rule are for clarification purposes only and they impose no reporting, recordkeeping or other compliance requirements, nor would they require professional services in order to comply. N.J.A.C. 13:35-6.17(e) prohibits a practitioner from deriving a profit from the sale of goods and devices. The amendment replaces the former 10 percent cap on profits and requires physicians to maintain and produce upon demand specific, detailed records justifying their true and reasonable costs. However, these recordkeeping and reporting requirements are no more than what licensees may ordinarily do in the normal course of conducting business. Compliance with the amendment should not require the expenditure of any additional revenue for equipment, hiring of personnel or professional services as these requirements are those business practices which are normally performed in a practitioner's office. However, this rule makes them mandatory and requires specificity and production of documentation upon demand.

The Board cannot further minimize the impact on small businesses because it would undermine the intent of the rule which is to protect the public's health and welfare by assuring that practitioners derive their profit from the rendering of professional services not the sale of goods and devices.

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

13:35-6.17 Professional fees and investments, prohibition of kickbacks

(a) For the purposes of this rule, the following words and terms shall have the following meanings:

1. "Health care service" means a business entity which provides on an in-patient or out-patient basis: testing for or diagnosis or treatment of human disease or dysfunction or dispensing of drugs or medical devices for the treatment of human disease or dysfunction. Health care service includes, but is not limited to, a bioanalytical laboratory, pharmacy, home health care agency, **home infusion therapy company,** rehabilitation facility, nursing home, hospital, or a facility which provides radiologic or other diagnostic imaging services, physical therapy, ambulatory surgery, or ophthalmic services.

2. "Financial interest" means a monetary interest of any amount held by a practitioner personally or through immediate family, as defined herein, in a health care service [owned in whole or in part, and] to which the practitioner's patients are referred. It includes the offer or receipt, directly or indirectly, by the practitioner or immediate family of anything of more than negligible value as a result of a patient's purchase of a prescribed service, goods or device from the person or entity providing this. **Except as set forth in (a)2i through vii below,** "[Financial] **financial** interest" includes a licensee's financial interest in a contractual arrangement with a **licensed** health care facility (such as a hospital, nursing home or clinic, etc.), whereby the licensee agrees to provide health care services on referral, for example, cardiac or radiologic diagnostic testing, to patients including those receiving Emergency Room care or [admitted to] **inpatients or outpatients of** the health care facility. "Financial interest" does not include [a straight salary.] **the following:**

i. A straight salary or an annual retainer which is not related to the volume of patients treated;

ii. A contractual arrangement with a licensed health care facility or health care service to provide non-clinical services such as quality

assurance review, peer review, administrative or supervisory services, duties (other than hands-on care) of a department chair or medical director, or similar services;

iii. A contractual arrangement with a licensed health care facility to provide health care services to patients who are medically indigent, under which the facility pays the licensee reasonable fees for services rendered. For purposes of this rule, "medically indigent" patient means any patient meeting the requirements for indigency established by the State Medicaid program, by the Federal government for purposes of meeting Hill-Burton obligations, by the State Department of Health for purposes of reimbursing hospitals for uncompensated care, or by any other governmental program for purposes of providing health care to indigent individuals;

iv. A contractual arrangement (including a faculty practice plan) with a licensed health care facility to provide health care services to patients of the facility, under which the licensee agrees to accept payments from third party payors (plus any deductible or coinsurance amounts) as payment in full for such services; in the absence of a third party payment mechanism, the licensee shall have agreed to provide such services at no charge or the facility shall have agreed to pay the licensee reasonable fees for services rendered;

v. A contractual arrangement with a licensed health care facility to provide health care services to patients of the facility, under which the contract establishes the maximum fees which can be charged for the services or the facility approves the licensee's fees in advance, and the services to be provided are part of the facility's normal utilization review process;

vi. A contractual arrangement with a licensed health care facility in connection with a residency or externship program conducted by the facility in affiliation with a medical school accredited by the American Council on Graduate Medical Education or the American Osteopathic Association under which the facility pays the licensee (either directly or through a professional corporation or nonprofit corporation or other appropriate entity) for administration, teaching, supervision and/or hands-on care, and under which the facility or licensee (directly or indirectly) bills patients and third party payors for hands-on care; or

vii. A contractual arrangement (either individually or through an individual practice association, competitive medical plan, or similar organization) with a licensed health care facility to provide health care services to the facility's employees and/or beneficiaries of the facility's health plan, and/or to provide services to eligible individuals pursuant to an agreement between the facility and a health maintenance organization, other managed health care organization, insurance company, union welfare plan, employers or other similar organizations.

3. "Immediate family" means the practitioner's spouse and children, the practitioner's siblings and parents, the practitioner's spouse's siblings and parents, and the spouses of the practitioner's children.

4. "Practitioner" means a physician, podiatrist, bioanalytical laboratory director or specialty laboratory director, acupuncturist, midwife, certified nurse midwife, **physician assistant** and all other categories of licensee now or henceforth under the jurisdiction of the State Board of Medical Examiners.

5. "Significant beneficial interest" means any financial interest including an equity or ownership interest in a practice or in a commercial entity holding itself out as offering health care service as defined in (a)1 above. This interest does not, however, include ownership of a building or component thereof wherein the space is leased, in writing, to a person or entity at the prevailing rate under a straight lease agreement (that is, a fixed fee for a fixed term), or any interest held in **publicly traded** securities [publicly traded in the United States].

6. "Grandfathered" means a personal attribute and status of an individual licensee derived from a significant beneficial interest in a health care service, held on or before July 30, 1991, which renders him or her exempt from the referral prohibitions set forth in N.J.S.A. 45:9-22.5. Those practitioners employed by or professionally affiliated with a grandfathered practitioner do not share the "grandfathered" status.

(b) A practitioner shall not refer a patient or direct an employee of the practitioner to refer a patient to a health care service in which the practitioner or the practitioner's immediate family, or the practitioner in combination with the practitioner's immediate family, has a significant beneficial interest, unless the practitioner held the interest prior to July 31, 1991 and discloses that interest to the patient as required herein **or as otherwise permitted in this rule. Such a practitioner shall be deemed to be grandfathered. If a licensee professionally affiliated with a grandfathered practitioner obtains a significant beneficial interest in the same health care service in which the grandfathered practitioner holds an interest, on or after July 31, 1991, that practitioner shall not refer patients to that service.** A licensee professionally affiliated with a **grandfathered** practitioner [required to disclose a significant beneficial interest shall disclose that practitioner's interest] **who does not hold an interest in that health care service may refer patients to that service so long as all of the disclosure requirements set forth below are met.** Disclosure shall be made by the practitioner in ways appropriate to the professional circumstances including conspicuous posting of a written disclosure form prepared as set forth below, at least 8½ by 11 inches in size, in the practitioner's waiting room in all office locations. The patient shall also be provided with a personal copy of the notice. The notice format shall be as follows:

Public law/rule of the State of New Jersey/Board of Medical Examiners mandates that a physician, podiatrist and all other licensees of the Board of Medical Examiners inform patients of any significant financial interest held in a health care service.

Accordingly, take notice that practitioners in this office do have a financial interest in the following health care service(s) to which patients are referred:

(LIST APPLICABLE HEALTH CARE SERVICES)

You may, of course, seek treatment at a health care service provider of your own choice. A listing of alternative health care service providers can be found in the classified section of your telephone directory under the appropriate heading.

1.-2. (No change.)

3. **Neither the prohibition on referral, nor** [The] disclosure requirements of this rule [do not] apply in the case of a practitioner providing health care services pursuant to a prepaid capitate contract with the Division of Medical Assistance and Health Services in the Department of Human Services. [In addition, disclosure is not required of practitioners having a significant beneficial interest in the provision of services pursuant to a hospital contract to inpatients or patients receiving hospital Emergency Room services, notwithstanding that the practitioner has made the referral for the service, provided that a designated committee of the hospital reviews and confirms the medical justification and the reasonableness of the fee for each such referred service of the practitioner. Disclosure is mandatory for all other inpatient settings and situations.]

4. (No change.)

(c) The following pertain to miscellaneous monetary arrangements:

1. A licensee shall not, directly or indirectly, give to or receive from any licensed or unlicensed source a gift of more than nominal (negligible) value, or any fee, commission, rebate or bonus or other compensation however denominated, which a reasonable person would recognize as having been given or received in appreciation for or to promote conduct by a licensee including: purchasing a medical product, ordering or promoting the sale or lease of a device or appliance or other prescribed item, prescribing any type of item or product for patient use, or making or receiving a referral to or from another for professional services. For example, a licensee who refers a patient to a health care service (such as a cardiac rehabilitation service or a provider of durable medical equipment or a provider of testing services) shall not accept from nor give to the health care service a fee directly or indirectly in connection with the referral, whether denominated as a referral or prescription fee or consulting or supervision fee or space leasing in which to render the services (other than as permitted in (h) below), or by any other name, whether or not the licensee has a financial interest as defined in (a) above.

i. (No change.)

ii. This section shall be construed broadly to effectuate its remedial intent. It shall not, however, prohibit a flat-fee payment by a licensee for regular advertising services (including placement on a commercially-sponsored "referral list" of licensed health care providers). [nor] **It** shall [it] **not** prohibit receipt of reasonable payment for bona fide participation as a speaker at a professional workshop or seminar **nor attendance by non-faculty licensees at a continuing medical education program whereby in conformance with the guidelines of the American Council on Continuing Medical Education commercial sources have been utilized in calculating the registration fees to be charged to all participants.** [, nor] **It shall not** prohibit receipt of normal, commercially reasonable discounts for volume purchases from vendors, nor prohibit compensation for the sale of medical equipment by a licensee of the Board, in the disclosed capacity of a salesman, to another licensed health care professional. It shall not prohibit a licensee's participation by permit in an FDA-approved research project.

2.-3. (No change.)

4. A bill for services **of members of a professional service corporation, or services** of a physician's employees which have been rendered by licensed professionals authorized to provide services without medical supervision, shall identify the provider of service by name and degree, **as well as the name of the service entity (if different).**

5. A licensee may bill for **only the actual cost of** prescribed professional/technical services (including, for example, laboratory services, radiologic and EKG consultation, fabrication of eyeglasses, orthotics, etc.) ordered by or through the licensee, with the patient's consent, provided that the name and address of the provider of the professional/technical services and the cost as billed to the licensee, are disclosed to the patient. A licensee may contract with and provide professional/technical services to the prescribing licensee, supplying the information necessary for incorporation in the bill prepared by the prescribing licensee to the patient.

(d) A licensee shall not charge for "free samples" or other similar items obtained by the licensee from any source.

(e) Acting within the scope of lawful practice, a licensee may offer to and provide to a patient medications, including a prescription drug or an over-the-counter preparation or vitamin or food supplement, but only in accordance with the requirements of P.L. 1991, c.187, sec. 46 (N.J.S.A. 45:9-22.11) and N.J.A.C. 13:35-6.6. A licensee may also offer to and provide to a patient medical goods and devices under certain circumstances, as set forth in this rule and defined as follows: medical goods and devices include, but are not limited to, such items as hearing aids, eyeglasses, contact lenses, prosthetic devices, orthotics, etc.

1. A Board licensee shall derive his or her net professional income from the rendering of professional service. The practitioner may recoup the [net discounted] **actual** cost of providing those goods and devices which are ancillary to the primary professional service **as well as the reasonable costs associated with the provision thereof,** [plus an administrative cost not to exceed 10 percent of the cost of item. The] **but the** licensee shall not charge for these items a fee [intended to generate] **which generates** a profit. **Licensees shall be required to maintain specific detailed and itemized records justifying the fees charged for goods and devices, and shall provide such records to the Board upon demand.**

i.-iii. (No change.)

2.-3. (No change.)

4. The requirement to charge [no more than true cost plus 10 percent for an item prescribed and sold] **a fee which does not generate a profit** shall not apply to a hearing aid dispenser licensed pursuant to N.J.S.A. 45:9A-1 et seq. However, the customer receipt required by N.J.A.C. 13:35-8.14 shall clarify "cost" of earmold and of hearing aid by designating it as the "retail price" of each.

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

(h) The following pertain to real estate and medical equipment arrangements:

1.-4. (No change.)

5. A licensee who owns or practices in premises used for the performance of personal medical services including, but not limited to, ambulatory surgery services but not holding a Certificate of Need from the State Department of Health, shall not charge, or permit or condone a charge or "facility fee" separate from the fee for professional services. A facility fee may, however, be charged by a licensee who is a registered Medicare provider of surgical services **to Medicare beneficiaries,** who is billing pursuant to criteria for such fee established by rules of the United States Department of Health and Human Services.

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

(a)

DIVISION OF CONSUMER AFFAIRS
STATE BOARD OF MEDICAL EXAMINERS
Hair Replacement Techniques
Proposed New Rule: N.J.A.C. 13:35-6.21

Authorized By: Board of Medical Examiners,
Charles A. Janousek, Executive Director.
Authority: N.J.S.A. 45:9-2.
Proposal Number: PRN 1993-637.

Submit written comments by January 5, 1994 to:
Charles A. Janousek
Executive Director
New Jersey State Board of Medical Examiners
28 West State Street
Trenton, New Jersey

The agency proposal follows:

Summary

The State Board of Medical Examiners is proposing a new rule to establish standards for physicians to follow if they participate in hair transplantation techniques. The Division of Consumer Affairs has alerted the Board to a large number of consumer complaints concerning the practices involved in certain hair replacement techniques. It appears that there may be business enterprises within New Jersey, employing physicians to perform what is known as an implanted prolene loop procedure or the dermal retention technique, which basically involves the suturing of a hairpiece to the scalp with prolene stitches. The complications arising from this procedure can be far ranging, and indeed life threatening. The Board has had the opportunity to consider the comments of Harold E. Pierce, M.D., concerning the scalp suture technique. Specifically, Dr. Pierce has described his experiences in performing the technique and in treating those who had developed complications. On the suture implantation technique, he wrote:

> "In late 1969 and early 1970, I became aware of a scalp suture implantation technique advocated by Drs. James and Joseph Williams, Plastic and Reconstructive Surgeons at Century City, Beverly Hills, California. This appeared to be an innovative method for attaching a hair piece to the alopecic scalp. Being involved in surgical hair replacement techniques including flaps and punch scalp hair transplant procedures which proved successful, like a few others I embarked on this surgical adventure with some enthusiasm. I have performed a number of these procedures, including several in which infection was encountered obviously due to the patients' inability to satisfactorily wash their hair with any degree of regularity and still maintain the integrity of the hair piece attached to the stainless steel imbricated scalp implant technique. I elected to discard this procedure as being more than high risk in terms of the risk benefit ratio as far as the patient was concerned."

He also addressed "a technique thought to have originated in Japan of implanting plastic simulated hair fibers with barbs into the scalp."

> "These fibers, many which were made by Monsanto and were really designed for the manufacture of carpets were inserted via a needle produced aperture in the scalp enabling thousands of these foreign body fibers to be implanted into a bald scalp. ... Subsequently, a number of these patients appeared in my office with clinical evidence of fever, infection, purulent exudate exuding from the scalp with cervical

lymphadenopathy, pain and severe discomfort. Many of these patients had spent thousands of dollars to undergo this procedure and it was costly for them to undergo scalp surgical debridement to manually extract the fibers from their embedded position in the scalp requiring topical and systemic antibiotics to offset infection generally due to staph or strep organisms."

He noted that these difficulties caused a resurgence of interest in the "implanted prolene loop procedure designed to facilitate the placement of the hair piece using special clips attached to these prolene loops." He noted that most of these procedures were being performed at business establishments and hair replacement salons operated by lay people. He further remarked:

"Understandably, this has proven to be a very lucrative business venture and these entrepreneurs often times recruited surgical residents to moonlight in their establishments and performed this invasive surgical technique to facilitate the later application of the prosthesis attached to these prolene loops.

A number of these cases were examined by me in my office subsequently suffering from pain, purulent exudate, infection, and fever requiring immediate debridement of the scalp with removal of the hair piece and the implant attachment. The patients were placed on topical and systemic antibiotics to facilitate healing. Many were left with significant permanent scarring.

In conclusion, while this hair replacement technique is still marketed to the unknowing public as a baldness panacea enthusiastically with anticipated improved aesthetic appearance of the patient with the balding problem, these benefits are enthusiastically forecast with no mention of the significant side effects and the fact that a number of deaths due to undercurrent (sic) infection associated with the septicemia are not mentioned as possible complications or risks. In the medical environment today, these procedures are and should be discontinued as a serious violation of the standard of medical care. Certainly, any aesthetic cosmetic surgical procedure designed to enhance one's appearance is not worth the risk of encountering the foregoing complications no matter how insignificant they may appear to be; the public needs to be made generally aware of the risks encountered in undergoing this hair replacement procedure. The establishments performing this procedure market heavily, spending thousands of dollars enticing thousands of patients to undergo these procedures. Frankly they prey on the ignorance of the general public while they collect thousands of dollars from these unwitting patient victims."

The proposed rule forbids the use of the implanted prolene loop procedure in this State. It appears to the Board, that based on its understanding of basic surgical, biological and immunological principles, there is such a high risk that the use of even very inert material, such as prolene, as an external suture can lead to an inflammation and infection such that the procedure itself should be proscribed. By this rule, doctors performing hair transplantation techniques are reminded that they are rendering a medical service and thus their practice must comport with appropriate standards. Thus, this rule would require maintenance of specific medical records relating to the conduct of all medical procedures relating to hair transplantation. Violation of the rule will be sanctionable under N.J.S.A. 45:1-21(e) for professional misconduct. Finally, the rule obligates a licensee, such as a subsequent treating physician who may be called upon to treat the infection resulting from the process, to report a violation of the rule to the Board, pursuant to the colleague reporting mandate set forth at N.J.S.A. 45:9-19.5.

Social Impact

It is expected that this rule will have the salutary effect of protecting consumers from a risky medical procedure, with complications which can place their lives at risk. Those who do seek out hair transplantation services of these enterprises will be assured that the physicians associated with these enterprises provide medical services in accordance with appropriate standards of care relating to sanitation, sterilization, medication storage and maintenance and recordkeeping.

Economic Impact

While this rule may have a detrimental economic impact on those few physicians associated with these enterprises which have relied on this technique, there can be expected to be countervailing savings in the costs of medical treatment for those who might have suffered complications arising out of dangerous practices. By giving licensees clear guidance as to the techniques which it will deem impermissible and enhancing the Board ability to detect abuses through a clear delineation of the colleague reporting obligation, the Board hopes to protect consumers from dangerous and costly "treatment."

This rule will have a detrimental economic impact on those hair replacement businesses staffed by licensee-surgeons whose "moonlighting" performance of either the suture implantation technique or the implanted prolene loop procedure will hereby be prohibited. If licensees are needed to perform the hair replacement techniques in question, then that portion of the hair-replacement businesses' income derived from providing such services will be eliminated, although that income may to some extent be recouped by continuing to offer prospective clients other techniques for hair replacement.

Regulatory Flexibility Analysis

This proposed new rule does not impose any reporting (beyond that already expected of licensees to notify the Board of colleagues engaging in unprofessional conduct, as mandated by N.J.S.A. 45:9-19.5) or recordkeeping (beyond that already required by N.J.A.C. 13:35-6.5) requirements on small businesses, except that a log must be maintained that will be used solely to record any and all complications that follow a hair transplantation procedure. This requirement is separate from requirements mandated by the patient's record rule and thus constitutes an additional recordkeeping requirement for enforcement purposes. A compliance requirement, in that licensees are forbidden from performing certain hair replacement techniques, is imposed. No professional services are needed to comply with these requirements, and, as necessary to protect the public health, no lesser requirements or exceptions are provided based on business size.

Full text of the proposed new rules follows:

13:35-6.21 Hair replacement techniques

(a) As used within this section, the following terms have the following meanings unless the content indicates otherwise:

1. "Cosmetic suturing retaining process" means a method of attaching a unit of hair to the scalp via a suturing (retaining) process.

2. "Implanted prolene loop procedure" means a surgical insertion of continuous prolene sutures in and out of the scalp in concentric circles to which a hair weave is attached.

3. "Licensee" means a physician subject to regulation by the New Jersey Board of Medical Examiners.

(b) No licensee shall perform or assist in the performance of a hair replacement technique using the implanted prolene loop procedure or any other cosmetic suturing retaining process involving the use of suture material in the scalp.

(c) Nothing in this section shall preclude licensees from performing medically recognized hair transplantation techniques.

(d) Licensees shall complete and maintain patient medical records pursuant to N.J.A.C. 13:35-6.5 which accurately reflect the transplantation technique utilized in any hair replacement procedure, a brief history pertinent to the procedure, any complications which ensued, any medications prescribed and follow-up directed.

(e) Licensees shall assure that prior to the initiation of a permitted hair transplantation technique, the risks and benefits have been discussed with the patient and informed consent has been obtained.

(f) Licensees shall, by means of a telephone number by which they shall be available, provide appropriate medical coverage on a 24-hour basis to all patients undergoing a hair transplantation technique and shall maintain a log for the sole purpose of recording all complications. This log shall be available for inspection by the Board upon request.

(g) Violation of any of (b) through (f) above may be deemed to constitute one or more of the following:

1. Gross malpractice, gross neglect, or gross incompetence in the practice of the licensed profession pursuant to N.J.S.A. 45:1-21(c);

2. Professional misconduct in the practice of the licensed profession, pursuant to N.J.S.A. 45:1-21(e);

3. A failure to comply with the provisions of an act or regulation administered by the Board, pursuant to N.J.S.A. 45:1-21(h); or

4. Unprofessional conduct which would present an imminent danger to the individual patient or to the public health, safety or welfare, within the meaning of N.J.S.A. 45:9-19.5.

(h) Licensees who are in possession of information which reasonably indicates that another licensee has engaged in a prohibited hair replacement technique shall be obligated to report such information to the Board pursuant to N.J.S.A. 45:9-19.5.

(a)

DIVISION OF CONSUMER AFFAIRS STATE BOARD OF PHYSICAL THERAPY

Fees and Charges

Proposed Amendment: N.J.A.C. 13:39A-1.4

Authorized By: Board of Physical Therapy, Stanley Mendelson, P.T., Chair.

Authority: N.J.S.A. 45:1-3.2 and 45:9-37.18(f).

Proposal Number: PRN 1993-638.

Submit written comments by January 5, 1994 to:

Susan Gartland, Executive Director
State Board of Physical Therapy
Post Office Box 45014
Newark, New Jersey 07101

The agency proposal follows:

Summary

The State Board of Physical Therapy is proposing amendments to N.J.A.C. 13:39A-1.4, Fees and charges, that will serve two purposes. The proposed amendments will not only clarify the fee categories so as to bring them into conformity with the fee categories of other professional boards within the Division, but will also increase fees pursuant to N.J.S.A. 45:1-3.2, which requires the Board to be self-funding by generating revenue from fees that shall meet but not exceed the operating costs of the Director and the Board. These amendments will enable the Division to comply with the statute.

The proposed amendments involve various clarifications. The examination/temporary license fees for physical therapists and physical therapist assistants have been restructured, with the examination fee to be paid directly to the examination service administering the National Physical Therapist Examination and the temporary license fee transformed into an independent fee category. The initial licensure fee for physical therapists and physical therapist assistants will henceforth be divided into two separate categories with pro-rated fees depending on whether the fee is being paid during the first or second year of the biennial renewal period. Separate fee categories were created for duplicate certificates, depending on whether or not the request is for a wall certificate. The fee for failing to renew a license in a timely fashion has also been clarified, with a late renewal fee applicable within the first month after failing to pay the biennial renewal licensure fee and a reinstatement fee that will be applicable after that one-month deadline for individuals who, having failed to renew their license within the one-month late fee period, will need to be reinstated as licensees of the Board. The recordation of name change and issuance of replacement license and wall certificate will hereby cease to exist as a fee category.

To cover the Board's expenses, certain increases have been proposed. The biennial renewal fee that was previously $90.00 for both physical therapists and physical therapist assistants will be reestablished at $110.00 for physical therapists and $100.00 for physical therapist assistants. The reinstatement fee has been increased from $90.00 to $150.00. The duplicate license fee has increased from $10.00 to $25.00 for general duplicate licenses and $40.00 for the duplicate wall certificate. The certificate of licensure status fee has been updated from $25.00 to $40.00. The temporary visiting license fee has risen from $90.00 to $100.00.

Social Impact

Pursuant to N.J.S.A. 45:1-3.2, the Board must as previously noted be self-funding by establishing fees that meet but do not exceed the operating costs of the Board. The proposed amendments will enable the Division to continue to comply with this statute. The amendments will have no social impact upon the public.

Economic Impact

The proposed amendments to the Board's fee schedule will affect all applicants for licensure and all current licensees in that they will be required, in various instances, to pay increased licensing fees. Those fee increases have been necessitated by the Board's increased expenses, which must be covered by the Board pursuant to N.J.S.A. 45:1-3.2. It is unlikely that the proposed fee schedule will result in an increase in fees charged to the consumer since these fee increases constitute a nominal business expense increase for licensees ($10.00 per year for physical therapists and $5.00 per year for physical therapist assistants).

Regulatory Flexibility Analysis

The proposed amendments to N.J.A.C. 13:39A-1.4 will apply to all of the approximately 3,700 licensees of the Board of Physical Therapy. The Board estimates that all of the licensees would be categorized as "small businesses" according to the criteria of the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq.

Compliance requirements consist of paying increased licensing fees in a timely manner. No reporting or recordkeeping requirements exist, nor are any professional services required. Since the fees have been set at the lowest amount that will cover the Board's operating expenses, the intent of the Regulatory Flexibility Act to minimize adverse economic impact has been implemented.

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

13:39A-1.4 Fees and charges

(a) The following fees shall be charged by the New Jersey State Board of Physical Therapy:

[1. Examination fee for Physical Therapist (includes temporary license) ..... $185.00]

1. Application fee for Physical Therapist and Physical Therapist Assistant $125.00

[2. Examination fee for Physical Therapist Assistant (includes temporary license) ..... $160.00]

2. Temporary license for Physical Therapist and Physical Therapist Assistant ..... $ 75.00

[3. Initial licensure fee for Physical Therapist and Physical Therapist Assistant ..... $150.00]

3. Initial licensure fee, Physical Therapist:

If paid during first year of biennial renewal period: $110.00

If paid during second year of biennial renewal period: ..... $ 55.00

Initial licensure fee, Physical Therapist Assistant:

If paid during first year of biennial renewal period: $100.00

If paid during second year of biennial renewal period: ..... $ 50.00

[4. Fee for issuance of a temporary license pursuant to N.J.S.A. 45:9-37.29(b) to practice on a temporary basis to assist in a medical emergency or to engage in a special project or teaching assignment $ 90.00]

4. Biennial renewal fee:

Physical Therapist $110.00

Physical Therapist Assistant $100.00

[5. Biennial renewal licensure fee: Physical Therapist and Physical Therapist Assistant ..... $ 90.00]

5. Late renewal fee: $100.00

[6. Restoration charge for lapsed license ..... $ 90.00]

6. Reinstatement fee $150.00

7. Temporary visiting license pursuant to N.J.S.A. 45:9-37.29(b) to practice on a temporary basis to assist in a medical emergency or to engage in a special project or teaching assignment $100.00

[7.]**8.** [Provision of] Duplicate license [or wall certificate ..... $ 10.00] **$ 25.00**

9. Duplicate wall certificate ..... $ 40.00

[8.]**10.** [Provision of certification] **Certification** of eligibility for examination (for persons not yet seeking the issuance of a temporary license) [or certification of licensure status] ..... $ 25.00

11. Certification of licensure status ..... $ 40.00
[9. Recordation of name change and issuance of replacement license and wall certificate ..... $ 25.00]

(a)

DIVISION OF CONSUMER AFFAIRS
STATE BOARD OF PHYSICAL THERAPY
Examination Standards for Physical Therapists and Physical Therapist Assistants
Recognition of Scores—Standardized Examination
Proposed Amendments: N.J.A.C. 13:39A-5.2, 5.4 and 5.6

Authorized By: Board of Physical Therapy, Stanley Mendelson, P.T., Chair.
Authority: N.J.S.A. 45:1-3.2 and 45:9-37.18(f).
Proposal Number: PRN 1993-639.

Submit written comments by January 5, 1994 to:
Susan Gartland, Executive Director
State Board of Physical Therapy
Post Office Box 45014
Newark, New Jersey 07101

The agency proposal follows:

Summary

The State Board of Physical Therapy is proposing identical amendments to N.J.A.C. 13:39A-5.2, Examination standards for applicants for licensure as physical therapists, and N.J.A.C. 13:39A-5.4, Examination standards for applicants for licensure as physical therapist assistants. The amendments consist of requiring applicants to achieve a score of at least 600 based on a scale of 200 to 800, rather than continuing to require a converted score of 70 percent, which corresponds to 1.5 standard deviations below the mean raw score of the national norm.

The current method of scoring, "mean referencing," is based on an applicant's knowledge scored against all other applicants. If a test group does poorly, the passing score is lowered, thereby creating a group of licensees whose knowledge may be suspect. The proposed method of scoring, "criterion referencing," measures the applicant's knowledge against the body of information being evaluated by the examination. The criterion method ensures that the individual who passes the examination has a solid understanding of the principles of physical therapy.

In a related move, the State Board of Physical Therapy is proposing to amend N.J.A.C. 13:39A-5.6, Recognition of scores on standardized examinations administered in other states, in order to require applicants to obtain a score of at least 600 on a scale of 200 to 800. Such an amendment is in keeping with the other two amendments being offered at this time, and is sought by the Board because the standard it creates for licensure in New Jersey through endorsement means that all new licensees will have demonstrated an equally high level of knowledge in their field.

Social Impact

The proposed amendments create a more statistically reliable method of assessing an individual's abilities to practice as a physical therapist or a physical therapist assistant. Both the Board and the physical therapy patient should benefit from the assurance that, because examination scores adequately and reliably gauge an individual's competence, only qualified individuals will be licensed to practice physical therapy.

The passing score of 600 has been adopted by the delegates to the Federation of State Boards of Physical Therapy. Accordingly, an individual who receives a passing score will be able to rely upon the knowledge that the score will be acceptable to any member state for endorsement purposes.

Economic Impact

The proposed amendments will have no economic impact on consumers, applicants for licensure or the Board. The amendments merely change the method by which required examinations are scored.

Regulatory Flexibility Statement

The proposed amendments will only affect individual applicants for licensure, and not small businesses as defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. No regulatory flexibility analysis is, therefore, necessary.

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

13:39A-5.2 Examination standards for applicants for licensure as physical therapists

Applicants for licensure as physical therapists submitting satisfactory proof of educational attainment as set forth in N.J.A.C. 13:39A-5.1 shall be admitted to take the written examination administered by the Board or such standardized examination as the Board may select pursuant to N.J.S.A. 45:9-37.25. Upon satisfactory passage of such examination, an applicant shall be deemed eligible for licensure. Satisfactory passage of the examination shall be attained upon receipt of a [converted score of 70 percent which corresponds to 1.5 standard deviations below the mean raw score of the national norm] **score of at least 600 based on a scale of 200 to 800.** Applicants must pass every portion of the examination at the same sitting and will not be permitted to take only those portions of the examination which previously have been failed.

13:39A-5.4 Examination standards for applicants for licensure as physical therapist assistants

Applicants for licensure as physical therapist assistants submitting satisfactory proof of educational attainment as set forth in N.J.A.C. 13:39A-5.3 shall be admitted to take the written examination administered by the Board or such standardized examination as the Board may select pursuant to N.J.S.A. 45:9-37.25. Upon satisfactory passage of such examination, an applicant shall be deemed eligible for licensure. Satisfactory passage of the examination shall be attained upon receipt of a [converted score of 70 percent which corresponds to 1.5 standard deviations below the mean raw score of the national norm] **score of at least 600 based on a scale of 200 to 800.** Applicants must pass every portion of the examination at the same sitting and will not be permitted to take only those portions of the examination which previously have been failed.

13:39A-5.6 Recognition of scores on standardized examinations administered in other states

The Board will recognize standardized examination scores obtained as a result of an examination administered in another state or jurisdiction in satisfaction of its examination requirement provided that the applicant has obtained a [converted score of 70 percent which corresponds to 1.5 standard deviations below the mean raw score of the national norm] **score of at least 600 on a scale of 200 to 800** and has passed all portions of the examination at the same sitting.

(b)

DIVISION OF CONSUMER AFFAIRS
STATE BOARD OF PROFESSIONAL ENGINEERS AND LAND SURVEYORS
Practice of Land Surveying
Subdivision Plats
Proposed Amendment: N.J.A.C. 13:40-5.1

Authorized By: State Board of Professional Engineers and Land Surveyors, Lewis Conley, Jr., President.
Authority: N.J.S.A. 45:8-27 et seq.
Proposal Number: PRN 1993-640.

Submit written comments by January 5, 1994 to:
Arthur Russo, Executive Director
State Board of Professional Engineers and Land Surveyors
Post Office Box 45015
Newark, New Jersey 07101

The agency proposal follows:

Summary

The State Board of Professional Engineers and Land Surveyors is proposing an amendment to N.J.A.C. 13:40-5.1, which sets forth the

specific standards that govern and define the practice of land surveying and the preparation of land surveys. The proposed amendment formalizes, for the benefit of licensed land surveyors, the existing regulation by incorporating Board policy regarding survey work that involves subdivision plats.

In paragraph (m)1, the proposed amendment clarifies that, in the preparation of subdivisions, licensees must provide survey information that is complete enough to enable a subsequent licensee to lay out newly described lots relying on the information supplied by the original surveyor. The clarification is offered to ensure that a licensee understands his or her professional responsibilities when preparing a subdivision.

Proposed new paragraph (m)2 addresses situations in which a newly described lot is adjacent to or abutting a perimeter line. In these instances, a licensee will be required to conduct his or her survey in a manner that guarantees that the perimeter line will be accurately established. The goal here is to specifically establish what should already be common practice for any responsible licensee intent on preparing complete survey work that will allow a subsequent licensee to conduct further survey work.

Proposed new paragraph (m)3 requires a surveyor using another surveyor's boundary information on which a subdivision is based to ensure that the map contains a certification of the licensee who prepared the boundary survey. This provision aims to establish without question the identity of the surveyor or surveyors who deservedly retains both credit and responsibility for the subdivision.

Proposed new paragraph (m)3 also addresses situations in which deeds are used to record minor subdivisions based on an existing plat or plan of survey. In these instances, the surveyor who prepared the boundary map on which the subdivision is based shall provide evidence that the boundary survey was prepared under the licensee's supervision by including a certification complete with the licensee's signature and professional seal so as to establish professional responsibility for the boundary survey and its implementation.

Social Impact

The impact of this proposed amendment will be entirely beneficial for consumers and land surveyors alike. Consumers will benefit because the amendment seeks to enforce high standards regarding the professional conduct of land surveyors. According to the amendment, surveyors will work in a manner that provides appropriate survey information, including if pertinent the accurate establishment of a perimeter line, a certification that identifies the surveyor responsible, and the surveyor's signature and professional seal.

Land surveyors will also benefit socially from this proposed amendment because the same high standards that promise the public that it will receive quality work mean that surveyors should be able to count on appropriate survey information when they assume responsibility for a project, and that they will not be unfairly held accountable for the certification of a boundary survey prepared under the supervision of another licensee.

Economic Impact

The proposed amendment's economic impact on consumers promises to be beneficial. Costly delays or mistakes resulting from insufficient survey information should be avoided in situations in which a licensee assumes responsibility for a project initiated by a previous surveyor because, under the proposed amendment, the previous surveyor must generate survey information that is reasonably sufficient to allow the new surveyor to handle the project without error. Similar efficiency is likely to be encouraged by those paragraphs that call on surveyors to identify themselves and certify only those portions of maps prepared under their supervision.

The economic impact of this amendment on land surveyors should be benign. Granted, under this amendment surveyors will need to invest enough effort to provide appropriate survey information, but as these efforts are already standard practice among responsible licensees, the new requirements will not place any undue burdens on the profession at large.

Regulatory Flexibility Analysis

If, for the purposes of the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., land surveyors are deemed "small businesses," then within the meaning of the statute the following statement is applicable:

The proposed amendment will apply to all licensed land surveyors. Reporting requirements exist only in that in certain circumstances detailed in paragraph (m)3, surveyors will need to certify the boundary survey prepared under their supervision. Recordkeeping requirements exist only in that surveyors will need to generate and maintain survey information that is reasonably sufficient for subsequent land surveyors to follow, and for perimeter lines to be accurately established as necessary. No initial capital costs, costs for professional services or other costs of compliance are anticipated.

The Board considers this amendment to be reasonable and to be the minimum necessary for the protection of the public's interest. Thus the proposed amendment must be uniformly applied to all licensed land surveyors without differentiation as to size of practice.

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

13:40-5.1 Land surveyors; preparation of land surveys

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

(m) [Subdivisions] **Subdivision plats**, whether classified as major or minor, shall be prepared by a licensed land surveyor and shall be based on a new or existing survey of the property being subdivided.[; provided, however, that when an existing plat or plan of survey is used, only the licensed land surveyor who prepared the boundary map on which the subdivision is based shall provide the certification that the boundary survey was prepared under this supervision as required by the map filing law, N.J.S.A. 46:23-9.11(m).]

1. The licensee shall provide appropriate survey information, as set forth above, to permit a subsequent licensed land surveyor to accurately lay out newly described lots.

2. If a newly described lot will be adjacent to or abutting a perimeter line, the licensee shall ensure that the perimeter line is accurately established on the ground.

3. In all instances, including where deeds are used to record minor subdivisions and/or where an existing plat or plan of survey is used, only the licensee who prepared the boundary map on which the subdivision is based may provide the certification on the subdivision plat that the boundary survey is accurate and was prepared under his or her supervision, as required by the Map Filing Law, N.J.S.A. 46:23-9.11(m), and in accordance with N.J.A.C. 13:40-9, Responsible Charge of Engineering or Land Surveying Work.

(n) (No change.)

(a)

DIVISION OF CONSUMER AFFAIRS AUDIOLOGY AND SPEECH-LANGUAGE PATHOLOGY ADVISORY COMMITTEE

Fees and Charges

Proposed Amendment: N.J.A.C. 13:44C-2.2

Authorized By: Emma N. Byrne, Director, Division of Consumer Affairs.

Authority: N.J.S.A. 45:3B-20 and 45:3B-24.

Proposal Number: PRN 1993-641.

Submit written comments by January 5, 1994 to:

Marianne Kehoe, Executive Director
Audiology and Speech-Language Pathology Advisory Committee
Post Office Box 45002
Newark, New Jersey 07101

The agency proposal follows:

Summary

The Division of Consumer Affairs is proposing to amend the Audiology and Speech-Language Pathology Advisory Committee's fee schedule, N.J.A.C. 13:44C-2.2.

The proposed amendments do not increase the biennial renewal fee; rather, the amendments reflect the Division's determination to amend the fee schedules of the professional boards which it regulates in order to accurately and specifically identify the actual elements for which a board incurs expenses and in order to create within the Division a uniform method of assessing and collecting fees from the professional boards. Thus, the application fee has been increased from $10.00 to

$75.00 and the reinstatement fee has been increased from $10.00 to $50.00 in order to more accurately reflect the cost of administrative staff time required to process these applications.

In addition, two new categories of fees have been created: a late renewal category and an initial license category subdivided such that only one-half of the fee is required if payment is made during the second year of a biennial license renewal period. The fee once identified as the fee for a duplicate license or wall certificate has also been subdivided into either a duplicate license fee or a duplicate wall certificate fee. Hereby deleted in the fee for the replacement of license or wall certificate on account of name change.

Social Impact

Pursuant to N.J.S.A. 45:3B-20, the Committee must be self-funding by generating revenue from fees that shall meet but not exceed the operating costs of the Director and the Committee. This proposed amendment will enable the Division to continue to comply with the statute. The amendment will have no social impact upon the public.

Economic Impact

The proposed amendments to the Board's fee schedule will affect all applicants for licensure and all current licensees in that they will be required, in certain instances, to pay increased licensing fees. Those fee increases have been necessitated by the Advisory Committee's increased expenses, which must be covered by the Advisory Committee pursuant to N.J.S.A. 45:3B-20. It is unlikely that the proposed fee schedule will result in an increase in fees charged to the consumer, since these fees constitute a nominal business expense.

Regulatory Flexibility Analysis

The proposed amendment to N.J.A.C. 13:44C-2.2 will apply to all of the approximately 2,700 licensees of the Audiology and Speech-Language Pathology Advisory Committee. The Committee estimates that all of the licensees would be categorized as "small businesses" according to the criteria of the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq.

Compliance requirements consist, in certain cases, of paying increased licensing fees in a timely manner. No reporting or recordkeeping requirements exist, nor are any professional services required. Since the fees have been set at the lowest amount that will cover the Committee's operating expenses, the intent of the Regulatory Flexibility Act to minimize adverse economic impact has been implemented.

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

13:44C-2.2 Fees and charges

(a) The following fees shall be charged by the Advisory Committee:

1. Application fee	[$10.00]	**$75.00**
[2. License fee for two years	$100.00]	
2. Initial license fee		
i. If paid during the first year of a biennial license renewal period		**$100.00**
ii. If paid during the second year of a biennial license renewal period		**$50.00**
3. License renewal fee, biennial		**$100.00**
[3.]**4.** Temporary license [fee for one year] **(one year)**		$50.00
5. Late renewal fee (up to 30 days)		**$50.00**
[4.]**6.** Reinstatement fee **(after 30 days)**	[$10.00]	**$50.00**
[5.]**7.** Certification of licensure to other states	[$25.00]	**$50.00**
[6.]**8.** Duplicate license [or wall certificate] **fee**		$10.00
9. Duplicate wall certificate		**$25.00**
[7. Replacement of license or wall certificate on account of name change	$25.00]	

(a)

DIVISION OF CONSUMER AFFAIRS ADVISORY BOARD OF PUBLIC MOVERS AND WAREHOUSEMEN

Bill of Lading and Insurance Legal Liability

Proposed Amendments: N.J.A.C. 13:44D-4.1 and 4.2

Authorized By: Emma N. Byrne, Director, Division of Consumer Affairs.

Authority: N.J.S.A. 45:14D-6.

Proposal Number: PRN 1993-646.

Submit written comments by January 5, 1994 to:

Diane Romano, Executive Director
Advisory Board of Public Movers and Warehousemen
Post Office Box 45018
Newark, New Jersey 07101

The agency proposal follows:

Summary

In response to numerous consumer complaints, the Board of Public Movers and Warehousemen, through the Director, Division of Consumer Affairs, is proposing to amend its regulation on liability for damage to, or loss of, a shipper's goods by adding measures intended to protect those consumers who do not purchase insurance to cover their goods but rely instead on the usual contractual liability of 60 cents per pound per article. This amount is standard for the industry, nationwide. Where the shipper has not been fully informed of the minimum liability of the mover/warehouseman and the option of making other insurance arrangements, however, or where the damage or loss of goods is due to gross negligence or incompetence on the part of the mover/warehouseman, the Board believes that more stringent liability is in order.

The amendments to N.J.A.C. 13:44D-4.2, Legal liability and insurance, therefore state that while the public mover and/or warehouseman may continue to limit liability by contract to a minimum of 60 cents per pound per article, the limitation shall be null and void and the licensee subject to full liability if any of the three following conditions apply: the mover and/or warehouseman failed to present an Order for Service to the shipper at least one day prior to the actual move and obtain his or her signature, with the date of signature, thus acknowledging receipt; at the same time that the Order for Service was presented, the mover and/or warehouseman failed to present the shipper with the brochure entitled "Important Notice to Consumers Utilizing Public Movers," which advises the shipper of the limitation and of the option of obtaining additional coverage; or the Board determines that the damage or loss of goods is due to gross negligence and/or gross incompetence on the part of the mover and/or warehouseman regarding either the handling of goods or the failure to provide adequate security against theft.

For consistency's sake, the amendments proposed for N.J.A.C. 13:44D-4.2, Legal liability and insurance, are necessarily reflected in amendments proposed for N.J.A.C. 13:44D-4.1, Bill of lading, brochure, estimated cost of services form, order for services form, warehouse receipt; issuance. In specific, the brochure entitled "Important Notice to Consumers Utilizing Public Movers" would now be referred to by name, and the requirement that an Order for Service to be presented to the shipper at least one day prior to the commencement of any moving services for his or her signature, with the date of signature, would now appear in the paragraph concerning the order for services form.

Social Impact

The proposed amendments are intended to ensure that consumers are fully informed regarding the public mover's and/or warehouseman's liability, as well as to correct serious inequities suffered by consumers whose goods are lost or damaged due to gross negligence or incompetence in the provision of moving and/or warehousing services. For example, while 60 cents per pound per article might be acceptable for a worn, heavy desk, that amount is manifestly unfair for a two-pound, $300.00 camera stolen by a warehouseman's employee. The Board anticipates that the proposed amendments will cause its licensees to take greater care of shippers' goods, and to be scrupulous in providing customers with a clear sense of liability and insurance options. Moreover, the consumer should be in a position to investigate those options because

of the provision that notification shall be offered at least one day prior to the commencement of any moving services. As such, the proposed amendments provide a strong consumer-protective measure.

Economic Impact

The proposed amendments will be economically beneficial to consumers by ensuring that they receive adequate information regarding liability and optional insurance coverage of shipped or stored goods. With such information, the consumer can make a reasoned choice whether or not to obtain coverage beyond the usual 60 cents per pound per article. Additional insurance is generally available at either full replacement value (costing approximately $7.50 per $100.00) or at a depreciated value (approximately 50 cents per $100.00). Economic loss is obviously lessened where realistic insurance covers the shipper's goods. Also, in instances of loss due to gross negligence or incompetence, the consumer will benefit monetarily because of the voiding of the contractual limit on liability, enabling him or her to press for a more equitable settlement. Conversely, public movers and warehousemen who do not comply with the liability disclosure requirement, or do not properly discharge their professional responsibilities, will suffer economically because they will be vulnerable to claims for higher amounts than the usual 60 cents per pound per article.

Regulatory Flexibility Analysis

The proposed amendments will apply to all of the approximately 400 licensees of the Board of Public Movers and Warehousemen. The Board estimates that the majority of these entities would be classified as small businesses within the meaning of the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq.

Although the proposed amendments may result in considerable cost to movers and/or warehousemen if required information is not given to the consumer or if the low contractual liability clause is voided, compliance does not directly involve expenditure beyond that possibly incurred for additional executive and supervisory time; obviously, greater attention to the provision of insurance information and the proper rendition of services is implicit in the proposed amendments. However, there are no reporting or recordkeeping requirements and neither capital investment nor professional services are necessary in order to comply.

Because the intent of the proposed amendments is to promote full disclosure of the licensee's liability and consumer insurance options, as well as to encourage more equitable settlements by voiding low contractual liability where there is gross negligence or incompetence, no exemption based upon business size is possible.

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

13:44D-4.1 Bill of lading, brochure, estimated cost of services form, order for service form, warehouse receipt; issuance

(a) Prior to entering into an agreement to render services, every public mover and/or warehouseman shall issue the following to each shipper:

1. **The brochure entitled "Important Notice to Consumers Utilizing Public Movers,"** [A brochure] which shall contain detailed explanations of the following:

i.-iv. (No change.)

2. (No change.)

3. An order for services form which shall include, but not be limited to, all pertinent information such as the date of shipment, storage arrangements, points of origin and destination, the date of delivery, a notice indicating that the shipper acknowledges receipt of the public mover's and/or warehouseman's brochure and the order for insurance. The form shall be fully completed in all respects, **and signed and dated by the shipper at least one day prior to the commencement of any moving services.** No charges shall be affixed to this form. A sample order for service form is provided at Appendix B, incorporated herein by reference. The public mover and/or warehouseman may adopt any form substantially similar to the suggested form outlined herein and in the sample; said form shall contain all of the information outlined in this paragraph.

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

13:44D-4.2 Legal liability and insurance

(a) [The minimum legal liability of a public mover and/or warehouseman shall be 60 cents ($.60) per pound per article.] **The public mover and/or warehouseman may by contract with the shipper limit liability for loss or damage to goods in storage or in transit to a minimum of $.60 per pound per article, provided, however, that such limitation shall be null and void and the public mover and/or warehouseman subject to full liability if any of the following conditions apply:**

1. The public mover and/or warehouseman failed to present an Order for Service to the shipper at least one day prior to the actual move and obtain his or her signature, with the date of signature, thus acknowledging receipt, as required by N.J.A.C. 13:44D-4.1(a)3;

2. At the time that an Order for Service was presented, the public mover and/or warehouseman failed to provide the shipper with the brochure entitled "Important Notice to Consumers Utilizing Public Movers," which informs the shipper that such limitation applies and that the shipper has the option of making other arrangements for insurance coverage for any damage in excess of the minimum liability offered by the mover and/or warehouseman; or

3. A court or administrative finding has been made that the loss of or damage to the shipper's goods was the result of gross negligence and/or gross incompetence on the part of the mover and/or warehouseman and his or her agents and/or employees, whether as to the actual handling of goods or in the failure to provide appropriate security to prevent loss by theft.

(b)-(h) (No change.)

(a)

NEW JERSEY RACING COMMISSION

Thoroughbred Rules

Superfecta

Proposed New Rule: N.J.A.C. 13:70-29.61

Authorized By: New Jersey Racing Commission, Frank Zanzucki, Executive Director.

Statutory Authority: N.J.S.A. 5:5-22 and 30.

Proposal Number: PRN 1993-647.

Submit written comments by January 5, 1994 to:
Michael Vukcevich, Deputy Director
New Jersey Racing Commission
CN 088
Trenton, New Jersey 08625

The agency proposal follows:

Summary

Since July 3, 1992, patrons attending New Jersey racetracks have been able to wager on full race cards from other states on a common pool basis. Through these outlets, New Jersey patrons have been exposed to different types of exotic wagers offered in those states. The superfecta is one of those exotic type wagers that has been exposed to New Jersey patrons and has proven to be successful. As set forth in the proposed new rule, the superfecta is a wagering pool that requires the patron to correctly select the first four finishing horses, in exact order, in a designated race. Because of the difficulty of correctly selecting this order of finish, the payoffs are usually quite large. It is because of these payoffs that patrons have been attracted to this form of wagering.

Social Impact

The social impact of the proposed new rule is positive. These exotic types of wagering pools have proven to be very popular to New Jersey patrons when included in common pools from out-of-State. Wagering pools such as the superfecta offer large payouts and generally encourage widespread participation by racing patrons.

Economic Impact

The economic impact of the proposed new rule is positive. The superfecta is expected to generate increased handle at the New Jersey racetracks which, in turn, will increase State revenue, provide additional purse monies to the horsemen, tracks and breeders programs without additional increased costs.

Regulatory Flexibility Statement

The proposed new rule poses no reporting, recordkeeping or other compliance requirements on small business, as defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. Assuming a racetrack permitholder secures Commission approval for superfecta wa-

gering, it will assume compliance and recordkeeping responsibility inherent in this or any other wagering format. Those track associations which would assume such responsibilities are not small businesses, as each employ more than 100 people. Therefore, a regulatory flexibility analysis is not required.

Full text of the proposed new rule follows:

13:70-29.61 Superfecta

(a) The superfecta (or other approved name) is a form of parimutuel wagering where each bettor selects, in order, the first, second, third and fourth placed horses in the designated superfecta race. The superfecta pool shall be held entirely separate from all other pools, and is not part of a daily double, exacta or other wagering pool.

(b) Superfecta tickets shall be sold in not less than $1.00 denominations.

(c) Races in which superfecta pools shall be conducted shall be approved by the Commission and shall be clearly designated in the program.

(d) If a horse is scratched or declared a non-starter, no further superfecta tickets may be issued designating such horse and all superfecta tickets previously issued designating such horse shall be refunded and the money deducted from the gross pool.

(e) Where a field in a superfecta race is less than seven at wagering time, said race shall not be run as a superfecta. A late scratch after wagering starts will not affect the superfecta.

(f) The net superfecta pool shall be distributed to winning wagers in the following precedence, based on the official order of finish:

1. As a single price pool to those whose combination finished in correct sequence as the first four different betting interests; but if there are no such wagers, then:

2. As a single pool to those whose combination included, in correct sequence the first three different betting interests; but if there are no such wagers, then:

3. As a single price pool to those whose combination included, in correct sequence, the first two different betting interests; but if there are no such wagers, then:

4. As a single price pool to those whose combination correctly selected the first place betting interest only: but if there are no such wagers, then:

5. The entire pool of superfecta wagers shall be refunded for that contest.

(g) If less than four different betting interests finish the race and the contest is declared official, payoffs will be made based upon the order of finish of those betting interests completing the race. The balance of any selection beyond the number of different betting interests completing the race shall be ignored.

(h) If there is a dead heat for first involving:

1. Contestants representing four or more different betting interests, all of the wagering combinations selecting the four betting interests which correspond with any of the betting interests involved in the dead heat shall share in a profit split.

2. Contestants representing three different betting interests, all of the wagering combinations selecting the three dead-heated different betting interests, irrespective of order, along with the fourth place different interest shall share in a profit split.

3. Contestants representing two different betting interests, both of the wagering combinations selecting the two dead-heated different betting interests, irrespective of order, along with the third place and fourth place different betting interest shall share in a profit split.

(i) If there is a dead heat for second involving:

1. Contestants representing three or more different betting interests, all of the wagering combinations correctly selecting the winner combined with any of the three different betting interests involved in the dead heat for second shall share in a profit split.

2. Contestants representing two different betting interests, all of the wagering combinations correctly selecting the winner, the two dead-heated different betting interests, irrespective of order, and the fourth place betting interest shall share in a profit split.

(j) If there is a dead heat for third, all wagering combinations correctly selecting the first two finishers, in correct sequence, along with any two of the different betting interests involved in the dead heat for third share in a profit split.

(k) If there is a dead heat for fourth, all wagering combinations correctly selecting the first three different finishers, in correct sequence, along with any of the different betting interests involved in the dead heat for fourth shall share in a profit split.

(a)

NEW JERSEY RACING COMMISSION

Harness Rules

Superfecta

Proposed New Rule: N.J.A.C. 13:71-27.59

Authorized By: New Jersey Racing Commission,
Frank Zanzucki, Executive Director.
Statutory Authority: N.J.S.A. 5:5-22 and 30.
Proposal Number: PRN 1993-644.

Submit written comments by January 5, 1994 to:
Michael Vukcevich, Deputy Director
c/o New Jersey Racing Commission
CN 088
Trenton, New Jersey 08625

The agency proposal follows:

Summary

Since July 3, 1992, patrons attending New Jersey racetracks have been able to wager on full race cards from other states on a common pool basis. Through these outlets, New Jersey patrons have been exposed to different types of exotic wagers offered in those states. The superfecta is one of those exotic type wagers that has been exposed to New Jersey patrons and has proven to be successful. As set forth in the proposed new rule, the superfecta is a wagering pool that requires the patron to correctly select the first four finishing horses, in exact order, in a designated race. Because of the difficulty of correctly selecting this order of finish, the pay-offs are usually quite large. It is because of these pay-offs that patrons have been attracted to this form of wagering.

Social Impact

The social impact of the proposed new rule is positive. These exotic types of wagering pools have proven to be very popular to New Jersey patrons when included in common pools from out-of-State. Wagering pools such as the superfecta offer large payouts and generally encourage widespread participation by racing patrons.

Economic Impact

The economic impact of the proposed new rule is positive. The superfecta is expected to generate increased handle at the New Jersey racetracks which, in turn, will increase State revenue, provide additional purse monies to the horsemen, tracks and breeders programs without additional increased costs.

Regulatory Flexibility Statement

The proposed new rule poses no reporting, recordkeeping or other compliance requirements on small business, as defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. Assuming a racetrack permit-holder secures Commission approval for superfecta wagering, it will assume compliance and recordkeeping responsibility inherent in this or any other wagering format. Those track associations which would assume such responsibilities are not small businesses, as each employ more than 100 people. Therefore, a regulatory flexibility analysis is not required.

Full text of the new proposed rule follows:

13:71-27.59 Superfecta

(a) The superfecta (or other approved name) is a form of parimutuel wagering where each bettor selects, in order, the first, second, third and fourth placed horses in the designated superfecta race. The superfecta pool shall be held entirely separate from all other pools, and is not part of a daily double, exacta or other wagering pool.

(b) Superfecta tickets shall be sold in not less than $1.00 denominations.

(c) Races in which superfecta pools shall be conducted shall be approved by the Commission and shall be clearly designated in the program.

(d) If a horse is scratched or declared a non-starter, no further superfecta tickets may be issued designating such horse and all superfecta tickets previously issued designating such horse shall be refunded and the money deducted from the gross pool.

(e) Where a field in a superfecta race is less than seven at wagering time, said race shall not be run as a superfecta. A late scratch after wagering starts will not affect the superfecta.

(f) The net superfecta pool shall be distributed to winning wagers in the following precedence, based on the official order of finish:

1. As a single price pool to those whose combination finished in correct sequence as the first four different betting interests; but if there are no such wagers, then:

2. As a single pool to those whose combination included, in correct sequence the first three different betting interests; but if there are no such wagers, then:

3. As a single price pool to those whose combination included, in correct sequence, the first two different betting interests; but if there are no such wagers, then:

4. As a single price pool to those whose combination correctly selected the first place betting interest only: but if there are no such wagers, then:

5. The entire pool of superfecta wagers shall be refunded for that contest.

(g) If less than four different betting interests finish the race and the contest is declared official, payoffs will be made based upon the order of finish of those betting interests completing the race. Balance of any selection beyond the number of different betting interests completing the race shall be ignored.

(h) If there is a dead heat for first involving:

1. Contestants representing four or more different betting interests, all of the wagering combinations selecting the four betting interests which correspond with any of the betting interests involved in the dead heat shall share in a profit split.

2. Contestants representing three different betting interests, all of the wagering combinations selecting the three dead-heated different betting interests, irrespective of order, along with the fourth place different interest shall share in a profit split.

3. Contestants representing two different betting interests, both of the wagering combinations selecting the two dead-heated different betting interests, irrespective of order, along with the third place and fourth place different betting interest shall share in profit split.

(i) If there is a dead heat for second involving:

1. Contestants representing three or more different betting interests, all of the wagering combinations correctly selecting the winner combined with any of the three different betting interests involved in the dead heat for second shall share in a profit split.

2. Contestants representing two different betting interests, all of the wagering combinations correctly selecting the winner, the two dead-heated different betting interests, irrespective of order, and the fourth place betting interest shall share in a profit split.

(j) If there is a dead heat for third, all wagering combinations correctly selecting the first two finishers, in correct sequence, along with any two of the different betting interests involved in the dead heat for third shall share in a profit split.

(k) If there is a dead heat for fourth, all wagering combinations correctly selecting the first three different finishers, in correct sequence, along with any of the different betting interests involved in the dead heat for fourth shall share in a profit split.

TRANSPORTATION

(a)

DIVISION OF TRANSPORTATION ASSISTANCE

Employer Trip Reduction Program (ETRP)
Employee Transportation Coordinator (ETC)
Training; Disclosure of Information

Proposed Amendment: N.J.A.C. 16:50-8.9
Proposed New Rules: N.J.A.C. 16:50-11

Authorized By: Kathy A. Stanwick, Deputy Commissioner, Department of Transportation.

Authority: N.J.S.A. 27:26A-1 to 27:26A-14 (P.L.1992, c.32, "New Jersey Traffic Congestion and Air Pollution Control Act"); N.J.S.A. 27:1A-5, 27:1A-6; and Section 182(d)(1)(B) of the Clean Air Act Amendments (CAAA) of 1990 (42 U.S.C. Section 7511a(d)(a)(B)).

Proposal Number: PRN 1993-664.

Submit written comments by January 5, 1994 to:

Charles L. Meyers
Administrative Practice Officer
Bureau of Policy and Legislative Analysis
Department of Transportation
1035 Parkway Avenue, CN 600
Trenton, New Jersey 08625
(609) 530-5720

The agency proposal follows:

Summary

Proposed rules designed to implement the Employer Trip Reduction Program in New Jersey were published in the New Jersey Register on July 19, 1993. Notice of the final adoption of these rules is published elsewhere in this issue of the New Jersey Register.

In consideration of the comments received regarding these rules and after reevaluation by the Department of Transportation, an amendment and new rules are proposed herein that were, following discussion with the Office of Administrative Law, considered too substantive to publish as changes upon adoption to the final rules. Therefore, this proposal requests comments on these two, new substantive revisions.

The first substantive change clarifies the requirements of an employer transportation coordinator (ETC). The original rule simply required that an affected employer designate an ETC at each work location with 100 or more employees to administer the Employee Commute Options (ECO) program at that work location. The proposed amendment to N.J.A.C. 16:50-8.9 adds the following requirements and clarifications regarding an ETC:

1. An employer is not required to send its ETC to training; however, training is encouraged as a measure of "good faith."

2. The Department will provide employers with a list of approved ETC trainers and training courses.

3. The Department shall issue a request for qualifications of ETC trainers, and shall specify the qualifications and requirements of such trainers.

4. ETC trainers approval shall be for renewable, one-year periods. Renewal may be denied or approval revoked under certain circumstances, in which case an appeal may be made in accordance with N.J.A.C. 16:50-14.

5. The Department will not prohibit an ETC trainer from charging fees for services nor regulate those fees.

The second substantive change delineates the Department's position with respect to disclosure of information, adopting standards that are similar to other State agencies. The intent of this provision is to protect individual employers from exposure or risk as a result of information provided to the Department that could be construed as public information. The proposed new rules at N.J.A.C. 16:50-11 will not allow the disclosure of information except as authorized by the Commissioner according to the following restrictions:

1. The Department of Treasury shall have access to information for the purposes of verifying eligible tax credits and deductions.

2. Employers and duly authorized employees of an employee shall have access to information upon written request. An attorney represent-

ing an employer shall only have access if the attorney has a written signed release from an employer.

3. Federal agents charged with oversight of the Employer Trip Reduction Program or the Employee Commute Options Program shall have access to information.

4. Other interested parties may have access to information as expressly authorized by the Commissioner if their use of such information is consistent with the purposes of the "New Jersey Traffic Congestion and Air Pollution Control Act" and such party guarantees the written confidentiality of such information.

5. Notwithstanding the above, public information shall only consist of the aggregate data that is not identifiable to any individual employer.

6. Information related to violation or penalties shall not be considered confidential and will be accessible.

7. The Department may charge fees for photocopying, reprinting, etc. to cover the costs of providing requested records.

Social Impact

The proposed amendments and new rules clarify training provisions of the Employer Trip Reduction Program and provide for confidentiality of information submitted to the Department by affected employers. These provisions will ensure that the social benefits of the program, namely improving air quality and reducing traffic congestion, will be carried out without unintended adverse consequences.

Economic Impact

The proposed amendment and new rules will protect the economic advantage of employers by ensuring that the information they provide to the Department of Transportation is kept confidential. Employers may, however, incur economic costs if they choose to train their employee transportation coordinator(s), or if they request information from the Department that is authorized for release.

Regulatory Flexibility Statement

The proposed amendment and new rules do not impose any reporting, recordkeeping or compliance requirements on small businesses as the term is defined by the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. Therefore, a regulatory flexibility analysis is not required. The rules apply to employers that have work sites with 100 or more workers per location, which is not considered a small business.

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

16:50-8.9 Requirement for an ETC

(a) An affected employer shall designate an employee transportation coordinator (ETC) at each work location with 100 or more employees to administer the ECO program at that work location.

(b) An affected employer is not required to send its designated ETC to training. However, the Department shall provide affected employers with a list of Department approved ETC trainers and Training courses.

(c) The Department shall issue a request for qualifications (RFQ) for ETC trainers and select candidates from among trainer applicants. To be considered for selection as a candidate trainer, applicants must have four years experience in the direct conduct of adult education classes or courses, and at least two years of education or experience in the field of transportation demand management, transportation planning or closely related field.

(d) To be approved as ETC trainers, candidates must attend and complete a training course developed and sponsored by the Department, and must pass a proficiency examination at the completion of the course. Additionally, all ETC course materials shall be reviewed and approved by the Department. Participation in the ETC Trainer training course shall be at the expense of the candidate trainer.

(e) The Department shall approve ETC trainers for one-year renewable periods. The Department may deny renewal or may revoke the ETC trainer's approval if the Department receives multiple complaints from employers regarding the ETC trainer's conduct of training courses or fees, or if a Department audit of training courses provided by the ETC trainer indicates that such courses are not being conducted as approved by the Department. The ETC trainer may appeal revocation of approval in the same manner as provided for certifiers in N.J.A.C. 16:50-14.

(f) Notwithstanding any other provisions of this chapter, there is no prohibition against an ETC trainer charging a fee for ETC training.

SUBCHAPTER 11. [(RESERVED)] **DISCLOSURE OF INFORMATION**

16:50-11.1 Administration of the Employer Trip Reduction Program

No disclosure of information obtained from and identifiable to specific employers in the course of administering the requirements of the Employer Trip Reduction Program shall be made directly, or indirectly, except as authorized by the Commissioner or his or her representative in accordance with this subchapter.

16:50-11.2 Authorized disclosure of information

(a) Disclosure of any information in the course of administering the ETR Program may be authorized in the following cases for the following purposes:

1. To the Department of Treasury, Division of Taxation, for purposes of verifying eligible expenses and deductions claimed for State income tax purposes;

2. To any properly identified employee or duly authorized representative of an affected employer required to file a compliance plan, APO Survey Report or other information in accordance with this subchapter;

i. Requests for employer information received directly from an employee or duly authorized representative, in writing, will be honored once the identity of the requestor has been verified;

ii. Telephone or informal requests are not to be honored;

iii. Written requests from an attorney or other individual who states that he or she is the employer's representative are not to be honored unless the employer provides the Department with a signed and dated authorization for the release of the specified information;

3. To officers or employees of any agency of the Federal government or New Jersey State government which is lawfully charged with the administration, monitoring or enforcement of an employer trip reduction or employee commute option program;

4. To other interested parties only to the extent and for such purposes that such disclosure will not impede the operation of, and is not inconsistent with, the purposes of the New Jersey Traffic Congestion and Air Pollution Control Act and this subchapter, and as may be expressly authorized by the Commissioner of Transportation. Such persons or agencies requesting information must certify in writing that the confidentiality of the disclosed information will be maintained;

5. To employees, employers, and the public, disclosure of the names, geographic location of affected employers, as well as the percentage of employees by mode, and current aggregate APO of affected employers. Such release shall not include numbers of employees, trip reduction strategies, and amount of incentives identifiable to individual employers. Aggregate data which is not identifiable to individual employers may be released to anyone upon written request to the Department.

6. Information related to violations or penalties shall not be considered confidential and may be released upon request;

7. Any citizen or agency requesting information provided for in this subchapter shall refer to N.J.A.C. 16:1-2.2(f) and (g) regarding the sale of public records and costs associated with duplication of such records.

TREASURY-TAXATION

(a)

DIVISION OF TAXATION

Gross Income Tax
Setoff of Individual Liability
Proposed Amendment: N.J.A.C. 18:35-2.2

Authorized By: Leslie A. Thompson, Director, Division of Taxation.
Authority: N.J.S.A. 54:50-1.
Proposal Number: PRN 1993-642.

Submit comments by January 5, 1994 to:
Nicholas Catalano
Chief, Tax Services
Division of Taxation
50 Barrack Street
CN 269
Trenton, NJ 08646

The agency proposal follows:

Summary

This proposed amendment will correct an erroneous statutory citation in the definition of "rebate" for the purposes of setoff. The former homestead rebate, codified in N.J.S.A. 54:4-3.80, was repealed by P.L. 1990, c.61. Under this legislation, a new rebate program was enacted and can be found at N.J.S.A. 54:4-8.57 et seq.

Social Impact

This proposed amendment will eliminate any confusion that taxpayers or tax practitioners may have concerning the identity of a rebate which may be set off.

Economic Impact

This proposed amendment has no economic impact whatsoever. Though the present rule reference is erroneous, the underlying statute was amended by P.L. 1990, c.61, substituting one rebate program for another. The setoff law in this regard is administered according to the statute, not the rule. Thus, necessary changes were made in administration of the setoff system and the position of creditors and debtors was unaffected by the existence of an erroneous citation in the definition of "rebate."

Regulatory Flexibility Statement

This proposed amendment does not impose reporting, recordkeeping or other compliance requirements on small businesses as defined in the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The amendment merely corrects an erroneous statutory citation and does not compel or prohibit any activity on the part of any entity.

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

18:35-2.2 Definitions

...

"Rebate" means a [Homestead Rebate made pursuant to P.L. 1976, c.72 (C.54:4-3.80 et seq.)] **homestead property tax rebate pursuant to P.L. 1990, c.61 (N.J.S.A. 54:4-8.57 et seq.).**

...

OTHER AGENCIES

(b)

CASINO CONTROL COMMISSION

Gaming Equipment
Rules of the Games
Blackjack Table; Card Reader Device; Physical Characteristics; Inspections
Cards; Number of Decks; Value of Cards
Permissible Additional Wager
Proposed Amendments: N.J.A.C. 19:46-1.10; 19:47-2.2 and 2.17

Authorized By: Casino Control Commission, Joseph A. Papp, Executive Secretary.
Authority: N.J.S.A. 5:12-69(c), 70(f) and 100(e).
Proposal Number: PRN 1993-633.

Submit written comments by January 5, 1994 to:
Barbara A. Mattie, Chief Analyst
Casino Control Commission
Arcade Building
Tennessee Avenue and the Boardwalk
Atlantic City, NJ 08401

The agency proposal follows:

Summary

The proposed amendments would give a casino licensee the discretion to offer a patron the option to make an additional wager at the game of blackjack. Specifically, prior to receiving his or her first two cards, a patron could place an additional wager, up to the amount of his or her original wager, on whether the first two cards dealt to the patron will be of the same suit. A patron who is dealt a king and queen of the same suit or any other combination of the same suit would be paid at odds selected by the casino licensee from various available paycharts.

Social Impact

The proposed amendments are not anticipated to have any significant social impact. The amendments would allow a casino licensee to offer an additional wager in the game of blackjack, which may increase interest and participation among patrons.

Economic Impact

The proposed amendments would permit casino licensees to make use of new strategies in table game marketing, which may help them increase participation and gaming revenues. Casinos which elect to utilize this option may benefit by realizing increased revenues at the game of blackjack.

Regulatory Flexibility Statement

A regulatory flexibility analysis is not required for this proposal. The proposed amendments only affect licensed casinos in Atlantic City, none of which are small businesses 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]):

19:46-1.10 Blackjack table; card reader device; physical characteristics; inspections

(a)-(e) (No change.)

(f) If a casino licensee offers **one of** the additional wagers authorized by N.J.A.C. 19:47-2.17, the cloth covering the blackjack table shall **be approved by the Commission and shall** have designated areas for the placement of the additional wager. **If a casino licensee offers the additional wager authorized by N.J.A.C. 19:47-2.17(a)1, the layout shall also have** [and] the payout odds for the additional wager imprinted thereon.

(g)-(h) (No change.)

19:47-2.2 Cards; number of decks; value of cards

(a) (No change.)

(b) The value of the cards contained in each deck shall be as follows:

1.-2. (No change.)
3. An ace shall have a value of:
i. (No change.)
ii. One, if the ace is one of the initial two cards dealt to a player in determination of the additional wager authorized by N.J.A.C. 19:47-2.17(a)1; provided, however, that the value of such ace for all other purposes under this subchapter shall be governed by (b)3i above.
(c) (No change.)

19:47-2.17 Permissible additional wagers
(a) A casino licensee may, in its discretion, offer to all players at a blackjack table the option to make [an] **one of the following** additional wagers [on whether the player's initial two cards shall have a point total either greater than or less than 13,] provided that the casino licensee complies with the notice requirements set forth in N.J.A.C. 19:47-8.3 prior to withdrawing the offer of this option[.]:

1. A wager on whether the player's initial two cards shall have a point total either greater than or less than 13; or

2. A wager on whether the player's initial two cars shall be of the same suit.

(b) Prior to the first card being dealt for each round of play, each player shall make a wager against the dealer as required by N.J.A.C. 19:47-2.3(a) and (d) and, **if given an option to make an additional wager,** shall also indicate whether he or she wishes to [make an additional] wager, **as applicable,** that:

1. The point total of the player's initial two cards shall exceed 13, which wager shall win if the point total does exceed 13; [or]

2. The point total of the player's initial two cards shall be less than 13, which wager shall win if the point total is less than 13[.]; **or**

3. The player's initial two cards shall be the same suit which wager shall win if the initial two cards are of the same suit.

(c) An additional wager [made in accordance with this section] **pursuant to (a)1 above** shall be lost when the point total of the player's initial two cards equals 13.
(d) (No change.)
(e) All winning additional wagers shall be paid [at odds of one to one] immediately after the second card is dealt to each player and prior to any additional cards being dealt to any player at the table. **All winning additional wagers shall be paid at the following odds:**

1. For wagers made pursuant to (a)1 above, one to one; or

2. For wagers made pursuant to (a)2 above, depending on the number of decks in use at the table and the cards received by the player, in accordance with one of the following options as selected by the casino licensee; provided, however, that notice of the payout option selected by the casino licensee or any change thereto shall be provided in accordance with the requirements of N.J.A.C. 19:47-8.3; and provided further, however, that the same payout option shall be used by a casino licensee at all blackjack tables which use the same number of decks of cards:

i. Single Deck Blackjack Tables:
Initial Two Cards

	Option 1	Option 2	Option 3	Option 4
King and queen	50 to 1	10 to 1	5 to 1	25 to 1
Any two cards	2.5 to 1	3 to 1	3 to 1	2.5 to 1

ii. Two Deck Blackjack Tables:
Initial Two Cards

	Option 1	Option 2	Option 3	Option 4
King and queen	10 to 1	5 to 1	25 to 1	20 to 1
Any two cards	3 to 1	3 to 1	2.5 to 1	2.5 to 1

iii. Four Deck Blackjack Tables:
Initial Two Cards

	Option 1	Option 2	Option 3	Option 4
King and queen	5 to 1	25 to 1	20 to 1	50 to 1
Any two cards	3 to 1	2.5 to 1	2.5 to 1	2 to 1

iv. Six Deck Blackjack Tables:
Initial Two Cards

	Option 1	Option 2	Option 3	Option 4
King and queen	5 to 1	25 to 1	20 to 1	15 to 1
Any two cards	3 to 1	2.5 to 1	2.5 to 1	2.5 to 1

v. Eight Deck Blackjack Tables:
Initial Two Cards

	Option 1	Option 2	Option 3
King and queen	5 to 1	25 to 1	50 to 1
Any two cards	3 to 1	2.5 to 1	2 to 1

(f)-(i) (No change.)

(a)

CASINO REINVESTMENT DEVELOPMENT AUTHORITY

Hotel Development Project Eligibility and Conditions Approval Criteria

Proposed Amendment: N.J.A.C. 19:65-2.5

Authorized By: Casino Reinvestment Development Authority, Nicholas R. Amato, Executive Director.
Authority: N.J.S.A. 5:12-144.1 and 5:12-161(f); P.L. 1993, c.159 (N.J.S.A. 5:12-173.1 et seq.).
Proposal Number: PRN 1993-654.

Submit comments by January 5, 1994 to:
Nicholas R. Amato
Executive Director
Casino Reinvestment Development Authority
1014 Atlantic Avenue
Atlantic City, New Jersey 08401

The agency proposal follows:

Summary

On August 30, 1993, the Casino Reinvestment Development Authority (the "Authority") filed with the Office of Administrative Law ("OAL") its adopted emergency amendments and an emergency new rule which set forth certain criteria and conditions of eligbility for projects to be funded out of the $100,000,000 fund for hotel development projects which the Authority was required to set aside pursuant to P.L. 1993, c.159. See 22 N.J.R. 4514(a) (September 20, 1993), and adoption of concurrent proposal published elsewhere in this issue of the New Jersey Register. One of the conditions imposed by the Authority in the emergency amendment to N.J.A.C. 19:65-2.5 was that the project not involve the construction, reconstruction or rehabilitation of any unit which was in existence and used or available for use as of July 1, 1993, the effective date of P.L. 1993, c.159. See N.J.A.C. 19:65-2.5(d)3, 22 N.J.R. at 4515-4516. The Authority's rationale for this condition was that since the object of the Legislature was to increase the number of hotel rooms available for convention attendees and other visitors, projects that simply improved existing space without increasing room inventory would not further that purpose.

In connection with the publication of the Authority's emergency adoption of amendments and new rule, it concurrently proposed those amendments and new rule for comments. See 22 N.J.R. 4514(a). The Authority has received comments in response to that proposal to the effect that use of CRDA funding to rehabilitate existing rooms would accomplish the intent of the Legislature to increase the number of first class hotel rooms in Atlantic City, and that the use of CRDA funds for the rehabilitation of hotel rooms is consistent with P.L. 1993, c.159. The Authority is now persuaded that the blanket prohibition of projects involving hotel units in existence as of July 1, 1993 is unwarranted. The Legislature clearly intended that it was permissible to use the $100,000,000 hotel development fund for "reconstruction" or "rehabilitation" of existing space because it expressly so stated. P.L. 1993, c.159, §8. It is also clear that the Legislature's object was not simply to create hotel rooms, but rather "first class hotel rooms" since only "first class hotel units" are eligible for funding. *Id.* Obviously, therefore, the Legislature was of the view that to attract conventioneers and other visitors to Atlantic City, additional first class hotel space was needed. Inferior units are not suitable for or attractive to convention attendees or other visitors.

The Authority remains convinced that all renovations of existing space should not qualify for funding out of the $100,000,000 fund set aside by P.L. 1993, c.159. However, a limited subject of renovation projects should be permitted. The Authority is persuaded that "reconstruction" or "rehabilitation" projects which involve substantial improvements to existing properties and result in the upgrading of existing hotel units to first class space are within the legislative intendment of P.L. 1993, c.159. This proposed amendment will permit the funding of such projects. Whether a project involves substantial improvements will be determined by the relationship of project costs to the value of the existing structure. If project costs exceed 50 percent of the appraised value of the structure, the test of substantiality is met.

The Authority in studying this change, at one point gave consideration to utilizing the concept of replacement cost, rather than appraised value as a measurement of substantiality. It received an informal comment arguing that the concept of appraised value rather than replacement cost be used because the appraised value takes into account market forces more typically associated with the rehabilitation investment decision such as depreciation and external obsolescence. The Authority agrees and has adopted this approach in the proposed amendment to N.J.A.C. 19:65-2.5(d)3.

In furtherance of the legislative object discussed above, the Authority is also convinced that it must restrict projects for rehabilitation of units in existence and used or available for use as a hotel unit on July 1, 1993 to those projects which will result in hotel units being upgraded to "first class hotel units." A commenter on the emergency amendment to N.J.A.C. 19:65-2.5 submitted that the definition of a "first class hotel unit" should not be tied to the Casino Control Act definition of an "approved hotel" which would require a 325 square foot minimum thereby excluding certain worthy projects. Another informal comment also challenged the Authority's proposed definition of "first class hotel unit" as too rigid because of its requirement that the sleeping unit contain at least 325 square feet, which would exclude rehabilitation of units which cannot achieve that 325 square foot minimum. The informal commenter instead suggested that a more flexible definition be proposed which would emphasize the quality and finish, and level of service, upkeep and maintenance to be employed in the facility. After careful consideration, the Authority has developed the proposed definition of "first class hotel unit." The Authority's proposed definition of "first class hotel unit" is patterned on the legislative definition of "qualifying sleeping unit" as set forth in N.J.S.A. 5:12-27. Only hotels containing the requisite number of qualifying sleeping units qualify as approved casino hotels. Only approved hotels having "at least 500 qualifying sleeping units" may have casino space. N.J.S.A. 5:12-83b. Only by the addition of "qualifying sleeping units" may a casino hotel expand its casino floor space. N.J.S.A. 5:12-83b(2)(c). The Authority is of the view that the new rooms being constructed by casino licensees minimally should be of similar class and kind as those contained in their existing facilities, including space dimensions. Mindful that with respect to rehabilitation projects the unit size may well be constrained by the existing space, and that some units might otherwise fall just short of the requirement, the Authority has provided in its proposed definition that first class hotel units must contain at least "approximately" 325 square feet to provide necessary discretion to the Authority.

Social Impact

The social impact of this proposed amendment mirrors the social impact discussed in connection with the initial emergency adoption and concurrent proposal of N.J.A.C. 19:65-2.5. See 25 N.J.R. 4514, 4515 (September 20, 1993). The proposed amendment is anticipated to have little social impact directly, although the investment decisions made in accordance with the amendment will go far to revitalize Atlantic City and provide an impetus for economic growth throughout South Jersey. The amendment further refines the regulatory framework for the implementation of hotel development projects by casino licensees out of the $100,000,000 fund set aside by the Legislature to develop thousands of new and reconstructed and rehabilitated hotel rooms in Atlantic City by casino licensees in time to coincide with the opening of the new Atlantic City Convention Center now scheduled for the early part of 1997. Any social value reflected in the determination to go forward with these development projects is reflective of legislative judgment to authorize such activities as opposed to the rules themselves. The Authority believes that the amendment will enable it to better carry out its mandate in accordance with legislative intent and effectively redevelop the "corridor region" and other areas of Atlantic City and South Jersey.

Economic Impact

The proposed amendment should only add minor costs to the reasonably modest costs of the application process already utilized by casino licensees which were discussed in connection with the initial emergency adoption and concurrent proposal of N.J.A.C. 19:65-2.5(d)3. See 25 N.J.R. 4514, 4515 (September 20, 1993). Development of first class hotel space will generate additional revenue for casinos, as well as encourage utilization of the new Atlantic City Convention Center by large groups. The increase in visitors to Atlantic City, both conventioneers and hotel guests, will also serve to stimulate the local economy of the city.

It is not anticipated that the amendment will have any significant economic impact on the Authority.

Regulatory Flexibility Statement

A regulatory flexibility analysis is not required since the proposed amendment will only affect the operation of New Jersey casino licensees, none of which qualifies as a small business protected under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq.

Full text of the proposal follows (additions indicated in boldface **thus**):

19:65-2.5 Approval criteria

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

(d) The Authority shall require that the applicant establish, among other things, with respect to hotel development projects, the following:

1.-2. (No change.)

3. The project does not include the construction, reconstruction or rehabilitation of any unit which was in existence and used or available for use as a hotel unit as of July 1, 1993 **except when the project will result in the hotel units being upgraded to first class hotel units, and the cost of such construction, reconstruction or rehabilitation exceeds 50 percent of the acquisition value of the structure as defined in N.J.A.C. 19:65-1.2. For purposes of this subsection, "first class hotel unit" shall mean a sleeping unit:**

i. Containing at least approximately 325 square feet measured to the center of perimeter walls, including bathroom and closet space and excluding hallways, balconies and lounges;

ii. Containing private bathroom facilities; and

iii. To be held available and to be used regularly for the lodging of tourists and convention guests and conforming in all respects to the facilities requirements contained in the Casino Control Act, N.J.S.A. 5:12-27, except that the building or buildings containing units need not be operated as a part of one casino hotel facility nor be physically connected to a casino hotel.

LABOR

(a)

OFFICE OF EMPLOYMENT AND TRAINING

Job Training Partnership Act (JTPA): Non-Criminal Complaint/Grievance, Hearing and Review Procedures at Employer, SDA, State and Federal Level

Proposed Readoption with Amendments: N.J.A.C. 12:41

Authorized By: Raymond L. Bramucci, Commissioner, Department of Labor.

Authority: N.J.S.A. 34:1-20, 34:1A-3(e), 20 U.S.C.A. §1554 and 20 CFR §627.500 et seq.

Proposal Number: PRN 1993-652.

Submit written comments by January 5, 1994 to:

Linda Flores, Special Assistant for External and Regulatory Affairs
Office of the Commissioner
Department of Labor
CN 110
Trenton, New Jersey 08625-0110

The agency proposal follows:

Summary

Pursuant to Executive Order No. 66(1978), N.J.A.C. 12:41, Division of Employment and Training, is scheduled to expire on January 17, 1994. The current rules in this chapter set forth the grievance, hearing and review procedures that apply at the employer, Service Delivery Area (SDA), State and Federal levels for non-criminal complaints and appeals under both the Federal Job Training Partnership Act (JTPA) and the New Jersey Jobs Training Act (NJJTA). The Department has reviewed these rules, particularly in light of the 1992 Federal amendments to the JTPA, P.L. 102-367, and the 1992 repeal of NJJTA by the State, P.L. 1992, c.43, Section 15. The Department has determined them to be reasonable, necessary, adequate, efficient, understandable and generally responsive to the purpose for which they were originally promulgated. However, to ensure compliance with the 1992 Federal amendments to the Act, as well as the 1992 repeal of the New Jersey Job Training Program, the rules proposed for readoption have been amended to correspond to these amendments.

The Federal Job Training Partnership Act was enacted in 1982 to establish programs to prepare youth and unskilled adults for reentry into the labor force and to afford job training to those economically disadvantaged individuals and other individuals facing serious barriers to employment, who are in special need of such training to obtain productive employment (see 29 U.S.C.A. 1501). To further these purposes, Section 144 of the JTPA and 20 CFR 627.502 require that each administrative entity and local recipient of JTPA funds establish and maintain a grievance procedure for grievances or complaints from local recipients, participants and other interested persons about its programs and activities. Also, each employer of active participants who receives funds under the JTPA must establish and maintain a grievance procedure relating to the terms and conditions of employment. The State, as represented by the Commissioner of Labor, is required to maintain a state-level grievance procedure and must ensure establishment of procedures at the Service Delivery Area level and substate grantee level.

The rules proposed for readoption are being amended to incorporate revisions made necessary by the JTPA Reform amendments of 1992 and the repeal of the New Jersey Job Training Program, P.L. 1992, c.43, Section 15. A brief summary of the rules proposed for readoption, along with the proposed amendments follows.

N.J.A.C. 12:41-1.1 sets forth the purpose of the chapter. Because the New Jersey Jobs Training Act (NJJTA) has been repealed as noted above, all reference to the grievance and hearing procedures applicable to the NJJTA has been deleted. In addition, the citation to the Federal regulations governing JTPA grievance and hearing procedures has been amended to reflect the redesignation which has occurred at the Federal level.

N.J.A.C. 12:41-1.2 sets forth the scope of the chapter as governing non-criminal complaints from program participants and local recipients of JTPA funds. As with N.J.A.C. 12:41-1.1, all reference to the New Jersey Jobs Training Act has been deleted. In addition, several terms, namely references to Service Delivery Areas (SDAs), subgrantees and subrecipients, have been amended to correspond to the definitional changes reflected at N.J.A.C. 12:41-1.3. The last amendment consists of the provision of the citation to the Code of Federal Rules where the Federal review procedures for complaints under the JTPA Program may be found.

N.J.A.C. 12:41-1.3 provides the definitions of words and terms used in the chapter and adds new definitions for the terms "Assistant Director," "complainant," "local recipient," "respondent" and "substate grantee." The terms, "Director," "Grantee/contractor/subrecipient," "NJJTA" and "SDA grant recipient," have been deleted. The last change relates to the term "participant" which has been amended to encompass the broader eligibility criteria for the JTPA program included in the 1992 Federal amendments. The change in eligibility criteria has been carried over to the definition of the term "participant." All of the changes to this section are required due to the 1992 Federal amendments to the JTPA and the accompanying regulations.

N.J.A.C. 12:41-1.4 sets forth a deadline of one year from the alleged occurrence for the filing of complaints at the employer, SDA and State level. This section has not been amended in the proposed readoption.

N.J.A.C. 12:41-1.5 sets forth the grievance and hearing procedure which is to be followed at the employer level.

N.J.A.C. 12:41-1.6 sets forth the grievance and hearing procedures applicable at the SDA level. Time frames for the filing and local processing of complaints are provided. The time frame contained in the notice which must be provided pursuant to N.J.A.C. 12:41-1.6(b)7x has been increased from 10 to 15 days for calculating the time from which an appeal may be taken when the SDA has failed to issue a decision. This change is mandated by the recent amendments to the Federal JTPA regulations found at 20 CFR Sec. 627.503(c). N.J.A.C. 12:41-1.6(b)7xi requires written notice that the complainant has one year within which to file a complaint except for discrimination complaints, which are limited to a 180 day limitation; this exception has been amended to provide for a good cause exception from the 180 day deadline pursuant to Federal regulations found at 29 CFR Part 34, Implementation of Non-Discrimination and Equal Opportunity Requirements of the Job Training Partnership Act of 1982 (January 15, 1993). A new provision, N.J.A.C. 12:41-1.6(b)7xii, requires notice to participants and local recipients that a complaint alleging violations of labor standards may be filed with the U.S. Secretary of Labor after exhaustion of the local and State grievance procedure, or when 60 days have elapsed from the date a decision should have been reached; the notice must also advise that the complaint may be submitted to binding arbitration if a collective bargaining agreement so provides. However, if binding arbitration is pursued, the Federal review procedure is not available. These amendments are required by the recent 1992 Federal amendments to the JTPA found at Section 144(d), (e), (f) and (g).

N.J.A.C. 12:41-1.7 sets forth the review procedure at the State level when a local decision has either not been made or is unsatisfactory to the complainant. Time frames for the State level review are also established and the individual to whom such a request for review should be directed is provided. The time frame provided in N.J.A.C. 12:41-1.7(a)1 has been increased from 10 to 15 days from the date by which a decision should have been received by the complainant. This change, as noted above, is mandated by the recent amendments to the Federal regulations governing the JTPA program. N.J.A.C. 12:41-1.7(e) reflects the change in the Federal rules that discrimination complaints may be filed with the Directorate of Civil Rights, as well as the JTPA program, under Section 167 of the JTPA, 29 CFR, Part 34. Finally, N.J.A.C. 12:41-1.7(f), which reiterates that a complainant may request a review at the Federal level if the State fails to issue a decision, has been deleted since this information is found at N.J.A.C. 12:41-1.9 and is, accordingly, redundant.

N.J.A.C. 12:41-1.8 sets forth the hearing procedure at the State level and includes the necessary time frames. The time frame contained in N.J.A.C. 12:41-1.8(d)1 for the filing of a request for an independent review has been increased from 10 to 15 days from the date by which a complainant should have received the decision. Again, this extension of the time frame is consistent with the recent Federal amendments to the regulations found at 20 CFR 627.503(c). N.J.A.C. 12:41-1.8(g) involving discrimination complaints or grievances based upon handicapped status has been deleted since these types of complaints are now to be submitted to the Directorate of Civil Rights pursuant to 29 CFR Part 34 which prescribes the comprehensive procedure for filing discrimination complaints. Accordingly, this section is no longer applicable.

N.J.A.C. 12:41-1.9 sets forth the Federal review procedure and includes the U.S. Secretary of Labor's address for easy reference. N.J.A.C. 12:41-1.9(b)1, consistent with the other provisions, has been amended to provide for 15 days, instead of 10 days, for a complaint to be filed with the U.S. Secretary of Labor based upon a non-decision at the State level.

N.J.A.C. 12:41-1.10 precludes discriminatory actions against, or unlawful denial of JTPA benefits to, any individual filing or participating in a complaint.

N.J.A.C. 12:41-1.11 through 1.14 are proposed new rules.

N.J.A.C. 12:41-1.11 allows for the use of the local level grievance procedure for a review of an eligibility determination.

N.J.A.C. 12:41-1.12 sets forth the procedure for complaints alleging violation of labor standards established at Section 143 of the JTPA.

N.J.A.C. 12:41-1.13 provides for remedies when it has been determined that a Section 143 labor standards violation has occurred.

Finally, N.J.A.C. 12:41-1.14 identifies binding arbitration as an alternative to the grievance procedure for Section 143 labor standards complaints.

Social Impact

The Federally required non-criminal complaint procedure benefits JTPA participants who are aggrieved by SDAs, service providers, or employers through the provision of an established set of procedures to

address these grievances. The procedures can be used by any interested person, organization, or agency challenging the State, SDA or other JTPA recipients' administrative or programmatic activities. Each participant in the JTPA program is provided with a copy of the grievance and hearing procedure, thereby facilitating the filing of a complaint with regard to which corrective action, if justified, can be taken. These review procedures ensure that the program is properly administered and achieves its goal of preparing participants for gainful employment. The rules also protect complainants by prohibiting discriminatory or retaliatory action by a respondent against whom a complaint has been filed.

The proposed amendments to the definitions and the new terms clarify ambiguities in the program by adopting common definitions which are applicable across the various JTPA titles as well as other Federal programs. For example, the redefinition of "subrecipient" to "local recipient" now makes it clear that the term does not include individuals who are the intended beneficiaries of JTPA Program services. These clarifications are expected to improve the administration of the program. The proposed amendments and new rules also provide that compliance by JTPA recipients with 29 CFR Part 34 constitutes compliance with the U.S. Department of Labor's general non-discrimination and equal opportunity regulations applicable to Federally assisted programs. As a result, the proposed amendments and new rules eliminate the burden of complying with overlapping regulatory requirements, thereby furthering program efficiencies. The proposed amendments also expand the number of days within which a request for review must be filed from 10 days to 15 days from the date a decision should have been rendered, thereby allowing for greater opportunity for complainants to file such requests. Finally, the proposed new rules implement provisions of Section 144 of the JTPA relating to the Federal handling of labor standards violations and specify the remedies for different categories of Section 143 labor standards violations. These new provisions encourage compliance with labor standards and complement the Department's general enforcement efforts in the labor standards area. Finally, the new rules also provide complainants under certain conditions with the alternative mechanism of binding arbitration for resolving their labor standards claim, thereby expanding the options available to complainants.

Economic Impact

The standardized procedures identify time frames and steps at both the local and State level which efficiently address individual grievances. The clear establishment of time frames and the detailed description of the requirements associated with the grievance procedure at each level which must be provided to each participant in JTPA programs and proof of receipt thereof maximize the opportunity to resolve disputes in an efficient manner, thereby ensuring that corrective action, if necessary, can be quickly undertaken. Participants whose complaints are found to be justified and whose complaints relate to a lack of adequate services can be provided with those services and ultimately are able to obtain gainful employment, thereby furthering the objectives of JTPA. To the extent that participants are placed in gainful employment, they themselves are benefitted as wage earners, and the public and the Department are also benefitted in the form of tax contributions and other revenues which support the overall economy.

The new provisions are expected to have a minimal economic impact on those affected by the proposed rules. The revisions to the definitions are expected to result in economies and efficiencies since the number of hearings and reviews regarding the interpretation of terms should be minimized due to the clarifications made in the definitions section. The provision in the proposed rules which provide that compliance by JTPA recipients with 29 CFR Part 34 constitutes compliance with the Federal nondiscrimination and equal opportunity regulations applicable to Federally assisted programs avoids the economic burden associated with complying with different, although overlapping, regulatory requirements. The expansion of the number of days within which a request for review must be filed from 10 to 15 days from the date a decision should have been rendered is not expected to have any economic impact on the affected individuals. The proposed new rules provide remedies for Section 143 labor standards violations; however, while there may be compliance costs incurred to remedy these violations, these costs are already required by the existing labor laws and the new rules do not require any additional costs. Finally, the proposed new rules provide for the alternative mechanism of binding arbitration for the handling of Section 143 labor standards violations which imposes administrative costs on the parties involved, however, this avenue for resolution is only available if a collective bargaining agreement so provides and, as such, the proposed rules do not add to the costs that would otherwise be incurred as a result of the existence of a collective bargaining agreement.

Regulatory Flexibility Statement

The rules proposed for readoption with amendments govern the administration and conduct of Job Training Partnership Act activities. The rules will impose reporting, recordkeeping and compliance requirements upon local recipients of JTPA funds, some of whom may be small businesses as that term is defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The rules require any individual or entity providing training to JTPA participants to maintain a grievance and hearing procedure relating to the terms and conditions of employment. In addition, under the rules, a local recipient conducting JTPA training must furnish a copy of the grievance and hearing procedure and maintain evidence that the procedure has been furnished to each JTPA participant. Since the rules set forth the specific requirements for these procedures, no professional services are necessarily required. As the noncriminal grievance and hearing procedures are imposed by the Federal Job Training Partnership Act, funding for the conduct of JTPA activities can only be provided to recipients who comply with the Federal mandate. Accordingly, no lesser requirement or exemption can be provided.

Full text of the proposed readoption may be found in the New Jersey Administrative Code at N.J.A.C. 12:41.

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

SUBCHAPTER 1. JOB TRAINING PARTNERSHIP ACT (JTPA) [AND NEW JERSEY JOBS TRAINING ACT (NJJTA)]: NON-CRIMINAL COMPLAINT/GRIEVANCE, HEARING AND REVIEW PROCEDURES AT EMPLOYER, SDA, STATE AND FEDERAL LEVEL

12:41-1.1 Purpose

[(a)] The purpose of this subchapter is to set forth the grievance, hearing and review procedures required under the Job Training Partnership Act (JTPA) at 29 U.S.C.A. §1554 and the regulations that implement the JTPA at [20 CFR §629.51 et seq.] **20 CFR Sec. 627.500 et seq.**

[(b) This subchapter also sets forth the grievance, hearing and review procedures for the New Jersey Jobs Training Act (NJJTA) as required by the Commissioner pursuant to N.J.S.A. 34:15B-26.]

12:41-1.2 Scope

(a) Employers of JTPA [and/or NJJTA] participants shall follow the grievance and hearing requirements set forth at N.J.A.C. 12:41-1.5. The employer grievance and hearing procedures shall apply to any JTPA [and/or NJJTA] participant aggrieved by his or her employer.

(b) Each SDA shall follow, at a minimum, the grievance and hearing requirements set forth at N.J.A.C. 12:41-1.6. The SDA grievance and hearing procedures shall apply to the following:

1. JTPA [and/or NJJTA] participant appeals from decisions at the employer level;

2. JTPA [and/or NJJTA] participant complaints;

3. [Subgrantee] **Local recipient** complaints (schools; **contractors;** employers with on-the-job training contracts; and consultants); and

4. Complaints from other interested persons.

(c) The State review procedures set forth at N.J.A.C. 12:41-1.7 shall apply to the following:

1. JTPA [and/or NJJTA] participant appeals from decisions at the [SDA] **employer** level;

2. [Subgrantee] **Local recipient** appeals from decisions at the SDA level; and

3. Appeals by other interested persons from decisions at the SDA level.

(d) The State hearing procedures set forth at N.J.A.C. 12:41-1.8 shall apply to [subrecipients] **local recipients** adversely affected by the results of monitoring and/or investigations and to any other complainants who must seek resolution initially at the State level

(complaint not subject to review at the SDA level), and any other participant[, subcontractor] or [other] interested party aggrieved by [a subrecipient] **an SDA**.

1. [Each subrecipient] **All SDAs** shall provide its participants, upon their enrollment [in the subrecipient's program], with a copy of the State hearing procedures.

2. Each [subrecipient] **SDA** shall also provide [subcontractors and subgrantees] **local recipients** with a copy of the State hearing procedures no later than the date of the contract between the [subrecipient] **SDA** and the [subcontractor or subgrantee] **local recipient.**

(e) The audit resolution procedures set forth at N.J.A.C. 12:5-1 shall apply to subrecipients adversely affected by the results of an audit.

(f) The Federal review procedures set forth at N.J.A.C. 12:41-1.9 shall apply **pursuant to 20 CFR 627.600 et seq.** to appeals from complainants who did not receive a decision at the State level.

12:41-1.3 Definitions

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

"Assistant Director" means the Assistant Director of the Office of Employment and Training Services, New Jersey Department of Labor.

"Commissioner" means the Commissioner, New Jersey Department of Labor.

"Complainant" means the individual, group or agency alleging a non-criminal violation of the JTPA and/or related agreements and makes an informal and/or formal complaint.

["Director" means the Director of the Division of Employment and Training, New Jersey Department of Labor.]

["Grantee/contractor/subrecipient"] **"Local recipient"** means any person or government department, agency or establishment (private-for-profit/non-profit) that receives Federal JTPA [and/or NJJTA] funds to carry out JTPA [and/or NJJTA] programs through a State or local government but does not include an individual who is a beneficiary of such a program.

"JTPA" means Job Training Partnership Act, 29 U.S.C.A. §1501 et seq.

["NJJTA" means New Jersey Jobs Training Act, N.J.S.A. 34:15B-11 et seq.]

"Participant" means any individual who has been determined eligible for participation upon intake, and [has] **may have** started receiving employment, training, or services (except post-termination services) funded under the JTPA [and/or NJJTA,] following intake. [Individuals who receive only outreach and/or intake and assessment services or postprogram followup are excluded.]

"Recipient" means the State of New Jersey.

"Respondent" means the individual, group or agency against whom a complaint is made and to whom opportunity is given to participate in the complaint resolution process.

"SDA" means Service Delivery Area as defined in 29 U.S.C.A. §1511.

["SDA grant recipient" means the entity that receives JTPA and/or NJJTA funds for a SDA directly from the State.]

"Secretary" means the United States Secretary of Labor.

"Substate grantee (SSG)" means the entity which receives JTPA Title III funds for one or more SDAs from the State.

12:41-1.5 Grievance and hearing procedures at the employer level

(a) Each employer, including private-for-profit employers under the JTPA [and/or NJJTA], shall maintain a grievance and hearing procedure relating to the terms and conditions of employment available to its participants.

1. Each employer may operate its own grievance and hearing system or may utilize the grievance and hearing system established by the SDA or by the Department at N.J.A.C. 12:41-1.6.

(b) Each employer **grievance** system shall provide for, upon request of the complainant, a review of an employer's decision by the SDA and the **Assistant** Director, if necessary, in accordance with N.J.A.C. 12:41-1.6 and 1.7, respectively.

12:41-1.6 Grievance and hearing procedures at the SDA level

(a) Each SDA shall establish and maintain grievance and hearing procedures for grievances or complaints about its programs and activities from participants, [subgrantees, subcontractors] **local recipients** and other interested persons. The procedures shall include the resolution of complaints alleging a violation of the JTPA [and/or NJJTA], regulations, grants or other agreements under the JTPA [and/or NJJTA].

(b) The grievance and hearing procedures shall contain, at a minimum, the following requirements:

1. Upon enrollment into a JTPA [and/or NJJTA] program, the SDA shall provide participants with a written description of the grievance procedures which shall include the requirements set forth in (b)4 through 7 below. The SDA shall also provide [subcontractors and subgrantees] **local recipients** with these procedures no later than the date of execution of the contract between the SDA and the [subcontractor] **local recipient.**

2. The SDA shall maintain evidence that the grievance and hearing procedures have been provided to participants and to [subcontractors] **local recipients**.

3. The grievance and hearing procedures shall provide that the identity of any person who has furnished information relating to, or assisting in, an investigation of a possible violation of the JTPA [and/or NJJTA] shall be kept confidential to the extent possible, consistent with a fair determination of the issues.

4.-5. (No change.)

6. The SDA shall provide participants and [subcontractors] **local recipients** with the name, address and telephone number of the local official to whom complaints and grievances can be directed.

7. At a minimum, the SDA shall also provide participants and [subcontractors] **local recipients** with the following:

i. A written notice of the date, time and place of the hearing;

ii. An opportunity to be represented by an attorney or other representative of the complainant's choice;

iii. An opportunity to bring witnesses and documentary evidence. [(]SDA recipients or other subrecipients shall cooperate in making available any persons under their control or employ to testify, if such persons are requested to testify by the complainant, and to release requested documents unless privacy laws or other laws intervene to take precedence[)];

iv.-vi. (No change.)

vii. Written notice that the complainant is entitled to a hearing within 30 days of filing the written grievance and that a written decision shall be made by the hearing officer or designated representative of the SDA [grant recipient] within 60 days of the filing of the complaint/grievance;

viii. Written notice that the complainant has a right [of appeal] to **an administrative review by** the [Director] **Assistant Commissioner** if the decision is adverse or is not made within 60 days of the filing of the complaint;

ix. The name and address of the State agency to whom the [appeal] **request for an administrative review** is to be addressed and other information needed to file [an appeal to] **the request for review with** the State;

x. Written notice that the complainant must file the [appeal to] **request for an administrative review with** the **Assistant** Director within 10 days of receiving the adverse decision or within [10] **15** days of the date the decision should have been made by the SDA[, and that the decision of the Director shall be final];

xi. Written notice that the complainant has one year to submit a complaint after the date of the occurrence (except for complaints regarding discrimination, which have a 180 day limitation **subject to an extension for good cause granted by the Directorate of Civil Rights**);

xii. Written notice that the complainant may submit a complaint alleging violations of Section 143 labor standards to the Secretary of Labor when the complainant has exhausted the local and State grievance procedures, or when the 60 day time period specified for reaching a decision has elapsed without a decision. The complainant should also be informed that he or she has a right to submit the complaint to binding arbitration if a collective bargaining agreement

covering the parties to the grievance so provides, and that if the complaint is submitted to binding arbitration, the Federal review procedure is not available for appeals of labor standards complaints.

[xii.]**xiii.** Written notice that the complainant has a right to request a review by **the Commissioner pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and by** the Secretary [for JTPA complaints and by the Commissioner pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., for NJJTA complaints] if the State does not render a decision, and that the Federal review is confined to allegations of violations of law under the JTPA; and

Recodify existing xiii. as **xiv.** (No change in text.)

8. (No change.)

12:41-1.7 Review procedures at the State level

(a) If a participant, [subgrantee,] **local recipient** or other interested person does not receive a decision at the SDA level within 60 days of filing the complaint or receives a decision unsatisfactory to the complainant, the complainant may file a written request for a review at the State level.

1. The request for a review shall be filed within 10 days of receipt of the adverse decision or [10] **15** days from the date on which the complainant should have received a decision.

(b) Each request for a review shall be submitted to:

New Jersey Department of Labor
Assistant Director, [Division]
Office of Employment and Training
CN 055
Trenton, New Jersey 08625-0055

(c) Upon filing the request for review, the complainant shall simultaneously submit the following:

1.-4. (No change.)

5. If applicable, citations to the provisions of the JTPA [and/or NJJTA] or other agreements under the Act believed to have been violated;

6.-7. (No change.)

(d) The [Director] **Commissioner** shall issue a written decision within 30 days. The [Director's] **Commissioner's** decision is final.

(e) If the complaint or grievance is based upon alleged discrimination [regarding handicapped status, the appeal shall be submitted to:

New Jersey Department of Labor
Office of Monitor Advocate and
Affirmative Action Programs
John Fitch Plaza—Room 1309
Trenton, New Jersey 08625
Attention: Director, Monitor Advocate and EEO Programs

1. The Office shall assist the complainant in his or her appeal] **the complaint shall be submitted to either the SDA or the Directorate of Civil Rights in accordance with Section 167 of the JTPA, P.L. 102-367.**

[(f) If the Director fails to issue a decision at the State level, the complainant or appellant may request a review at the Federal level for JTPA complaints or a hearing pursuant to the Administrative Procedure Act for NJJTA complaints.]

12:41-1.8 Hearing procedures at the State level

(a) Any [subrecipient] **local recipient of JTPA funds** adversely affected by the results of monitoring and/or investigations, or any other complainant who must seek resolution initially at the State level, having a complaint not subject to review at the SDA level, may submit to the Commissioner a written request for a hearing.

1. Any participant, subcontractor or other interested party aggrieved by a [subrecipient] **local recipient** may submit to the Commissioner a written request for a hearing.

(b) (No change.)

(c) The hearing shall be conducted **pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.,** within 30 days from the date the Commissioner received the written request for a hearing. The hearing officer shall issue a written decision in the matter within 60 days of the receipt of the written request for a hearing.

1. The Commissioner shall attempt to resolve the complaint informally prior to the hearing date.

2. The Commissioner may, upon agreement of both parties, extend the time period for the hearing by 15 days if an informal resolution seems imminent.

(d) If the decision of the hearing officer is adverse to either party or the decision is not made within 60 days, the complainant or respondent may request an independent review.

1. The request for an independent review shall be submitted to the Commissioner within 10 days of the receipt of the adverse decision or [10] **15** days from the date on which the complainant should have received a decision.

(e) The Commissioner shall issue a written decision within 30 days of the [hearing] **receipt of the complaint**. The Commissioner's decision shall be final.

(f) If the Commissioner fails to issue a written decision within 30 days of [the hearing] **receipt of the complaint**, the complainant or respondent may appeal to the Secretary **pursuant to 20 CFR 627.600 et seq.** utilizing the procedures set forth [in] **at** N.J.A.C. 12:41-1.9 [for JTPA complaints]. [For NJJTA complaints, the complainant may request a hearing pursuant to the Administrative Procedure Act.]

[(g) If the complaint or grievance is based upon alleged discrimination regarding handicapped status, the complaint/grievance shall be submitted to:

New Jersey Department of Labor
Office of Monitor Advocate and
Affirmative Action Programs
John Fitch Plaza—Room 1309
Trenton, New Jersey 08625
Attention: Director, Monitor Advocate and EEO Programs

1. The office shall assist the complainant in his or her appeal.]

12:41-1.9 Federal review procedures

(a) If the [Director or] Commissioner fails to issue a decision as required by N.J.A.C. 12:41-1.7 and 1.8, respectively, the complainant or respondent may request a determination from the United States Secretary of Labor whether reasonable cause exists to believe that the JTPA or its regulations have been violated.

(b) A complainant or respondent making a request to the Secretary due to non-decision by the [Director or] Commissioner on a grievance shall use the following procedures and submit the following information when filing the appeal:

1. The request shall be filed no later than [10] **15** days from the date on which the complainant should have received a decision. Appeals shall be submitted to:

Secretary of Labor
United States Department of Labor
Washington, D.C. 20210

2.-4. (No change.)

5. Citations to the provisions of the [Act] **JTPA**, regulations, grant or other agreements under the [Act] **JTPA** believed to have been violated;

6. (No change.)

7. A statement of the date the complaint was filed with the [Director or] Commissioner, the date on which the [Director or] Commissioner should have issued a decision, and an attestation that no decision was issued.

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

(e) A complaint alleging violation of the JTPA, Section 143 labor standards may be submitted to the Secretary of Labor under the terms and conditions specified at N.J.A.C. 12:41-1.11, Section 143 labor standards complaints.

[(e)]**(f)** A complainant or respondent shall notify the Commissioner if he or she plans to submit an appeal to the United States Department of Labor. Any [subrecipient] **local recipient** or SDA upon learning of a complainant's or respondent's intention of filing an appeal to the United States Department of Labor shall inform the Commissioner.

12:41-1.10 Protection of complainants

(a) No recipient **of JTPA funds** shall discriminate against or unlawfully deny JTPA [and/or NJJTA] benefits to any participant or individual connected with the administration of the program who has filed a complaint or instituted or caused to be instituted any proceeding related to the JTPA [and/or NJJTA], or has testified or is about to testify in any such proceeding or investigation under or related to the JTPA [and/or NJJTA].

(b) The Secretary, **as set forth at 20 CFR 627.600 et seq.,** or the Commissioner shall, within 30 days, take such action or order such corrective measures, as necessary, with respect to the recipient or the aggrieved individual, or both.

12:41-1.11 Eligibility determination complaints

In cases where an applicant disagrees with the eligibility determination made by a Service Delivery Area, the local level grievance procedure shall apply. Applicants who disagree with the eligibility determination must be advised that they may use the grievance system to appeal the initial eligibility determination.

12:41-1.2 Section 143 labor standards violations: complaints

(a) Pursuant to the Federal Job Training Reform Amendments of 1992, P.L. 102-367, complainants alleging violations of labor standards at Section 143 of the JTPA may appeal to the Secretary of Labor under the conditions described below. Section 143 labor standards cover health and safety, worker's compensation, benefit and working conditions, nondisplacement of currently employed workers, payment of minimum wage, noninterference in union organizing and compliance with the Davis-Bacon Act, U.S.C.A. 276(a) et seq.

(b) A complaint alleging JTPA Section 143 violations may be submitted to the Secretary of Labor by either party to the complaint when:

1. The complainant has exhausted the local and State grievance procedures set forth in this chapter; or

2. The 60-day time period specified in this chapter for reaching a decision under the local or State procedure has elapsed without a decision.

(c) Pursuant to 20 CFR 627.600 et seq., the Secretary of Labor shall investigate the allegations contained in a complaint alleging violation(s) of JTPA Section 143, make a determination whether a violation has occurred, and issue a decision within 120 days of receipt by the Secretary of Labor of the complaint. Such complaints are to be directed to the:

Secretary of Labor
United States Department of Labor
200 Constitution Avenue
Washington, D.C. 20210

12:41-1.13 Section 143 labor standards complaints: remedies

(a) Except as provided below, violations of Section 143 shall be limited to:

1. Suspension or termination of payments under JTPA;

2. Prohibition of placement of a participant, for an appropriate period of time, in a program under the Act with an employer that has violated Section 143; and/or

3. Appropriate equitable relief (other than back pay).

(b) Remedies are available under the following conditions: for violations of the benefits and working condition requirements, Section 143(a)(4); displacement of currently employed workers, Section 143(b)(1); employing participants when another individual is on layoff or the employer terminates regular employees to hire JTPA participants, Section 143(b)(3); or when the prevailing wage requirements of the Davis-Bacon Act are not met.

(c) Available remedies for violations of Sections 143(a)(4), (b)(1), (b)(3), and (d) are those listed in (a) above and the following:

1. Reinstatement of the grievant to the position held prior to displacement;

2. Payment of lost wages and benefits; and/or

3. Reestablishment of other relevant terms, conditions, and privileges of employment.

(d) A grievant may pursue remedies authorized under another Federal, State, or local law for a violation of Section 143 of the JTPA.

12:41-1.14 Section 143 labor standards complaints: binding arbitration

(a) As an alternative to the procedure set forth at N.J.A.C. 12:41-1.12, a person alleging a violation of Section 143 may submit the grievance to binding arbitration if a collective bargaining agreement covering the parties to the grievance so provides.

(b) A person electing to have her or his complaint on JTPA Section 143 labor standards violation(s) processed under binding arbitration provisions is subject to the following requirements:

1. The person shall choose binding arbitration before, and in lieu of, initiating a complaint under other grievance procedures provided under Section 144 of the JTPA; and

2. The person may not elect binding arbitration for a complaint that previously has been subject to any other grievance procedure established under the JTPA.

(c) Binding arbitration decisions under this section are not reviewable by the Secretary of Labor.

(d) The remedies available to a grievant under binding arbitration are limited to:

1. Appropriate equitable relief (other than back pay);

2. Reinstatment of the grievant to the position held by the grievant prior to displacement;

3. Payment of lost wages and benefits; and

4. Reestablishment of other relevant terms, conditions, and privileges of employment.

(e) The grievant may pursue remedies authorized under another Federal, State, or local law for violation of Section 143 of the JTPA.

RULE ADOPTIONS

AGRICULTURE

(a)

DIVISION OF REGULATORY SERVICES

Commercial Feeding Stuffs

Readoption with Amendments: N.J.A.C. 2:68

Proposed: September 7, 1993 at 25 N.J.R. 3889(a).
Adopted: October 27, 1993 by the State Board of Agriculture and Arthur R. Brown, Jr., Secretary, Department of Agriculture.
Filed: October 29, 1993 as R.1993 d.606, **without change.**

Authority: N.J.S.A. 4:4-20.10.

Effective Date: October 29, 1993, Readoption;
December 6, 1993, Amendment.
Expiration Date: October 29, 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. 2:68.

Full text of the adopted amendments follows:

2:68-1.1 General rules and regulations

(a) The Department of Agriculture adopts and incorporates by reference the general rules and regulations set forth in the current edition of the official publication of the Association of American Feed Control Officials, Inc.

1.-10. (No change.)

2:68-1.6 Sampling and analysis

Sampling and analysis shall be conducted in accordance with methods published in current edition of the official methods of analysis of the Association of Official Chemists or in accordance with other recognized official methods.

2:68-1.8 Obtaining copies of rules incorporated by reference

(a) A copy of the current edition of the Official Publication of the American Feed Control Officials is on file in the Director's Office, Division of Regulatory Services, New Jersey Department of Agriculture, Health & Agriculture Building, John Fitch Plaza, Trenton, New Jersey 08625. Copies may be procured by writing to Charles P. Rank, Georgia Department of Agriculture, Capital Square, Atlanta, Georgia 30334.

(b) A copy of the current edition of the official methods of the Association of Official Analytical Chemists (AOAC) is on file in the Director's Office, Division of Regulatory Services, New Jersey Department of Agriculture, Health & Agriculture Building, John Fitch Plaza, Trenton, New Jersey 08625. Copies may be procured by writing to AOAC, Fulfillment Coordinator, 2200 Wilson Boulevard, Arlington, Virginia 22201-3301.

BANKING

(b)

NEW JERSEY CEMETERY BOARD

Location of Interment Spaces

Adopted Amendment: N.J.A.C. 3:41-2.1
Adopted New Rules: N.J.A.C. 3:41-11

Proposed: February 16, 1993 at 25 N.J.R. 623(a).
Adopted: November 5, 1993 by the New Jersey Cemetery Board, William B. Waits, Executive Director.
Filed: November 8, 1993 as R.1993 d.632, **with a substantive change** not requiring additional public notice and comment (See N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 8A:2-2 and 8A:6-11.

Effective Date: December 6, 1993.
Expiration Date: October 11, 1995.

Summary of Public Comments and Agency Responses:

The Department received comments from the following:

Richard M. Ralph, President, New Jersey Cemetery Association
John D. Del Colle, Associate Executive Director, and Jill Sulzberg, Association Advocate, Eastern Paralyzed Veterans Association
James P. McMahon, Jr., Millville, New Jersey

COMMENT: A commenter suggested that the 24 inch path width does not provide adequate access for persons confined to wheelchairs and suggests a width of 36 inches.

RESPONSE: The Board agrees that it is important to provide reasonable access to cemetery property. The Board also recognizes the applicability of the Federal Americans With Disabilities Act, 42 U.S.C.A. §12101, which seems to require a path having a minimum width of 30 inches. After consideration of this issue, the Board changes, upon adoption, the minimum width required for paths from 24 inches to 30 inches. This is the only change made from the proposal.

This change is effectively mandated by Federal law, a mandate which cannot be overcome by further public comment on the rule. Therefore, no purpose would be served by reproposal. In addition, the change should have only minimal adverse impact on cemeteries and the public, and will provide a substantive benefit in increasing access for those in wheelchairs.

COMMENT: A commenter expressed his view that the proposal is not consistent with the legislative intent that sidewalks be designed so as to provide access to those in wheelchairs, citing N.J.S.A. 52:32-14 and the Department of Transportation "Roadway Design Manual" standards 5-07.1 and 5-07.2.

RESPONSE: The Board reviewed the referenced statute and standards and has concluded that they apply only to paved sidewalks which are contiguous to public streets and ways. Not only are cemetery paths generally grass covered, they are on cemetery land which is for the use of lot owners, not the general public. Nevertheless, the Board has amended the rule upon adoption, as indicated above, so as to accommodate in a reasonable manner the needs of lot owners in wheelchairs to have access to their cemetery property.

COMMENT: A commenter expressed his view that the rule was inconsistent with the action of the Board in the matter of *McMahon v. Greenwood Memorial Park* which was taken on June 12, 1991.

RESPONSE: The referenced matter involved a complaint filed by Mr. McMahon against Greenwood Cemetery because the cemetery had placed a monument in a path of the cemetery. The Board notified Greenwood of the complaint, whereupon the cemetery removed the monument and agreed to refund the price of the interment space to the lot owner. By vote, the Board approved of the resolution of this matter.

The vote of the Board was to approve the settlement of the complaint, not to resolve the issue of whether monuments could be placed in paths, or whether they could be placed in paths under certain conditions. The Board considers its present resolution of this matter, namely widening the minimal required width for pathways from 24 inches to 30 inches to be consistent with its prior action.

COMMENT: A commenter suggested that the rule contravenes the Legislature's intent to provide access to interment spaces as expressed in N.J.S.A. 8A:6-11.

RESPONSE: The Board agrees that the rule, as originally proposed, might have impeded the access of some persons in wheelchairs. Therefore, the Board amended the rule upon adoption to widen the minimal required width for pathways from 24 inches to 30 inches. In the opinion of the Board, this fully satisfies the statutory requirement for providing access while making available for interments certain areas in existing paths.

COMMENT: A commenter asked whether the new path may be placed anywhere within the existing path provided that it is at least 30 inches wide and provides pedestrian access to interment spaces.

RESPONSE: Yes, the new, reconfigured path may be placed anywhere within an existing path provided that a 30 inch path is maintained to all existing interment spaces including, those along both sides of the existing path. This means that the new interment spaces may not be placed against one side of an existing pathway abutting sold interment spaces because such an arrangement would cut off access to those spaces.

To give two examples, a single width interment space (three feet wide) may be placed in the middle of a path which is eight feet wide, as this would leave 30 inches on either side of the interment space. Where there is an existing path around the perimeter of the cemetery property which is at least five and one-half feet wide, a row of single width interment spaces may be placed along the outside of the existing path space, leaving a 30 inch wide path which would provide access to existing spaces.

COMMENT: A commenter asked what the word "maintained" in N.J.S.A. 8A:6-11 will mean if the rule is adopted.

RESPONSE: A cemetery company may maintain the paths in its cemetery by preserving access to all sold interment spaces on both sides of the existing path by continuous courses or ways at least 30 inches wide.

COMMENT: A commenter asked whether due diligence is accomplished when the cemetery company offers an alternate space to someone to whom they had previously sold a space which does not conform to the "thirty inch rule" of this regulation.

RESPONSE: The cemetery company is obligated by this rule to make a conscientious and genuine effort to offer a lot owner an alternative interment space of comparable value and appeal which conforms to this rule. If the lot owner refuses the cemetery company's offer, the obligation of the cemetery company under this rule is fulfilled and the lot may be used for interment when the need arises.

It is estimated that the number of interment spaces which are plotted so as to not conform with this rule, and which have been sold but not used for interments, is small. Of that number, the cemetery company should be able to contact most of those lot owners through its records. For the few lot owners, if any, which remain, the cemetery company may comply with the rule by raising the question of the exchange of the interment space at the time of need.

COMMENT: A commenter recommended that, once the cemetery company has exercised due diligence to locate the lot owner but is unable to do so, the cemetery company should be authorized by the rule to reassign the lot owner's interment space after the passage of a specified time. Alternatively, a statutory amendment could be adopted which would provide authority to the cemetery company to reassign spaces.

RESPONSE: Rather than specifying a specific time within which lot owners must contact the cemetery, the rule allows lot owners to contact the cemetery anytime prior to interment, including at-need, regarding a swap of interment spaces. The commenter's suggestion, if implemented, would cut off the rights of lot owners to be notified that their lot should be switched. A rule which authorized such a procedure might be seen as abrogating the contractual right of the lot owner to the interment space. Because of this, the suggestion of establishing a limited period for notification is rejected.

With regard to the commenter's suggestion of a statutory amendment which would permit the cemetery company to manditorily exchange the interment space, the Board does not express an opinion on what the Legislature might do in this regard.

COMMENT: A commenter opined that the Legislature intended that paths not be reduced in width at all or degraded in quality.

RESPONSE: The Board disagrees. It interprets the relevant statute (N.J.S.A. 8A:6-11) to permit all portions of ground (other than avenues or building grounds, which are specifically excluded) to be laid out into interment spaces provided that access is maintained.

COMMENT: A commenter asked whether portions of ground labeled on a cemetery map as "walk" and "sidewalk" are included in the definition of "path" in the proposal.

RESPONSE: The rule defines a path as a "continuous course or way which has a minimum width of 30 inches and which primarily provides pedestrian access to interment spaces already sold" but does not include avenues, other roadways, or building areas. "Walks" and "sidewalks" which fit this definition would be regarded as "paths" for purposes of the rule.

COMMENT: A commenter noted that N.J.S.A. 8A:6-11 provides that "paths or other roadways shall be maintained to the interment spaces already sold" and inquired whether the word "maintained" applies equally to "paths" and "other roadways."

RESPONSE: Yes, it applies equally to both terms. Paths and other roadways must be maintained when interment spaces are laid out in either. This rule specifies the width of ground which must remain to maintain a path. The width of ground which must be left in order to maintain a roadway is not addressed.

COMMENT: A commenter asked whether N.J.A.C. 3:41-11.1 applies to the laying out of ground in roadways or avenues which were represented on a map but have never been completed.

RESPONSE: The laying out of portions of grounds which is referred to in N.J.A.C. 3:41-11.1 is subject to N.J.S.A. 8A:6-11. The statute provides that the portions of ground which are available to be laid out do not include avenues; thus, such portions of ground may not be marked out into interment spaces. The proposed amendments to N.J.A.C. 3:41-2.1 would define "avenue" as a "public way, street or thoroughfare."

In contrast, roadways may be laid out into interment spaces provided that a roadway is maintained to interment spaces already sold. The regulation does not specify how much width must remain in the roadway for it to be maintained.

Note, however, that if no interment spaces have been sold in the area of the cemetery to which the roadway (as represented on the map) provides access, the roadway may be completely eliminated and plotted into interment spaces or used for any other purpose permitted for cemetery land.

COMMENT: A commenter asked whether the cemetery company was obligated to submit plottings of interments in pathways to the Cemetery Board for approval.

RESPONSE: There is no obligation to submit new plottings to the Cemetery Board for approval. Note, however, that if the area of the cemetery in which an existing path is located was acquired by the cemetery company after the passage of the New Jersey Cemetery Act (that is, on or after December 1, 1971), a revised map indicating the new interment spaces must be filed with the Cemetery Board. N.J.S.A. 8A:6-7.

COMMENT: A commenter asked that the comment period be extended for an additional 30 days.

RESPONSE: The Board considers the standard 30-day comment period to be sufficient time to submit comments on this rule. Therefore, this request is rejected.

COMMENT: A commenter asked the Board to hold a public hearing on this proposal.

RESPONSE: The Board concludes that adequate opportunity was provided for the receipt of comments through the regular process of written submissions. Therefore, this request is rejected.

Full text of the adption follows (addition to proposal indicated in boldface with asterisks ***thus***; deletion from proposal indicated in brackets with asterisks *[thus]*):

3:41-2.1 Definitions

The following words and terms, when used in this chapter, shall have the following meanings:

...

"Avenue" shall mean a public way, street or thoroughfare.

...

"Path" means a continuous course or way which has a minimum width of *[24]* ***30*** inches and which primarily provides pedestrian access to interment spaces already sold, but a path shall not include an avenue or other roadway or areas reserved or set apart for building purposes.

...

"Roadway" means any open way for the passage of vehicles and persons.

"Sold" means that a contract for the sale of the interment space has been executed by the purchaser.

. . . .

SUBCHAPTER 11. LOCATION OF INTERMENT SPACES

3:41-11.1 Use of cemetery land

(a) A cemetery company shall maintain paths to interment spaces already sold when the cemetery company lays out portions of grounds into interment spaces pursuant to N.J.S.A. 8A:6-11. When a cemetery company resurveys, alters, changes or modifies a portion of its grounds previously laid out on a map or maps into such interment spaces, the definition of "path" at N.J.A.C. 3:41-2.1 shall apply.

(b) This subchapter shall not apply to the laying out of portions of ground in areas of cemetery property which have not previously been laid out on a map or maps into paths or interment spaces.

3:41-11.2 Applicability to existing sales and interments

(a) An unsold interment space which, on the effective date of this rule, is plotted in a manner that does not conform with this subchapter shall not be sold or used for interment purposes.

(b) If, on the effective date of this rule, a sold interment space, in which no interment has been made, is plotted in a manner which makes a path non-conforming, the cemetery company shall exercise due diligence and negotiate in good faith with the lot owner for the transfer or exchange of the lot owner's non-conforming space with other space that conforms with this provision. Thereafter, the non-conforming plot shall be replotted or eliminated. The transfer or exchange of the non-conforming plot shall be provided at no expense to the lot owner beyond what the lot owner agreed to pay for the non-conforming plot.

PERSONNEL

(a)

MERIT SYSTEM BOARD

Disability Discrimination Grievance Procedure

Adopted New Rules: N.J.A.C. 4A:1-5

Proposed: April 5, 1993 at 25 N.J.R. 1314(c).

Adopted: September 10, 1993 by the Merit System Board, Anthony J. Cimino, Commissioner, Department of Personnel.

Filed: November 3, 1993 as R.1993 d.614, **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. 11A:2-6(d), 42 U.S.C. §12101 et seq., and 28 C.F.R. §35.107.

Effective Date: December 6, 1993.

Expiration Date: Exempt under 28 C.F.R. Part 35.

On April 5, 1993 a notice of proposed rulemaking was published in the New Jersey Register announcing the proposed adoption by this agency of a grievance procedure to be followed when and if this agency receives a complaint that it had violated or was violating the Americans with Disabilities Act, 42 U.S.C. §12101 et seq. That notice was part of a joint coordinated rulemaking process intended to produce a uniform grievance procedure for all participating agencies with the Department of Law and Public Safety as the lead agency. This notice of adoption concludes the process.

After publication of the notices of proposed rulemaking participating agencies received public comments, which were forwarded to the Department of Law and Public Safety for consolidated review, formulation of replies and revision of the proposed rules, where appropriate. The Summary of Public Comments and Agency Responses is being published under the heading of the Department of Law and Public Safety in this issue of the New Jersey Register. The reader is directed to that agency's notice of adoption to find the comments and replies. The final text of the grievance procedure appears below.

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

SUBCHAPTER 5. DISABILITY DISCRIMINATION GRIEVANCE PROCEDURE

4A:1-5.1 Definitions

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

"ADA" means the Americans with Disabilities Act, 42 U.S.C.A. §12101 et seq.

"Agency" means the New Jersey Department of Personnel.

"Designated decision maker" means the Commissioner of Personnel or his or her designee.

4A:1-5.2 Purpose

(a) These rules are adopted by the agency in satisfaction of the requirements of the ADA and regulations promulgated pursuant thereto, 28 C.F.R. 35.107.

(b) The purpose of these rules is to establish a designated coordinator whose duties shall include assuring that the agency complies with and carries out its responsibilities under the ADA. Those duties shall also include the investigation of any complaint filed with the agency pursuant to N.J.A.C. 4A:1-5.5 through 5.8.

4A:1-5.3 Required ADA Notice

In addition to any other advice, assistance or accommodation provided, a copy of the following notice shall be given to anyone who inquires regarding the agency's compliance with the ADA or the availability of accommodation which would allow a qualified individual with a disability to receive services or participate in a program or activity provided by the agency.

AGENCY NOTICE OF ADA PROCEDURE

The agency has adopted an internal grievance procedure providing for prompt and equitable resolution of *[complaints]* ***grievances*** alleging any action prohibited by the U.S. Department of Justice regulations implementing Title 11 of the Americans with Disabilities Act. Title 11 states, in part, that "no otherwise qualified disabled individual shall, solely by reason of such disability, be excluded from participation in, be denied the benefits of or be subjected to discrimination" in programs or activities sponsored by a public entity.

Rules describing and governing the internal grievance procedure can be found in the New Jersey Administrative Code, N.J.A.C. 4A:1-5. As those rules indicate, *[complaints]* ***grievances*** should be addressed to the agency's designated ADA Coordinator, who has been designated to coordinate ADA compliance efforts, at the following address:

[(The following address will be specific to the Agency)]
ADA Coordinator
New Jersey Department of Personnel
CN 312
Trenton, New Jersey 08625

1. A *[complaint]* ***grievance*** may be filed in writing or orally, but should contain the name and address of the person filing it, and briefly describe the alleged violation. A form for this purpose is available from the designated ADA coordinator. In cases of employment related *[complaints]* ***grievances***, the procedures established by the Department of Personnel, N.J.A.C. 4A:7-1.1 et seq. will be followed where applicable.

2. A *[complaint]* ***grievance*** should be filed promptly within *[20]* ***30*** days after the *[complainant]* ***grievant*** becomes aware of the alleged violation. (Processing of allegations of discrimination which occurred before this grievance procedure was in place will be considered on a case-by-case basis.)

3. An investigation, as may be appropriate, will follow the filing of a *[complaint]* ***grievance***. The investigation will be conducted by the agency's designated ADA Coordinator. The rules contemplate informal but thorough investigations, affording all interested persons and their representatives, if any, an opportunity to submit evidence relevant to a *[complaint]* ***grievance***.

4. In most cases a written determination as to the validity of the *[complaint]* ***grievance*** and a description of the resolution, if any, will be issued by the designated decision maker and a copy forwarded to the *[complainant]* ***grievant*** no later than 45 days after its filing.

5. The ADA coordinator will maintain the files and records of the agency relating to the *[complaints]* ***grievances*** filed.

6. The right of a person to a prompt and equitable resolution of the *[complaint]* ***grievance*** filed hereunder will not be impaired by the person's pursuit of other remedies such as the filing of an ADA *[complaint]* ***grievance*** with the responsible Federal department or agency or the New Jersey Division on Civil Rights. Use of this grievance procedure is not a prerequisite to the pursuit of other remedies.

7. The rules will be construed to protect the substantive rights of interested persons, to meet appropriate due process standards and to assure that the agency complies with the ADA and implementing Federal rules.

4A:1-5.4 Designated ADA coordinator

(a) The designated coordinator of ADA compliance and complaint investigation for the agency is:

[(The following address will be specific to the Agency)]

ADA Coordinator
New Jersey Department of Personnel
CN 312
Trenton, New Jersey 08625

(b) All inquiries regarding the agency's compliance with the ADA and the availability of accommodation which would allow a qualified individual with a disability to receive services or participate in a program or activity provided by the agency should be directed to the designated coordinator identified in (a) above.

(c) All *[complaints]* ***grievances*** alleging that the agency has failed to comply with or has acted in a way that is prohibited by the ADA should be directed to the designated ADA coordinator identified in this section, in accordance with the procedures set forth in N.J.A.C. 4A:1-5.5 through 5.8.

4A:1-5.5 *[Complaint]* ***Grievance*** procedure

A *[complaint]* ***grievance*** alleging that the agency has failed to comply with the ADA or has acted in a way that is prohibited by the ADA shall be submitted either in writing or orally to the designated ADA coordinator identified in N.J.A.C. 4A:1-5.4 ***within 30 days of the grievant becoming aware of the alleged violation***. A *[complaint]* ***grievance*** alleging employment discrimination will be processed pursuant to the rules of the Department of Personnel, N.J.A.C. 4A:7-1.1 through 3.4, if those rules are applicable.

4A:1-5.6 *[Complaint]* ***Grievance*** contents

(a) A *[complaint]* ***grievance*** submitted pursuant to this subchapter may be submitted in or on the form set forth at N.J.A.C. 4A:1-5.7.

(b) A *[complaint]* ***grievance*** submitted pursuant to this subchapter shall include the following information:

1. The name of the *[complainant]* ***grievant*** and/or any alternate contact person designated by the *[complainant]* ***grievant*** to receive communication or provide information for the *[complainant]* ***grievant***;

2. The address and telephone number of the *[complainant]* ***grievant*** or alternate contact person; and

3. A description of manner in which the ADA has not been complied with or has been violated, including times and locations of events and names of witnesses if appropriate.

4A:1-5.7 *[Complaint]* ***Grievance*** form

The following form may be utilized for the submission of a *[complaint]* ***grievance*** pursuant to this subchapter:

Americans with Disabilities Act Grievance Form

Date: _____

Name of grievant: _____

Address of grievant: _____

Telephone number of grievant: _____

[Disability of grievant: _____]

Name, address and telephone number of alternate contact person:

_____

_____

Agency alleged to have denied access:

Department: _____

Division: _____

Bureau or office: _____

Location: _____

Incident or barrier: _____

Please describe the particular way in which you believe you have been denied the benefits of any service, program or activity or have otherwise been subject to discrimination. Please specify dates, times and places of incidents, and names and/or positions of agency employees involved, if any, as well as names, addresses and telephone numbers of any witnesses to any such incident. Attach additional pages if necessary.

_____

_____

_____

_____

_____

_____

Proposed access or accommodation:

If you wish, describe the way in which you feel access may be had to the benefits described above, or that accommodation could be provided to allow access.

_____

_____

_____

A copy of the above form may be obtained by contacting the designated ADA coordinator identified at N.J.A.C. 4A:1-5.4.

4A:1-5.8 Investigation

(a) Upon receipt of a *[complaint]* ***grievance*** submitted pursuant to this subchapter, the designated ADA coordinator will notify the *[complainant]* ***grievant*** of the receipt of the *[complaint]* ***grievance*** and the initiation of an investigation into the matter. The designated ADA coordinator will also indicate a date by which it is expected that the investigation will be completed, which date shall not be later than 45 days from the date of receipt of the *[complaint]* ***grievance, if practicable or*** unless a later date is agreed to by the *[complainant]* ***grievant***.

(b) Upon completion of the investigation, the designated ADA coordinator shall prepare a report for review by the designated decision maker for the agency. The designated decision maker shall render a written decision within 45 days of receipt of the *[complaint]* ***grievance, if practicable or*** unless a later date is agreed to by the *[complainant]* ***grievant***, which decision shall

be transmitted to the *[complainant]* ***grievant*** and/or the alternate contact person if so designated by the *[complainant]* ***grievant***.

COMMUNITY AFFAIRS

(a)

DIVISION OF FIRE SAFETY

Uniform Fire Code; Fire Code Enforcement; High Level Alarms; Fire Service Training and Certification

Adopted Amendments: N.J.A.C. 5:18-1.4, 1.5, 2.1, 2.3, 2.5, 2.6, 2.11, 2.14, 4.1 and 4.3; 5:18A-1.4, 2.2, 2.3, 2.5, 2.6, 2.7, 2.8, 2.9, 2.10, 2.11, 3.3, 3.4, 3.6, 4.2, 4.3, 4.4, 4.5, 4.6, 4.9 and 4.10; 5:18B-2.8; and 5:18C-1.4, 1.5, 1.7, 1.8, 1.9 and 2.3

Proposed: September 20, 1993 at 25 N.J.R. 4363(a).
Adopted: November 1, 1993 by Stephanie R. Bush, Commissioner, Department of Community Affairs.
Filed: November 5, 1993 as R.1993 d.628, **with technical changes** not requiring additional public notice or comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 52:27D-25d, 52:27D-198 and 52:27D-219.

Effective Date: December 6, 1993.
Expiration Date: January 4, 1995, N.J.A.C. 5:18, 5:18A and 5:18B;
February 5, 1995, N.J.A.C. 5:18C.

Summary of Public Comments and Agency Responses:
No comments received. Clarifying technical changes were made to N.J.A.C. 5:18A-1.4, "Code," and 5:18A-2.7(a) and 4.4(d).

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

5:18-1.4 Applicability
(a)-(g) (No change.)
(h) Any requirement in this chapter that is applicable to a building shall also be applicable to the exterior portion of the premises in which the building is located, or to a premises that does not include a building, if the Division or the fire official finds compliance with such requirement in such exterior area or premises to be necessary for the protection of the safety of persons upon the premises, firefighters or the general public.

5:18-1.5 Definitions
The following terms shall have the meanings indicated except where the context clearly requires otherwise. All definitions found in the Uniform Fire Safety Act, P.L. 1983, c.383, N.J.S.A. 52:27D-192 et seq., shall be applicable to this chapter. Where a term is not defined in this section or in the Uniform Fire Safety Act, then the definition of that term found in the Uniform Construction Code at N.J.A.C. 5:23-1.4 shall govern.
...
"Director" means the Director of the Division of Fire Safety.
"Division" means the Division of Fire Safety of the Department of Community Affairs.
...

5:18-2.1 Enforcement authority
(a) It shall be the duty and responsibility of the fire official to enforce the provisions of this Code as set forth herein.
1. Where no local enforcing agency has been created by the local governing body having jurisdiction then it shall be the duty and responsibility of the Division of Fire Safety in the Department of Community Affairs (hereinafter cited as the Division) to enforce the provisions of this Code as herein set forth for life hazard uses or whenever conditions which constitute an imminent hazard are found to exist.
i. The Division shall publish quarterly a roster of enforcing agencies which shall list the enforcing agency having general jurisdiction and the enforcing agency having jurisdiction for life hazard uses in each municipality, fire district and fire department area in the State. The listing shall determine the agency that has jurisdiction.
2. (No change.)
3. The Division shall enforce the provisions of this Code, as herein set forth, for all facilities owned by the State or any board, commission or authority thereof, and shall have concurrent jurisdiction with the local enforcing agency or the county fire marshal for all facilities owned or leased by State, county and local governments and any instrumentality thereof.
(b)-(h) (No change.)

5:18-2.3 Variances
(a)-(c) (No change.)
(d) Copies of all variance applications and records of the action taken on them shall be maintained as permanent public records by the fire official.
1. A local fire official shall promptly provide the Division with copies of all decisions granting or denying variances after they have been rendered.
(e) (No change.)

5:18-2.5 Required inspections
(a)-(b) (No change.)
(c) Within 30 days following each annual and every other quarterly inspection of a life hazard use, the owner shall file an application for a certificate of inspection on forms provided by the local enforcing agency. Forms shall be provided either before or at the time of inspection. The form shall request, and the owner shall provide, the information specified below, or where applicable, certify that it remains as stated on the registration survey. The form shall be returned to the local enforcing agency, which shall review it and forward it to the Division.
1.-5. (No change.)
(d) (No change.)
(e) In addition to inspecting life hazard uses, a local enforcing agency may, by giving notice to the Division of Fire Safety, accept responsibility for cyclical inspection and enforcement of the Uniform Fire Code in hotels and multiple dwellings that are not life hazard uses. A local enforcing agency that accepts this responsibility shall inspect each multiple dwelling that is not a life hazard use and each hotel that is not a life hazard use at a frequency not less than that currently provided for in the rules for the Maintenance of Hotels and Multiple Dwellings, N.J.A.C. 5:10.
1. (No change.)
(f) If a building is a multiple dwelling or a hotel, as defined in N.J.S.A. 55:13A-3, or a rooming house or boarding house, as defined in N.J.S.A. 55:13B-3, the local enforcing agency shall send a copy of the certificate of inspection to the Division of Fire Safety at the time of issuance of the certificate.

5:18-2.6 Registration of buildings and uses
(a)-(h) (No change.)
(i) The owner of a life hazard use shall pay the annual fee within 30 days of the day on which it is demanded by the Department. If the owner fails to do so, the Department may, pursuant to N.J.S.A. 52:27D-201, issue a certificate to the clerk of the Superior Court stating that the owner is indebted to the Department for the payment of the annual fee and the clerk shall immediately enter upon the record of docketed judgments the name of the owner and of the Department, a designation of the statute under which the fee is assessed, the amount of the fee certified and the date the certification was made. The making of the entry shall have the same effect as the entry of a docketed judgment in the office of the clerk, but without prejudice to the owner's right of appeal.
1. Upon application by a local enforcing agency and approval by the Division, the certificate obtained pursuant to this subsection shall be assigned to the local enforcing agency in which the life hazard

use is located. The local enforcing agency shall pursue collection and forward any fees collected to the Division, in accordance with N.J.A.C. 5:18A-2.6(a)4.

5:18-2.11 Appeals

(a) The person aggrieved may appeal any enforcement action, including rulings, orders and notices, by submitting a written hearing request as set forth herein. Either the owner of the premises or of the use, or an authorized agent of the owner, may be a person aggrieved.

1. (No change.)

2. If from the act of the Department serving as the local enforcing agency, the request shall be made to the Hearing Coordinator, Department of Community Affairs, CN 802, Trenton, New Jersey 08625. The hearing shall be conducted by the Office of Administrative Law, with the Commissioner or his or her designee issuing the final decision.

3. (No change.)

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

5:18-2.14 Imminent hazards

(a) (No change.)

(b) The enforcing agency shall reinspect the building, structure or premises within 48 hours of receiving written notice from the owner of a building, structure or premises that has been vacated or closed, or ordered to be vacated or closed, stating that the violation has been terminated. If, upon reinspection, the enforcing agency determines that the violation has been terminated, it shall rescind the order requiring the vacation of the building, structure or premises and occupancy may be resumed immediately; provided that, if the reinspection is not made by the local enforcing agency within 48 hours of the receipt of the notice, the owner may apply to the Director, Division of Fire Safety in the Department of Community Affairs for a reinspection.

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

5:18-4.1 Code adopted; scope

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

(c) A comprehensive facility fire protection plan may be submitted for facilities located within the jurisdiction of more than one local enforcing agency that are under single facilities management, ownership and operational control.

1. The plan shall be submitted to the Division of Fire Safety for approval and shall include an original and one copy plus a copy for each local enforcing agency having jurisdiction in the areas in which the subject facilities are located. The plan shall include the following:

i.-iii. (No change.)

2. The Division shall consult with the fire official in each local enforcing agency having jurisdiction in the areas in which facilities included on the plan are located before taking any final action on a plan.

3. Within 60 days after receiving the facility fire protection plan, the Division of Fire Safety shall approve or disapprove of the plan submitted in writing. If the plan is disapproved, then the written statement shall include the reason(s) for such disapproval.

i. A plan that is not approved within 60 days shall be deemed to have been disapproved unless the 60 day period is extended by mutual agreement of the Division and the applicant;

ii. (No change.)

iii. No owner shall be required to retrofit a facility pending approval or disapproval of the plans by the Division.

4. The original approved plan shall be maintained on file by the Division of Fire Safety. One copy of the approved plan shall be returned to the applicant and one copy shall be supplied to the fire official in each local enforcing agency having jurisdiction in the areas in which facilities included on the plan are located.

5. Any deviation from the plan as approved must be submitted to the Division for approval in accordance with the procedure established herein for the submission and approval of plans.

6. (No change.)

5:18-4.3 Relation to Uniform Construction Code and other Codes

(a) (No change.)

(b) A building in full compliance with the current fire safety requirements of the New Jersey Uniform Construction Code (N.J.A.C. 5:23), as determined by the construction official with the concurrence of the fire subcode official and in consultation with the fire official, shall not be required to conform to more restrictive requirements established by this subchapter.

1. A determination as to whether a New Jersey Uniform Construction Code requirement involves fire safety shall, in a disputed case, be determined by the Construction Code Element after consultation with the Division of Fire Safety and with the fire official and with the concurrence of the Director, Division of Housing and Development.

2.-3. (No change.)

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

5:18A-1.4 Definitions

(a) As used in this chapter:

...

"Code" ***or "fire code"*** means the Uniform Fire Code adopted as N.J.A.C. 5:18.

...

"Division" means the Division of Fire Safety of the Department of Community Affairs.

...

5:18A-2.2 Matters covered; jurisdictions; exceptions

(a) (No change.)

(b) Jurisdictional responsibilities for enforcing the Code are as follows:

1. A local enforcing agency, where established, shall be responsible for enforcement of the Code within its jurisdictional area for:

i.-iv. (No change.)

v. All buildings leased, in whole or in part, by the State of New Jersey or any of its boards, commissions, agencies or authorities, provided that the jurisdiction of the local enforcing agency in such buildings shall be concurrent with that of the Division.

2. (No change.)

3. The Division shall be responsible for enforcing the Code:

i.-iii. (No change.)

4. (No change.)

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

5:18A-2.3 Local enforcing agencies; establishment

(a) Creation of a local enforcing agency shall be subject to the following:

1.-2. (No change.)

3. The governing body shall designate a county enforcing agency or local enforcing agency, other than the Division, to enforce the Code within the limits of a fire department or district if requested by the proper department or district authority.

4.-5. (No change.)

6. If the fire department or district chooses neither to enforce the Code nor to designate an existing county fire marshal, or if the fire marshal declines designation, the municipality may create its own local enforcing agency subject to (a)7 below. If no agency is created or designated, the Division will assume jurisdiction in accordance with N.J.A.C. 5:18A-2.2.

7. (No change.)

(b) (No change.)

(c) The effective date of the establishment of an enforcing agency shall be determined as follows:

1. (No change.)

2. If no local enforcing agency was established by August 18, 1985, or a local enforcing agency was established but no election was made by that date to enforce the Code in life hazard uses, the Division shall enforce the Code in life hazard uses within the municipality, or within such portion of the municipality as is not served by a local enforcing agency that enforces the Code in life hazard uses.

3. When, at any time after August 18, 1985, a municipality adopts an ordinance creating a local enforcing agency authorized to enforce the Code in life hazard uses, or the municipality or county, as the

case may be, adopts an ordinance or resolution authorizing an existing local enforcing agency to enforce the Code in life hazard uses, and a copy of the ordinance or resolution, as the case may be, has been filed with the Division, the effective date of the assumption by the local enforcing agency of enforcement responsibility in life hazard uses shall be the date of the next quarterly publication of the Registry of Enforcing Agencies.

4. If the Division determines that a local enforcing agency is not properly enforcing the Code in life hazard uses, and, also, with regard to imminent hazard, the Division may assume responsibility for enforcing the Code in life hazard uses with regard to imminent hazards within the territorial jurisdiction of the local enforcing agency. In any such case, the effective date shall be as established by the Division in its notice of findings.

5. (No change.)

6. When the Division assumes responsibility pursuant to N.J.A.C. 5:18A-4.3(c), then the effective date shall be the 61st day after the vacancy occurs unless the Division grants a 30 day extension, as provided in N.J.A.C. 5:18A-4.3(c).

(d) If a fire district designated as a separate local enforcing agency under this subchapter is dissolved, the fire department within the territorial area of the dissolved district shall have the option, within 30 days of the dissolution, to assume the local enforcing agency responsibilities. If the fire department does not exercise this option, it shall pass to another district within the municipality and, if not exercised by a district, shall pass to the municipality itself. The district and municipality shall each have 15 days in which to decide the matter.

1. (No change.)

2. Exercise of the option shall be evidenced by a written notice signed by the party authorized to act on behalf of the entity. This notice shall be delivered to the municipal governing body that enacted the ordinance authorizing local enforcement. In addition, a copy shall immediately be forwarded to the Division.

3. The local enabling ordinance governing the local enforcing agency shall be modified if necessary and promptly filed with the Division. The new local enforcing agency shall promptly assume LEA responsibilities and notify the Division.

4. If, within 60 days of dissolution, the Division has not received proper written notice of the assumption of a dissolved district's obligations, the Division shall assume responsibility.

(e) (No change.)

5:18A-2.5 State enforcing agency; establishment

(a) The Division of Fire Safety in the Department of Community Affairs is constituted as the State enforcing agency for the purpose of administering and enforcing the Code (N.J.A.C. 5:18, 5:18A, and 5:18B) in those areas where a local enforcing agency has not been established for the inspection of life hazard uses and that responsibility has not been delegated to a county fire marshal.

(b) The Division of Fire Safety shall also carry out any other responsibility of the Department under the Code or these regulations.

5:18A-2.6 Collection of and accounting for fees and penalties

(a) Collection of registration fees:

1. The Division shall annually bill for, and take such steps as may be necessary to collect or provide for the collection of, the annual registration fees provided for by the Code.

2. The Division shall remit 65 percent of the amount collected to the local enforcing agency established for the inspection of life hazard uses. This payment shall be disbursed by the end of the quarter next succeeding the one in which the fees were collected.

3. (No change.)

4. Where a local enforcing agency has been assigned a certificate of judgment in accordance with N.J.A.C. 5:18-2.6(i)1, it shall remit 35 percent of the amount collected to the Division by the end of the quarter next succeeding the one in which the fees were collected.

i. (No change.)

(b) (No change.)

(c) All revenues collected by the Division shall be deposited in the Fire Safety Revolving Fund created by the Treasurer of the State of New Jersey. Expenditures may be made from the fund to carry out any of the responsibilities of the Division of Fire Safety.

(d) (No change.)

(e) The Division shall have no obligation to a local enforcing agency in respect of fees due but not collected in any given quarter.

5:18A-2.7 Registry of agencies

(a) Each municipality that passes an ordinance establishing a local enforcing agency shall file a copy of same with the Division of Fire Safety within two weeks of final adoption. Each county that passes an ordinance or resolution establishing a county enforcing agency shall file a copy of same with the Division of Fire Safety within two weeks of adoption.

1. Any municipality or county that later amends a resolution or an ordinance that established an enforcing agency shall file a copy of the amendments with the Division of Fire Safety within two weeks of adoption.

2. A municipality or county that does not file an ordinance shall be deemed not to have passed one*[. The]* ***, in which case, the*** Division of Fire Safety shall enforce the Code in *[those jurisdictions]* ***that jurisdiction***.

(b) The Division of Fire Safety shall compile those ordinances and shall issue quarterly a Registry of Enforcing Agencies. The Registry shall be made available to the general public and shall show what agency is responsible to enforce the Code and what agency is responsible to inspect life hazard uses in every Fire Code jurisdictional area of the State.

(c) (No change.)

5:18A-2.8 Amendments to the Code

(a) (No change.)

(b) Any amendments adopted to the State Fire Code shall be filed with the Division of Fire Safety. Failure to file shall not affect the validity of the amendment.

(c) (No change.)

5:18A-2.9 Conflict of interest

(a) No person employed by an enforcing agency, as a fire official or fire inspector, shall carry out any inspection or enforcement procedure with respect to any property or business in which he or she or a member of his or her immediate family has an economic interest.

1. Where an inspection or enforcement procedure is necessary or required in any such property or business, then the fire official shall arrange for the inspection or enforcement to be carried out by the county enforcing agency or the Division of Fire Safety.

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

5:18A-2.10 Departmental monitoring

(a) The Division of Fire Safety shall institute a regular program of monitoring local enforcing agencies to ensure that the Code is being properly enforced. This monitoring program shall provide for a regular schedule of random field visits, as well as monitoring visits in response to complaints.

(b) When making a monitoring visit, the Division shall determine:

1.-9. (No change.)

(c) If the Division determines that a local enforcing agency has failed to enforce the Code properly, then the Division shall notify the local enforcing agency of this determination and direct corrective action as needed.

(d) The local enforcing agency shall have 15 days in which to contest the Division's findings by filing exceptions in writing with the Division. The Division shall consider any such exceptions and issue a final finding.

(e) Where the local enforcing agency shall fail to take corrective action, or where the failure to enforce the Code is pervasive and substantial, then the Division shall notify the local enforcing agency of its determination or final finding and shall thereafter assume responsibility for all inspection and enforcement with respect to life hazard uses within the jurisdiction of the local enforcing agency. All fees and penalties associated with the enforcement in life hazard uses shall, from that date forward, be paid to the Division.

(f) Where the Division has assumed responsibility due to the failure of a local agency to enforce the Code properly, the local agency may petition the Commissioner to return jurisdiction. The petition shall set forth the corrective action the local enforcing agency has taken, or will take, to ensure proper enforcement of the Code. The Commissioner may return jurisdiction if he or she finds that the Code will be properly and fully enforced.

5:18A-2.11 Right of appeal

Any person or agency aggrieved by a notice, order, action or decision of the Division pursuant to this subchapter shall be entitled to a hearing before the Office of Administrative Law pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. and the Uniform Administrative Rules of Practice, N.J.A.C. 1:1, provided that a request for a hearing is submitted to the Hearing Coordinator, Department of Community Affairs, CN 802, Trenton, New Jersey 08625 within 15 days of the person or agency's receipt of the notice or order complained of.

5:18A-3.3 Duties of fire officials and fire inspectors

(a) The fire official shall enforce the code and the regulations and shall:

1. Maintain certification with the Division pursuant to N.J.A.C. 5:18A-4;

2.-7. (No change.)

8. Assist the Division, when requested, with any registration survey;

9.-15. (No change.)

16. File such reports as the Division may from time to time require;

17.-25. (No change.)

(b) Whenever a fire death occurs within the jurisdiction of a local enforcing agency, the fire official shall notify the Division of Fire Safety via telephone within 48 hours of the death. A Fire Incident and Casualty report shall be forwarded to the Division of Fire Safety within 30 days.

(c) The fire inspector shall enforce the Code and the regulations under the direction of the fire official and shall:

1. Maintain certification with the Division pursuant to N.J.A.C. 5:18A-4;

2.-8. (No change.)

5:18A-3.4 Records

(a) The local enforcing agency shall maintain a central file system for each property, building or use that requires a periodic inspection or a permit.

1. The files shall contain all information, including inspection reports, correspondence, notices and orders, and so forth, relevant to each property, building or use.

2. The files shall contain, or indicate the storage location of, all plans and reports too bulky for inclusion in the central file.

3. The files and records of the local enforcing agency shall be open to Division review and audit and public inspection at reasonable times.

4. File copies of all documents shall be retained in the official records as provided by law.

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

5:18A-3.6 Coordination for State-licensed facilities

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

(d) Any State agency that enforces the Fire Code as a part of any licensing standard and any fire official shall consult with the other before any variance to the Fire Code is granted.

1. The concurrence of both shall be required before the variance shall be granted.

2. A copy of any variance granted shall be filed with the Division.

(e) Wherever a difference in interpretation of the Code arises between the fire official and a State agency having licensing jurisdiction, then the official, the agency or the owner may apply to the Division for a final interpretation and ruling, which shall be requested and furnished in writing.

5:18A-4.2 Authority; hearings

(a) The following rules concern Office of Fire Code Enforcement certification:

1. There is hereby established in the Division of Fire Safety an Office of Fire Code Enforcement Certification. The office shall consist of such employees of the Department of Community Affairs as may be required for the efficient implementation of this subchapter.

2. The responsibilities of the Division of Fire Safety, in addition to all others provided in this subchapter, shall include the following:

i.-iii. (No change.)

(b) The following rules concern hearings:

1. Any person aggrieved by any notice, action, ruling or order of the Division, with respect to this subchapter, shall have a right to a hearing before the Office of Administrative Law. The final decision in any such case shall be issued by the Commissioner.

2. The aggrieved person must request a hearing. The request must be made within 15 days after receipt of the action or ruling being contested. The request shall be mailed to the Hearing Coordinator, Department of Community Affairs, CN 802, Trenton, New Jersey 08625. The request for hearing shall raise all issues that will be set forth at the hearing.

5:18A-4.3 Certification required

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

(c) When a local enforcing agency that enforces the Code in life hazard uses has a vacancy that leaves the agency without a certified fire official, then the appointing authority shall appoint a certified person to the position within 45 days of the vacancy having occurred. The appointing authority may request an extension of 30 days in which to make the appointment. Such requests shall be made within the initial 45 day period, by the appointing authority or designee, to the Division, Attention: LEA Supervisor, shall set forth the reasons why additional time is necessary and shall indicate if any inspection or enforcement matters require Division assistance in the interest of public health, safety or welfare. Within seven business days from receipt of an extension request, the Division shall send a written determination either granting or denying the request.

1. Fire officials appointed to fill vacancies shall so notify the Division in writing, on the local enforcing agency letterhead, within five days of the appointment.

2. (No change.)

3. The appointing authority or designee shall notify the Division, Attention: LEA Supervisor, in writing within five days of the date that the fire official vacates the office.

4. The Division shall be notified in writing by either the appointing authority or the fire official at least 10 days in advance of any leaves of absence by the fire official in excess of 30 days, which notification shall include the provisions that have been made to enforce the Code during the period of absence.

5. If no fire official is appointed within the applicable time, the Division shall assume responsibility for enforcement and modify the Registry accordingly. Registration fees collected for the period during which the Division is responsible, as well as for the preceding period of the fire official's vacancy, shall enure to the Division.

(d) The following shall be deemed to be violations of the Uniform Fire Safety Act subject to a penalty of not more than $500.00 for each offense:

1.-2. (No change.)

3. To fail to notify the Division of Fire Safety concerning a vacancy, as required by this section.

5:18A-4.4 Requirements for certification

(a) Any candidate for certification in Fire Code enforcement pursuant to this subchapter shall submit an application to the Office of Fire Code Enforcement Certification in the Division of Fire Safety, accompanied by the required fee established at N.J.A.C. 5:18A-4.7. The application shall include such information and documentation as the Division may require.

(b) Certification as a "fire inspector" shall be issued to any applicant who has successfully completed an educational program approved by the Division pursuant to N.J.A.C. 5:18A-4.9.

(c) Certification as a "fire official" shall be issued to any applicant who holds a valid certification as a fire inspector issued by the Division pursuant to this section and has successfully completed an educational program approved by the Division pursuant to N.J.A.C. 5:18A-4.9.

(d) The Division shall determine, by examination of the application and review of any supporting documents, including any evidence of experience, training and/or education submitted, whether an applicant is qualified for ***the*** certification for which the application has been made.

1. If the application is satisfactory, the Division shall issue a certification to the applicant upon payment of the required fee.

2. This certification shall show that the person has met the established requirements and is entitled to be employed in the State in accordance with the provisions of *[these regulations]* ***this subchapter***.

3. The Division may deny, or refuse to issue, a certification to an applicant upon proof that there has been any act or omission that would constitute grounds for revocation under N.J.A.C. 5:18A-4.6.

5:18A-4.5 Renewal of certification

(a) Every two years, any certification already issued shall be renewed upon submission of an application, payment of the required fee, and verification by the Office of Fire Code Enforcement Certification that the applicant has met such continuing educational requirements as may be established by the Commissioner. The Division shall renew, for a term of two years, the certification previously issued. The expiration date of the certification shall be January 31 or July 31.

(b) The Division shall issue, upon application, a duplicate certification of the appropriate type and specialty upon a finding that the certification has been issued and the applicant is entitled to such certification to replace the one that has been lost, destroyed, or mutilated. Payment of a fee as may be established by the Commissioner shall be required.

(c) Continuing education requirements, as follows, must be met for renewal of certification. The requirements are based upon the type(s) of certification(s) held and not upon employment position held. Continuing education units (CEU's) shall be approved by the Division for technical and administrative courses (one CEU equals 10 contact hours).

1.-2. (No change.)

(d) (No change.)

(e) After revocation of a certification upon any of the grounds set forth in N.J.A.C. 5:18A-4.6, the Division may not renew or reinstate such certification; however, a person may file a new application for a certification with the Division. When it can be shown that all loss caused by the act or omission for which the certification was revoked has been fully satisfied, that the applicant has been legally rehabilitated and that all conditions imposed by the decision of revocation have been complied with, the Division may issue a new certification. No new certification shall be issued if the cause for revocation was conviction of a crime of any degree which crime was in connection with Fire Code enforcement.

5:18A-4.6 Revocation of certifications and alternative sanctions

(a) The Division may suspend and/or revoke a certification, and/or assess a civil penalty of not more than $500.00, if the Department determines that the holder:

1.-11. (No change.)

(b) The Division, in addition, or as an alternative, to revoking or suspending a certification, or assessing a penalty, may issue a letter of warning, reprimand, or censure with regard to any conduct that, in the judgment of the Division, warrants a letter of warning, reprimand, or censure. Such letter, in addition to any other filing requirements, shall be made a part of the certification file of the individual.

(c) The Commissioner shall appoint a review committee to advise the Department concerning the appropriateness of sanctions that the Department proposes to take against persons holding certifications who are alleged to have done any act or omission proscribed by (a) above. The Department shall provide necessary staff for the review committee.

1.-5. (No change.)

6. The review committee shall submit its recommendations as to the sanctions, if any, that ought to be imposed, to the Director, Division of Fire Safety within 20 business days following the meeting. No sanctions shall then be imposed without the express approval of the Director. Failure of the review committee to submit a timely recommendation shall be deemed to be concurrence with the action proposed to be taken by the Department. Notice of the review committee's recommendation, or failure to issue a recommendation, shall be given to the person holding certification.

7. (No change.)

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

5:18A-4.9 Organizational, administrative, and operational functions of the Fire Code enforcement educational programs

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

(d) An organization or institution shall assure that:

1. (No change.)

2. It is the responsibility of the institution to maintain an adequate system of student personnel accounting, including a permanent cumulative record of each student enrolled. To facilitate ready interpretation by the Division, the graduate is entitled to an intelligible and adequate transcript of record, including a statement of the course title.

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

5:18A-4.10 Procedure for applying for approval of educational programs

(a) (No change.)

(b) Each application shall be submitted in the name of the institution or organization by a person authorized to do so. It shall contain, at a minimum, the following information:

1.-6. (No change.)

7. A statement that the institution or organization shall notify the Division if the program is withdrawn or changed at any time;

8.-9. (No change.)

(c) The Division shall have the right to undertake such reviews as may be necessary to verify the accuracy of an application or its conformity with this subchapter. The institution, by submitting an application, expressly agrees to cooperate in such reviews.

(d) Upon verification that the program or course will satisfy the educational program requirements, the Division shall:

1. (No change.)

2. Place the name of the institution and the course on the Division's list of approved courses. That list shall be made available to the public.

i. (No change.)

(e) Whenever a course or program has been approved by the Division, the institution or organization offering the course may include the statement "This course is approved for credit toward a certification issued by the Department of Community Affairs pursuant to the Uniform Fire Safety Act" in any catalog, bulletin or informational circulars. Whenever such a statement is included, however, the catalog, bulletin or circular shall also contain a statement describing precisely the nature and extent of the approval.

(f) The Division may revoke its approval, after notice and the opportunity to be heard, whenever it ascertains that a course has lapsed or is no longer in conformity with the requirements of this subchapter and/or the terms of the Division's approval. Whenever approval has been revoked or a course has been withdrawn by an institution or organization, a new application and approval shall be required before the course may again be offered as providing credit toward a certification.

(g) (No change.)

5:18B-2.8 Applicants' right of appeal; procedure

(a) Whenever the Department shall deny an application for an installation, fail to act upon an application for an installation, refuse to grant a variation, or make any other decision pursuant or related to this chapter, including the assessment of any monetary penalties,

an owner may file an appeal for an administrative hearing. The case shall be adjudicated before the Office of Administrative Law and the final decision shall be issued by the Commissioner. Such hearings shall be governed by the provisions of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., as implemented by N.J.A.C. 1:1.

(b) (No change.)

(c) The application for appeal shall be in writing, filed with the Hearing Coordinator, Department of Community Affairs, CN 802, Trenton, NJ 08625 and shall briefly set forth the appellant's position. Such application shall state the name and address of the appellant and the address of the terminal in question, and shall reference specific sections of the regulations and the extent and nature of the appellant's reliance on them. The appellant may append to the written application any relevant data or information.

5:18C-1.4 Definitions

The following terms shall have the meanings indicated except where the context clearly requires otherwise:

...

"Division" means the Division of Fire Safety of the Department of Community Affairs.

...

5:18C-1.5 Office established; hearings

(a) There is hereby established in the Division of Fire Safety an Office of Training and Certification. The office shall consist of such employees of the Department of Community Affairs as may be required for the efficient implementation of this chapter.

(b) (No change.)

(c) Any person aggrieved by any notice, action, ruling or order of the Commissioner, with respect to this chapter, shall have a right to a hearing before the Office of Administrative Law, 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. The final decision in any such case shall be issued by the Commissioner.

1. The aggrieved person must request a hearing. The request must be made within 15 days after receipt of the action or ruling being contested. The request shall be made to the Hearing Coordinator, Department of Community Affairs, CN 802, Trenton, NJ 08625. The request for hearing shall raise all issues that will be set forth at the hearing.

5:18C-1.7 Requirements for certification

(a) Any candidate for certification in any of the fire service areas pursuant to this chapter shall submit an application to the Office of Training and Certification in the Division of Fire Safety, accompanied by the required fee established at N.J.A.C. 5:18C-1.10. The application shall include such information and documentation as the Office may require.

(b) (No change.)

5:18C-1.8 Replacement of certificate; reinstatement

(a) The Division shall issue, upon application, a duplicate certificate of any type and specialty upon a finding that the certification has been issued and the applicant is entitled to such certification to replace the one which has been lost, destroyed, or mutilated. Payment of a fee as may be established by the Commissioner shall be required.

(b) After revocation of a certification upon any of the grounds set forth in this chapter, the Division may not renew or reinstate such certification; however, a person may file a new application for a certification with the Division. When it can be shown that all loss caused by the act or omission for which the certification was revoked has been fully satisfied, that the applicant has been legally rehabilitated and that all conditions imposed by the decision of revocation have been complied with, the Division may issue a new certification.

(c) (No change.)

5:18C-1.9 Revocation of certifications and alternative sanctions

(a) The Division may suspend and/or revoke a certification of a firefighter if the Department has determined that the holder:

1.-7. (No change.)

(b) The Division may suspend or revoke a certification of an Instructor Level 1, Instructor Level 2 or any special Instructor Certificate if the Department has determined that the holder:

1.-7. (No change.)

(c) The Division, in addition or as an alternative, as the case may be, to revoking or suspending a certification, or assessing a penalty, may issue a letter of warning, reprimand, or censure with regard to any conduct that, in the judgment of the Department, warrants a letter of warning, reprimand, or censure. Such letter, in addition to any other filing requirements, shall be made a part of the certification file of the individual.

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

5:18C-2.3 Procedure for approving educational programs

(a) Any eligible institution or organization may submit to the Office of Training and Certification any course or module required by this chapter for approval. The application shall be submitted on a form prescribed by the Division at least 60 days prior to the first class session of the course and shall contain all the information specified in this section.

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

(d) Upon verification that the program or course will satisfy the educational program requirements, the Office of Training and Certification shall:

1. (No change.)

2. Place the name of the institution and the course on the Division's list of approved courses. The list shall be made available to the public.

i. (No change.)

(e) Whenever a course or program has been approved by the Division, the institution or organization offering the course may include the statement "This course is approved for credit toward a certification issued by the Department of Community Affairs" in any catalog, bulletin or informational circulars. Whenever such a statement is included, however, the catalog, bulletin or circular shall also contain a statement describing precisely the nature and extent of the approval.

(f) The Office of Training and Certification may revoke its approval, after due notice and the opportunity to be heard, whenever it ascertains that a course has lapsed, is no longer in conformity with the requirements of this chapter or the terms of the Division's approval or for other good cause. Whenever approval has been revoked or a course or module has been withdrawn by an institution or organization, a new application and approval shall be required before the course or module may again be offered as providing credit toward a certification.

(g) (No change.)

(a)

NEW JERSEY HOUSING AND MORTGAGE FINANCE AGENCY

Housing Affordability Control Determination and Referral of Eligible Households; Request for Applicant Social Security Number

Adopted Amendment: N.J.A.C. 5:80-26.19

Proposed: September 20, 1993 at 25 N.J.R. 4369(a).

Adopted: November 10, 1993 by the Board of Directors of the New Jersey Housing and Mortgage Finance Agency, Christiana Foglio, Executive Director/Secretary.

Filed: November 10, 1993 as R.1993 d.640, **without change.**

Authority: N.J.S.A. 52:37D-321 and 324.

Effective Date: December 6, 1993.

Expiration Date: April 20, 1995.

Summary of Public Comments and Agency Responses:

No comments received.

Full text of the adoption follows:

5:80-26.19 Determination and referral of eligible households

(a) As units become available, the Agency will notify applicant households who satisfy the income criteria for an available unit who will then be scheduled for an interview to determine if they qualify as an eligible household. At the interview, the household will be requested to document all income. This determination process shall also include a credit background report. Every household member 18 years of age or older who will live in the affordable unit and who receives income shall be required to provide the required information, where applicable, identified at (a)1 below. All applicant households meeting the criteria shall be deemed an eligible household.

1. (No change.)

2. The Agency may also request the social security number of each applicant household member as set forth in (a) above. The request shall indicate that the submission of the social security number is voluntary and that it would be used to do credit checks on applicants. The request shall also include the privacy notice requirements of applicable federal and/or state law.

(b)-(e) (No change.)

MILITARY AND VETERANS' AFFAIRS

(a)

PERSONNEL

Disability Discrimination Grievance Procedure

Adopted New Rules: N.J.A.C. 5A:7-1

Proposed: April 5, 1993 at 25 N.J.R. 1317(a).

Adopted: May 10, 1993 by Major General Vito Morgano, The Adjutant General.

Filed: November 3, 1993 as R.1993 d.615, **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. 38A:3-6(a) and (o), 42 U.S.C. §12101 et seq. and 28 C.F.R. §35.107.

Effective Date: December 6, 1993.

Expiration Date: Exempt under 28 C.F.R. Part 35.

On April 5, 1993 a notice of proposed rulemaking was published in the New Jersey Register announcing the proposed adoption by this agency of a grievance procedure to be followed when and if this agency receives a complaint that it had violated or was violating the Americans with Disabilities Act, 42 U.S.C. §12101 et seq. That notice was part of a joint coordinated rulemaking process intended to produce a uniform grievance procedure for all participating agencies with the Department of Law and Public Safety as the lead agency. This notice of adoption concludes the process.

After publication of the notices of proposed rulemaking participating agencies received public comments, which were forwarded to the Department of Law and Public Safety for consolidated review, formulation of replies and revision of the proposed rules, where appropriate. The Summary of Public Comments and Agency Responses is being published under the heading of the Department of Law and Public Safety in this issue of the New Jersey Register. The reader is directed to that agency's notice of adoption to find the comments and replies. The final text of the grievance procedure appears below.

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

CHAPTER 7
DISABILITY DISCRIMINATION GRIEVANCE PROCEDURE

SUBCHAPTER 1. DEFINITIONS

5A:7-1.1 Definitions

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

"ADA" means the Americans with Disabilities Act, 42 U.S.C.A. §12101 et seq.

"Agency" means the New Jersey Department of Military and Veterans' Affairs.

"Designated decision maker" means the Adjutant General or his or her designee.

SUBCHAPTER 2. GENERAL PROVISIONS

5A:7-2.1 Purpose

(a) These rules are adopted by the agency in satisfaction of the requirements of the ADA and regulations promulgated pursuant thereto, 28 C.F.R. 35.107.

(b) The purpose of these rules is to establish a designated coordinator whose duties shall include assuring that the agency complies with and carries out its responsibilities under the ADA. Those duties shall also include the investigation of any complaint filed with the agency pursuant to N.J.A.C. 5A:7-4.

5A:7-2.2 Required ADA Notice

In addition to any other advice, assistance or accommodation provided, a copy of the following notice shall be given to anyone who inquires regarding the agency's compliance with the ADA or the availability of accommodation which would allow a qualified individual with a disability to receive services or participate in a program or activity provided by the agency.

AGENCY NOTICE OF ADA PROCEDURE

The agency has adopted an internal grievance procedure providing for prompt and equitable resolution of *[complaints]* ***grievances*** alleging any action prohibited by the U.S. Department of Justice regulations implementing Title 11 of the Americans with Disabilities Act. Title 11 states, in part, that "no otherwise qualified disabled individual shall, solely by reason of such disability, be excluded from participation in, be denied the benefits of or be subjected to discrimination" in programs or activities sponsored by a public entity.

Rules describing and governing the internal grievance procedure can be found in the New Jersey Administrative Code, N.J.A.C. 5A:7-1. As those rules indicate, *[complaints]* ***grievances*** should be addressed to the agency's designated ADA Coordinator, who has been designated to coordinate ADA compliance efforts, at the following address:

[(The following address will be specific to the Agency)]
ADA Coordinator
New Jersey Department of Military and Veterans' Affairs
CN 340
Trenton, New Jersey 08625

1. A *[complaint]* ***grievance*** may be filed in writing or orally, but should contain the name and address of the person filing it, and briefly describe the alleged violation. A form for this purpose is available from the designated ADA coordinator. In cases of employment related *[complaints]* ***grievances***, the procedures established by the Department of Personnel, N.J.A.C. 4A:7-1.1 et seq. will be followed where applicable.

2. A *[complaint]* ***grievance*** should be filed promptly within *[20]* ***30*** days after the *[complainant]* ***grievant*** becomes aware of the alleged violation. (Processing of allegations of discrimination which occurred before this grievance procedure was in place will be considered on a case-by-case basis.)

3. An investigation, as may be appropriate, will follow the filing of a *[complaint]* ***grievance***. The investigation will be conducted by the agency's designated ADA Coordinator. The rules contemplate informal but thorough investigations, affording all interested persons and their representatives, if any, an opportunity to submit evidence relevant to a *[complaint]* ***grievance***.

4. In most cases a written determination as to the validity of the *[complaint]* ***grievance*** and a description of the resolution, if any, will be issued by the designated decision maker and a copy forwarded to the *[complainant]* ***grievant*** no later than 45 days after its filing.

5. The ADA coordinator will maintain the files and records of the agency relating to the *[complaints]* ***grievances*** filed.

6. The right of a person to a prompt and equitable resolution of the *[complaint]* ***grievance*** filed hereunder will not be impaired by the person's pursuit of other remedies such as the filing of an ADA *[complaint]* ***grievance*** with the responsible Federal department or agency or the New Jersey Division on Civil Rights. Use of this grievance procedure is not a prerequisite to the pursuit of other remedies.

7. The rules will be construed to protect the substantive rights of interested persons, to meet appropriate due process standards and to assure that the agency complies with the ADA and implementing Federal rules.

SUBCHAPTER 3. DESIGNATED ADA COORDINATOR

5A:7-3.1 Designated ADA coordinator

(a) The designated coordinator of ADA compliance and complaint investigation for the agency is:

[(The following address will be specific to the Agency)]
ADA Coordinator
New Jersey Department of Military and Veterans' Affairs
CN 340
Trenton, New Jersey 08625

(b) All inquiries regarding the agency's compliance with the ADA and the availability of accommodation which would allow a qualified individual with a disability to receive services or participate in a program or activity provided by the agency should be directed to the designated coordinator identified in (a) above.

(c) All *[complaints]* ***grievances*** alleging that the agency has failed to comply with or has acted in a way that is prohibited by the ADA should be directed to the designated ADA coordinator identified in this section, in accordance with the procedures set forth in N.J.A.C. 5A:7-4.

SUBCHAPTER 4. ADA *[COMPLAINT]* ***GRIEVANCE*** PROCEDURE

5A:7-4.1 *[Complaint]* ***Grievance*** procedure

A *[complaint]* ***grievance*** alleging that the agency has failed to comply with the ADA or has acted in a way that is prohibited by the ADA shall be submitted either in writing or orally to the designated ADA coordinator identified in N.J.A.C. 5A:7-3.1 ***within 30 days of the grievant becoming aware of the alleged violation***. A *[complaint]* ***grievance*** alleging employment discrimination will be processed pursuant to the rules of the Department of Personnel, N.J.A.C. 4A:7-1.1 through 3.4, if those rules are applicable.

5A:7-4.2 *[Complaint]* ***Grievance*** contents

(a) A *[complaint]* ***grievance*** submitted pursuant to this subchapter may be submitted in or on the form set forth at N.J.A.C. 5A:7-4.3.

(b) A *[complaint]* ***grievance*** submitted pursuant to this subchapter shall include the following information:

1. The name of the *[complainant]* ***grievant*** and/or any alternate contact person designated by the *[complainant]* ***grievant*** to receive communication or provide information for the *[complainant]* ***grievant***;

2. The address and telephone number of the *[complainant]* ***grievant*** or alternate contact person; and

3. A description of manner in which the ADA has not been complied with or has been violated, including times and locations of events and names of witnesses if appropriate.

5A:7-4.3 *[Complaint]* ***Grievance*** form

The following form may be utilized for the submission of a *[complaint]* ***grievance*** pursuant to this subchapter:

Americans with Disabilities Act Grievance Form

Date: _____

Name of grievant: _____

Address of grievant: _____

Telephone number of grievant: _____

[Disability of grievant: _____]

Name, address and telephone number of alternate contact person:

_____

_____

Agency alleged to have denied access:

Department: _____

Division: _____

Bureau or office: _____

Location: _____

Incident or barrier: _____

Please describe the particular way in which you believe you have been denied the benefits of any service, program or activity or have otherwise been subject to discrimination. Please specify dates, times and places of incidents, and names and/or positions of agency employees involved, if any, as well as names, addresses and telephone numbers of any witnesses to any such incident. Attach additional pages if necessary.

_____

_____

_____

_____

_____

_____

Proposed access or accommodation:

If you wish, describe the way in which you feel access may be had to the benefits described above, or that accommodation could be provided to allow access.

_____

_____

_____

A copy of the above form may be obtained by contacting the designated ADA coordinator identified at N.J.A.C. 5A:7-3.1.

5A:7-4.4 Investigation

(a) Upon receipt of a *[complaint]* ***grievance*** submitted pursuant to this subchapter, the designated ADA coordinator will notify the *[complainant]* ***grievant*** of the receipt of the *[complaint]* ***grievance*** and the initiation of an investigation into the matter. The designated ADA coordinator will also indicate a date by which it is expected that the investigation will be completed, which date shall not be later than 45 days from the date of receipt of the *[complaint]* ***grievance*** unless a later date is agreed to by the *[complainant]* ***grievant***.

(b) Upon completion of the investigation, the designated ADA coordinator shall prepare a report for review by the designated decision maker for the agency. The designated decision maker shall render a written decision within 45 days of receipt of the *[complaint]* ***grievance, if practicable or*** unless a later date is agreed to by the *[complainant]* ***grievant***, which decision shall

be transmitted to the *[complainant]* ***grievant*** and/or the alternate contact person if so designated by the *[complainant]* ***grievant***.

CORRECTIONS

(a)

OFFICE OF INSTITUTIONAL SUPPORT SERVICE

Disability Discrimination Grievance Procedure

Adopted New Rules: N.J.A.C. 10A:1-3

Proposed: April 5, 1993 at 25 N.J.R. 1326(b).
Adopted: September 10, 1993 by William H. Fauver, Commissioner, Department of Corrections.
Filed: November 3, 1993 as R.1993 d.617, **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. 30:1B-6 and 42 U.S.C. §12101 et seq., and 28 C.F.R. §35.107.
Effective Date: December 6, 1993.
Expiration Date: Exempt under 28 C.F.R. Part 35.

On April 5, 1993 a notice of proposed rulemaking was published in the New Jersey Register announcing the proposed adoption by this agency of a grievance procedure to be followed when and if this agency receives a complaint that it had violated or was violating the Americans with Disabilities Act, 42 U.S.C. §12101 et seq. That notice was part of a joint coordinated rulemaking process intended to produce a uniform grievance procedure for all participating agencies with the Department of Law and Public Safety as the lead agency. This notice of adoption concludes the process.

After publication of the notices of proposed rulemaking participating agencies received public comments, which were forwarded to the Department of Law and Public Safety for consolidated review, formulation of replies and revision of the proposed rules, where appropriate. The Summary of Public Comments and Agency Responses is being published under the heading of the Department of Law and Public Safety in this issue of the New Jersey Register. The reader is directed to that agency's notice of adoption to find the comments and replies. The final text of the grievance procedure appears below.

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

SUBCHAPTER 3. DISABILITY DISCRIMINATION GRIEVANCE PROCEDURE

10A:1-3.1 Definitions

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

"ADA" means the Americans with Disabilities Act, 42 U.S.C.A. §12101 et seq.

"Agency" means the New Jersey Department of Corrections.

"Designated decision maker" means the Commissioner of Corrections or his or her designee.

10A:1-3.2 Purpose

(a) These rules are adopted by the agency in satisfaction of the requirements of the ADA and regulations promulgated pursuant thereto, 28 C.F.R. 35.107.

(b) The purpose of these rules is to establish a designated coordinator whose duties shall include assuring that the agency complies with and carries out its responsibilities under the ADA. Those duties shall also include the investigation of any complaint filed with the agency pursuant to N.J.A.C. 10A:1-3.5 through 3.8.

10A:1-3.3 Required ADA Notice

In addition to any other advice, assistance or accommodation provided, a copy of the following notice shall be given to anyone who inquires regarding the agency's compliance with the ADA or the availability of accommodation which would allow a qualified individual with a disability to receive services or participate in a program or activity provided by the agency.

AGENCY NOTICE OF ADA PROCEDURE

The agency has adopted an internal grievance procedure providing for prompt and equitable resolution of *[complaints]* ***grievances*** alleging any action prohibited by the U.S. Department of Justice regulations implementing Title 11 of the Americans with Disabilities Act. Title 11 states, in part, that "no otherwise qualified disabled individual shall, solely by reason of such disability, be excluded from participation in, be denied the benefits of or be subjected to discrimination" in programs or activities sponsored by a public entity.

Rules describing and governing the internal grievance procedure can be found in the New Jersey Administrative Code, N.J.A.C. 10A:1-3. As those rules indicate, *[complaints]* ***grievances*** should be addressed to the agency's designated ADA Coordinator, who has been designated to coordinate ADA compliance efforts, at the following address:

[(The following address will be specific to the Agency)]
ADA Coordinator
New Jersey Department of Corrections
CN 863
Trenton, New Jersey 08625

1. A *[complaint]* ***grievance*** may be filed in writing or orally, but should contain the name and address of the person filing it, and briefly describe the alleged violation. A form for this purpose is available from the designated ADA coordinator. In cases of employment related *[complaints]* ***grievances***, the procedures established by the Department of Personnel, N.J.A.C. 4A:7-1.1 et seq. will be followed where applicable.

2. A *[complaint]* ***grievance*** should be filed promptly within *[20]* ***30*** days after the *[complainant]* ***grievant*** becomes aware of the alleged violation. (Processing of allegations of discrimination which occurred before this grievance procedure was in place will be considered on a case-by-case basis.)

3. An investigation, as may be appropriate, will follow the filing of a *[complaint]* ***grievance***. The investigation will be conducted by the agency's designated ADA Coordinator. The rules contemplate informal but thorough investigations, affording all interested persons and their representatives, if any, an opportunity to submit evidence relevant to a *[complaint]* ***grievance***.

4. In most cases a written determination as to the validity of the *[complaint]* ***grievance*** and a description of the resolution, if any, will be issued by the designated decision maker and a copy forwarded to the *[complainant]* ***grievant*** no later than 45 days after its filing.

5. The ADA coordinator will maintain the files and records of the agency relating to the *[complaints]* ***grievances*** filed.

6. The right of a person to a prompt and equitable resolution of the *[complaint]* ***grievance*** filed hereunder will not be impaired by the person's pursuit of other remedies such as the filing of an ADA *[complaint]* ***grievance*** with the responsible Federal department or agency or the New Jersey Division on Civil Rights. Use of this grievance procedure is not a prerequisite to the pursuit of other remedies.

7. The rules will be construed to protect the substantive rights of interested persons, to meet appropriate due process standards and to assure that the agency complies with the ADA and implementing Federal rules.

10A:1-3.4 Designated ADA coordinator

(a) The designated coordinator of ADA compliance and complaint investigation for the agency is:

[(The following address will be specific to the Agency)]
ADA Coordinator
New Jersey Department of Corrections
CN 863
Trenton, New Jersey 08625

(b) All inquiries regarding the agency's compliance with the ADA and the availability of accommodation which would allow a qualified

individual with a disability to receive services or participate in a program or activity provided by the agency should be directed to the designated coordinator identified in (a) above.

(c) All *[complaints]* ***grievances*** alleging that the agency has failed to comply with or has acted in a way that is prohibited by the ADA should be directed to the designated ADA coordinator identified in this section, in accordance with the procedures set forth in N.J.A.C. 10A:1-3.5 through 3.8.

10A:1-3.5 *[Complaint]* ***Grievance*** procedure

A *[complaint]* ***grievance*** alleging that the agency has failed to comply with the ADA or has acted in a way that is prohibited by the ADA shall be submitted either in writing or orally to the designated ADA coordinator identified in N.J.A.C. 10A:1-3.4 ***within 30 days of the grievant becoming aware of the alleged violation***. A *[complaint]* ***grievance*** alleging employment discrimination will be processed pursuant to the rules of the Department of Personnel, N.J.A.C. 4A:7-1.1 through 3.4, if those rules are applicable.

10A:1-3.6 *[Complaint]* ***Grievance*** contents

(a) A *[complaint]* ***grievance*** submitted pursuant to this subchapter may be submitted in or on the form set forth at N.J.A.C. 10A:1-3.7.

(b) A *[complaint]* ***grievance*** submitted pursuant to this subchapter shall include the following information:

1. The name of the *[complainant]* ***grievant,*** and/or any alternate contact person designated by the *[complainant]* ***grievant*** to receive communication or provide information for the *[complainant]* ***grievant***;

2. The address and telephone number of the *[complainant]* ***grievant*** or alternate contact person; and

3. A description of manner in which the ADA has not been complied with or has been violated, including times and locations of events and names of witnesses if appropriate.

10A:1-3.7 *[Complaint]* ***Grievance*** form

The following form may be utilized for the submission of a *[complaint]* ***grievance*** pursuant to this subchapter:

Americans with Disabilities Act Grievance Form

Date: _____

Name of grievant: _____

Address of grievant: _____

Telephone number of grievant: _____

[Disability of grievant: _____]

Name, address and telephone number of alternate contact person:

_____

_____

Agency alleged to have denied access:

Department: _____

Division: _____

Bureau or office: _____

Location: _____

Incident or barrier: _____

Please describe the particular way in which you believe you have been denied the benefits of any service, program or activity or have otherwise been subject to discrimination. Please specify dates, times and places of incidents, and names and/or positions of agency employees involved, if any, as well as names, addresses and telephone numbers of any witnesses to any such incident. Attach additional pages if necessary.

_____

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Proposed access or accommodation:

If you wish, describe the way in which you feel access may be had to the benefits described above, or that accommodation could be provided to allow access.

_____

_____

_____

A copy of the above form may be obtained by contacting the designated ADA coordinator identified at N.J.A.C. 10A:1-3.4.

10A:1-3.8 Investigation

(a) Upon receipt of a *[complaint]* ***grievance*** submitted pursuant to this subchapter, the designated ADA coordinator will notify the *[complainant]* ***grievant*** of the receipt of the *[complaint]* ***grievance*** and the initiation of an investigation into the matter. The designated ADA coordinator will also indicate a date by which it is expected that the investigation will be completed, which date shall not be later than 45 days from the date of receipt of the *[complaint]* ***grievance, if practicable or*** unless a later date is agreed to by the *[complainant]* ***grievant***.

(b) Upon completion of the investigation, the designated ADA coordinator shall prepare a report for review by the designated decision maker for the agency. The designated decision maker shall render a written decision within 45 days of receipt of the *[complaint]* ***grievance, if practicable or*** unless a later date is agreed to by the *[complainant]* ***grievant***, which decision shall be transmitted to the *[complainant]* ***grievant*** and/or the alternate contact person if so designated by the *[complainant]* ***grievant***.

(a)

THE COMMISSIONER

Public Information Requests Reimbursement for Cost of Copying

Adopted Amendments: N.J.A.C. 10A:1-1.3 and 10A:31-6.13

Adopted New Rule: N.J.A.C. 10A:1-1.4

Proposed: October 4, 1993 at 25 N.J.R. 4552(a).
Adopted: November 8, 1993 by William H. Fauver, Commissioner, Department of Corrections.
Filed: November 10, 1993 as R.1993 d.635, **without change.**

Authority: N.J.S.A. 30:1B-6, 30:1B-10 and 47:1A-2.

Effective Date: December 6, 1993.
Expiration Date: June 1, 1997, N.J.A.C. 10A:1;
March 5, 1995, N.J.A.C. 10A:31.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows:

10A:1-1.3 Public information requests

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

10A:1-1.4 Reimbursement for costs of copying

(a) Pursuant to N.J.S.A. 47:1A-2, correctional facilities and other administrative units within the Department of Corrections may charge the following fees for copying records deemed to be public:

1. First through 10th page: $0.75 per page
2. Eleventh through 20th page: $0.50 per page; and
3. All pages over 20: $0.25 per page.

(b) Government agencies are exempt from cost for copies of documents.

(c) The copying fees for documents or records other than records deemed to be public shall also be based on the fee schedule in (a) above.

(d) When or if fees for the copying of public records change in accordance with the N.J.S.A. 47:1A-2, these changes shall be published as a public notice in the New Jersey Register.

10A:31-6.13 Reimbursement for costs of copying

(a) Pursuant to N.J.S.A. 47:1A-2, except as otherwise provided in this subchapter, adult county correctional facilities may charge the following fees for copying records deemed to be public:

1. First through 10th page $0.75 per page
2. Eleventh through 20th page $0.50 per page
3. Over 20 pages $0.25 per page

(b) (No change.)

(c) The copying fees for documents or records other than records deemed to be public shall also be based on the fee schedule in (a) above.

(d) When or if fees for the copying of public records change in accordance with the N.J.S.A. 47:1A-2, these changes shall be published as a public notice in the New Jersey Register.

(a)

THE COMMISSIONER

Classification Process

Restoration of Forfeited Commutation Credits

Adopted Amendment: N.J.A.C. 10A:9-5.5

Proposed: October 4, 1993 at 25 N.J.R. 4553(a).
Adopted: November 5, 1993 by William H. Fauver, Commissioner, Department of Corrections.
Filed: November 10, 1993 as R.1993 d.636, **without change.**

Authority: N.J.S.A. 30:1B-6 and 30:1B-10.

Effective Date: December 6, 1993.
Expiration Date: February 18, 1997.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows:

10A:9-5.5 Restoration of forfeited commutation credits

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

(d) The following procedures for restoring forfeited commutation credits apply to all inmates who received guilty findings from charges for prohibited acts which occurred prior to May 24, 1979:

1. One hundred percent of the forfeited commutation credits may be restored to an inmate(s) during three consecutive years (one-third restoration per year) which the inmate(s) completes without a charge which results in a finding of guilt.

2. Any inmate who feels that he or she meets the qualifications for restoration of commutation credits lost prior to May 24, 1979, must submit an application for restoration of commutation credits to the Institutional Classification Committee (I.C.C.) of the correctional facility in which the inmate is currently housed. The I.C.C. will not consider any restoration of forfeited commutation credits lost prior to May 24, 1979, unless an inmate submits an application. A recommendation on restoration of credits by the I.C.C. shall be made in accordance with this subchapter and forwarded to the Superintendent, who shall order the restoration of credits.

3. Any inmate under the jurisdiction of the Office of Interstate Services or Bureau of Community and Professional Services must submit an application for restoration of commutation credits lost prior to May 24, 1979, to the Superintendent of the correctional facility at which the inmate was housed prior to transfer. The Institutional Classification Committee (I.C.C.) of that correctional facility shall review the application. A recommendation on restoration of credits by the I.C.C. shall be made in accordance with this subchapter and forwarded to the Superintendent, who shall order the restoration of credits.

4. Any inmate housed at a contract facility under the jurisdiction of the Bureau of Contract Administration must submit an application for restoration of commutation credits lost prior to May 24, 1979, to the Superintendent of the regional correctional facility with responsibility for the inmate. The I.C.C. of that correctional facility shall review the application. A recommendation on restoration of credits by the I.C.C. shall be made in accordance with this subchapter and forwarded to the Superintendent, who shall order the restoration of credits.

LABOR

(b)

OFFICE OF GRANTS AND SPECIAL PROJECTS

Disability Discrimination Grievance Procedure

Adopted New Rules: N.J.A.C. 12:7

Proposed: April 5, 1993 at 25 N.J.R. 1334(a).
Adopted: August 9, 1993 by Raymond L. Bramucci, Commissioner, Department of Labor.
Filed: November 3, 1993 as R.1993 d.619, **with substantive and technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 52:17B-4d; 42 U.S.C. §12101 et seq., and 28 C.F.R. §35.107.

Effective Date: December 6, 1993.
Expiration Date: Exempt under 28 C.F.R. Part 35.

On April 5, 1993 a notice of proposed rulemaking was published in the New Jersey Register announcing the proposed adoption by this agency of a grievance procedure to be followed when and if this agency receives a complaint that it had violated or was violating the Americans with Disabilities Act, 42 U.S.C. §12101 et seq. That notice was part of a joint coordinated rulemaking process intended to produce a uniform grievance procedure for all participating agencies with the Department of Law and Public Safety as the lead agency. This notice of adoption concludes the process.

After publication of the notices of proposed rulemaking participating agencies received public comments, which were forwarded to the Department of Law and Public Safety for consolidated review, formulation of replies and revision of the proposed rules, where appropriate. The Summary of Public Comments and Agency Responses is being published under the heading of the Department of Law and Public Safety in this issue of the New Jersey Register. The reader is directed to that agency's notice of adoption to find the comments and replies. The final text of the grievance procedure appears below.

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

CHAPTER 7
DISABILITY DISCRIMINATION GRIEVANCE PROCEDURE

SUBCHAPTER 1. DEFINITIONS

12:7-1.1 Definitions

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

"ADA" means the Americans with Disabilities Act, 42 U.S.C.A. §12101 et seq.

"Agency" means the New Jersey Department of Labor.

"Designated decision maker" means the Commissioner of Labor or his or her designee.

SUBCHAPTER 2. GENERAL PROVISIONS

12:7-2.1 Purpose

(a) These rules are adopted by the agency in satisfaction of the requirements of the ADA and regulations promulgated pursuant thereto, 28 C.F.R. 35.107.

(b) The purpose of these rules is to establish a designated coordinator whose duties shall include assuring that the agency complies with and carries out its responsibilities under the ADA. Those duties shall also include the investigation of any complaint filed with the agency pursuant to N.J.A.C. 12:7-4.

12:7-2.2 Required ADA Notice

In addition to any other advice, assistance or accommodation provided, a copy of the following notice shall be given to anyone who inquires regarding the agency's compliance with the ADA or the availability of accommodation which would allow a qualified individual with a disability to receive services or participate in a program or activity provided by the agency.

AGENCY NOTICE OF ADA PROCEDURE

The agency has adopted an internal grievance procedure providing for prompt and equitable resolution of *[complaints]* ***grievances*** alleging any action prohibited by the U.S. Department of Justice regulations implementing Title 11 of the Americans with Disabilities Act. Title 11 states, in part, that "no otherwise qualified disabled individual shall, solely by reason of such disability, be excluded from participation in, be denied the benefits of or be subjected to discrimination" in programs or activities sponsored by a public entity.

Rules describing and governing the internal grievance procedure can be found in the New Jersey Administrative Code, N.J.A.C. 12:7. As those rules indicate, *[complaints]* ***grievances*** should be addressed to the agency's designated ADA Coordinator, who has been designated to coordinate ADA compliance efforts, at the following address:

[(The following address will be specific to the Agency)]
ADA Coordinator
New Jersey Department of Labor
CN 110
Trenton, New Jersey 08625

1. A *[complaint]* ***grievance*** may be filed in writing or orally, but should contain the name and address of the person filing it, and briefly describe the alleged violation. A form for this purpose is available from the designated ADA coordinator. In cases of employment related *[complaints]* ***grievances***, the procedures established by the Department of Personnel, N.J.A.C. 4A:7-1.1 et seq. will be followed where applicable.

2. A *[complaint]* ***grievance*** should be filed promptly within *[20]* ***30*** days after the *[complainant]* ***grievant*** becomes aware of the alleged violation. (Processing of allegations of discrimination which occurred before this grievance procedure was in place will be considered on a case-by-case basis.)

3. An investigation, as may be appropriate, will follow the filing of a *[complaint]* ***grievance***. The investigation will be conducted by the agency's designated ADA Coordinator. The rules contemplate informal but thorough investigations, affording all interested persons and their representatives, if any, an opportunity to submit evidence relevant to a *[complaint]* ***grievance***.

4. In most cases a written determination as to the validity of the *[complaint]* ***grievance*** and a description of the resolution, if any, will be issued by the designated decision maker and a copy forwarded to the *[complainant]* ***grievant*** no later than 45 days after its filing.

5. The ADA coordinator will maintain the files and records of the agency relating to the *[complaints]* ***grievances*** filed.

6. The right of a person to a prompt and equitable resolution of the *[complaint]* ***grievance*** filed hereunder will not be impaired by the person's pursuit of other remedies such as the filing of an ADA *[complaint]* ***grievance*** with the responsible Federal department or agency or the New Jersey Division on Civil Rights. Use of this grievance procedure is not a prerequisite to the pursuit of other remedies.

7. The rules will be construed to protect the substantive rights of interested persons, to meet appropriate due process standards and to assure that the agency complies with the ADA and implementing Federal rules.

SUBCHAPTER 3. DESIGNATED ADA COORDINATOR

12:7-3.1 Designated ADA coordinator

(a) The designated coordinator of ADA compliance and complaint investigation for the agency is:

[(The following address will be specific to the Agency)]
ADA Coordinator
New Jersey Department of Labor
CN 110
Trenton, New Jersey 08625

(b) All inquiries regarding the agency's compliance with the ADA and the availability of accommodation which would allow a qualified individual with a disability to receive services or participate in a program or activity provided by the agency should be directed to the designated coordinator identified in (a) above.

(c) All *[complaints]* ***grievances*** alleging that the agency has failed to comply with or has acted in a way that is prohibited by the ADA should be directed to the designated ADA coordinator identified in this section, in accordance with the procedures set forth in N.J.A.C. 12:7-4.

SUBCHAPTER 4. ADA *[COMPLAINT]* ***GRIEVANCE*** PROCEDURE

12:7-4.1 *[Complaint]* ***Grievance*** procedure

A *[complaint]* ***grievance*** alleging that the agency has failed to comply with the ADA or has acted in a way that is prohibited by the ADA shall be submitted either in writing or orally to the designated ADA coordinator identified in N.J.A.C. 12:7-3.1 ***within 30 days of the grievant becoming aware of the alleged violation***. A *[complaint]* ***grievance*** alleging employment discrimination will be processed pursuant to the rules of the Department of Personnel, N.J.A.C. 4A:7-1.1 through 3.4, if those rules are applicable.

12:7-4.2 *[Complaint]* ***Grievance*** contents

(a) A *[complaint]* ***grievance*** submitted pursuant to this subchapter may be submitted in or on the form set forth at N.J.A.C. 12:7-4.3.

(b) A *[complaint]* ***grievance*** submitted pursuant to this subchapter shall include the following information:

1. The name of the *[complainant]* ***grievant*** and/or any alternate contact person designated by the *[complainant]* ***grievant*** to receive communication or provide information for the *[complainant]* ***grievant***;

2. The address and telephone number of the *[complainant]* ***grievant*** or alternate contact person; and

3. A description of manner in which the ADA has not been complied with or has been violated, including times and locations of events and names of witnesses if appropriate.

12:7-4.3 *[Complaint]* ***Grievance*** form

The following form may be utilized for the submission of a *[complaint]* ***grievance*** pursuant to this subchapter:

Americans with Disabilities Act Grievance Form

Date: _____

Name of grievant: _____

Address of grievant: _____

Telephone number of grievant: _____

[Disability of grievant: _____]

Name, address and telephone number of alternate contact person:

Agency alleged to have denied access:

Department:

Division:

Bureau or office:

Location:

Incident or barrier:

Please describe the particular way in which you believe you have been denied the benefits of any service, program or activity or have otherwise been subject to discrimination. Please specify dates, times and places of incidents, and names and/or positions of agency employees involved, if any, as well as names, addresses and telephone numbers of any witnesses to any such incident. Attach additional pages if necessary.

Proposed access or accommodation:

If you wish, describe the way in which you feel access may be had to the benefits described above, or that accommodation could be provided to allow access.

A copy of the above form may be obtained by contacting the designated ADA coordinator identified at N.J.A.C. 12:7-3.1.

12:7-4.4 Investigation

(a) Upon receipt of a *[complaint]* ***grievance*** submitted pursuant to this subchapter, the designated ADA coordinator will notify the *[complainant]* ***grievant*** of the receipt of the *[complaint]* ***grievance*** and the initiation of an investigation into the matter. The designated ADA coordinator will also indicate a date by which it is expected that the investigation will be completed, which date shall not be later than 45 days from the date of receipt of the *[complaint]* ***grievance, if practicable or*** unless a later date is agreed to by the *[complainant]* ***grievant***.

(b) Upon completion of the investigation, the designated ADA coordinator shall prepare a report for review by the designated decision maker for the agency. The designated decision maker shall render a written decision within 45 days of receipt of the *[complaint]* ***grievance, if practicable or*** unless a later date is agreed to by the *[complainant]* ***grievant***, which decision shall be transmitted to the *[complainant]* ***grievant*** and/or the alternate contact person if so designated by the *[complainant]* ***grievant***.

(a)

DIVISION OF WORKPLACE STANDARDS

Ski Lifts

Readoption with Amendments: N.J.A.C. 12:175

Proposed: October 4, 1993 at 25 N.J.R. 4581(a).
Adopted: November 10, 1993 by Raymond L. Bramucci, Commissioner, Department of Labor.
Filed: November 10, 1993 as R.1993 d.639, **without change.**

Authority: N.J.S.A. 34:1-2a, 34:1A-3(e) and 34:4A-1 et seq., specifically 34:4A-4.

Effective Date: November 10, 1993, Readoption; December 6, 1993, Amendments.
Expiration Date: November 10, 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. 12:175.

Full text of the adopted amendments follows:

12:175-4.2 Standards adopted by reference

(a) The standards prescribed by Passenger Tramways, ANSI B77.1-1990 are adopted as safety standards and shall apply according to their provisions, except that the following sections and subsections shall not apply:

1.-4. (No change.)

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

12:175-6.1 Documents referred to by reference

(a) The full title and edition of each of the standards or publication referred to in this chapter are as follows:

1. ANSI B77.1-1990, Passenger Tramways—Aerial Tramways and Lifts, Surface Lifts, and Tows.

2.-4. (No change.)

COMMERCE AND ECONOMIC DEVELOPMENT

(b)

OFFICE OF HUMAN SERVICES

Disability Discrimination Grievance Procedure

Adopted New Rules: N.J.A.C. 12A:1

Proposed: April 5, 1993 at 25 N.J.R. 1335(b).
Adopted: July 28, 1993 by Barbara McConnell, Commissioner, Department of Commerce and Economic Development.
Filed: November 3, 1993 as R.1993 d.620, **with substantive and technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 52:27H-6f, 42 U.S.C. §12101 et seq., and 28 C.F.R. §35.107.

Effective Date: December 6, 1993.
Expiration Date: Exempt under 28 C.F.R. Part 35.

On April 5, 1993 a notice of proposed rulemaking was published in the New Jersey Register announcing the proposed adoption by this agency of a grievance procedure to be followed when and if this agency receives a complaint that it had violated or was violating the Americans with Disabilities Act, 42 U.S.C. §12101 et seq. That notice was part of a joint coordinated rulemaking process intended to produce a uniform grievance procedure for all participating agencies with the Department of Law and Public Safety as the lead agency. This notice of adoption concludes the process.

After publication of the notices of proposed rulemaking participating agencies received public comments, which were forwarded to the Department of Law and Public Safety for consolidated review, formulation of

replies and revision of the proposed rules, where appropriate. The Summary of Public Comments and Agency Responses is being published under the heading of the Department of Law and Public Safety in this issue of the New Jersey Register. The reader is directed to that agency's notice of adoption to find the comments and replies. The final text of the grievance procedure appears below.

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

CHAPTER 1
DISABILITY DISCRIMINATION GRIEVANCE PROCEDURE

SUBCHAPTER 1. DEFINITIONS

12A:1-1.1 Definitions

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

"ADA" means the Americans with Disabilities Act, 42 U.S.C.A. §12101 et seq.

"Agency" means the New Jersey Department of Commerce and Economic Development.

"Designated decision maker" means the Commissioner of Commerce and Economic Development or his or her designee.

SUBCHAPTER 2. GENERAL PROVISIONS

12A:1-2.1 Purpose

(a) These rules are adopted by the agency in satisfaction of the requirements of the ADA and regulations promulgated pursuant thereto, 28 C.F.R. 35.107.

(b) The purpose of these rules is to establish a designated coordinator whose duties shall include assuring that the agency complies with and carries out its responsibilities under the ADA. Those duties shall also include the investigation of any complaint filed with the agency pursuant to N.J.A.C. 12A:1-4.

12A:1-2.2 Required ADA Notice

In addition to any other advice, assistance or accommodation provided, a copy of the following notice shall be given to anyone who inquires regarding the agency's compliance with the ADA or the availability of accommodation which would allow a qualified individual with a disability to receive services or participate in a program or activity provided by the agency.

AGENCY NOTICE OF ADA PROCEDURE

The agency has adopted an internal grievance procedure providing for prompt and equitable resolution of *[complaints]* ***grievances*** alleging any action prohibited by the U.S. Department of Justice regulations implementing Title 11 of the Americans with Disabilities Act. Title 11 states, in part, that "no otherwise qualified disabled individual shall, solely by reason of such disability, be excluded from participation in, be denied the benefits of or be subjected to discrimination" in programs or activities sponsored by a public entity.

Rules describing and governing the internal grievance procedure can be found in the New Jersey Administrative Code, N.J.A.C. 12A:1. As those rules indicate, *[complaints]* ***grievances*** should be addressed to the agency's designated ADA Coordinator, who has been designated to coordinate ADA compliance efforts, at the following address:

[(The following address will be specific to the Agency)]
ADA Coordinator
New Jersey Department of Commerce and Economic Development
CN 822
Trenton, New Jersey 08625

1. A *[complaint]* ***grievance*** may be filed in writing or orally, but should contain the name and address of the person filing it, and briefly describe the alleged violation. A form for this purpose is available from the designated ADA coordinator. In cases of employment related *[complaints]* ***grievances***, the procedures established by the Department of Personnel, N.J.A.C. 4A:7-1.1 et seq. will be followed where applicable.

2. A *[complaint]* ***grievance*** should be filed promptly within *[20]* ***30*** days after the *[complainant]* ***grievant*** becomes aware of the alleged violation. (Processing of allegations of discrimination which occurred before this grievance procedure was in place will be considered on a case-by-case basis.)

3. An investigation, as may be appropriate, will follow the filing of a *[complaint]* ***grievance***. The investigation will be conducted by the agency's designated ADA Coordinator. The rules contemplate informal but thorough investigations, affording all interested persons and their representatives, if any, an opportunity to submit evidence relevant to a *[complaint]* ***grievance***.

4. In most cases a written determination as to the validity of the *[complaint]* ***grievance*** and a description of the resolution, if any, will be issued by the designated decision maker and a copy forwarded to the *[complainant]* ***grievant*** no later than 45 days after its filing.

5. The ADA coordinator will maintain the files and records of the agency relating to the *[complaints]* ***grievances*** filed.

6. The right of a person to a prompt and equitable resolution of the *[complaint]* ***grievance*** filed hereunder will not be impaired by the person's pursuit of other remedies such as the filing of an ADA *[complaint]* ***grievance*** with the responsible Federal department or agency or the New Jersey Division on Civil Rights. Use of this grievance procedure is not a prerequisite to the pursuit of other remedies.

7. The rules will be construed to protect the substantive rights of interested persons, to meet appropriate due process standards and to assure that the agency complies with the ADA and implementing Federal rules.

SUBCHAPTER 3. DESIGNATED ADA COORDINATOR

12A:1-3.1 Designated ADA coordinator

(a) The designated coordinator of ADA compliance and complaint investigation for the agency is:

[(The following address will be specific to the Agency)]
ADA Coordinator
New Jersey Department of Commerce and Economic Development
CN 822
Trenton, New Jersey 08625

(b) All inquiries regarding the agency's compliance with the ADA and the availability of accommodation which would allow a qualified individual with a disability to receive services or participate in a program or activity provided by the agency should be directed to the designated coordinator identified in (a) above.

(c) All *[complaints]* ***grievances*** alleging that the agency has failed to comply with or has acted in a way that is prohibited by the ADA should be directed to the designated ADA coordinator identified in this section, in accordance with the procedures set forth in N.J.A.C. 12A:1-4.

SUBCHAPTER 4. ADA *[COMPLAINT]* ***GRIEVANCE*** PROCEDURE

12A:1-4.1 *[Complaint]* ***Grievance*** procedure

A *[complaint]* ***grievance*** alleging that the agency has failed to comply with the ADA or has acted in a way that is prohibited by the ADA shall be submitted either in writing or orally to the designated ADA coordinator identified in N.J.A.C. 12A:1-3.1 ***within 30 days of the grievant becoming aware of the alleged violation***. A *[complaint]* ***grievance*** alleging employment discrimination will be processed pursuant to the rules of the Department of Personnel, N.J.A.C. 4A:7-1.1 through 3.4, if those rules are applicable.

12A:1-4.2 *[Complaint]* ***Grievance*** contents

(a) A *[complaint]* ***grievance*** submitted pursuant to this subchapter may be submitted in or on the form set forth at N.J.A.C. 12A:1-4.3.

(b) A *[complaint]* ***grievance*** submitted pursuant to this subchapter shall include the following information:

1. The name of the *[complainant]* ***grievant*** and/or any alternate contact person designated by the *[complainant]* ***grievant*** to receive communication or provide information for the *[complainant]* ***grievant***;

2. The address and telephone number of the *[complainant]* ***grievant*** or alternate contact person; and

3. A description of manner in which the ADA has not been complied with or has been violated, including times and locations of events and names of witnesses if appropriate.

12A:1-4.3 *[Complaint]* ***Grievance*** form

The following form may be utilized for the submission of a *[complaint]* ***grievance*** pursuant to this subchapter:

Americans with Disabilities Act Grievance Form

Date: _____

Name of grievant: _____

Address of grievant: _____

Telephone number of grievant: _____

[Disability of grievant: _____]

Name, address and telephone number of alternate contact person:

_____

_____

Agency alleged to have denied access:

Department: _____

Division: _____

Bureau or office: _____

Location: _____

Incident or barrier: _____

Please describe the particular way in which you believe you have been denied the benefits of any service, program or activity or have otherwise been subject to discrimination. Please specify dates, times and places of incidents, and names and/or positions of agency employees involved, if any, as well as names, addresses and telephone numbers of any witnesses to any such incident. Attach additional pages if necessary.

_____

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Proposed access or accommodation:

If you wish, describe the way in which you feel access may be had to the benefits described above, or that accommodation could be provided to allow access.

_____

_____

_____

A copy of the above form may be obtained by contacting the designated ADA coordinator identified at N.J.A.C. 12A:1-3.1.

12A:1-4.4 Investigation

(a) Upon receipt of a *[complaint]* ***grievance*** submitted pursuant to this subchapter, the designated ADA coordinator will notify the *[complainant]* ***grievant*** of the receipt of the *[complaint]* ***grievance*** and the initiation of an investigation into the matter. The designated ADA coordinator will also indicate a date by which it is expected that the investigation will be completed, which date shall not be later than 45 days from the date of receipt of the *[complaint]* ***grievance if practicable or*** unless a later date is agreed to by the *[complainant]* ***grievant***.

(b) Upon completion of the investigation, the designated ADA coordinator shall prepare a report for review by the designated decision maker for the agency. The designated decision maker shall render a written decision within 45 days of receipt of the *[complaint]* ***grievance, if practicable or*** unless a later date is agreed to by the *[complainant]* ***grievant***, which decision shall be transmitted to the *[complainant]* ***grievant*** and/or the alternate contact person if so designated by the *[complainant]* ***grievant***.

LAW AND PUBLIC SAFETY

(a)

ADMINISTRATION

Disability Discrimination Grievance Procedure

Adopted New Rules: N.J.A.C. 13:1C

Proposed: April 5, 1993 at 25 N.J.R. 1338(a).

Adopted: November 3, 1993 by Fred DeVesa, Acting Attorney General.

Filed: November 3, 1993 as R.1993 d.612, **with substantive and technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 52:17B-4d, 42 U.S.C. §12101 et seq. and 28 C.F.R. §35.107.

Effective Date: December 6, 1993.

Expiration Date: Exempt under 28 CFR Part 35.

Summary of Public Comments and Agency Responses:

Because the Notice of Proposed Rulemaking of the Department of Law and Public Safety which appeared in the April 5, 1993 issue of the New Jersey Register was the basis of 16 other agencies' simultaneous Notices proposing the same rule by reference to that of the DLPS (or, in the case of the Office of Legislative Services, a Public Notice), this Summary of Public Comments reviews the comments received by all participating agencies. This joint summary of comments is appropriate because few of the comments were agency specific, but were applicable to all agencies alike.

None of the comments received and reviewed herein gives rise to the need for any substantive modification that would have required reproposal of the rules. Some changes have been made to the rules as proposed, but these changes are minor and principally stylistic.

No public comments were received by any of the following Departments and agencies: Agriculture, Banking, Commerce and Economic Development, Community Affairs, Corrections, Developmental Disabilities Council, Higher Education, Insurance, Military and Veterans' Affairs and State. The remaining six agencies received a total of 10 different submissions.

COMMENT: Two agencies (the Casino Control Commission and the Department of Human Services) received the comment (from Katerina Wright, Deputy Attorney General for the Division of Gaming Enforcement and from Mary Scott, Associate Executive Director of the Association for Retarded Citizens, respectively) that reference in the proposed rules to an agency head or an agency head's designee should be in gender neutral language, that is, "the agency head or her/his designee." For the Casino Control Commission this would result in references to the Chairperson rather than the Chairman of the Commission.

RESPONSE: This recommendation will be incorporated into the final rule, where appropriate or necessary; with regard to the reference to

the Chairman of the Casino Control Commission, the rules of the Commission, at N.J.A.C. 19:40-1.4, presently provide a definition that effects the same result.

COMMENT: One agency, the Department of Human Services, received a comment (from Marion E. Reitz, Director of its own Division of Family Development) that the processing time for a grievance of 45 days was too short a time, in light of the need to obtain information from county welfare agencies when investigating grievances that relate to such offices. Recognizing that the proposed rule implicitly allows an enlargement of that 45 days when necessary, that Division also requested that the rule include a specific process for establishing such an extension of time.

RESPONSE: Since the need and justification for such extensions of time are anticipated to usually depend upon the particular facts of a case, since there is no default resolution provided for in the proposed rules and since no legal rights are affected by the need to extend the time for investigation and resolution of a grievance, it was felt that no single procedure for establishing such extensions would be appropriate, but rather it would be best to leave the resolution of each case of extension to the ADA Coordinator to work out with the grievant.

COMMENT: The same Division requested clarification of the meaning of the term "day," noting that the term could mean either work day or calendar day.

RESPONSE: The usual meaning of the term, that is, calendar day, is intended.

COMMENT: Human Services also received other comments from the Association for Retarded Citizens. One comment requested a clarification of the distinction between employment and non-employment grievances, and specifically asked who would direct the employment related grievance to the Department of Personnel.

RESPONSE: In both employment and nonemployment cases the grievance originates in the same way, with the submission of the grievance to the agency charged with discrimination. Because of a preexisting process that has been in place for the review of certain employment related charges of discrimination, the proposed rule makes reference to the pertinent Department of Personnel rules (N.J.A.C. 4A:7-1.1 through 3.4) pertaining to that Department's investigation of complaints of discrimination lodged against agencies whose employment procedures come under the jurisdiction of the DOP. To attempt to delineate the various circumstances under which the DOP rules do or do not apply would be cumbersome, complex and, perhaps, uncertain; it would also involve an analysis and interpretation of the DOP rules, themselves. The DOP rules clearly indicate, however, that where the DOP has jurisdiction a complaint alleging discrimination against an agency employer is to be initiated within the charged agency, pursuant to procedures identical to those proposed in the ADA grievance procedure, resulting in an agency determination with a right of appeal of that determination to the Division of Equal Employment Opportunity/ Affirmative Action, Department of Personnel (EEO/AA). If either the grievant or the charged agency concluded that the DOP process applies, review of the agency determination may be had in the Division of EEO/ AA at the request of the grievant. It was thought better therefore to leave the question of whether an individual case is cognizable under those rules for case-by-case determination or resolution by each agency or grievant.

COMMENT: The Department of Personnel received two comments from Paul K. O'Leary, of the Rutgers University's Bureau of Economic Research and a member of the Department of Personnel's ADA Task Force. Mr. O'Leary suggests that the Agency Notice of ADA Grievance Procedure, the text of which appears as part of the proposed rules, be posted at points of department access by the public, including employment related offices and testing centers.

RESPONSE: This is a good suggestion, and all agencies are encouraged to publish the Notice in this way, as each agency finds appropriate. No modification of the proposed rules is necessary for this to occur, however, but each agency will be relied upon to judge where such postings are appropriate according to its individual circumstances.

COMMENT: Mr. O'Leary's other comment argues that it is unnecessary and inappropriate to require a grievant to identify his or her disability, as elicited by the suggested grievance form contained in the proposed rules.

RESPONSE: This comment was validated in discussions with some of the agencies participating in the joint rulemaking process. Although the information requested was sought in view of the necessity in at least some circumstances of having to determine if a grievant presents a "disability" as that term is used in the ADA, nevertheless, in light of the fact that not all meritorious grievances need necessarily be presented by an individual with a disability, it has been decided that this question will not be included in the suggested grievance form in the final rules. Rather, it will be left to the investigator to determine in appropriate cases whether the existence or identity of a particular disability is necessary to a resolution of the grievance, and if so whether the grievant qualifies for protection under the ADA. Unlawful discrimination against a particular individual under the ADA will not arise in most cases unless the individual has, has had or is regarded as having a condition that satisfies the statutory definition of "disability," found at 42 U.S.C.A. §12102.(2). Thus, a determination of the merit of a grievance may turn on the resolution of this question of fact, and it may be necessary for the investigator to determine it.

COMMENT: Three agencies (the Departments of Law and Public Safety, Labor and Transportation) received a copy of a set of comments from John D. Del Colle, Associate Executive Director, and Jill Sulzberg, Associate Advocate of the Eastern Paralyzed Veterans Association (EPVA), which were the most extensive of all submissions. None, however, requires a substantial modification of the rule as proposed. The EPVA properly expresses concern that the public be advised of the name and telephone number of the agency ADA Coordinator, and recognizes the reasons that such information is not contained in the rule itself.

RESPONSE: The Federal regulation which requires that the grievance process be published does not require it and such specifics as the name of the person holding the position and the person's telephone number are subject to change, and can easily become outdated, useless and even more inconvenient to the concerned public if contained in the rules themselves than if not included in the first place. Including such information in the rules would also necessitate amending the rule as such details changed. The information will of course be available from the agencies upon request, and could be contained in any appropriate periodical or occasional written communication from the agencies, including their Notice of ADA Procedure.

COMMENT: The EPVA correctly notes that the proposed rules state that the suggested grievance form contained therein may be used to file a grievance; it also correctly notes that use of that form is not required, a grievant being free to initiate the process with a letter.

RESPONSE: In fact, the rules allow for the filing of a grievance by telephone or orally in person, if appropriate.

COMMENT: The EPVA takes issue with the recommended 20 day time limit on the filing of a grievance as being too short.

RESPONSE: This proposed procedure was modeled on the Department of Personnel rule referred to above, which at the time of the Notice of Proposed Rulemaking giving rise to these comments contained a 20 day deadline for filing a grievance thereunder. Since the publication of the Notice of Proposed Rulemaking the Review Committee on Sexual Harassment established pursuant to Executive Order 88 has recommended that the DOP rule be amended to enlarge the filing time to 30 days from the date the grievant becomes aware of the alleged violation. Therefore, that recommended change will be made in these rules, as well. It should be understood, however, that the time limit for filing is not intended to be rigid, but to be merely an indication that the process is intended to yield rapid resolution. Each agency will have the discretion and flexibility under the rule to adjust the limit to individual cases as the circumstances justify.

COMMENT: The EPVA interprets the language of the fourth numbered paragraph of the Agency Notice of ADA Procedure ("In most cases a written determination ... will be issued ... no later than 45 days after its filing") to mean that a written determination may not issue at all in some cases.

RESPONSE: This is a misunderstanding of the meaning of the language in question. The phrase "in most cases" refers to the 45 day time objective within which a determination will hopefully issue, not to the form of determination, written or other. It is the intent of the rule that a written determination will be forthcoming in all cases, but that some determinations may require more time than the objective of 45 days.

COMMENT: The proposed rule is also critiqued for failing to state how long the records of grievances will be retained.

RESPONSE: Other State laws presently establish document retention times, and each agency will be guided by those applicable to it.

COMMENT: EPVA suggests that proposed N.J.A.C. 13:1C-4.4(a) be reworded to indicate that the ADA Coordinator will notify the grievant in writing that the grievance has been received.

RESPONSE: It is anticipated that in the vast majority of cases such notice will be in writing, but that there may be circumstances where written notice is unnecessary or inappropriate, for example when a grievance is taken in person. No amendment to the proposed rule is necessary in this regard.

COMMENT: The EPVA suggests that the 20 day objective time limit for filing a grievance be included in the substantive rule, at N.J.A.C. 13:1C-4.1, as well as in the Agency Notice part of the rule.

RESPONSE: This comment is well taken and this change will be made in the final rule.

COMMENT: The EPVA also requests that the grievance form eliminate solicitation of both an alternate contact person and a proposed access or accommodation.

RESPONSE: Both inquiries are optional, and have good reasons. As regards the option of providing an alternate contact person, some grievants may wish assistance from a lawyer or other person, and in some cases individuals may find communication facilitated by such assistance. Likewise, it will assist the State and its agencies to better meet the needs of persons with disabilities if all information that can help lead to proper accommodation or access is made available to them. In either case, the grievant is under no obligation to provide such information, however. As to accommodation or access, it also should be understood that if the responding agency is unable on its own to devise a solution in a particular case, and the grievant is aware of a solution, it does no one any good to deny the grievant this option of contributing to the resolution of the problem from the outset. As to the comment that one person's solution may not suit another, this may be true, but it seems more to justify retaining the inquiry than eliminating it.

COMMENT: The EPVA's final comment is that the interchangeable use of "grievance" and "complaint" throughout the proposed rule is less than clear, and that only the former term should be used.

RESPONSE: The Federal regulation requiring the publication of this procedure (28 CFR §35.107(b)) uses both terms, apparently synonymously and the proposed rules carried that usage over. However, to avoid confusion, the word "grievance" will be used exclusively in the final rules.

COMMENT: The Department of Labor received a submission from Jamie C. Hilton, Executive Director of the Commission for the Blind and Visually Impaired in the Department of Human Services, which raised the question, dealt with above, of the rigidity of the 20 day filing goal, and further questioned whether the time ran from the occurrence of the act of discrimination or from the time that the grievant became aware of the occurrence.

RESPONSE: The rules intend that the time runs from the time the grievant becomes aware of the occurrence that constitutes the alleged violation. Again, the 20 days is a guideline, and should be applied flexibly to equitably adjust to the circumstances of each case.

COMMENT: Wilfredo Davila, Director of the Bergen County Department of Human Services' Office of the Disabled, also filed a submission with the Department of Labor. Mr. Davila's submission notes a typographical error in the text of Labor's citation to its Administrative Code, which was corrected in the published proposal. Observation is also made that references in the Summary accompanying the notice incorrectly suggest that the Federal Regulations (28 CFR §35.107) that give rise to this rulemaking require the time limits of 20 days on filing and 45 days for resolution.

RESPONSE: It is true that the Federal regulations do not require these times, and the Summary was not intended to indicate that they did.

COMMENT: Mr. Davila reads the proposed rules to indicate that the agency's ADA Coordinator would be the final decision maker in the grievance process and out of concern for due process he suggested that an appeal be available to the agency head or another suitable official with expertise in the area of ADA if the grievant is not satisfied with the initial outcome.

RESPONSE: The proposed rules indicate that in each case the head of the agency or her or his designee is the final decision maker. It is to be assumed that by the time the final decision is rendered the grievance will have been reviewed by individuals with particular responsibility and experience in the resolution of such grievances.

COMMENT: Mr. Davila also raised the question of the meaning of "day" (calendar or business) and the question of the rigidity of the 20 day filing guideline and the 45 day resolution goal, dealt with above.

Finally, two agencies received comments from individuals or agencies approving of the rules as proposed: the Department of Law and Public Safety, from Deputy Attorney General Katerina Wright, for the Division of Gaming Enforcement and the Department of Transportation from Wm. E. Roland, Director of the John D. Young Memorial Lions Blind Center. The Department of Transportation also received a comment from Kathleen Gallagher, Rehabilitation Specialist with National Industries for the Blind which, although not providing any comment on the proposed rules reported the organization's positive experiences with New Jersey Transit and the Passaic and Burlington Counties' paratransit systems; she enclosed a laudatory letter she had written to Transit's Manager of County Support Services, Robert Koska.

Summary of Changes upon Adoption:

Throughout the final rules, the terms "complaint" and "complainant" have been eliminated and the terms "grievance" and "grievant" respectively have been substituted.

The provision of N.J.S.A. 13:1C-2.2, the Agency Notice of ADA Procedure, has been changed to suggest that a grievance should be filed promptly within 30 days, rather than the original 20 days, and to indicate also that the time period specified is not a strict limit barring all grievances not filed within that time.

The provisions of N.J.S.A. 13:1C-4.1 has been changed to include the suggested filing deadline of 30 days; no reference to a filing deadline appeared in the original proposal.

The provision of N.J.S.A. 13:1C-4.3, the Grievance Form, has been changed by the deletion of the inquiry seeking the identification of the disability of the grievant, which appeared in the original proposal.

The provisions of N.J.S.A. 13:1C-4.4(a) and (b) have been changed to clarify that the completion of the investigation and the rendering of the decision on the grievance will be completed within 45 days if practicable, a qualification not included in the original proposal.

The foregoing changes being minor or technical in nature and not substantially altering the proposed rules do not require reproposal.

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

CHAPTER 1C
DISABILITY DISCRIMINATION GRIEVANCE PROCEDURE

SUBCHAPTER 1. DEFINITIONS

13:1C-1.1 Definitions

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

"ADA" means the Americans with Disabilities Act, 42 U.S.C.A. §12101 et seq.

"Agency" means the Department of Law and Public Safety.

"Designated decision maker" means the Attorney General or a designee of the Attorney General.

SUBCHAPTER 2. GENERAL PROVISIONS

13:1C-2.1 Purpose

(a) These rules are adopted by the agency in satisfaction of the requirements of the ADA and regulations promulgated pursuant thereto, 28 C.F.R. 35.107.

(b) The purpose of these rules is to establish a designated coordinator whose duties shall include assuring that the agency complies with and carries out its responsibilities under the ADA. Those duties shall also include the investigation of any complaint filed with the agency pursuant to N.J.A.C. 13:1C-4.

13:1C-2.2 Required ADA Notice

In addition to any other advice, assistance or accommodation provided, a copy of the following notice shall be given to anyone who inquires regarding the agency's compliance with the ADA or the availability of accommodation which would allow a qualified individual with a disability to receive services or participate in a program or activity provided by the agency.

AGENCY NOTICE OF ADA PROCEDURE

The agency has adopted an internal grievance procedure providing for prompt and equitable resolution of *[complaints]* ***grievances*** alleging any action prohibited by the U.S. Department of Justice regulations implementing Title II of the Americans with Disabilities

Act. Title II states, in part, that "no otherwise qualified disabled individual shall, solely by reason of such disability, be excluded from participation in, be denied the benefits of or be subjected to discrimination" in programs or activities sponsored by a public entity.

Rules describing and governing the internal grievance procedure can be found in the New Jersey Administrative Code, N.J.A.C. 13:1C-1.1 et seq. As those rules indicate, *[complaints]* ***grievances*** should be addressed to the agency's designated ADA Coordinator, who has been designated to coordinate ADA compliance efforts, at the following address:

[(The following address will be specific to the Agency)]

ADA Coordinator
Department of Law and Public Safety
Hughes Justice Complex
CN 080
Trenton, New Jersey 08625

1. A *[complaint]* ***grievance*** may be filed in writing or orally, but should contain the name and address of the person filing it, and briefly describe the alleged violation. A form for this purpose is available from the designated ADA coordinator. In cases of employment related *[complaints]* ***grievances***, the procedures established by the Department of Personnel, N.J.A.C. 4A:7-1.1 et seq. will be followed where applicable.

2. A *[complaint]* ***grievance*** should be filed promptly within *[20]* ***30*** days after the *[complainant]* ***grievant*** becomes aware of the alleged violation. (Processing of allegations of discrimination which occurred before this grievance procedure was in place will be considered on a case-by-case basis).

3. An investigation, as may be appropriate, will follow the filing of a *[complaint]* ***grievance***. The investigation will be conducted by the agency's designated ADA Coordinator. The rules contemplate informal but thorough investigations, affording all interested persons and their representatives, if any, an opportunity to submit evidence relevant to a *[complaint]* ***grievance***.

4. In most cases a written determination as to the validity of the *[complaint]* ***grievance*** and a description of the resolution, if any, will be issued by the designated decision maker and a copy forwarded to the *[complainant]* ***grievant*** no later than 45 days after its filing.

5. The ADA coordinator will maintain the files and records of the agency relating to the *[complaints]* ***grievances*** filed.

6. The right of a person to a prompt and equitable resolution of the *[complaint]* ***grievance*** filed hereunder will not be impaired by the person's pursuit of other remedies such as the filing of an ADA *[complaint]* ***grievance*** with the responsible Federal department or agency or the New Jersey Division on Civil Rights. Use of this grievance procedure is not a prerequisite to the pursuit of other remedies.

7. The rules will be construed to protect the substantive rights of interested persons, to meet appropriate due process standards and to assure that the agency complies with the ADA and implementing Federal rules.

SUBCHAPTER 3. DESIGNATED ADA COORDINATOR

13:1C-3.1 Designated ADA coordinator

(a) The designated coordinator of ADA compliance and complaint investigation for the agency is:

[(The following address will be specific to the Agency)]

ADA Coordinator
Department of Law and Public Safety
Hughes Justice Complex
CN 080
Trenton, New Jersey 08625

(b) All inquiries regarding the agency's compliance with the ADA and the availability of accommodation which would allow a qualified individual with a disability to receive services or participate in a program or activity provided by the agency should be directed to the designated coordinator identified in (a) above.

(c) All *[complaints]* ***grievances*** alleging that the agency has failed to comply with or has acted in a way that is prohibited by the ADA should be directed to the designated ADA coordinator identified in this section, in accordance with the procedures set forth in N.J.A.C. 13:1C-4.

SUBCHAPTER 4. ADA *[COMPLAINT]* ***GRIEVANCE*** PROCEDURE

13:1C-4.1 *[Complaint]* ***Grievance*** procedure

A *[complaint]* ***grievance*** alleging that the agency has failed to comply with the ADA or has acted in a way that is prohibited by the ADA shall be submitted either in writing or orally to the designated ADA coordinator identified in N.J.A.C. 13:1C-3.1 ***within 30 days of the grievant becoming aware of the alleged violation***. A *[complaint]* ***grievance*** alleging employment discrimination will be processed pursuant to the rules of the Department of Personnel, N.J.A.C. 4A:7-1.1 through 3.4, if those rules are applicable.

13:1C-4.2 *[Complaint]* ***Grievance*** contents

(a) A *[complaint]* ***grievance*** submitted pursuant to this subchapter may be submitted in or on the form set forth at N.J.A.C. 13:1C-4.3.

(b) A *[complaint]* ***grievance*** submitted pursuant to this subchapter shall include the following information:

1. The name of the *[complainant]* ***grievant***, and/or any alternate contact person designated by the *[complainant]* ***grievant*** to receive communication or provide information for the *[complainant]* ***grievant***;

2. The address and telephone number of the *[complainant]* ***grievant*** or alternate contact person; and

3. A description of manner in which the ADA has not been complied with or has been violated, including times and locations of events and names of witnesses if appropriate.

13:1C-4.3 *[Complaint]* ***Grievance*** form

The following form may be utilized for the submission of a *[complaint]* ***grievance*** pursuant to this subchapter:

Americans with Disabilities Act Grievance Form

Date: _____

Name of grievant: _____

Address of grievant: _____

Telephone number of grievant: _____

[Disability of grievant: _____]

Name, address and telephone number
of alternate contact person:

_____

_____

Agency alleged to have denied access:

Department: _____

Division: _____

Bureau or office: _____

Location: _____

Incident or barrier: _____

Please describe the particular way in which you believe you have been denied the benefits of any service, program or activity or have otherwise been subject to discrimination. Please specify dates, times and places of incidents, and names and/or positions of agency employees involved, if any, as well as names, addresses and tele-

phone numbers of any witnesses to any such incident. Attach additional pages if necessary.

Proposed access or accommodation:

If you wish, describe the way in which you feel access may be had to the benefits described above, or that accommodation could be provided to allow access.

A copy of the above form may be obtained by contacting the designated ADA coordinator identified at N.J.A.C. 13:1C-3.1.

13:1C-4.4 Investigation

(a) Upon receipt of a *[complaint]* ***grievance*** submitted pursuant to this subchapter, the designated ADA coordinator will notify the *[complainant]* ***grievant*** of the receipt of the *[complaint]* ***grievance*** and the initiation of an investigation into the matter. The designated ADA coordinator will also indicate a date by which it is expected that the investigation will be completed, which date shall not be later than 45 days from the date of receipt of the *[complaint]* ***grievance*** unless a later date is agreed to by the *[complainant]* ***grievant***.

(b) Upon completion of the investigation, the designated ADA coordinator shall prepare a report for review by the designated decision maker for the agency. The designated decision maker shall render a written decision within 45 days of receipt of the *[complaint]* ***grievance, if practicable or*** unless a later date is agreed to by the *[complainant]* ***grievant***, which decision shall be transmitted to the *[complainant]* ***grievant*** and/or the alternate contact person if so designated by the *[complainant]* ***grievant***.

(a)

DIVISION OF CONSUMER AFFAIRS STATE BOARD OF ARCHITECTS

Fees

Adopted Amendment: N.J.A.C. 13:27-5.8

Proposed: August 16, 1993 at 25 N.J.R. 3704(a).

Adopted: September 23, 1993 by the State Board of Architects, Charles A. Spitz, President.

Filed: October 28, 1993 as R.1993 d.602, **without change.**

Authority: N.J.S.A. 45:3-3 and 7 and 45:1-3.2.

Effective Date: December 6, 1993.

Expiration Date: February 20, 1995.

The State Board of Architects afforded all interested parties an opportunity to comment on the proposed amendments to N.J.A.C. 13:27-5.8(b), relating to examination fees for applicants as part of the licensure process. Announcement of the opportunity to respond to the Board appeared in the New Jersey Register on August 16, 1993 at 25 N.J.R. 3704(a). Announcements were also forwarded to The Star Ledger, The Trenton Times, and other interested parties. The official comment period ended on September 15, 1993.

A full record of this opportunity to be heard can be inspected by contacting the Board of Architects, Kevin Earle, Executive Director, P.O. Box 45001, 124 Halsey Street, Newark, New Jersey 07101.

Summary of Public Comment and Agency Response:

The Board received one written comment regarding the proposal. The commenter's name follows. Subsequently recorded is a summary of the comment received together with the Board's response.

Kenneth G. Mayer, P.E.

COMMENT: After noting that the Board is statutorily empowered to set reasonable fees to cover its expenses, the commenter stated his belief that the proposed administrative surcharges of $15.00 and $25.00 are well in excess of the Board's actual expenses in administering the various exam modules. In addition, the commenter suggested that the administrative surcharges may have been set at a high level in order to create a reserve fund.

RESPONSE: The proposed fee amendments involve no changes in either calculating the fees to be charged or in determining the administrative costs. Indeed, the fee amendments have been proposed simply in order to reflect the graphic and written examination fees so that they will always total the amount charged by the Board by the National Council of Architectural Registration Boards (NCARB) whenever NCARB raises its fees, plus a portion of the administrative costs involved in administering the examination. The administrative costs have remained relatively constant and consist of the following: the cost of renting an exam site for a period of as many as four days; the cost of retaining the services of proctors; the cost of professional time, including time dedicated to the exams by the Board's executive director and administrative staff, as well as by the Board's members; the cost of postage; and the cost of printing/reproduction. In short, these numerous and substantial administrative costs mean that the fees charged merely allow the Board to cover its own expenses, as it is required to do.

Full text of the adopted amendment follows:

13:27-5.8 Fees

(a) (No change.)

(b) The fees for the licensing examination and any reexamination are as follows:

1. Graphic: the fee charged the Board by the National Council of Architectural Registration (NCARB), plus $25.00;

2. Written: the fee charged the Board by NCARB, plus $15.00.

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

(b)

DIVISION OF CONSUMER AFFAIRS BOARD OF EXAMINERS OF OPHTHALMIC DISPENSERS AND OPHTHALMIC TECHNICIANS

Lease Agreements

Adopted Amendment: N.J.A.C. 13:33-1.35
Adopted New Rule: N.J.A.C. 13:33-1.36

Proposed: November 2, 1992 at 24 N.J.R. 4010(a).

Adopted: January 6, 1993 by the the Board of Examiners of Ophthalmic Dispensers and Ophthalmic Technicians, Robert Troast, President.

Filed: October 28, 1993 as R.1993 d.603, **with technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 52:17B-41.13 and 41.17.

Effective Date: December 6, 1993.

Expiration Date: March 12, 1995.

The Board of Examiners of Ophthalmic Dispensers and Ophthalmic Technicians afforded all interested parties an opportunity to comment on the proposed amendment and new rule, N.J.A.C. 13:33-1.35 and 1.36, regarding lease agreements. The official comment period ended on December 2, 1992. Announcement of the opportunity to respond to the Board appeared in the New Jersey Register on November 2, 1992, at 24 N.J.R. 4010(a). Announcements were also forwarded to the Star Ledger, the Trenton Times, the Society of Dispensing Opticians of New Jersey and to other interested parties.

A full record of this opportunity to be heard can be inspected by contacting the Board of Examiners of Ophthalmic Dispensers and

Ophthalmic Technicians, Post Office Box 45011, Newark, New Jersey 07101.

Summary of Public Comments and Agency Responses:

One letter was received during the 30-day comment period from Bonnie L. Johnson, Managing Attorney for LensCrafters, Inc. Ms. Johnson stated that the comments of LensCrafters, as summarized below, reflect the views of other optical retailers as well, including Pearle, Inc. and Cole Vision, doing business as Sears Optical.

The commenter states that it is a common leasing arrangement for rent to fluctuate from month to month depending on cash flow. The commenter contends that this arrangement results in overall lower rents and that this lower cost of doing business is passed on to the consumer in the form of reduced costs of eye examination services and products. The commenter argues that the Board has no grounding in law which allows it to prohibit such a common leasing arrangement. Citing *In the Matter of Kaufman and Morenstein,* 194 *N.J. Super.* 124, 476 *A.2d* 319 (App. Div. 1984), the commenter notes that several courts have recognized the customary nature of percentage lease arrangements and sustained such an arrangement between an optical company and an optometrist.

The commenter also argues that subsection (b) of the proposed rule provides no relief as it gives the Board "unfettered discretion in determining which percentage lease provisions are protected, thereby allowing the potential for abuse of that discretion."

The Board reiterates that its intent in proposing this new rule was to eliminate an eyecare practitioner's incentive to steer a patient for inappropriate reasons, such as financial gain. Referrals of patients by or to an ophthalmic dispenser should be made on the basis of the quality of goods and services provided to the public, uninfluenced by the existence of a financial interest arising from the referral. Excessive or inappropriate referrals which can result from direct financial incentives to refer have a more significant detrimental impact upon overall health care costs than any savings to the public resulting from lower rent in months of "decreased traffic." An incentive to refer for financial gain is present in any type of percentage leasing arrangement between eyecare practitioners. For example, when the referring practitioner is the lessor, the more referrals he or she makes the more rent he or she will receive. Similarly, if rent is abated by a predetermined amount per referral, the more referrals the lessee makes the less rent he or she will pay. In either case, the incentive to refer for financial gain is present, thus operating to preclude independent, objectively made referrals and to provide for excessive referrals which may result in higher health care costs and decreased quality of goods and services.

Contrary to the commenter's statement that the Board has unfettered discretion in determining which percentage lease provisions may be permitted, the Board, in fact, is and will remain subject to legal standards prohibiting arbitrary and capricious use of its discretion. As stated in the proposal, the intent of subsection (b) was to allow for standard agreements such as shopping mall space rental agreements where the likelihood of abusive referring is remote. It should also be noted again in this regard that the regulation operates only upon leases between Board licensees and other licensees (physicians and optometrists) who, by virtue of their practice, possess the inherent capacity to refer patient-consumers to one another.

Finally, *I/M/O Kaufman and Morenstein* does not require a result contrary to the regulation. *Kaufman* primarily addresses the issue of permissibility of optometrists and opticians physically offering their respective services to the public from the same commercial or retail premises. While one limited factual aspect of the interrelationship of the landlord-optician and tenant-optometrists involved a lease in which rent was in part determined by a percentage of the gross fees received by the tenant-optometrists, the court did not consider the legality *per se* of such an arrangement and certainly did not hold that a regulatory prohibition of such lease provisions as here contemplated was invalid. In short, the holding and dicta in *Kaufman* do not implicate the validity of a Board regulation adopted to advance a legislative scheme of regulation to protect against a discernible evil directly related to the public's health, safety and welfare.

Accordingly, consistent with the Board's statutory mandate to protect the public health, safety and welfare and for the reasons specifically outlined above, the Board is adopting the prohibition against percentage leasing agreements.

Summary of Agency-Initiated Changes:

At N.J.A.C. 13:33-1.35(e), "from" is changed to "form" as in the current rule text, and, at N.J.A.C. 13:33-1.36, "in" is inserted, to correct typographic errors.

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

13:33-1.35 Advertising; prohibition on rebates and commissions for referring patients

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

(e) It shall be unlawful for any ophthalmic dispenser or ophthalmic technician or employee or agent thereof or any other person on their behalf to offer to pay a rebate or commission in any *[from]* ***form*** whatsoever to any physician, optometrist, or any other person in return for referring patients to anyone licensed under N.J.S.A. 52:17B-41.1 et seq.

13:33-1.36 Space rental agreements with other health care practitioners

(a) A Board licensee may rent space to or from a person authorized by law to prescribe corrective or therapeutic eyewear or from a separately held entity in which said person and/or his or her immediate family hold any financial interest, only where the total rent to be paid is set forth ***in*** a written agreement and such rent is for a fixed dollar amount for a stated period of time determined by the fair market value for the rented space. The rent shall not be determined by the number of referrals made or by volume of sales or fees.

(b) Any monetary arrangement other than as set forth in (a) above shall require Board approval for good cause shown.

(c) The term "immediate family," for the purpose of this section, means the spouse and children, siblings and parents, spouse's siblings and parents, and the spouses of the children of the person authorized by law to prescribe corrective or therapeutic eyewear.

(d) A Board licensee shall not enter into a contract or renewal thereof or any other arrangement which violates the provisions of this section after the effective date hereof.

(a)

DIVISION OF CONSUMER AFFAIRS
BOARD OF MARRIAGE COUNSELOR EXAMINERS
Board of Marriage Counselor Examiners Rules
Readoption with Amendments: N.J.A.C. 13:34

Proposed: July 19, 1993 at 25 N.J.R. 3060(a).

Adopted: October 14, 1993 by the Board of Marriage Counselor Examiners, Edward Haldeman, President.

Filed: October 22, 1993 as R.1993 d.599, **with technical changes** not requiring additional public notice and comment (See N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 45:8B-13.

Effective Date: October 22, 1993, Readoption;
December 6, 1993, Amendments.

Expiration Date: October 22, 1998.

The Board of Marriage Counselor Examiners afforded all interested parties an opportunity to comment on the proposed readoption of N.J.A.C. 13:34. The 30-day comment period ended on August 18, 1993. Announcement of the opportunity to respond to the Board appeared in the New Jersey Register on July 19, 1993 at 25 N.J.R. 3060(a). Announcements were also forwarded to the Star Ledger, the Trenton Times and interested parties.

A full record of this opportunity to be heard can be inspected by contacting the Board of Marriage Counselor Examiners, Post Office Box 45007, Newark, New Jersey 07101.

Summary of Public Comments and Agency Responses:

During the 30-day comment period, the Board received responses from the following three individuals:

Susan I. Wegner, Esq., of the law firm of Sokol, Behot and Fiorenzo, on behalf of the Psychoanalytic Center of Northern New Jersey and the National Association for the Advancement of Psychoanalysis.

Joseph A. Racite, Ph.D., past president of the New Jersey Mental Health Counselors Association.

Ann R. Neuman, M.S.S., who identified herself as a clinical social worker who is a member of both NASW and the New Jersey Society for Clinical Social Work.

Following is a summary of the issues raised by these commenters together with the Board's responses:

COMMENT: By letter dated July 30, 1993, Susan Wegner, Esq., requested an extension of the comment period from August 18, 1993 to September 18, 1993, stating that because psychoanalysts traditionally vacation during August, many of the persons directly affected by the proposed rules will be unavailable to adequately prepare and submit comments. Without identifying specific areas of concern, Ms. Wegner also requested a public hearing.

RESPONSE: By letter dated August 16, 1993, the Board invited the commenter to attend its September 9, 1993 open public meeting or to submit to the Board in writing by that date specific areas of concern with regard to the impact of the regulations on psychoanalysts. The Board did not receive any further correspondence from this commenter nor did she appear at the meeting. Accordingly, at the September 9, 1993 meeting, the Board denied Ms. Wegner's requests for an extension of the comment period and for a public hearing based upon the failure to identify issues which would warrant a public hearing.

COMMENT: Ann Neuman stated that there are no historical or theoretical reasons for basing the change in supervision standards upon supervision standards promulgated by the Board of Psychological Examiners. The commenter stated her concern that "there is a move towards the setting up of a standard for mental health in New Jersey based on the psychologists' dictates."

RESPONSE: As stated in the proposal, the change in supervision standards does, in fact, cause this Board's rules to be consistent with those of the Board of Psychological Examiners. However, consistency was not the compelling reason for the change; rather, as stated in the Summary statement, the Board determined that increased clinical experience was necessary based on the evolving complexity and dynamics of family therapy. The Board also believes, however, that a move towards consistency in the requirements of the various mental health professions offering similar services is both logical and beneficial to the consumer. In those instances when services may be provided by an individual from any of the mental health professions, the consumer may be aided in the decision-making process by the knowledge that the training standards of the various professions are reasonably similar. No inference that one standard is superior to another was intended nor should it be made.

COMMENT: Ann Neuman stated that "this is the beginning of a trend to promote marriage counseling as something other than a sub-specialty of psychology, psychiatry, social work and nursing clinical practice."

RESPONSE: The New Jersey State Legislature declared the practice of marriage counseling to be a separate profession in the State of New Jersey when it enacted the Practicing Marriage Counseling Act, N.J.S.A. 45:8B-1 et seq. Accordingly, marriage counseling cannot be considered, nor does the Board believe it to be, a sub-specialty of any other mental health profession.

COMMENT: Ann Neuman argued that use of the words "family therapy" appears to be a subtle broadening of the subspecialty of marriage counseling.

RESPONSE: As stated above, marriage counseling is not a subspecialty of any other mental health profession. Furthermore, as set forth in N.J.S.A. 45:8B-2, the practice of marriage counseling "includes premarital counseling, pre- and post-divorce counseling, and family counseling which emphasizes the spousal relationship as a key to successful family living."

COMMENT: The same commenter stated that she objected to the proposal if it changed the legislation from a title protection act to a practice protection act. She argued that all the law should do is prohibit an uncertified provider from misrepresenting himself or herself as a certified marriage counselor. The commenter also recommended as a clarification to the exceptions to the Act specific language exempting "physicians, social workers, psychologists, nurses or students within training programs of these professions."

RESPONSE: The Practicing Marriage Counseling Act is not merely a "title protection" act, but rather regulates the substantive practice of the profession by limiting its practice to licensees. See N.J.S.A. 45:8B-5. In addition to prohibiting an unlicensed provider from misrepresenting himself or herself as a licensed marriage counselor (N.J.S.A. 45:8B-5), the Act also requires the Board to examine and pass on the qualifications of all applicants for permits or licenses. (N.J.S.A. 45:8B-13). Furthermore, N.J.S.A. 45:8B-18 requires as a condition for licensure five years of full time counseling experience or its equivalent "of a character approved by the Board . . ." It is pursuant to these specific statutory directives that the Board has promulgated standards for supervisory experience as well as standards of practice. Exemptions from the provisions of the act for members of other professional groups doing marriage and family counseling work are specifically spelled out in N.J.S.A. 45:8B-8 and, in the Board's opinion, need not be reiterated in the regulations.

COMMENT: Joseph Racite wrote in response to the proposal "to repeal the existing rules of the Boards of Psychological and Marriage Counselors." (The Board points out that these are two separate boards which coincidentally published proposed readoptions in the New Jersey Register on the same day.) In relating his concerns, the commenter refers to "the Board" without specifying to which of the two boards he is referring. Except for the two comments set forth below, the commenter's concerns appear to relate solely to the regulations proposed by the Board of Psychological Examiners and thus cannot be addressed by this Board.

One of the concerns raised by Mr. Racite was that the proposed regulations are "clearly establishing the Board of Psychological Examiners as the controller and regulator of all of the helping professions."

RESPONSE: If the reference here is to this Board's regulations, the commenter is directed to the response to Ann Neuman set forth above.

COMMENT: Mr. Racite also argued that the definition of exempt setting as being funded 50 percent or more by public funds is overly restrictive and that current bona fide State licensed community agencies which have been operating for many years would no longer be "bona fide" if outside funding decreased or if, for any reason, revenue exceeded 50 percent of total income.

RESPONSE: The Board recognizes that agencies are now being encouraged not to rely on public funds and that its definition of "bona fide community organization" should therefore be revisited. The Board will continue to review this matter, and any amendments will be proposed in a future issue of the New Jersey Register.

Summary of Agency-Initiated Change:

The Board is amending N.J.A.C. 13:34-3.4, Supervised experience, because it inaccurately reiterates the statutory requirement (N.J.S.A. 45:8B-18(b)) that a candidate must document a minimum of five years of experience, two of which must be supervised. As written, the regulation requires "five years of supervised experience, two of which shall have been in marriage counseling, one year of which shall be after receipt of a qualifying degree." This amendment represents a technical change only since the Board has always complied with the statute in requiring that only two years, and not all five, be under supervision.

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

13:34-1.7 Hearings to conform to law

The conduct of all hearings shall conform to the requirements of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., as amended and supplemented.

13:34-2.1 Misconduct defined

(a) Professional or occupational misconduct in the practice of marriage counseling by persons licensed by the State Board of Marriage Counselor Examiners shall include, but not be limited to, the following:

1.-5. (No change.)

6. Failing to maintain a record for each client which accurately reflects the client contact with the practitioner.

i. Unless otherwise provided by law, all client records must be retained for at least seven years.

ii. If a licensee ceases to engage in practice or it is anticipated that he or she will remain out of practice for more than three months, the licensee or designee shall:

(1) Establish a procedure by which clients can obtain their records or acquiesce in the transfer of those records to another licensee or health care professional who is assuming the responsibilities of that practice;

(2) Publish a notice of the practice cessation and the established procedure for the retrieval of records in a newspaper of general circulation in the geographic location of the licensee's practice, at least once each month for the first three months after the cessation; and

(3) Make reasonable efforts to directly notify any client treated during the six months preceding the cessation, providing information concerning the established procedure for record retrieval.

7. (No change.)

8. Failing to make available to a client, or, upon a client's request, to another licensed health practitioner consistent with that practitioner's authorized scope of practice, copies of reports or test records relating to the client which are in the possession or under the control of the licensee, or failing to complete forms or reports required for the reimbursement of a client by a third party.

i. (No change.)

ii. A practitioner may, however, withhold information from a client if he or she believes release of such information would adversely affect the client's mental or psychological health.

iii. This section shall not require release to the parent or guardian of a minor of records or information relating to sexually transmitted disease or abortion except with the minor's consent.

9.-18. (No change.)

13:34-3.2 Bonafide community agency defined

(a) For the purpose of N.J.S.A. 45:8B-6(a)(2), legal incorporation as a not-for-profit organization shall not in itself be satisfactory evidence of a de facto clinic or bona fide community agency.

1. Such corporations shall give other evidence of their status as a bona fide community agency, such as proof that the organization is supported wholly or in major part by public funds, before being permitted to advertise performance of marriage and family counseling services.

2. (No change.)

13:34-3.4 Supervised experience

(a) (No change.)

(b) The processing of a candidate's application is dependent upon successful completion and documentation of a minimum of five years of *[supervised]* experience, two years of which shall have been in ***supervised*** marriage counseling, one year of which shall be after receipt of a qualifying degree. As prescribed in N.J.S.A. 45:8B-18(b), "supervised experience" shall mean marriage and family counseling or therapy that meets the following criteria:

1. The equivalent of one year of full-time experience is set at a minimum of 1,750 hours, equal to but no more than 35 hours per week on a 50-week per year basis. The 35 hours per week shall include:

i. Twenty hours of face-to-face client contact per week;

ii. Four hours of supervision, at least two hours of which must be individual face-to-face supervision. The remaining two hours may be individual or group supervision. The ratio shall be one hour of supervision for each five hours of client contact; and

iii. Eleven hours in other work-related activities such as recordkeeping, consultations, report writing, etc.

2. Unsupervised independent practice by the candidate is prohibited. The candidate's clients shall include only those who have been approved in advance by the supervisor(s).

3. No more than three candidates shall be under concurrent supervision by any supervisor.

4. (No change in text.)

5. (No change in text.)

6. Supervised experience not completed prior to the filing of an application for licensure, unless conducted in a facility expressly permitted by law (N.J.S.A. 45:8B-6), will require the issuance of a temporary permit (N.J.S.A. 45:8B-6(e)), obtainable by the following procedures:

i. Filing the application with all supporting materials;

ii.-iii. (No change.)

Recodify existing 6 through 8 as 7 through 9. (No change in text.)

13:34-4.1 Experiential requirements

(a) Pursuant to N.J.S.A. 45:8B-18(b), the processing of a candidate's application is dependent upon successful completion and documentation of a minimum of five years of supervised counseling experience, two years of which shall be in marriage counseling.

1. "Supervised experience" for a period of one year is defined as:

i. A minimum of 20 hours per week of actual marriage and family counseling client contact, with a minimum of one hour of supervision for every five hours of client contact; and

ii. A minimum of 1,000 hours of counseling with couples and families and a minimum of 200 hours of supervision is required.

2. (No change.)

13:34-4.2 Educational requirements

(a) Pursuant to N.J.S.A. 45:8B-18(a), any person applying to the Board after January 1, 1970 with a doctorate degree in a closely allied field of study or a doctor of medicine, shall establish through official transcripts from regionally accredited educational institutions that a course of study including the following components has been completed. In addition, a post-masters degree pursuant to N.J.S.A. 45:8B-18(a) in marriage and family counseling is defined as a degree which requires as a prerequisite a masters degree in a mental health related field and which includes the following components:

1.-6. (No change.)

(b) The Board shall not base its determination as to whether it will recognize an educational institution's program solely on the failure of any professional organization of marriage counselors to accredit the program.

(a)

STATE BOARD OF MEDICAL EXAMINERS

Prescribing, Dispensing or Administering Anabolic Steroids

Adopted New Rule: N.J.A.C. 13:35-6.18

Proposed: November 2, 1992 at 24 N.J.R. 4012(a).

Adopted: October 26, 1993 by the State Board of Medical Examiners, Fred Jacobs, M.D., J.D., President.

Filed: October 28, 1993 as R.1993 d.604, **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. 45:9-2.

Effective Date: December 6, 1993.

Expiration Date: September 21, 1994.

The Board of Medical Examiners afforded all interested parties an opportunity to comment on the new rule regarding prescribing, dispensing or administering anabolic steroids. The official comment period ended December 2, 1992. Announcement of the opportunity to respond to the Board appeared in the New Jersey Register on November 2, 1992 at 24 N.J.R. 4012(a).

A full record of the opportunity to be heard may be inspected by contacting the Board of Medical Examiners, 28 West State Street, Trenton, New Jersey 08608.

Summary of Public Comments and Agency Responses:

During the 30-day comment period, the Board received two letters regarding the proposal. Following is a summary of the comments received and the Board's response:

COMMENT: The Essex County Medical Society stated its concern that N.J.A.C. 13:35-6.18(d), requiring that a licensee shall indicate a diagnosis on any prescription for anabolic steroids, would violate a patient's right to confidentiality. The Society stated that proper notation by a physician in the patient's record should suffice.

RESPONSE: The Board, having balanced the concerns related to appropriate prescribing practices and patient confidentiality, agrees with this comment and has deleted N.J.A.C. 13:35-6.18(d) from the rule.

COMMENT: Sterling Winthrop, Inc., a company that manufactures drugs, supported the Board's efforts to curb abuse of anabolic steroids but objected to the inclusion of Danazol, a drug Sterling manufactures

under the name Danocrine. Sterling asserted that Danazol, a synthetic steroid differs from anabolic steroids as to direct actions, and noted it has a different pharmacological profile than an anabolic steroid. Sterling, observing that Federal regulations do not list Danazol as an anabolic steroid, asked the Board to delete Danazol from the list of anabolic steroids in the regulations.

RESPONSE: The Board considered Sterling's initial comment as well as Sterlng's supplemental submission dated January 4, 1993 setting forth preclinical and clinical data, as well as general comments that concluded "the weak myotrophic/anabolic properties of Danazol in combination with the androgenic and hypoestrogenic side effects would make it a poor choice for the athlete in training who wants to build muscle mass." The Board refers the commenter to the regulatory definition of "anabolic steroid" as "any drug or hormonal substance ..." The Board has concluded that Danazol is an androgen with anabolic effect. While Danazol's anabolic activity may be low it is nonetheless recognized, and consistent with the Board's stated purpose to help prevent abuse of anabolic steroids, Danazol will be retained on the list of substances included in the new rule.

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

13:35-6.18 Prescribing, dispensing or administering anabolic steroids

(a) As used within this section, the following terms have the following meanings unless the content indicates otherwise:

1. "Anabolic steroid" means any drug or hormonal substance, chemically and pharmacologically related to testosterone (other than estrogen, progestin and *[corticodsteriods]* ***corticosteroids***) that promotes muscle growth, including the substances listed below as well as any salt, ester, or isomer of such substance which act in a similar manner in the human body:

Bolenone
Chlorotestosterone (4-chlortestosterone)
Chorionic gonadotropin
Clostebol
Danazol
Dehydrochlormethyltestosterone
Dihydrotestosterone (4-dihydrotesterone)
Drostanolone
Ethylestrenol
Fluoxymesterone
Formebulone (formebolone)
Mesterolone
Methandienone
Methandranone
Methandriol
Methandrosterone
Methenolone
Methyltestosterone
Mibolerone
Nandrolone
Norethandrolone
Oxandrolone
Oxymesterone
Oxymetholone
Stanolone
Stanozolol
Testolactone
Testosterone
Trenbolone

2. "Human growth hormone" ("hGH") means any polypeptide hormone of recombinant DNA origin and includes the following substances:

Somatrem
Somatropin

3. "Licensee" means a physician, registered resident or resident permit holder, podiatrist or certified nurse midwife subject to regulation by the New Jersey Board of Medical Examiners.

(b) No licensee shall prescribe, order, dispense, administer, sell or transfer any anabolic steroid or human growth hormone, for the purpose of hormonal manipulation intended to increase muscle mass, strength, or weight without an accepted medical necessity to do so, or for the intended purpose of improving performance in any form of exercise, sport or game. Body building, muscle enhancement, or increasing muscle bulk or strength through the use of anabolic steroid or human growth hormone by a person in good health is not a valid medical purpose.

(c) Licensees shall complete and maintain patient medical records which accurately reflect the utilization of any substance or drug included in this rule, which records must indicate the diagnosis, any additional information upon which the diagnosis is based and the purpose for which the substance or drug is being used.

[(d) Licensees shall state on any prescription for anabolic steroids or human growth hormones the diagnosis for which the medication is prescribed as treatment.]

*[(e)]***(d)*** Violation of any of the requirements of (b) through (d) above may be deemed to constitute one or more of the following:

1. Distribution or dispensing of a controlled dangerous substance in an indiscriminate manner, not in good faith, or without good cause, pursuant to N.J.S.A. 45:1-13;

2. Gross malpractice, gross neglect, or gross incompetence in the practice of the licensed profession pursuant to N.J.S.A. 45:1-21(c);

3. Professional misconduct in the practice of the licensed profession pursuant to N.J.S.A. 45:1-21(e);

4. A failure to comply with the provisions of an act or regulation administered by the Board, pursuant to N.J.S.A. 45:1-21(h); or

5. Unprofessional conduct which would present an imminent danger to an individual patient or to the public health, safety or welfare, within the meaning of N.J.S.A. 45:9-19.5.

*[(f)]***(e)*** Licensees who are in possession of information which reasonably indicates that another licensee has prescribed, dispensed or administered an anabolic steroid for the purpose of hormonal manipulation that is apparently intended to increase muscle mass, strength or weight without a medical necessity to do so or for apparent purpose of improving performance in any form of exercise, sport or game shall be obligated to report such information to the Board pursuant to N.J.S.A. 45:9-19.5.

(a)

DIVISION OF CONSUMER AFFAIRS
STATE BOARD OF PHYSICAL THERAPY
Referral of Patients by Chiropractors
Adopted Amendment: N.J.A.C. 13:39A-2.5

Proposed: September 7, 1993 at 25 N.J.R. 3938(a).
Adopted: October 26, 1993 by the State Board of Physical Therapy, Stanley Mendelson, P.T., Chair.
Filed: November 10, 1993 as R.1993 d.642, **without change.**

Authority: N.J.S.A. 45:9-37.18(f) and 45:1-3.2.

Effective Date: December 6, 1993.
Expiration Date: June 21, 1996.

Summary of Public Comments and Agency Responses:
No comments were received.

Full text of the adoption follows:

13:39A-2.5 Referral of patients by chiropractors

(a) Except as set forth in (b) below, a physical therapist shall not initiate physical therapy treatment unless the physical therapist has received the following information from the referring chiropractor in writing:

1. The name of the patient;

2. The printed name of the referring chiropractor, including office address and phone number;

3. The Signature of the chiropractor and the date;

4. The purpose of referral (for example, "physical therapy examination and treatment"); and

5. The Spinal component of the patient's problem.

(b) A physical therapist may initiate physical therapy treatment based on verbally supplied information provided that the physical therapist ensures that such information is confirmed in written form within two weeks.

(c) After completing the physical therapy examination and evaluation, the physical therapist shall consult with the referring chiropractor. This consultation shall:

1. Clarify any divergent assessments that the referring chiropractor and physical therapist may have made regarding the patient's needs;

2. Coordinate treatment programs in the event that the patient receives concurrent chiropractic and physical therapy. Any such concurrent treatment programs shall be compatible; and

3. Jointly determine a schedule of additional consultation that will allow the physical therapist to monitor the patient's on-going plan of care.

(d) The physical therapist shall document the initial and on-going consultations with the referring chiropractor in the patient's record.

(a)

DIVISION OF CONSUMER AFFAIRS STATE BOARD OF PUBLIC MOVERS AND WAREHOUSEMEN

Late Renewal and Reinstatement Fee Timeframes

Adopted Amendment: N.J.A.C. 13:44D-2.4

Proposed: September 7, 1993 at 25 N.J.R. 3931(a).
Adopted: November 16, 1993 by Jan Eavzy, Acting Director, Division of Consumer Affairs.
Filed: November 17, 1993 as R.1993 d.643, **without change.**

Authority: N.J.S.A. 45:14D-6.

Effective Date: December 6, 1993.
Expiration Date: August 7, 1994.

Summary of Public Comments and Agency Responses:
No comments were received.

Full text of the adoption follows:

13:44D-2.4 Fees

(a) Fees for initial licenses, renewal licenses and copies of licenses shall be as follows:

1.-3. (No change.)

4. Late renewal fee (0 to 30 days)	$100.00
5. Reinstatement fee (31 to 60 days)	$200.00
plus the initial license fee.	

STATE

(b)

ADMINISTRATION

Disability Discrimination Grievance Procedure

Adopted New Rules: N.J.A.C. 15:1

Proposed: April 5, 1993 at 25 N.J.R. 1347(a).
Adopted: August 30, 1993 by Daniel J. Dalton, Secretary of State.
Filed: November 3, 1993 as R.1993 d.621, **with substantive and technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 52:16A-11a, 42 U.S.C. §12101 et seq., and 28 C.F.R. §35.107.

Effective Date: December 6, 1993.
Expiration Date: Exempt under 28 C.F.R. Part 35.

On April 5, 1993 a notice of proposed rulemaking was published in the New Jersey Register announcing the proposed adoption by this agency of a grievance procedure to be followed when and if this agency receives a complaint that it had violated or was violating the Americans with Disabilities Act, 42 U.S.C. §12101 et seq. That notice was part of a joint coordinated rulemaking process intended to produce a uniform grievance procedure for all participating agencies with the Department of Law and Public Safety as the lead agency. This notice of adoption concludes the process.

After publication of the notices of proposed rulemaking participating agencies received public comments, which were forwarded to the Department of Law and Public Safety for consolidated review, formulation of replies and revision of the proposed rules, where appropriate. The Summary of Public Comments and Agency Responses is being published under the heading of the Department of Law and Public Safety in this issue of the New Jersey Register. The reader is directed to that agency's notice of adoption to find the comments and replies. The final text of the grievance procedure appears below.

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

CHAPTER 1
DISABILITY DISCRIMINATION GRIEVANCE PROCEDURE

SUBCHAPTER 1. DEFINITIONS

15:1-1.1 Definitions

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

"ADA" means the Americans with Disabilities Act, 42 U.S.C.A. §12101 et seq.

"Agency" means the New Jersey Department of State.

"Designated decision maker" means the Secretary of State or his or her designee.

SUBCHAPTER 2. GENERAL PROVISIONS

15:1-2.1 Purpose

(a) These rules are adopted by the agency in satisfaction of the requirements of the ADA and regulations promulgated pursuant thereto, 28 C.F.R. 35.107.

(b) The purpose of these rules is to establish a designated coordinator whose duties shall include assuring that the agency complies with and carries out its responsibilities under the ADA. Those duties shall also include the investigation of any complaint filed with the agency pursuant to N.J.A.C. 15:1-4.

15:1-2.2 Required ADA Notice

In addition to any other advice, assistance or accommodation provided, a copy of the following notice shall be given to anyone who inquires regarding the agency's compliance with the ADA or the availability of accommodation which would allow a qualified individual with a disability to receive services or participate in a program or activity provided by the agency.

AGENCY NOTICE OF ADA PROCEDURE

The agency has adopted an internal grievance procedure providing for prompt and equitable resolution of *[complaints]* ***grievances*** alleging any action prohibited by the U.S. Department of Justice regulations implementing Title 11 of the Americans with Disabilities Act. Title 11 states, in part, that "no otherwise qualified disabled individual shall, solely by reason of such disability, be excluded from participation in, be denied the benefits of or be subjected to discrimination" in programs or activities sponsored by a public entity.

Rules describing and governing the internal grievance procedure can be found in the New Jersey Administrative Code, N.J.A.C. 15:1. As those rules indicate, *[complaints]* ***grievances*** should be addressed to the agency's designated ADA Coordinator, who has been designated to coordinate ADA compliance efforts, at the following address:

[(The following address will be specific to the Agency)]
John F. Kettner
ADA Coordinator
New Jersey Department of State
CN 459
Trenton, New Jersey 08625

1. A *[complaint]* ***grievance*** may be filed in writing or orally, but should contain the name and address of the person filing it, and briefly describe the alleged violation. A form for this purpose is available from the designated ADA coordinator. In cases of employment related *[complaints]* ***grievances***, the procedures established by the Department of Personnel, N.J.A.C. 4A:7-1.1 et seq. will be followed where applicable.

2. A *[complaint]* ***grievance*** should be filed promptly within *[20]* ***30*** days after the *[complainant]* ***grievant*** becomes aware of the alleged violation. (Processing of allegations of discrimination which occurred before this grievance procedure was in place will be considered on a case-by-case basis.)

3. An investigation, as may be appropriate, will follow the filing of a *[complaint]* ***grievance***. The investigation will be conducted by the agency's designated ADA Coordinator. The rules contemplate informal but thorough investigations, affording all interested persons and their representatives, if any, an opportunity to submit evidence relevant to a *[complaint]* ***grievance***.

4. In most cases a written determination as to the validity of the *[complaint]* ***grievance*** and a description of the resolution, if any, will be issued by the designated decision maker and a copy forwarded to the *[complainant]* ***grievant*** no later than 45 days after its filing.

5. The ADA coordinator will maintain the files and records of the agency relating to the *[complaints]* ***grievances*** filed.

6. The right of a person to a prompt and equitable resolution of the *[complaint]* ***grievance*** filed hereunder will not be impaired by the person's pursuit of other remedies such as the filing of an ADA *[complaint]* ***grievance*** with the responsible Federal department or agency or the New Jersey Division on Civil Rights. Use of this grievance procedure is not a prerequisite to the pursuit of other remedies.

7. The rules will be construed to protect the substantive rights of interested persons, to meet appropriate due process standards and to assure that the agency complies with the ADA and implementing Federal rules.

SUBCHAPTER 3. DESIGNATED ADA COORDINATOR

15:1-3.1 Designated ADA coordinator

(a) The designated coordinator of ADA compliance and complaint investigation for the agency is:

[(The following address will be specific to the Agency)]
John F. Kettner
ADA Coordinator
New Jersey Department of State
CN 459
Trenton, New Jersey 08625

(b) All inquiries regarding the agency's compliance with the ADA and the availability of accommodation which would allow a qualified individual with a disability to receive services or participate in a program or activity provided by the agency should be directed to the designated coordinator identified in (a) above.

(c) All *[complaints]* ***grievances*** alleging that the agency has failed to comply with or has acted in a way that is prohibited by the ADA should be directed to the designated ADA coordinator identified in this section, in accordance with the procedures set forth in N.J.A.C. 15:1-4.

SUBCHAPTER 4. ADA *[COMPLAINT]* ***GRIEVANCE*** PROCEDURE

15:1-4.1 *[Complaint]* ***Grievance*** procedure

A *[complaint]* ***grievance*** alleging that the agency has failed to comply with the ADA or has acted in a way that is prohibited by the ADA shall be submitted either in writing or orally to the designated ADA coordinator identified in N.J.A.C. 15:1-3.1 ***within 30 days of the grievant becoming aware of the alleged violation***. A *[complaint]* ***grievance*** alleging employment discrimination will be processed pursuant to the rules of the Department of Personnel, N.J.A.C. 4A:7-1.1 through 3.4, if those rules are applicable.

15:1-4.2 *[Complaint]* ***Grievance*** contents

(a) A *[complaint]* ***grievance*** submitted pursuant to this subchapter may be submitted in or on the form set forth at N.J.A.C. 15:1-4.3.

(b) A *[complaint]* ***grievance*** submitted pursuant to this subchapter shall include the following information:

1. The name of the *[complainant]* ***grievant*** and/or any alternate contact person designated by the *[complainant]* ***grievant*** to receive communication or provide information for the *[complainant]* ***grievant***;

2. The address and telephone number of the *[complainant]* ***grievant*** or alternate contact person; and

3. A description of manner in which the ADA has not been complied with or has been violated, including times and locations of events and names of witnesses if appropriate.

15:1-4.3 *[Complaint]* ***Grievance*** form

The following form may be utilized for the submission of a *[complaint]* ***grievance*** pursuant to this subchapter:

Americans with Disabilities Act Grievance Form

Date: _____

Name of grievant: _____

Address of grievant: _____

Telephone number of grievant: _____

[Disability of grievant: _____]

Name, address and telephone number of alternate contact person:

_____

_____

Agency alleged to have denied access:

Department: _____

Division: _____

Bureau or office: _____

Location: _____

Incident or barrier: _____

Please describe the particular way in which you believe you have been denied the benefits of any service, program or activity or have otherwise been subject to discrimination. Please specify dates, times and places of incidents, and names and/or positions of agency employees involved, if any, as well as names, addresses and telephone numbers of any witnesses to any such incident. Attach additional pages if necessary.

_____

_____

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_____

_____

Proposed access or accommodation:

If you wish, describe the way in which you feel access may be had to the benefits described above, or that accommodation could be provided to allow access.

_____

_____

_____

A copy of the above form may be obtained by contacting the designated ADA coordinator identified at N.J.A.C. 15:1-3.1.

15:1-4.4 Investigation

(a) Upon receipt of a *[complaint]* ***grievance*** submitted pursuant to this subchapter, the designated ADA coordinator will notify the *[complainant]* ***grievant*** of the receipt of the *[complaint]* ***grievance*** and the initiation of an investigation into the matter. The designated ADA coordinator will also indicate a date by which it is expected that the investigation will be completed, which date shall not be later than 45 days from the date of receipt of the *[complaint]* ***grievance, if practicable or*** unless a later date is agreed to by the *[complainant]* ***grievant***.

(b) Upon completion of the investigation, the designated ADA coordinator shall prepare a report for review by the designated decision maker for the agency. The designated decision maker shall render a written decision within 45 days of receipt of the *[complaint]* ***grievance, if practicable or*** unless a later date is agreed to by the *[complainant]* ***grievant***, which decision shall be transmitted to the *[complainant]* ***grievant*** and/or the alternate contact person if so designated by the *[complainant]* ***grievant***.

TRANSPORTATION

(a)

FINANCE AND ADMINISTRATION

Disability Discrimination Grievance Procedure

Adopted New Rules: N.J.A.C. 16:1B

Proposed: April 5, 1993 at 25 N.J.R. 1478(a).

Adopted: July 29, 1993 by Kathy A. Stanwick, Deputy Commissioner, Department of Transportation.

Filed: November 3, 1993 as R.1993 d.622, **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. 27:1A-5, 42 U.S.C. §12101 et seq., and 28 C.F.R. §35.107.

Effective Date: December 6, 1993.

Expiration Date: Exempt under 28 C.F.R. Part 35.

On April 5, 1993 a notice of proposed rulemaking was published in the New Jersey Register announcing the proposed adoption by this agency of a grievance procedure to be followed when and if this agency receives a complaint that it had violated or was violating the Americans with Disabilities Act, 42 U.S.C. §12101 et seq. That notice was part of a joint coordinated rulemaking process intended to produce a uniform grievance procedure for all participating agencies with the Department of Law and Public Safety as the lead agency. This notice of adoption concludes the process.

After publication of the notices of proposed rulemaking participating agencies received public comments, which were forwarded to the Department of Law and Public Safety for consolidated review, formulation of replies and revision of the proposed rules, where appropriate. The Summary of Public Comments and Agency Responses is being published under the heading of the Department of Law and Public Safety in this issue of the New Jersey Register. The reader is directed to that agency's notice of adoption to find the comments and replies. The final text of the grievance procedure appears below.

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

CHAPTER 1B
DISABILITY DISCRIMINATION GRIEVANCE PROCEDURE

SUBCHAPTER 1. DEFINITIONS

16:1B-1.1 Definitions

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

"ADA" means the Americans with Disabilities Act, 42 U.S.C.A. §12101 et seq.

"Agency" means the New Jersey Department of Transportation.

"Designated decision maker" means the Commissioner of Transportation or his or her designee.

SUBCHAPTER 2. GENERAL PROVISIONS

16:1B-2.1 Purpose

(a) These rules are adopted by the agency in satisfaction of the requirements of the ADA and regulations promulgated pursuant thereto, 28 C.F.R. 35.107.

(b) The purpose of these rules is to establish a designated coordinator whose duties shall include assuring that the agency complies with and carries out its responsibilities under the ADA. Those duties shall also include the investigation of any complaint filed with the agency pursuant to N.J.A.C. 16:1B-4.

16:1B-2.2 Required ADA Notice

In addition to any other advice, assistance or accommodation provided, a copy of the following notice shall be given to anyone who inquires regarding the agency's compliance with the ADA or the availability of accommodation which would allow a qualified individual with a disability to receive services or participate in a program or activity provided by the agency.

AGENCY NOTICE OF ADA PROCEDURE

The agency has adopted an internal grievance procedure providing for prompt and equitable resolution of *[complaints]* ***grievances*** alleging any action prohibited by the U.S. Department of Justice regulations implementing Title 11 of the Americans with Disabilities Act. Title 11 states, in part, that "no otherwise qualified disabled individual shall, solely by reason of such disability, be excluded from participation in, be denied the benefits of or be subjected to discrimination" in programs or activities sponsored by a public entity.

Rules describing and governing the internal grievance procedure can be found in the New Jersey Administrative Code, N.J.A.C. 16:1B. As those rules indicate, *[complaints]* ***grievances*** should be addressed to the agency's designated ADA Coordinator, who has been designated to coordinate ADA compliance efforts, at the following address:

[(The following address will be specific to the Agency)]
ADA Coordinator
New Jersey Department of Transportation
CN 600
Trenton, New Jersey 08625

1. A *[complaint]* ***grievance*** may be filed in writing or orally, but should contain the name and address of the person filing it, and briefly describe the alleged violation. A form for this purpose is available from the designated ADA coordinator. In cases of employment related *[complaints]* ***grievances***, the procedures established by the Department of Personnel, N.J.A.C. 4A:7-1.1 et seq. will be followed where applicable.

2. A *[complaint]* ***grievance*** should be filed promptly within *[20]* ***30*** days after the *[complainant]* ***grievant*** becomes aware of the alleged violation. (Processing of allegations of discrimination which occurred before this grievance procedure was in place will be considered on a case-by-case basis.)

3. An investigation, as may be appropriate, will follow the filing of a *[complaint]* ***grievance***. The investigation will be conducted

by the agency's designated ADA Coordinator. The rules contemplate informal but thorough investigations, affording all interested persons and their representatives, if any, an opportunity to submit evidence relevant to a *[complaint]* ***grievance***.

4. In most cases a written determination as to the validity of the *[complaint]* ***grievance*** and a description of the resolution, if any, will be issued by the designated decision maker and a copy forwarded to the *[complainant]* ***grievant*** no later than 45 days after its filing.

5. The ADA coordinator will maintain the files and records of the agency relating to the *[complaints]* ***grievances*** filed.

6. The right of a person to a prompt and equitable resolution of the *[complaint]* ***grievance*** filed hereunder will not be impaired by the person's pursuit of other remedies such as the filing of an ADA *[complaint]* ***grievance*** with the responsible Federal department or agency or the New Jersey Division on Civil Rights. Use of this grievance procedure is not a prerequisite to the pursuit of other remedies.

7. The rules will be construed to protect the substantive rights of interested persons, to meet appropriate due process standards and to assure that the agency complies with the ADA and implementing Federal rules.

SUBCHAPTER 3. DESIGNATED ADA COORDINATOR

16:1B-3.1 Designated ADA coordinator

(a) The designated coordinator of ADA compliance and complaint investigation for the agency is:

[(The following address will be specific to the Agency)]

ADA Coordinator
New Jersey Department of Transportation
CN 600
Trenton, New Jersey 08625

(b) All inquiries regarding the agency's compliance with the ADA and the availability of accommodation which would allow a qualified individual with a disability to receive services or participate in a program or activity provided by the agency should be directed to the designated coordinator identified in (a) above.

(c) All *[complaints]* ***grievances*** alleging that the agency has failed to comply with or has acted in a way that is prohibited by the ADA should be directed to the designated ADA coordinator identified in this section, in accordance with the procedures set forth in N.J.A.C. 16:1B-4.

SUBCHAPTER 4. ADA *[COMPLAINT]* ***GRIEVANCE*** PROCEDURE

16:1B-4.1 *[Complaint]* ***Grievance*** procedure

A *[complaint]* ***grievance*** alleging that the agency has failed to comply with the ADA or has acted in a way that is prohibited by the ADA shall be submitted either in writing or orally to the designated ADA coordinator identified in N.J.A.C. 16:1B-3.1 ***within 30 days of the grievant becoming aware of the alleged violation***. A *[complaint]* ***grievance*** alleging employment discrimination will be processed pursuant to the rules of the Department of Personnel, N.J.A.C. 4A:7-1.1 through 3.4, if those rules are applicable.

16:1B-4.2 *[Complaint]* ***Grievance*** contents

(a) A *[complaint]* ***grievance*** submitted pursuant to this subchapter may be submitted in or on the form set forth at N.J.A.C. 16:1B-4.3.

(b) A *[complaint]* ***grievance*** submitted pursuant to this subchapter shall include the following information:

1. The name of the *[complainant]* ***grievant*** and/or any alternate contact person designated by the *[complainant]* ***grievant*** to receive communication or provide information for the *[complainant]* ***grievant***;

2. The address and telephone number of the *[complainant]* ***grievant*** or alternate contact person; and

3. A description of manner in which the ADA has not been complied with or has been violated, including times and locations of events and names of witnesses if appropriate.

16:1B-4.3 *[Complaint]* ***Grievance*** form

The following form may be utilized for the submission of a *[complaint]* ***grievance*** pursuant to this subchapter:

Americans with Disabilities Act Grievance Form

Date: _____

Name of grievant: _____

Address of grievant: _____

Telephone number of grievant: _____

[Disability of grievant: _____]

Name, address and telephone number of alternate contact person:

_____

_____

Agency alleged to have denied access:

Department: _____

Division: _____

Bureau or office: _____

Location: _____

Incident or barrier: _____

Please describe the particular way in which you believe you have been denied the benefits of any service, program or activity or have otherwise been subject to discrimination. Please specify dates, times and places of incidents, and names and/or positions of agency employees involved, if any, as well as names, addresses and telephone numbers of any witnesses to any such incident. Attach additional pages if necessary.

_____

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Proposed access or accommodation:

If you wish, describe the way in which you feel access may be had to the benefits described above, or that accommodation could be provided to allow access.

_____

_____

_____

A copy of the above form may be obtained by contacting the designated ADA coordinator identified at N.J.A.C. 16:1B-3.1.

16:1B-4.4 Investigation

(a) Upon receipt of a *[complaint]* ***grievance*** submitted pursuant to this subchapter, the designated ADA coordinator will notify the *[complainant]* ***grievant*** of the receipt of the *[complaint]* ***grievance*** and the initiation of an investigation into the matter. The designated ADA coordinator will also indicate a date by which it is expected that the investigation will be completed, which date shall not be later than 45 days from the date of receipt of the *[complaint]* ***grievance*** unless a later date is agreed to by the *[complainant]* ***grievant***.

(b) Upon completion of the investigation, the designated ADA coordinator shall prepare a report for review by the designated decision maker for the agency. The designated decision maker shall

render a written decision within 45 days of receipt of the *[complaint]* ***grievance, if practicable or*** unless a later date is agreed to by the *[complainant]* ***grievant***, which decision shall be transmitted to the *[complainant]* ***grievant*** and/or the alternate contact person if so designated by the *[complainant]* ***grievant***.

(a)

DIVISION OF TRAFFIC ENGINEERING AND LOCAL AID
BUREAU OF TRAFFIC ENGINEERING AND SAFETY PROGRAMS
Restricted Parking and Stopping
Routes N.J. 28 in Somerset County and U.S. 206 in Mercer County
Adopted Amendments: N.J.A.C. 16:28A-1.19 and 1.57

Proposed: September 20, 1993 at 25 N.J.R. 4459(b).
Adopted: October 21, 1993 by Richard C. Dube, Director, Division of Traffic Engineering and Local Aid.
Filed: November 4, 1993 as R.1993 d.623, **without change.**

Authority: N.J.S.A. 27:1A-5, 27:1A-6, 39:4-138.1, 39:4-197.5, 39:4-198 and 39:4-199.

Effective Date: December 6, 1993.
Expiration Date: May 7, 1998.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows:

16:28A-1.19 Route 28

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

(e) The certain parts of State highway Route 28 described in this subsection shall be designated and established as "Time Limit Parking" zones where parking is prohibited at all times except in the areas designated below. In accordance with the provisions of N.J.S.A. 39:4-199, permission is granted to erect appropriate signs at the following established Time Limit Parking zones:

1.-2. (No change.)

3. In the Borough of Bound Brook, Somerset County:

i. Along the westbound (northerly) side (Union Avenue):

(1) Two hours time limit parking, from 8:00 A.M. to 6:00 P.M. daily, except Sundays and Holidays:

(A) Beginning at a point 132 feet west of the westerly curb line of Vosseller Avenue to a point 793 feet westerly therefrom.

ii. Along the eastbound (southerly) side (Union Avenue):

(1) Two hours time limit parking, from 8:00 A.M. to 6:00 P.M. daily, except Sundays and Holidays:

(A) Beginning at a point 132 feet west of the westerly curb line of Vosseller Avenue to a point 793 feet westerly therefrom.

16:28A-1.57 Route U.S. 206

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

(d) The certain parts of State highway Route U.S. 206 described in this subsection shall be designated and established as a "restricted parking space" for the use of persons who have been issued special Vehicle Identification Cards by the Division of Motor Vehicles. No other persons shall be permitted to park in these areas. In accordance with the provisions of N.J.S.A. 39:4-199, permission is granted to erect appropriate signs at the following established handicapped parking spaces:

1. (No change.)

2. Restricted parking space in Hamilton Township, Mercer County:

i. Along the northbound (easterly) side, in front of 1804 South Broad Street:

(1) Beginning at a point 35 feet east of the southerly curb line of Joseph Street and extending 22 feet south therefrom.

(b)

DIVISION OF TRAFFIC ENGINEERING AND LOCAL AID
BUREAU OF TRAFFIC ENGINEERING AND SAFETY PROGRAMS
Turn Prohibitions
Route N.J. 36 in Monmouth County
Adopted Amendment: N.J.A.C. 16:31-1.32

Proposed: September 20, 1993 at 25 N.J.R. 4460(b).
Adopted: October 21, 1993 by Richard C. Dube, Director, Division of Traffic Engineering and Local Aid.
Filed: November 4, 1993 as R.1993 d.624, **without change.**

Authority: N.J.S.A. 27:1A-5, 27:1A-6, 39:4-123, 39:4-183.6 and 39:4-199.

Effective Date: December 6, 1993.
Expiration Date: May 7, 1998.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows:

16:31-1.32 Route 36

(a) Turning movements of traffic on certain parts of State highway Route N.J. 36 described in this subsection are regulated as follows:

1. (No change.)

2. No "U" turn in Sea Bright Borough, Monmouth County:

i. In both directions between mileposts 9.20 and 11.50.

(c)

DIVISION OF TRAFFIC ENGINEERING AND LOCAL AID
BUREAU OF TRAFFIC ENGINEERING AND SAFETY PROGRAMS
Turn Prohibitions
Route N.J. 12 in Hunterdon County
Adopted New Rule: N.J.A.C. 16:31-1.33

Proposed: September 20, 1993 at 25 N.J.R. 4460(a).
Adopted: October 21, 1993 by Richard C. Dube, Director, Division of Traffic Engineering and Local Aid.
Filed: November 4, 1993 as R.1993 d.625, **without change.**

Authority: N.J.S.A. 27:1A-5, 27:1A-6, 39:4-123.5, 39:4-183.6 and 39:4-199.

Effective Date: December 6, 1993.
Expiration Date: May 7, 1998.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows:

16:31-1.33 Route 12

(a) Turning movements on the certain parts of State highway Route 12 described in this subsection are regulated as follows:

1. No "U" turn:

i. In Hunterdon County:

(1) Borough of Flemington and Township of Raritan:

(A) In both directions between the Main Street Circle and the County Road 523 Circle.

(a)

DIVISION OF TRANSPORTATION SYSTEMS PLANNING
BUREAU OF AUTHORITY COORDINATION AND LOCAL TRANSPORTATION PLANNING

State Highway Access Management Code Access Classifications

Adopted Amendment: N.J.A.C. 16:47-8.5

Proposed: September 7, 1993 at 25 N.J.R. 3945(a).
Adopted: October 13, 1993 by William D. Ankner, Director, Division of Policy and Capital Programming.
Filed: October 28, 1993 as R.1993 d.601, **without change.**

Authority: N.J.S.A. 27:1A-5, 27:1A-6, 27:7-44.1 and State Highway Access Management Act, P.L. 1989 c.32.

Effective Date: December 6, 1993.
Expiration Date: April 20, 1997.

Summary of Public Comments and Agency Responses:

The Department received comments from Steven L. Pollock, Planning Director, Ocean County Planning Board, Toms River, New Jersey; Honorable Alex DeCroce, Assemblyman 26th District, Morris Plains, New Jersey; and Steven L. Kehs, Director, Cumberland County Department of Planning and Development, Bridgeton, New Jersey. The comments and responses follow:

COMMENT: The Department by changing the regulations is confusing the public.

RESPONSE: The Department made a commitment to the Legislature that it would monitor activities under the Access Code and make adjustments where appropriate. Feedback from Department customers has already led to changes to the rules and this ongoing dialogue and discussion can assist the Department in achieving the legislative declarations and all other provisions of the Access Management Act. One of the important features of the Access Code was to seek municipal and county input on the access classification system and desirable typical sections. Many counties and municipaliites have indicated that they need more time to determine the impacts of these issues on their master plans, zoning and development ordinances and community and regional goals. This modification provides other public agencies the opportunity to communicate to the Department their concerns and work with the Department to resolve any problems with the access classification system. Meanwhile, immediate concerns with access classification may be handled under N.J.A.C. 16:47-5, Procedure for changes in classification.

COMMENT: The staff of Cumberland County Department of Planning and Development appreciates the extension of time to allow a greater opportunity to discuss the implications of the Access Management Act with our local municipalities.

RESPONSE: The Department thanks Mr. Kehs for the support from Cumberland County. The Department is actively working on scheduling meetings and developing programs to help the counties work with municipalities on this issue.

COMMENT: The Ocean County Department of Planning concurs with the proposed extension.

RESPONSE: The Department appreciates the support from Mr. Pollock.

Full text of the adoption follows:

16:47-8.5 Access classifications

(a) (No change.)

(b) Each county may recommend revisions to the access classifications and desirable typical sections of each State highway segment within the county boundaries by September 21, 1994. The Department shall make those revisions it determines to be warranted and adopt the changes in accordance with N.J.A.C. 16:47-5.5(c).

(b)

DIVISION OF TRANSPORTATION ASSISTANCE
Employer Trip Reduction Program (ETRP)

Adopted New Rules: N.J.A.C. 16:50

Proposed: July 19, 1993 at 25 N.J.R. 3132(a).
Adopted: November 3, 1993 by Kathy Stanwick, Deputy Commissioner, Department of Transportation.
Filed: November 4, 1993 as R. 1993 d.626 **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. 27:26A-1 to 27:26A-14 (P.L. 1992, c.32—"New Jersey Traffic Congestion and Air Pollution Control Act"); N.J.S.A. 27:1A-5, 27:1A-6; and Section 182(d)(1)(B) of the Clean Air Act Amendments (CAAA) of 1990 (42 U.S.C. Section 7511a(d)(a)(B).

Effective Date: December 6, 1993.
Expiration Date: December 6, 1998.

Summary of Public Comments and Agency Responses:

The New Jersey Department of Transportation (Department) is adopting new rules to implement the provisions of the 1992 State statute, "New Jersey Traffic Congestion and Air Pollution Control Act" (ACT) (P.L. 1992, c.32) (N.J.S.A. 27:26A-1 to 27:26A-14) and the 1990 Federal Clean Air Act Amendments (42 U.S.C. Section 7511a(d)(1)(B), as N.J.A.C. 16:50 "Employer Trip Reduction Program (ETRP)."

The ETRP will require certain New Jersey employers located in areas of the State designated by the Federal government as "severe" for non-attainment of the ozone air quality standard, to develop and implement programs at their work locations to reduce vehicle trips and vehicle miles travelled to the work location by encouraging employees to use public transit, carpool or vanpool, or use other commute alternatives. These work location programs are termed employee commute option (ECO) programs.

The proposed new rules appeared in the New Jersey Register at 25 N.J.R. 3132(a). The comment period closed September 2, 1993. The Department held three public hearings regarding the rule proposal at the places, times and on dates indicated:

Tuesday August 3, 1993 from 1:00 P.M. to 4:00 P.M.
Multi-Purpose Room
Engineering and Operations Building
Department of Transportation
1035 Parkway Avenue
Trenton, New Jersey 08625

Thursday August 5, 1993 from 1:00 P.M. to 4:00 P.M.
Municipal Building
820 Mercer Street
Cherry Hill, NJ 08002

Thursday August 12, 1993 from 11:00 A.M. to 2:00 P.M.
Municipal Building
900 Clifton Avenue
Clifton, NJ 07013

A total of 102 persons submitted written and/or made oral comments on the proposed rules. Twenty-eight persons made oral comments from an attendance of 499 persons at all three hearings. Mr. John Mycoff, of the Department's Bureau of Community Involvement, conducted each hearing. There was no formal recommendation made by Mr. Mycoff to the Department. The Department evaluated oral and written comments submitted at the hearings and received via the mail, and the responses are included in this adoption.

The hearing record may be reviewed by the public by contacting Mr. Charles L. Meyers, Administrative Practice Officer, Department of Transportation, 1035 Parkway Avenue, Trenton, New Jersey 08625, telephone (609) 530-5720. Any other inquiries for further clarification or guidance should be directed to the Bureau of Employer Trip Reduction at the same address, telephone (609) 530-8039.

The following individuals submitted written and/or made oral comments about the proposed rules and are shown with their affiliation where applicable:

William R. Abrams—New Jersey Association of Health Care Facilities
John Aubert—Bloomberg Financial Markets
Lawrence S. Bernson, PhD—AT&T Bell Laboratories

Dorothy K. Bertany—County of Hunterdon
Eric E. Brooks—FMC Corporation
J. William Brooks—New Jersey Association of Personnel Consultants
Sharie A. Brown—MOBIL Oil Corporation
Deborah Caponigro—Monmouth Transportation Management Association, Inc.
F. Joseph Carragher—Meadowlink Ridesharing
Stephen G. Carrellas, P.E.—National Motorists Association
Ronald V. Chen—Independent Association of Publishers' Employees
Stephen Chupa—Johnson & Johnson
Karen B. Cipot—HIP Rutgers Health Plan
Thomas A. Clardy—Wheaton Industries
John R. Conaty—United Parcel Service
Douglas H. Contreras—Permanent Label Machinery, Inc.
Eli Cooper, P.P.—Cross County Connection TMA
Robert A. D'Auria—County of Mercer
Doris A. Damm—ACCU
Ralph A. Dean—New Jersey Hospital Association
Linda M. Dechen—City of Vineland
Anthony DeJohn—Southern New Jersey Developmental Council
Shirley A. DeLibero—NJ TRANSIT
Edward Denburg/Robert Rosenfeld—Barton Press, Inc.
Kenneth Dolan—Home Care Council of New Jersey
Theresa M. Donlan, P.P.—Gloucester County Planning Department
Kevin Downes—Bradlees, Inc.
Martin Dubin—Department of the Navy (Philadelphia)
Kenneth Edwards—OK Towel & Uniform Supply
Martin Eisenhart—Department of the Air Force (McGuire)
Beverly H. Farano—Tricon USA, Inc.
Warren Faure—Middlesex County
Len Fishman—New Jersey Association of Nonprofit Homes for the Aging
Lisa A. Fleming—City of Vineland
John P. Gagliardi—Public Service Electric & Gas
John P. Gagliardi—New Jersey Chapter of ACT
Ray Garcia—Toshiba
Donald Garman—XEROX
Shannon M. Gibson—New Jersey State Chamber of Commerce
Mark Goodman—J. Josephson, Inc.
J. Douglas Griffith, P.P., AICP—Camden County Planning Board
Georgia H. Hartnett—Elizabethtown Gas Company
Pamela Hersch—Princeton University
Mary E. Hewlett—CIGNA Companies
Guliet D. Hirsch—Hovnanian Industries
Carla E. Hjelm—Hackensack Water Company
Walter L. Holt, Jr.—The Gloucester County Times
Carol Hughes—Cliffwood, New Jersey
Kathleen M. Immordino—Department of Personnel (New Jersey)
R. Thomas Jaggard—Burlington County Planning Department
Duane Johnson—Ford Motor Co.
Stephen L. Kehs—Cumberland County Planning Department
R. Michael Kennedy, Jr.—TYCO Toys, Inc.
Carol J. Kientz, R.N., M.S.—The Home Health Assembly of New Jersey
William F. King. III—Carnegie Center Associates
Frank L. Kinnear—DuPont Chambers Works
Michael Kish—Township of North Brunswick
Edward Kozack—Rutgers University
Virginia L. Laughlin—Bergen County College
James Laurie—Millburn, New Jersey
Gerald C. Lenaz, AIA, ACC/PP—Lenaz, Mueller & Associates
William Levine—Epstein's
Edward Lloyd, Esq.—Rutgers Environmental Law Clinic
Robert Long—Brennan Transportation Services
Robert W. Looby—AT&T Technologies
Yvonne C. Manfra, AICP/PP—Somerset County Planning Department
Janet May—West Essex Chamber of Commerce
John McCormack—Block Drug Company
Paul & Jacqueline McKeon—Yardville, New Jersey
Wendy A. Morrison—Martin Marietta
Robert Mosca—Woods Edge Care Center
Robert W. Muldrow—City of Vineland
Joanne Nacucchio—Checkpoint Systems, Inc.
Donna L. Norbury—Merck & Co., Inc.
Eric Olsen—MCOSS
Gene Ormond—The Home Depot
Dawn Perrotta—New Jersey Business & Industry Association
Richard Preissler—Bergen County Board of Social Services
Richard E. Pryor, II—UJB Financial
Regina M. Purcell—New Jersey Catholic Conference
Peter S. Reinhart—K. Hovnanian Enterprises, Inc.
Robert Rivers—New Jersey Bell
Robert E. Scheurle—Bedminster, New Jersey
Stephen J. Schmidt—Bell Atlantic/New Jersey Bell
William A. Schnurr, Esq.—New Jersey American Water Company
Conrad Simon—Environmental Protection Agency (US—Region II)
James Sinclair—New Jersey Business & Industry Association
Katherine Snell—Rhone-Poulenc Inc.
Richard Soltoff—Accurate Industries
Catherine St. John—The Prudential
Daniel H. Stewart—Rhone-Poulenc Inc.
William C. Sullivan, Jr.—Rutgers Environmental Law Clinic
T. Tilton—Johnson & Johnson International Systems Co.
Frederick S. Title—HIP Rutgers Plan
Joanne Van Dorn—Hudson County Chamber of Commerce
Brian Weeks, Esq.—Metuchen, New Jersey
Robert M. Wilkins/John Wilkins—Delaware Valley Wholesale Florist, Inc.
Melanie Willoughby—New Jersey Retail Merchants Associations
Edward Witczak—Cherokee High School
Nancy Wittenberg—Department of Environmental Protection and Energy (New Jersey)
W.B. Wood—Exxon Research & Engineering Company
David W. Worrell—Church & Dwight Co., Inc.

General Comments:

COMMENT: The commenter supported the implementation of the ETRP law in response to the Federal mandate.

COMMENT: Several commenters complimented the Department on the inclusive process by which the rule was developed and the clarity of the rule language.

RESPONSE: The Department appreciates the commenters' support.

COMMENT: Several commenters expressed the need for additional public transportation as a necessary component of the strategy to comply with the rules. One commenter stated that the "responsibility for creating a public transportation system cannot be placed on the employer."

COMMENT: There's no suburban transit in the Cranbury/Plainsboro area. The development of a reliable mass transit system in suburban areas is critical. Even with the implementation of various other commuting options, APO goals will not be met without transit.

COMMENT: In urbanized areas where you can rely on mass transportation and where working hours are standardized, shift times can be shifted without a negative impact. However, it will be much more difficult for suburban and rural areas.

COMMENT: The best method for achieving desired results is a better developed public transit program, but there are very few public transit alternatives in many parts of South Jersey.

COMMENT: Transportation for personal business at noontime and before and after work is needed. A creative partnership is needed to develop a suburban transportation system.

COMMENT: Would like to see a commitment from NJDOT to develop transportation systems in areas like Exit 8A of the Turnpike which will create opportunities for a practical approach to comply with ETRP regulations.

COMMENT: Significant reductions in SOVs can only be achieved in conjunction with aggressive efforts by government to improve and expand mass transit, provide market-based incentives, and provide parking facilities for mass transit, carpools, and vanpools.

RESPONSE: The Department appreciates the special transportation needs of commuters in the suburban areas. NJ TRANSIT has initiated a new pilot program specifically targeted toward suburban employers. However, public transportation is only one of many strategies that an employer might implement. These strategies will be described at length in the guidance and support materials to be developed by the Department.

COMMENT: Compliance plan and survey data should be made available to New Jersey Transit for transit planning purposes.

RESPONSE: When employer or employee confidentiality is not compromised and the Department determines the request is appropriate,

the Department will share ETRP data with requesting agencies. However, the Department will not collect individual survey data, but only summaries of the surveys.

COMMENT: A commenter requested clarification on its status as a "government" or "independent government employer."

RESPONSE: The Department does not feel it is appropriate to include language regarding the classification of a single employer in the rules, but will respond to such requests on an individual basis. The definitions of Chapter 32 will be used to determine an individual employer's classification.

COMMENT: Several commenters support the idea of telecommuting.

RESPONSE: The Department concurs with the comment.

COMMENT: Encourages NJDOT to continue to use their business partnerships to identify strategies in response to infrastructure needs which grow more obvious as ETR is implemented.

COMMENT: Urges the formation of a partnership of companies, municipalities, and county agencies to work together to generate a practical workable solution to reach the APO goals for 1996.

COMMENT: Supports TMAs and believes that employers should collectively get involved through chambers of commerce or local business groups to push the transportation planning aspect so that buses are efficient and useful.

RESPONSE: The Department encourages such partnerships.

COMMENT: A Statewide promotional campaign conducted by the DOT to ask New Jersey motorists to reduce trips by pooling and utilizing transit will be far more effective than the ETRP.

RESPONSE: The Department agrees that such a campaign has value and has retained a marketing/public relations firm to conduct promotional activities.

COMMENT: Public sector employers will need to set a good faith example for all employers to follow. If public employers try to avoid compliance, then the private sector will try to do so as well.

RESPONSE: The Department also believes that the public sector should set the example. The Department will monitor and audit public sector employers' compliance.

COMMENT: The employees surveyed thus far indicated a disinterest in using a company provided bus or van because people want to arrive and leave at different times; and have their own agendas in terms of what they want to do after work.

COMMENT: Employees with children will not be interested in getting locked into a set time for arriving and departing. A lot of people like to work late. These issues severely restrict this program.

COMMENT: Our business operation is not compatible with carpooling arrangements. Often employees must work overtime with only a three hour advance notice. Management cannot bend to the will of employees who refuse to work after hours simply because they are in a carpool.

COMMENT: Several commenters pointed out that their employees live in remote, rural areas without public transportation, and were scattered about making it difficult to form carpools.

COMMENT: Several commenters pointed out that their employees had to maintain flexible schedules on a daily basis in order to meet customer needs.

COMMENT: Some commenters expressed the strong belief that employers cannot and should not regulate the off duty behavior of their employees. Furthermore, there is nothing an employer can do to mandate that their employees participate in the ETRP.

COMMENT: Some commenters felt that ECOs were better suited for office settings but were not viable for continuously operating manufacturing operations.

COMMENT: A personal automobile is a necessity for home health care providers. The existing caseload would be impossible if their employees were to carpool. Moreover, it would be impractical to stagger work hours outside of the 6:00 A.M. to 10:00 A.M. peak period.

COMMENT: Hope that the final rules in this section will reflect the compliance flexibility needed as applied to hospitals as atypical work environments.

COMMENT: Due to the fact that employees/drivers associated with the trucking industry work 12 to 14 hours per shift, tend to commute farther than most individuals, and in general, experience scheduling conflicts, it will be very difficult to comply with the regulation.

COMMENT: The New Jersey Catholic Conference is deeply concerned about the economic impact on the Church's agencies, schools, and institutions. Alternative strategies for motivating participation of nonprofits was vital but had not been recognized by DOT.

COMMENT: Special circumstances of colleges and universities were apparently not considered when the proposed rules were being formulated.

RESPONSE: The Department attempted through its regulatory development process to provide adequate opportunities for all employers to comment to the Department and those comments have been addressed to the degree possible in the rules. The Department recognizes that not all employees will be able or willing to utilize a commute alternative, but restrictions by USEPA prohibited the Department from excluding any group of employers or employees from the ETRP. The Department will provide specific guidance to non profit employers with special employee needs.

COMMENT: A commenter suggests the Department expand the Economic Impact section to include the economic benefit of the decreasing demand for road widenings and other transportation improvements if traffic congestion is decreased.

COMMENT: The goals of the ETRP program should be accomplished at the least possible cost to affected employers.

RESPONSE: The Department is committed to implementing the ETRP in as business-friendly and cost-effective manner as possible. The Department is hopeful that the costs of the ETRP will be offset by savings realized through a decreased demand on public dollars for highway improvements.

COMMENT: One commenter suggested that it would be far more effective to use the money being spent on the ETRP to purchase vehicles that were built before 1975 and then junk them.

COMMENT: Is there an incentive to replace existing older vehicles in the organization with newer less polluting vehicles to reduce emissions on a fleet level?

RESPONSE: The ETRP provides incentives for alternative fuel vehicles when used for commuting purposes. In addition, DEPE is considering a separate initiative to replace older, more polluting vehicles. This separate initiative is not employer work site oriented.

COMMENT: Some commenters expressed the strong belief that this program will eliminate the environmental problem by driving every business out of the State, creating an economic disaster as a result.

RESPONSE: The Department understands the commenters' concerns, however, the ETRP is Federally mandated. Should the State fail to implement the Federal mandate, USEPA would be required to impose sanctions, including the potential loss of several hundred million dollars in Federal highway funds and other economic growth sanctions.

COMMENT: One commenter suggested that toll booths be eliminated since they back up traffic which causes more air pollution.

RESPONSE: The Department and Authorities in the State are considering ways to reduce traffic congestion and air pollution at toll booths (for example, through new technologies).

COMMENT: Will the government be making an effort to reduce emissions from buses, trains, ships, tractor trailers, farm equipment, and other vehicles?

RESPONSE: As required by the Federal Clean Air Act Amendments, stricter emission controls and inspections are being considered by DMV and DEPE.

COMMENT: Can employers receive a credit for nontraditional ECO programs—such as an employer mortgage assistance program, if it enables employees to relocate closer to work thus reducing their daily commute miles?

RESPONSE: No. It has not been authorized by USEPA or existing State law.

COMMENT: Liability is an issue of concern. Who will be responsible if an employee is caused harm while in a carpool? All insurance issues must be addressed and communicated before asking employees to become involved with this program.

COMMENT: Recommend that the State address insurance regulations to favor carpools and vanpools.

RESPONSE: At the request of the Department, the Department of Insurance has developed an advisory document for commuters on personal automobile insurance. Additionally, the Department has established a task force to address employer risk management issues.

COMMENT: There is a concern about the lack of infrastructure to support alternative fuel vehicles for refueling and maintenance.

RESPONSE: The Department understands the concern and will forward the comment to NJDEPE and other appropriate agencies. The Department has established one of the first compressed natural gas refueling stations in the State.

COMMENT: There is a concern that prospective employee hiring practices will discriminate against SOV drivers in favor of those who carpool.

RESPONSE: The ETR Program requires employers to provide commute options to their employees; it is not intended to be a mandatory ridesharing measure.

COMMENT: Tax credits should be established for the purchase of company vans used for employee ridesharing programs.

COMMENT: A more significant tax incentive of at least 20 percent is needed to further encourage employers to participate in the program.

COMMENT: Several commenters wanted to know if the State or Federal government was providing tax credits to help employers with the high costs of administering the ETRP.

RESPONSE: Tax incentives for employers impacted by ETRP were approved by the State Legislature and the Governor on June 24, 1993. In addition, Federal (IRS Code Section 132(f)) and State law provide incentives to employees through tax-free income (State Public Law 1993, Chapter 108).

COMMENT: Several commenters stated that parents with children would have difficulty transporting them to day care centers if they had to rideshare to work. They would also not have the freedom to leave work in the event of an emergency.

COMMENT: These regulations unfairly hurt women. Mass transit, vanpools, and carpools not only eliminate the flexibility needed to pick up or drop off children, but also consume more time which leaves them less time for home life and household chores.

RESPONSE: The ETRP is directed at reducing vehicle miles travelled and trips made by employees. The Department and USEPA Guidance do not define children as employees. USEPA will not allow the states to exempt these employees from the APO calculation. Employers with significant numbers of parents (regardless of gender) with these special needs may choose to establish onsite daycare or guaranteed or emergency ride home programs to support parents' needs.

COMMENT: If an employee works a compressed work week, will the additional hours worked past the regular eight hour day be subject to overtime pay?

RESPONSE: The Department has established a task force to address this issue and will provide additional information to employers on the methodology for establishing compressed work weeks as it becomes available.

COMMENT: One commenter noted that the draft regulations did not address the banking and trading of credits, either intra or inter-company, and requested some statement by the DOT on whether it recognizes said credits as a viable option.

COMMENT: Several commenters believe the ETR should allow for the banking and trading of credits for reduction in vehicle emissions achieved through the use of clean fuel vehicles.

RESPONSE: Due to anticipated administrative difficulties associated with banking and trading, the Department has not included provisions for these options in the final rule. In 1996, employers are permitted to average their APOs across sites and with other employers. This provides a form of "trading" without the administrative burden associated with trading.

COMMENT: This complex statute should be tempered by as much flexibility in the final implementation as possible, consistent with meeting the goals of the Act.

COMMENT: The plan is limited in covering only 48 percent of the New Jersey's workforce. The need for a more comprehensive plan is stressed. It should cover not only the entire workforce (with large and small employers both sharing the burden), but the general public as well.

RESPONSE: State law does not allow the Department to promulgate rules that are more stringent than the 1990 Federal CAAA. State law supports a good faith effort criteria that does not mandate specific strategies. The CAAA imposes the ETRP only on employers with 100 or more employees.

COMMENT: Employers should encourage biking and walking by offering changing facilities for employees. Bike paths and lanes should be added to existing roadways and be planned in all new construction. Tax incentives should be offered to employers who provide the necessary facilities.

RESPONSE: The Department appreciates these comments and will provide guidance to employers on the tax credit eligibility of commuter amenities.

N.J.A.C 16:50-2.1 Definitions

COMMENT: Change the definition of affected work location to specify that the count of employees at the work location is to be made "during an average 24 hour day, Monday through Friday during the survey week.

COMMENT: Change the definition of affected work location to specify that the count of employees at the work location is to include only employees who arrive Monday through Friday during the peak period.

COMMENT: Change the definition of affected work location to mean a work location of an affected employer where 100 or more employees "regularly" report . . ."

COMMENT: Change the definition of affected work location to mean a location where 100 or more employees "physically" report to work on a daily basis or are "physically" present primarily for the purpose of performing work for the employer".

RESPONSE: The definition provided in the proposed rule is that provided by US EPA in its guidance to states on developing ETR Program rules. For the purposes of determining if the work location is affected, USEPA requires the count to be made over a 24-hour period, seven-days per week and to include employees who are primarily assigned to the work location, regardless of where they physically perform work. For purposes of calculating APO, however, only those employees who are scheduled to report during the peak period, Monday through Friday must be counted.

COMMENT: Include in the definition of "alternative fuel vehicles," dual fuel vehicles used for both commuting and business purposes.

COMMENT: Several commenters requested the Department include motorcycles and mopeds as "energy saving" vehicles.

RESPONSE: USEPA allows states to count as "alternative fuel vehicles," vehicles that are non-polluting or produce emissions substantially below those of gasoline-powered vehicles. Motorcycles and mopeds do not fall into this category and thus cannot be included. Dual fuel vehicles are not considered alternative fuel vehicles by USEPA/NJDEPE because the use of the alternative fuel cannot be assured.

COMMENT: Include definitions for "buspool" and "passenger vehicle."

RESPONSE: The Department has included the definition for "buspool" and "vehicle" that appeared in the New Jersey Traffic Congestion and Air Pollution Control Act, but feels a definition of passenger vehicle is not necessary. For the purposes of these rules, "passenger vehicle" is considered the same as "vehicle" which is included in the definition section.

COMMENT: Change the definition of carpool to be consistent with Federal guidelines (change from seating capacity of 15 to seating capacity of nine).

COMMENT: The definition of carpool conflicts with that provided in the State law.

RESPONSE: For the purposes of the APO survey, occupancy is most important. The change in definition from the State law is necessary to ensure equity and to eliminate confusion related to seating capacity.

COMMENT: Change the definition of "compressed work week" to include employees who normally work less than 35 hours per week.

RESPONSE: Credit is given for a compressed work week when it reduces commute trips from the number that would have been made under the employee's regular (previous) schedule. The current definition does not need to be changed.

COMMENT: Several commenters asked the Department to revise the definition of consolidated plan to clarify that such plans may be submitted for work locations within the same or different target APO areas.

RESPONSE: The Department has revised the rules to clarify that consolidated plans will be allowed for work locations in either the same or different APO target areas.

COMMENT: The draft regulations define ECO as a program to reduce vehicle trips, increase APO or reduce commute trip vehicle miles. This could be interpreted as requiring only one of the three, and might lead to employers developing plans which will not fully meet the requirements of the regulation. The word "or" should be changed to "and."

RESPONSE: The Department concurs and has made this change.

COMMENT: Define "employee in a contract position" as "an employee whose daily assignments are provided by an employee of the affected employer in a non-contract position."

COMMENT: Define "employee in a contract position" as "an employee who has a direct contractual relationship with the employee and the employee reports to the same work location continuously for

a period of at least one year and whose work hours and assignments are defined as a specific assignment by the employer."

COMMENT: Modify definition of "contract position" to combine elements of who directly pays the individuals and controls their assignments and work hours.

COMMENT: Several commenters requested clarification on whether to include as contract employees, workers who perform work at the location, but who are employees of a firm with whom the employer has a contractual relationship.

RESPONSE: The Department does not intend for employers to include in their employee count, workers who provide a service at the work location but are not under the control of the employer at the work location, such as employees of a cafeteria concessionaire. The Department has changed the language of the rule for the employee to include those individuals that have a direct contractual relationship with the affected employer and will further clarify examples in this situation through written guidance the Department will release after the final rule is adopted.

COMMENT: Exclude temporary, seasonal, and or probationary employees from the count of employees at a work location.

COMMENT: Propose that sales and service personnel not be considered as "assigned to report employees" and be exempt from the count for determination of its APO.

COMMENT: Exclude employees considered exempt for purposes of overtime provisions should not be included in the computation of APO, as it is not practical for such employees to carpool.

RESPONSE: USEPA does not allow states to exclude these workers from the employer's count of employees. If an employee does not actually physically report to the work location and is not "teleworking," however, he or she is identified in the APO calculation for that day as a "did not report" and neither the employee nor their vehicle can be included in the APO calculation as a "credit."

COMMENT: Change the definition of employee to read "one who is scheduled to report between 6 am and 10 am."

RESPONSE: For purposes of determining if an employer is impacted by the requirements of the ETRP, all employees must be included in the 100 or more count, not just those that arrive between 6:00 A.M. and 10:00 A.M.

COMMENT: Change the definition of affected employer from one which employs an average of 100 or more employees "in at least one work location" to employs an average of 100 employees in one work location to remove confusion about employers with multiple sites each with fewer than 100 employees, but which collectively have more than 100 employees.

RESPONSE: The Department has considered this suggestion, but has chosen to change the definition to read "... employs 100 or more employees **as averaged over the immediately preceding 12 month period at any single work location** in ...". The Department feels that these changes better define an affected employee and should meet with USEPA approval.

COMMENT: Substitute "highest ranking responsible officer" for "highest ranking officer" because it is excessive to have someone removed from the actual management of the ETR program to attest to the accuracy and completeness of something implemented by the ETC.

COMMENT: Change the definition of "highest ranking responsible officer" from "... responsible for the management of the work location" to "responsible for the management of the daily operations of the work location."

COMMENT: Clarify the definition of "highest ranking responsible officer" to indicate that it is a person such as the CEO, Branch Manager, etc., and not the Property Manager, Building Manager, etc.

RESPONSE: Highest ranking responsible officer (HRRO) was the wording included in the proposed rule language. It includes highest ranking responsible employee. The Department feels the definition is sufficient as proposed and will not make additional changes, but will provide examples of the degree of control necessary for HRRO in additional written guidance after the adoption of the final rule.

COMMENT: Urge the definition of peak period be changed to refer to the period between 6:30 and 10:00 A.M., since child care facilities are typically not open before 6 A.M.

COMMENT: Change the definition of peak period to 6:00 and 9:00 A.M.

RESPONSE: USEPA requires states to use the 6:00 A.M. to 10:00 A.M. time period or to establish the peak period the four hour period that encompasses at least 85 percent of morning commute trips. In New Jersey, this time period is 6:00 A.M. to 10:00 A.M.

COMMENT: Expand the definition of "public transportation" to include "ferry service."

RESPONSE: "Ferry service" is captured in "other services provided to the commuting public" and is recognized as a commute alternative.

COMMENT: Change definition of teleworking to limit teleworking to work done at the employee's residence only, not at a satellite work center. If satellite work centers are to remain eligible, then they should be limited so that employees are not merely trading auto trips in different directions.

COMMENT: Satellite work centers should only be included when they are transit accessible.

COMMENT: Several commenters felt the distance test for satellite work centers was rigid and requested the Department relax or eliminate the provision that employees working at satellite work centers are counted as teleworking only if the center is no more than 10 miles and not more than 50 percent of the employee's commute trip.

RESPONSE: USEPA does not condone the calculation of SOV trips to satellite work locations as zero vehicles because it is not a trip reduction measure only a VMT reduction measure. However, unofficial guidance from USEPA indicates that if satellite work centers are included in the states' ETRPs, then a maximum trip distance requirement must be included. The Department feels that the current requirement meets this criteria. Further, the stipulation that transit accessibility should be a criteria is subjective.

COMMENT: Modify the definition of "vanpool" to allow vanpools of seven or more employees for which this represents at least half the adult seating capacity to be considered a zero vehicle.

RESPONSE: As proposed, the definition of vanpool is seven or more and for APO calculation is counted as a zero vehicle.

COMMENT: Several commenters asked the Department to clarify in the definition of "work location" the tests for "operated separately and distinctly" that determine separate work locations when businesses owned by one corporation are "physically located in the same or adjacent buildings."

COMMENT: Definition for "work location" should address situations where two nearby facilities of one business entity, ... have historically been on different schedules and perform separate functions within the organization.

COMMENT: It is not clear if different departments of a county government are to be treated as "separate." In some cases, the only thing these autonomous agencies have in common is that they're located in a county building, share a common parking lot and paychecks are issued by the same treasurer. Are these offices/agencies to be included together in the count of employees at a work location?

RESPONSE: The definition addresses the separateness of subsidiary businesses that are operated separately and distinctly The Department has revised the definition of work location to further clarify operating differences. The Department will provide additional guidance to employers regarding "work locations."

COMMENT: Revise the definition of "work location" to clarify the degree of physical separation which would result in two facilities of one employer being considered separate work locations. Facilities which are separated by a natural or manmade barrier which cannot be crossed by pedestrians should be considered as separate work locations.

RESPONSE: The Department has revised the definition to provide additional clarification.

N.J.A.C. 16:50-3.1 Scope

COMMENT: EPA guidance to states specifies that employers are exempt if they average less than 100 employees per month when averaged on a monthly basis over the course of a year. New Jersey describes this in the draft regulations as employers that have less than 100 employees for at least six months of the year. The applicability should be consistent with EPA guidance. EPA will not accept this unless a demonstration of effectiveness is provided and the number of employees is limited during the summer.

RESPONSE: The Department has changed this provision to be consistent with EPA guidance.

COMMENT: An employer should only be required to implement the actions detailed in the certified plan. The mandate to achieve and maintain the target APO is excessive.

RESPONSE: Both the 1990 Federal CAAA and the State law require employers to meet the target APO. The Department expects employers

to maintain the target APO after 1996 for ETRP progress to be counted in the State Implementation Plan.

COMMENT: NJDOT should not accelerate the schedule of ETRP implementation so as to infringe upon the timetable specifically provided for employers in the CAAA.

RESPONSE: The State law established the schedule for employers' compliance based on the requirement that the Revised State Implementation Plan containing the ETRP was due to USEPA on November 15, 1992.

N.J.A.C. 16:50-4.2 Published notice

COMMENT: Indicate that the date by which affected employers must return a completed registration form to the Department shall be no less than 60 days from the date of the notice.

RESPONSE: The State law requires employers to register within 60 days of notification. The date established by the public notice will be consistent with this requirement.

N.J.A.C. 16:50-5.1 Registration deadlines

COMMENT: Several commenters stated the regulations are unclear regarding how newly affected employers will be incorporated into the ongoing system.

RESPONSE: N.J.A.C. 16:50-5.1(c) indicates that employers that become affected after the initial registration notices are sent, must obtain and submit a registration form to the Department within 60 days of becoming affected. Additionally, N.J.A.C. 16:50-8.2(a)1 describes the requirements for submitting plans and meeting the target APO for employers that become affected employers after this date. The Department has expanded these sections to include also affected employers who have multiple worksites, one or more of which are not initially affected, but become affected at a later time. The requirements to register, submit plans, and meet the target APO are covered in the sections noted.

COMMENT: A commenter suggests adding the following sentence to N.J.A.C. 16:50-5.1(b): "Failure by the Department to request additional information or to otherwise notify such employer shall be deemed the Department's acceptance that the employer is not subject to these regulations. Each employer shall have 45 days to contest the Department's findings."

RESPONSE: The Department reserves the right to audit employers that report they are not subject to the rule and will not set a time limitation by which a determination of non-affected status by the Department must be made. An employer that chooses to contest the Department's findings must follow the procedures outlined in subchapter 13.

COMMENT: It is not clear as to what happens if the employee count at an affected work location falls below 100.

RESPONSE: The Department has revised the language to reflect that an affected employer whose status changes must petition the Department for an Exemption as defined in N.J.A.C. 16:50-13.2.

N.J.A.C. 16:50-5.2 Completion and submittal of registration forms

COMMENT: The attestation to the accuracy of the information reported should be to the best of the belief of the person signing after "diligent inquiry of the person(s) responsible for obtaining information."

RESPONSE: The Department feels the language included in the proposed rule is adequate. The person signing the form may take any steps he or she feels are necessary to be confident the information presented is accurate.

COMMENT: Revise N.J.A.C. 16:50-5.2(a) and 5.2(a)1, to reflect that these requirements apply to "affected" employers.

RESPONSE: The Department concurs and has made this change.

COMMENT: At the time of registration, companies are just beginning to examine the issues and are far from developing their plans. The ETCs should be in place and trained prior to the plan implementation and it would be advisable that they be part of the plan development effort in order to be most effective. However, the regulations should not stipulate or require through implication that the individual named as the contact person with NJDOT be the eventual ETC responsible for plan implementation at the affected work location.

RESPONSE: The Department concurs that some employers will not have assigned an ETC at the time of registration and has removed this reference from the registration information and has added that the affected employer should include the name of the person who is to receive the compliance plan materials (N.J.A.C. 16:50-5.2(a)6). However, the Department recommends that employers designate the ETC as soon as possible, however, because the ETC should be an integral part of the program development process.

N.J.A.C. 16:50-6.2 Designation of ETRP performance targets

COMMENT: The ETRP goal employers must meet should be changed from a 25 percent increase over the average vehicle occupancy (AVO) for the AVO Zone to 25 percent over the employer's average passenger occupancy (APO) at the time the first plan is submitted.

COMMENT: AVO zones and APO targets should be reconsidered to recognize both the limits of public transportation alternatives in suburban areas, the lack of park and ride facilities, and the fact that there has been very little public education conducted on the issue of ETRP requirements. The AVO zone should be reexamined to minimize the impact to a required 25 percent and nothing greater.

COMMENT: Do employers receive credit for actions they have already taken such as transit checks?

RESPONSE: The Federal Clean Air Act Amendments defined 25 percent above zonal AVO as the formula states must use to establish target APOs. This was done to recognize and account for efforts some employers have made in the past toward trip reduction. Congress felt it would be inequitable to require employers that implemented trip reduction strategies prior to the start of the ETR Program to increase APO at the same percentage rate as employers that have not implemented any such strategies.

COMMENT: Several commenters requested the Department revise N.J.A.C. 16:50-3.1(a)6 to clarify if employers must increase the APO "to the appropriate target APO," or "by not less than 25 percent over the AVO for the AVO zone."

RESPONSE: Employers are required to meet the target APO for the affected zone or sub-area as defined later in N.J.A.C. 16:50-6. This section has been revised to reflect this clarification.

N.J.A.C. 16:50-6.3 Number of AVO Zones

COMMENT: A commenter disagreed with the statement in this subchapter that zones were selected based on areas with substantially similar development characteristics and availability of transportation service. The commenter felt this is not true in Burlington County where bus service is very irregular except on several corridors. Since the transit service in Burlington County is geared towards employers in Philadelphia, this service will provide little help for employers in the County.

RESPONSE: The Department recognizes the frustration employers may have with available transit services in the suburban areas, however, many employers face this dilemma throughout the Suburban Zone. Burlington County is not dissimilar in that regard to other counties in the Suburban Zone.

COMMENT: Several commenters felt that the suburban zone should be divided into sub-zones with individual target APOs for each county. Specific reasons included: "to make targets more in line with actual transportation patterns and public transit availability"; to "recognize demographic and geographic diversity," "because circumstances, e.g. in Mercer, are very different from those in Sussex or Salem Counties."

COMMENT: One AVO zone should prevail because now it is an increase in complexity of compliance with the regulations and a concomitant increase in the administrative burden and cost. Secondly, the adoption or imposition of multiple AVO zones may encourage intercounty jockeying and competition among sister counties for industry.

RESPONSE: The Department analyzed many dozens of AVO zone options prior to proposing these rules. A single zone option has the net impact of reducing the target for the urban zone and increasing the target for the suburban zone. The Department with its ETR Advisory Groups, considered the disparity in employment density and the availability of public transit opportunities for the suburban areas in its decision. The Department feels that the two zone option is the fairest to all affected employers.

N.J.A.C. 16:50-6.4 Baseline AVO

COMMENT: The numbers used to set the AVO baseline are misleading because the county's status as an interstate transportation hub creates a situation where a relatively large number of auto trips which terminate in the county are, in fact, trips to Trans-Hudson Commuter Services rather than to local employers.

RESPONSE: The method of calculating the AVO baseline is recommended in EPA Guidance. The data used to establish the AVO zones were collected from a survey that asked commuters in which county they worked. Only those trips that terminated at work locations in that county were counted. Through trips and trips that had a transfer within a county were not counted.

COMMENT: Commenter asked for a copy of the results of the telephone survey used to develop the AVO baseline.

RESPONSE: The AVO Study Final Reports should be available in early December 1993. Anyone wishing to receive these reports should call the Bureau of Employer Trip Reduction at 1-800-386-ETRP to be put on the Department's mailing list.

COMMENT: Feels the baseline and target APOs are not acceptable, unverifiable, and therefore cannot be met by employers.

RESPONSE: The Department feels confident that the data used to develop the AVO baseline was accurate. It was developed by two independent agencies, the Eagleton Institute and the Delaware Valley Regional Planning Commission. Appropriate statistical methodologies were used. Target APOs were developed as imposed by the 1990 Federal CAAA.

N.J.A.C. 16:50-6.5 Target APO

COMMENT: Designate the City of Camden and City of Trenton as "urban areas," with APO targets that are different from targets for more suburban areas of this zone.

RESPONSE: These cities were not designated as urban zones because the AVO study did not reveal significant statistical differences in commute habits and mode use between the surrounding suburban areas and these cities.

COMMENT: If Burlington County is grouped with other counties in the suburban area zone, we'll have to reach a target APO of 1.4. This represents an increase of 27.3 percent. Almost everyone will have to carpool.

COMMENT: To meet the APO target of 1.4, a 40 percent increase in APO would be necessary. This presents a tremendous, if not impossible, burden. There should be some degree of flexibility to those employers who fall below the AVO baseline and are in good faith trying their best to comply.

RESPONSE: The Department recognizes that some employers may have to produce a percentage increase in APO of greater than 25 percent due to their lower than average past performance, and agrees that this will present a challenge to those employers. However, the method of calculating the targets are mandated by the Federal CAAA and cannot be reduced. That is why the Department has included criteria for a "good faith effort." Under this provision, the APO increase that the employer has been able to achieve relative to its 1994 APO and to other employers with similar characteristics and their commitment to their approved plan will be considered by the Department.

COMMENT: The APO for the urban zone is disproportionately high at 1.97. This is nearly impossible to attain.

RESPONSE: The target APO for target area 1 of the urbanized zone is 1.97. This is only a 10 percent increase above the 1.79 baseline AVO for this area. While the absolute value of the target APO is higher than other target areas, it represents a smaller relative increase compared with other target areas. The CAAA requires states to establish APO based on the baseline AVO for the area. Developing the urban target area gives some credit to those that already use alternative commutes while still contributing to the improvement of the State's air quality and relief of traffic congestion.

N.J.A.C. 16:50-7.1 Requirement to survey

COMMENT: Require employers to conduct an employee transportation survey in 1995, not just 1994 and 1996.

COMMENT: Clarify the frequency for employers to conduct employee surveys.

RESPONSE: Employers are required to conduct a survey in 1994 and 1996, for the purpose of documenting work location APO. The Department feels that requiring a 1995 survey would be going beyond the CAAA which State law prohibits. The Department does, however, strongly recommend that employers conduct a survey in 1995, and the conduct of a 1995 survey is considered a test of an employer's good faith effort, in implementing its ECO program.

COMMENT: The requirement that the survey be conducted in 1994 makes survey efforts prior to 1993 inappropriate. Some companies have arranged to conduct a survey before the end of 1993. The message must get out to the business community and TMAs as soon as possible.

RESPONSE: The Department has revised the rules to allow for surveys to be conducted prior to 1994.

N.J.A.C. 16:50-7.2 Notice of requirement to survey

COMMENT: Several commenters urged the Department to distribute compliance plan packages as soon as possible. One commenter felt the Department should make every attempt to accelerate the distribution of survey forms from not later than May 1, 1994 to not later than February 1, 1994. Another urged the Department to distribute compliance plan packages to educational institutions in February 1994 rather than in May because the typical week for APO surveying would fall between March and April.

COMMENT: The Department should notify each employer within 180 days.

RESPONSE: The Department expects to have survey and plan materials available soon after publication of the final rule and plans to begin mailing survey forms to employers as early as March 1994 (approximately 120 days after adoption of the final rules). Employers that want to receive forms prior to this general mailing may contact the Department to request an advance copy of the survey and plan form package after December 6, 1993, by contacting the Bureau of Employer Trip Reduction at 1-800-386-ETRP.

N.J.A.C. 16:50-7.3 Survey procedure

COMMENT: Several commenters felt employers should be allowed to use their own survey form without prior approval of DOT.

COMMENT: Others understood the need to report survey results to NJDOT on a standardized form, but did not agree that the survey forms given to employees must be NJDOT forms without substitution.

COMMENT: The survey requirements should only require employers to use the questions in the DOT form, not the form itself. If an employer wishes to distribute the same questions to its employees, but on a form it prepared, it should be permitted to do so.

RESPONSE: Alterations, such as photocopying the survey on company letterhead, that do not delete questions or change the wording or order of questions, will be permitted without prior written approval of the Department. In order to ensure that all of the required information is captured (so that certifiers will be able to properly review plans), survey forms that change wording of the specific questions or delete questions must be reviewed and approved by DOT prior to use. Employers are free to add questions for their own use. The Department will provide further written guidance on survey procedures after the adoption of the final rule.

COMMENT: Employers should be allowed to survey their employees for subsequent submittal during any typical week up to one year before the submittal is due. Requiring that employers not survey before April constricts the plan preparation period.

COMMENT: State why APO surveys shall not be conducted earlier than April of the submittal year.

COMMENT: Does NJDOT prefer employers survey during a typical week in the summer when ozone values are higher or can the survey be taken any month during the year?

COMMENT: Is an employer permitted to choose among several weeks of survey data if several weeks are available?

RESPONSE: The Department has removed the restriction that employers not survey prior to April. The Department has included a provision that surveys conducted after the survey conducted for the initial compliance plan must be conducted within one month (either earlier or later) of the anniversary month of the baseline survey, but not sooner than January of the **subsequent (1996)** submittal year. Within this time frame, employers may choose any week for the survey as long as it is a typical week. The rule does not preclude employers from surveying for more than one week.

COMMENT: It would be impossible to find a week in which at least one of the operations is not shutdown for repairs or inventory control. Suggests the Department revise the provision for "typical survey week" to read: "shutdown of its operation causing a significant fluctuation in the number of employees reporting to the work location."

RESPONSE: The Department concurs and has made this change at N.J.A.C. 16:50-7.3(a)2iv.

COMMENT: One commenter expressed appreciation for the Department's allowing employers to utilize random sampling for APO surveys.

COMMENT: One commenter felt the Department should not allow random sampling for APO surveys.

COMMENT: Several commenters requested the Department reduce the minimum number of employees an employer must have to use the random sample survey; recommended alternative minimums were: 500 employees or 400 employees.

COMMENT: Employers submitting consolidated plans should be allowed to use random sampling if the total population of all work locations combined exceeds 500.

COMMENT: Rules for random sample surveying should specify the confidence level on which the random sampling should be based, not the arbitrary figure of 1,000 employees.

RESPONSE: The Department has considered these changes and has decided to retain the current rules for random sampling. Random sampling will be allowed for employers with 1,000 or more employees at a single work location.

COMMENT: The rule should indicate that employers utilizing a random sample survey are equally subject to audits on the accuracy of their surveys as are other employers.

RESPONSE: The Department concurs and has added this language in N.J.A.C. 16:50-7.3(a)4.

COMMENT: Is the ETRP based on an annual or weekly trip reduction basis?

RESPONSE: The intent of the ETRP is to increase vehicle occupancy by 25 percent and to maintain that reduction. The APO calculation, through which an employer demonstrates compliance, is based on a five day (Monday through Friday) survey of employees' travel patterns during a typical week.

COMMENT: The regulations would be clearer if they contained examples of how APO and AVO surveys are to be conducted for atypical employers such as military installations.

RESPONSE: The Department will provide written guidance with examples of possible survey procedures following the adoption of the final rules.

COMMENT: Survey methodology should be user friendly and not exceed sound statistical practices like it does now.

COMMENT: Standard statistical methodology should be followed in regard to all aspects of the survey.

RESPONSE: The Department agrees that survey methodology should be user friendly and meet sound statistical practices. The Department has tried to achieve these goals.

COMMENT: Several commenters requested the Department clarify the language regarding survey response rates to eliminate confusion between references to a 75 percent response rate and a 90 percent response rate.

COMMENT: Commenter suggested the Department require employers count affected employees who do not respond to the survey, as drive alone employees, only to the extent required to satisfy the 75 percent minimum response rate.

COMMENT: Suggest allowing employers to count the travel patterns of non-responding employees in proportion to the patterns of responding employees if the employer achieves a response rate of 75 percent or greater.

RESPONSE: To avoid confusion, the Department has removed the 75 percent response rate. Only if the employer achieves a rate of 90 percent or greater may they count affected non-respondent employees as though their commute modes were proportional to the modes of those who responded rather than counting them as arriving in a single vehicle. The Department encourages a response rate of 90 percent whenever possible.

COMMENT: The survey should be produced in English and Spanish.

RESPONSE: The Department recognizes the difficulty an English-only survey will present to some employers and, as a result, will develop bilingual survey forms.

COMMENT: The APO survey form should be constructed and organized so it can be read by electronic devices (that is, scannable forms).

RESPONSE: The Department recognizes the value electronic-read capability would offer and is considering options for machine-readable forms.

N.J.A.C. 16:50-7.5 Calculating work location APO

N.J.A.C. 16:50-7.5(a)1

COMMENT: Change the calculation of APO to divide the number of employees by the number of vehicles arriving in the peak period.

COMMENT: Change the calculation of APO to equal: total number of employees arriving at the location Monday through Friday of the survey week, divided by the number of vehicles arriving during the peak period.

RESPONSE: The formula for calculating APO was provided by USEPA and cannot be changed. APO must be calculated as the number of employees reporting during the peak period divided by the number of vehicles in which those employees arrive. Further, the Department feels that many employees are less cognizant of the time that they actually arrive and more cognizant of the time they are scheduled to report. Therefore, the survey will be a more accurate reflection of reality.

COMMENT: Requests that voluntary programs which companies undertake to improve air quality receive credit toward the company's APO goals.

RESPONSE: USEPA does not permit states to offer this credit toward the ETRP goals.

N.J.A.C. 16:50-7.5(a)2

COMMENT: Several commenters expressed support for and encouraged DOT to pursue the issue of allowing employees who report outside the 6:00 A.M. to 10:00 A.M. period (also described as use of "flextime") to be counted in the APO calculation.

COMMENT: Employers should be allowed to count employees that report to the work location at a time other than the peak period to be counted as reporting during the peak period, beginning with the 1994 APO calculation.

COMMENT: By allowing employers to take credit for shifting employees out of the peak only after 1995, NJDOT is discouraging early implementation of flextime as a strategy, clearly benefiting air quality and traffic congestion.

COMMENT: Employers may not receive credit for employees who move out of the peak period in the calculation of the APO. Employees formerly included in an APO calculation who subsequently move out of the peak period may have no bearing on future APO calculations. The USEPA definition of APO states that it applies only to those employees that are currently arriving at the workplace between 6:00 A.M. and 10:00 A.M.

RESPONSE: The Department will retain the provision allowing employees who are shifted out of the peak period for APO surveys conducted in 1995 and later years to be counted in recognition that it is a traffic congestion strategy as provided by State law. Baseline surveys conducted for the employer's initial compliance plan submittal may not use this provision, because to receive credit for shifting employees out of the peak, it should not be part of the baseline and the 1994 compliance plan. Additionally, this measure which improve traffic flow also contributes to improving air quality.

COMMENT: Revise the wording in N.J.A.C. 16:50-7.5(a)2iv to clarify that if an employer removed a certain number of employees from the 6:00 A.M. to 10:00 A.M. period, the process would be negated if the same number of employees were put back into the peak period.

RESPONSE: The Department agrees with the commenters' reasoning, but feels this is adequately addressed in the formula for calculating APO.

COMMENT: The provisions for counting employees who are shifted out of the peak period after 1994 as reporting during the peak period seem to deal with flextime/staggered work hours without specifically mentioning them as commute alternatives.

RESPONSE: The Department has used the definition for commute alternatives suggested by USEPA. Flextime/staggered work hours must purposefully shift employees out of the 6:00 A.M. to 10:00 A.M. peak period after 1994 in order to receive APO credit.

COMMENT: One commenter supports the ETRP, but brings to the Department's attention that it is possible that the peak hours of 6:00 A.M. to 10:00 A.M. can be "manipulated" so that an employer would be exempt from the provisions of the program.

RESPONSE: The Department understands the commenter's concerns that there could be differences between what an employer reports to the Department and what is actually occurring at the work location. Therefore, the Department will audit employer plans and programs accordingly.

COMMENT: Revise the count of employees to state that an employee on business travel is counted as reporting to the work location on the day he or she does not report to the location.

COMMENT: Commenter felt that employers should receive trip reduction credit for employees who travel throughout the State away from the principal place of business.

COMMENT: Revise the count of vehicles to state that an employee on business travel is counted as reporting to the work location in a zero vehicle on the day he or she does not report to the location.

RESPONSE: Within the USEPA guidance for APO calculation, only employees reporting to the worksite during the peak period are included. If an employee does not actually physically report to the work location and is not "teleworking," he or she is identified in the APO calculation for that day as a "did not report" and neither the employee nor their vehicle are included in the APO calculation. N.J.A.C. 16:50-7.5(a)2i and

iii through vi, and N.J.A.C. 16:50-7.5(a)6 through 8 have been revised to better define how and when an affected employee is (or is not) included in the APO calculation.

N.J.A.C. 16:50-7.5(a)3

COMMENT: Change the number of occupants in a passenger car or truck that is counted as a vehicle from fewer than seven employees to fewer than 10 employees.

COMMENT: Change the number of occupants in a vanpool that is counted as a zero vehicle from seven or more employees to 10 or more employees.

RESPONSE: The Department will retain the occupancy definition of a carpool as fewer than seven employees and the occupancy threshold for vanpools as more than seven as originally proposed. Additionally, the seven occupant threshold is consistent with Federal guidelines for non-taxable benefits for employees.

COMMENT: Clarify that "truck" does not include service trucks, but passenger trucks. Perhaps "passenger vehicles" can be used instead of trucks to avoid confusion in the interpretation of terms.

RESPONSE: The term truck refers to any truck that is used for the commuting trip. Although it primarily assumes light trucks, such as pick-up trucks and vans, it could include a service truck if it is used for a commuting purpose.

N.J.A.C. 16:50-7.5(a)4

COMMENT: Several commenters requested the Department allow employers to count as carpoolers, employees who drop children off at day care centers and/or drop off senior citizens at adult or senior care centers.

COMMENT: Employees responsible for delivering their children to daycare centers/schools should be counted as arriving in zero vehicles as long as the school is within two miles of the work site.

COMMENT: Several commenters were concerned that employers were going to be penalized because of employees with children. ETRP regulations should be revised to allow children dropped off at school to be counted as occupants in a vehicle for APO calculations.

COMMENT: Employees who transport children to child care should not be included in the calculation of APO.

RESPONSE: The Department is sensitive to the needs of working parents; however, USEPA has not indicated that they will allow the states to exempt these employees from the calculation of APO. The ETRP is directed at reducing trips made by employees. The Department and USEPA guidance does not define children as employees and the Department will not consider employees who drop off children or seniors exclusively, as carpoolers. Under USEPA guidance, only employees can be counted in the APO calculation.

COMMENT: Count private vehicles utilized for commuting by operations employees, employer-owned vehicles utilized for commuting and emergency response vehicles used by supervisory personnel in the utility industry as "zero vehicles" for calculation of APO. These persons are subject to mandatory overtime or emergency response at any time of the day or night. It is not practical for these employees to participate in vehiclepools.

RESPONSE: USEPA will not allow the State to exempt these employees from the calculation of APO or to count their vehicles as zero vehicles. The Department will provide further guidance to special industries after the rules are adopted.

N.J.A.C. 16:50-7.5(a)5

COMMENT: Several commenters requested clarification to N.J.A.C. 16:50-7.5(a)5 on how to count employees who were working compressed work weeks and teleworking in the APO calculation.

RESPONSE: The Department agrees that clarification regarding teleworking is needed and has done so through a revision of the definition of teleworking (subchapter 2). The definition now includes the option of working from home or a satellite office for an entire day. When an employer is counting employees and vehicles for purposes of calculating APO, the employer is to include employees working these work schedule arrangements in the count of employees arriving at the work location the day they telework or have a compressed work week day off, but not to assign them a vehicle count for that day.

N.J.A.C. 16:50-7.5(a)7

COMMENT: Commenters request clarification of the total number of occupants when employees in a vehiclepool work at different locations.

COMMENT: Individuals arriving at work after dropping off individuals at other locations should be counted as reporting in a fraction of a vehicle.

COMMENT: Clarify that both employees who are dropped off by an employee continuing to another work location and the employee who drops them off are counted as arriving in a carpool. Everyone in a carpool gets credit for the carpool. The current language makes no reference to how the driver dropping off employees at other work locations should be counted at their own worksites.

RESPONSE: All occupants are counted, regardless of the number of drop-off locations. Therefore, if three employees, each working at a different location commute together, each is counted as reporting in a three-person carpool, and is assigned ⅓ of a vehicle for that day. If eight employees, each working at different locations, commute together, each is counted as arriving in a zero vehicle at each separate work location for each day they commute together as an eight employee vanpool.

COMMENT: Suggests rewording this paragraph to read: "An employee that is dropped off at the work location by a person not traveling to a regularly scheduled destination shall be counted as arriving in a single occupant vehicle."

RESPONSE: Only employees can be counted as carpool and vanpool partners; therefore, the current wording, which requires the person dropping off to be continuing to a work location, more clearly describes the application of this provision.

N.J.A.C. 16:50-7.5(a)8

COMMENT: One commenter suggested, because the last few miles of trips made to urban centers generally are at low travel speeds when compared to speeds for the rest of the trip, that the Department exempt certain urban park and ride facilities from the de minimis 10 mile trip length, that is, employees that drove alone to these locations and travelled the remaining distance on transit or other commute alternative, would be counted as arriving in that alternative, even if the distance traveled in the alternative was less than 10 miles of the total trip.

COMMENT: Several commenters requested the Department relax or eliminate the provision that employees must travel at least 10 miles or 50 percent of the employee's commute trip (whichever is less) to be counted as arriving in a commute alternative, because they felt the 10 mile distance was arbitrary.

COMMENT: The Department should set the minimum commute distance for commuting alternatives at two miles, consistent with EPA guidance.

COMMENT: Suggests an equitable alternative to the 10 mile or 50 percent rule be that the employee is assigned a vehicle count proportional to the distance the employee travels by single occupant vehicle (for example, an employee that drives 20 miles of a 30 mile total trip would be assigned 2/3 of a vehicle for the APO calculation).

COMMENT: In suburban and rural locations such as Somerset County, it is difficult enough to find reasonable commute options for employees who are even remotely interested in car or vanpool options. Having this additional standard will make achieving compliance with these regulations nearly impossible.

COMMENT: Employees parking their cars at transit terminals, bus stops, or carpool formation points more than two miles from the worksite should be counted as employees with no vehicle driven.

COMMENT: If an employee travels 40 miles to work and picks up another passenger two miles away from the worksite, the passenger deserves credit for carpooling, because there is one less cold car start.

RESPONSE: In the final version of guidance released by USEPA, there was no reference to a minimum distance for commuting alternatives. However, the spirit and intent of both the Federal and State law is to reduce both trips **and** vehicle miles travelled. The "10 mile rule" was established to offset the higher emissions a vehicle generates from a "cold start." Therefore, a commute alternative should have a trip length of approximately 10 miles to offset this effect. However, this conflicts with urban trip patterns in New Jersey. Thus, the Department concurs that the 10 mile threshold may not be appropriate for New Jersey and has revised the language to reduce the mileage requirement to two miles or 50 percent of the one-way distance to the work location, whichever is **less**. Additionally, the Department feels it would be inequitable to exempt only certain park and ride facilities from the mileage restriction.

COMMENT: APO calculation should be clarified to note than an employee who parks off-site and walks to the facility is counted as having arrived in a vehicle. Some facilities have no on-site parking.

RESPONSE: Instructions provided to employees with the survey form and to employers with the APO calculation form will indicate how they should treat this type of commuter-parking situation. Offsite parking locations must be at least two miles from the worksite or at least 50 percent of the distance from the employee's home to the work location to be considered a valid transfer point for commute alternatives.

COMMENT: The rule counts employees working at satellite work locations not more than 10 miles and 50 percent of the distance from their home to work as arriving in a zero vehicle. The State should ensure this provision is not abused by employers who could officially transfer employees to distance primary work locations without actually making the employees move. The employees current work location would be designated as a satellite work location.

RESPONSE: The Department appreciates and shares the commenter's concern. This provision will be audited by the Department.

COMMENT: Do not permit satellite work centers as an ETR strategy.

RESPONSE: NJDOT feels that working at satellite work centers are an appropriate traffic congestion measure, an air quality benefit from the perspective of traffic flow improvements and consistent with State law. It fulfills the intent of the CAAA to reduce vehicle miles travelled.

N.J.A.C. 16:50-7.5(a)10

COMMENT: Change language from "handicapped" to "persons with disabilities" to be consistent with the language of the Americans with Disabilities Act. Further, to maintain the privacy of such employees, the commenter suggested persons with disabilities should be removed from the calculation of APO only if they self identify.

RESPONSE: The Department has made the changes requested to this section, but documentation of the disability may be necessary.

COMMENT: Employees impacted by the American Disabilities Act should not be a part of an employer's APO pool. Commenter was encouraged that DOT recognizes that public transportation and ridesharing may be impractical for persons who are physically handicapped.

COMMENT: Do not exempt disabled persons who require the use of an SOV for commuting from the APO calculation if accessible public transit or paratransit is available.

COMMENT: Single occupant vehicles used by handicapped employees should be counted as zero vehicles.

RESPONSE: The Department and USEPA agree that employees impacted by the American with Disabilities Act should not be included in the APO calculation. USEPA guidance does not allow for any peak period single occupant vehicles (SOVs) to be counted as zero vehicles. Transit accessibility should not be a criteria for including peak period SOVs driven by persons with disabilities to be included in the APO calculation.

COMMENT: How should the APO calculation treat handicapped employees who are dropped off at the worksite when the person who drops them off does not continue to another work location?

RESPONSE: The final rule allows employers to exempt these employees from the APO calculation if they need a single occupant vehicle for commuting and documentation may be necessary.

N.J.A.C. 16:50-8.2 Plan and report submittal schedule

COMMENT: Several commenters asked the Department to clarify what, if any, reports employers would be required to submit to the Department after 1996 to demonstrate their continued compliance.

RESPONSE: The rule requires employers to achieve the target APO by 1996 and to maintain the target APO after 1996. The rule states that employers may be required to submit additional plans after 1996 if such reporting is required by USEPA or by DEPE to meet EPA requirements. The Department has reflected this change in N.J.A.C. 16:50-8.2(a)4 and 8.4(d), to include the requirement of a maintenance plan if required by USEPA.

COMMENT: After-the-fact affected employers should have a full two years to submit plans if this is allowed under the Federal CAAA.

COMMENT: The time frame is unfair to employers who become affected after May 1, 1994. Recommend that the APO compliance period be amended to allow two years (rather than one year) from the date of submission of initial plan or November 15, 1996, whichever is later, if the Federal government allows it.

RESPONSE: The Department agrees that these employers should be given a sufficient amount of time to reach the target APO equal to that of employers who are affected at the start of the program. N.J.A.C. 16:50-8.2(a)1 has been revised to allow employers which became affected after May 1, 1994 two years to achieve the target APO from the time that they file their initial compliance plan. Again for consistency, newly affected employers will be given 180 days to develop and submit their plans.

COMMENT: Several commenters suggested that employers already in compliance in November 1994 should not be required to file a compliance plan. This provides employers an incentive to implement early commute option strategies.

COMMENT: Employers who attain their APO should not be required to submit an initial plan or update plan.

COMMENT: Employers who meet their target APOs should not be required to submit anything beyond the report of the APO survey results demonstrating compliance.

RESPONSE: Under the State law, all employers are required to submit compliance plans in 1994 and 1996. The Department has, however, added a provision for a maintenance plan to be submitted in 1996 by employers that have reached the target. The reporting requirement of the maintenance plan will be reduced from the update plan required of an employer that has not reached the target APO.

N.J.A.C 16:50-8.3 Plan filing fees

COMMENT: Several commenters strongly objected to the fees which were being charged. They appear to be steep and baseless. One commenter stated the belief that these were just another hidden tax which exceeded actual costs to the state to administer the program.

COMMENT: Fees and fines for penalties should be held at the same level through 1997. After that any increase in fees or fines should be limited by the rate of inflation.

COMMENT: Objects to the expense of the initial filing fee and the doubling of that initial fee for each subsequent biennial filing. NJDOT should generate funds to implement the program by seeking higher penalties rather than high filing fees.

COMMENT: The fees are substantial, particularly for companies with multiple locations. There is not apparent good rationale for the high fee basis. This is particularly so, considering that companies still have to expend substantial sums for certification, incentives, and the like to implement ETRP.

COMMENT: The update plan should be no more expensive than the initial plan. there should be a graduated cap for employer size (for example, five sites or more of less than 500 employees $1,000 to $2,000; five sites of 500 to 749 employees $2,000 to $4,000, etc.).

COMMENT: The filing fee should be based on the number of affected employees arriving at peak periods, not the total number of employees at the location.

COMMENT: Hope that the associated fees could become less financially burdensome.

RESPONSE: The fees were established to help pay the administrative costs of the program. They were established in the State law and cannot be changed by the Department until four years after the effective date of that statute. The State law did set a cap of $4,000 for the first filing and $8,000 for subsequent filings, for employers with multiple work locations.

COMMENT: The section does not discuss any fees for updated/revised compliance plans of affected employers. Are employers that submit updated plans in 1997 because of their inability to reach the target APO subject to fees? What about updates for change of location?

RESPONSE: Under the State law, the Department has no authority to impose filing fees except for the initial filing and subsequent biennial update filings. Employers submitting revised plans at any time and/or APO survey reports in 1997 will not be required to pay an additional fee.

N.J.A.C. 16:50-8.4 Components of a standard plan

COMMENT: "Contingency measures" should be included in all employer plans in order for New Jersey's ETR Program to be approved by USEPA. Contingency measures would include more draconian measures, such as parking pricing, which the employer would be committed to undertake if the APO target was not reached. These measures will bolster conformance of the compliance plans and educate employees about the level of commitment required for them.

RESPONSE: In its guidance to states on development of ETR programs, USEPA provided four methods by which states could show their programs to convincingly demonstrate compliance with the Federal requirements. New Jersey's program is primarily based on one of the four methods: "plan-by-plan review," with "penalties for not achieving the target" as a secondary method. The Department believes it is unneces-

sary to include contingency measures (a third option offered by USEPA). However, an employer's consideration of contingency measures in 1995 is included as a test of good faith effort if the program the employer implemented in 1994 is not effective in reducing trips.

COMMENT: The signature of the ETC should not be required on the compliance plan. It should only be the signature of the plan preparer.

RESPONSE: The Department concurs that the ETC should not be required to sign the plan, unless the ETC prepared the plan. This section has been reworded to reflect this change.

COMMENT: Change the requirement that the letter attesting that the employer shall implement the plan be signed by "highest ranking responsible officer" to allow the letter to be signed by a "designated management representative for multi-facility employers."

RESPONSE: The Department feels strongly that commitment at the worksite is important in the success of an ECO program. For this reason, the commitment letter must come from a responsible person at the worksite rather than an employee located away from the site.

COMMENT: Employers should be required to confirm in the plan that transit services included in the plan either already exist or have funding commitments, be they public or private.

RESPONSE: If an employer includes transit as a strategy in their plan, then the employer should provide information on the type of service and the potential for appropriate funding.

N.J.A.C. 16:50-8.7 Consolidated plans and APO reports

COMMENT: It would be beneficial if USEPA allowed an employer with many affected sites falling within the same zone to do one consolidated plan. Requiring individual plans seems to create an unnecessary expense.

COMMENT: Several commenters requested the Department amend this section to allow employers to file consolidated plans on the initial filing.

COMMENT: Employers should be able to submit consolidated plans in 1994 because that consolidation provision was inserted to allow employers to reduce costs and duplication of effort because many employers will be using the same employee commute options to reach the objectives.

COMMENT: Concerned as to why NJDOT will not allow the consolidated plan option to be included in the initial plan submittal in 1994 if it is used as a test of good faith.

COMMENT: Concurs with Pennsylvania's proposed regulation to permit consolidated plans in the original submission for employers in the same zone.

COMMENT: Should either permit consolidated plans to be submitted in 1994 or clarify the ability of planned office or mixed use development work locations containing two or more affected employers to prepare and submit development-wide ETRP programs for such employers commencing in 1994.

COMMENT: Those businesses with affected work locations in a closely defined geographic area should be allowed to submit one consolidated plan initially in 1994.

COMMENT: For those work locations situated in close proximity to one another and located in individual buildings, it makes little sense to wait two years before consolidated plans are permitted.

COMMENT: A military installation should need to only develop one ETRP. NJDOT's plan not allowing consolidation until 1996 will cause a hardship and increase costs to employers.

RESPONSE: The Department believes all employers should make an attempt to reach the target APO, before turning to APO averaging. APO averaging is not to be a primary compliance mechanism, but rather a secondary mechanism for employers who try but are unable to reach the target individually. The definition for "good faith effort" reflects the primary compliance mechanism. However, the Department strongly encourages employers to work with one another to achieve economies of scale in the development and implementation of coordinated commute alternative strategies without the formal commitment to work together that a consolidated plan in 1994 would require. The Department expects that it would be very difficult to avoid a complete interdependency between work sites included in a consolidated plan. The likelihood of one or more sites being negatively impacted by a major fluctuation (for example, bankruptcy, layoffs, etc.) is very high. Therefore, because employers are not required to show compliance until 1996, the option for consolidated plans and APO averaging will not be permitted until that year. All employers in all development types will be treated equally in this regard.

COMMENT: Concerned that employers will be permitted to average APOs for work locations that are separated by large distances. Suggests employers be allowed to average APOs only for locations which are within a reasonable distance of each other, perhaps 10 miles.

RESPONSE: USEPA has given no indication that it will require a mileage restriction, thus the Department has not imposed such a restriction.

COMMENT: Several commenters requested clarification on whether employers may use a consolidated plan for work locations in different APO target areas.

COMMENT: Consolidated reports should be permitted for two or more locations of the same employer within the same zone.

COMMENT: Employers may consolidate plans over more than one AVO target area, yet the definition in subchapter 2 states that a consolidated plan may only be made within a target AVO sub-area. The commenter believes that consolidation should be allowed beyond a single AVO target area.

RESPONSE: Employers are permitted to average APOs for work locations within the same target area or different target areas. The definition of consolidated plans in subchapter 2 and the language in subchapter 8 (N.J.A.C. 16:50-8.7) have been revised to clarify this point and are now consistent.

COMMENT: There should be a provision allowing employers to combine affected and non-affected worksites within the same plan. This approach should have a net beneficial effect in securing the cooperation of more employers.

COMMENT: Several commenters requested the Department allow employers to combine affected and non-affected worksites in the same plan.

RESPONSE: An employer is encouraged to provide commute options to all of its facilities, however, USEPA guidance indicates that only affected work locations must meet the target APO, either individually or by averaging with another affected work location. The inclusion of non-affected work locations would be of no strategic benefit to employers. Additionally, the State law stipulates that these rules cannot be more stringent than the Federal CAAA.

COMMENT: The use of employee miles for consolidated plans instead of the simpler APO calculation for single work sites seems to discourage consolidated plans. Yet these plans have the potential of achieving a greater trip reduction than single site plans by allowing employers to place their resources where they will be most effective. In order to achieve the greatest trip reduction, both calculations should be based on total trips, not mileage.

COMMENT: Several commenters stated that the formula for APO averaging inaccurately captures VMT data.

COMMENT: The calculation for APO for two or more work locations in different target areas should be adjusted. Vehicle miles must be based on the average miles traveled by the vehicles arriving to work and should not include miles traveled by employees commuting to work by train or bus, which could inappropriately skew the calculation either way.

COMMENT: Allowing consolidated plans across zones may have the impact of not reducing vehicle miles travelled, although the way the current consolidated formula is structured, there appears to be no negative impact on cold starts.

COMMENT: Consolidation based on averaging across zones and sub-areas would not be acceptable based on EPA's ETR guidance. New Jersey may allow employers across sub-areas to present consolidated plans based on the VMT weighted formula in the rule. The approach used by New Jersey to apply vehicle miles travelled to the APO calculation for a consolidated plan across zones and sub-areas is acceptable. However, the target APO for such plans must be weighted proportionally based on each employer's target APO. The simple averaging of APO targets for consolidated plans as described in the draft regulations is unacceptable.

RESPONSE: The Department has reviewed the formula in N.J.A.C. 16:50-8.7(a) and has revised it. The formula has been changed to calculate an averaged APO target for multiple work locations located in different APO target areas using maximum vehicles allowed as the denominator.

COMMENT: An employer participating in a consolidated plan should be able to submit a consolidated plan for all work locations with similar circumstances (that is, physical plant, parking and transit availability) and subsections of that consolidated plan for all other affected locations.

COMMENT: The requirement that an employer participating in a consolidated plan individually prepare and implement a plan "as if the

employer had submitted an individual plan" should be clarified in those workplace situations involving a planned office park or mixed use development project.

RESPONSE: As described in the proposed rule, employers participating in consolidated plans were required to develop and implement individual ECO programs. The programs could be identical, but each employer was required to implement the program individually. The Department has changed this subsection to indicate that consolidated plan forms submitted will be a single plan for all employers (or work locations) participating in the plan, but that consolidated plans are to be submitted only if the average APO for the employers and or work locations participating in the consolidated plan meets or exceeds the target. Additionally, the filing fees for consolidated plans (N.J.A.C. 16:50-8.3(c)) have been revised to allow for an overall lower filing fee. Because an employer that is above the target would have little reason to average with another employer if the resulting average APO would be below the target, the Department believes this change represents a clarification in the language rather than a restriction. All employers in all development types will be treated equally in this regard.

COMMENT: The regulations state that employers submitting consolidated plans must average their APO survey results. Employers would be disinclined from consolidating with another company that may have a lower APO survey result, hence reducing the number of employers which could take advantage of the consolidated plan provision.

RESPONSE: The concept behind the consolidated plan is to allow an employer that is unable to meet the target, despite good faith efforts to do so, to average its APO with an employer that has been able to exceed the APO target, sch that both employers, on average, meet the target. Averaging is also allowed for different affected work locations of the same employer. This provides for a more efficient mechanism for overall compliance for the state and for individual employers.

N.J.A.C.16:50-8.9 Requirement for an ETC

COMMENT: Several commenters felt there is no need for an ETC at each site and the regulation should allow for ETCs to manage more than one site.

COMMENT: Change this requirement to state that "an affected employer shall designate an ETC for each work location with 100 or more employees ..."

COMMENT: Employers with multiple sites or groups of employers contiguously located should appoint a contact person for each location. However, they should be permitted to have one ETC with expertise in ETR methods to have overall responsibility among these sites for trip coordination.

RESPONSE: The State law requires that each affected employer designate an ETC "at" each affected work location. The Department has interpreted this to mean an ETC must be physically located at the location. Additionally, experience from other areas of the country reveals that an ETC located on site, who is readily available to provide information and assistance is very important to the success of a commute option program. An employer with multiple sites may, however, assign a "corporate" ETC to coordinate work performed by on-site ETCs at individual locations. Further, an employer or several employers working together may use the services of an outside group, such as a TMA or consultant, to augment work performed by the on-site ETCs.

COMMENT: Request that the Department include in the rule, language clarifying who could be authorized as an ETC trainer and the requirements necessary for authorization.

RESPONSE: The Department agrees and will propose additional rules for a person to be authorized by the Department as a trainer. The Department intends to authorize any person who meets the minimum requirements to apply and who successfully completes the Department-sponsored training course and passes the examination that will be given at the end of the course. The Department is proposing such additional language as an amendment to N.J.A.C. 16:50-8.9 elsewhere in this issue of the New Jersey Register and welcomes public comment on the new section.

N.J.A.C. 16:50-8.10 Document recordkeeping

COMMENT: Several commenters recommended that documents should only have to be kept for three years not five years.

RESPONSE: The Department considered changing the requirement to three years, however, because achievement of the APO target is not required until November 1996, or if an update plan is approved, not until November 1997, employers should retain all program related records for at least five years to ensure sufficient documentation to support a request for a good faith effort waiver.

COMMENT: A commenter suggests the Department delete from the recordkeeping requirement, documents used in the preparation of ETRP documents.

RESPONSE: Employers must maintain all records pertaining to the development or implementation of the worksite ECO program and all materials required for the State's ETR program. This does not mean draft writings, but does mean all critical material such as survey forms, results, policy statements, etc. The Department has added N.J.A.C. 16:50-8.10(a)6 to further clarify what must be retained.

COMMENT: The commenter suggests the Department change the location at which records of multi-facility employers are to be kept, from the office of the ETC to "a central location approved by the Department."

RESPONSE: The Department feels it is important that records pertaining to the work location program be maintained at the work location. This is needed to expedite access to records in the case of an inquiry by the Department, audit, or enforcement action.

N.J.A.C. 16:50-9.1 Selection and approval of certifiers

COMMENT: This entire subchapter should be deleted and all other references to certification and certifiers should be removed from other subchapters. Why is New Jersey the only state using a certification process?

COMMENT: Delete "certifier" provision from the ETRP regulations.

COMMENT: Plan certification requirements will be expensive, add unreasonable time delays, be unnecessary to the process, and therefore, should be dropped in their entirety.

COMMENT: Certifiers are unnecessary.

COMMENT: The use of certifiers and DOT personnel to determine employers' compliance with the law and these regulations is duplicative, costly, and will delay the implementation of the ETRP. The commenter asks that subchapter 9 be deleted, or that N.J.A.C. 16:50-10.2 and 10.3 be deleted and a new section inserted indicating that once a certifier has deemed an employer's plan to be complete, NJDOT will adopt such a decision.

COMMENT: The plan certifier requirement in the regulations is unnecessary and duplicative of the Department's review process.

RESPONSE: The certification process is required in the rule because it is included in the State law. Other states also plan to intensively review employers' plans, but plan to hire employees at the agencies that are administering the programs in those states. The outside certification process was chosen by New Jersey to ensure that the 6,000 affected employers' plans would be reviewed in a timely manner without the need for the Department to hire a substantial number of new employees. The review by the Department described in subchapter 10 will not be duplicative. NJDOT will accept the judgement of the certifier as given, except the Department will audit a sample of plans certified by each certifier to ensure accuracy and consistency amongst certifiers and with the rules.

COMMENT: In the case of an employer with a certified compliance plan wishing to make a mid-point correction to evidence good faith effort in achieving its APO target, it is not clear if recertification of the revision by an approved certifier is required. The process for reviewing plan revisions prior to 1996 should be clarified.

COMMENT: Employers submitting revised compliance plans should be required to obtain plan certification prior to submittal to the Department.

RESPONSE: The Department feels that it is only necessary for revised compliance plans to be reviewed by certifiers when the revision is necessitated by a relocation. Because the number of revised plans is expected to be relatively small, the Department feels its resources will be adequate to allow it to conduct a thorough review of revised compliance plans for other minor corrections, reducing the need for the employer to seek outside review by a certifier. This will save many employers the cost of certification and the lead time they must allow for certification prior to submittal to the Department. The large number of initial compliance plans the Department will receive in 1994 makes it impractical for the Department to review all the plans. Outside certification of compliance plans is intended to ensure timely review of employers' plans without the need for a large Department plan review

staff. N.J.A.C. 16:50-8.2(a)6 and 16:50-10.1 have been revised to reflect that a revised plan would not need to be certified unless it is necessitated by a relocation of the affected work location.

COMMENT: Several commenters urge early approval of certifiers by the Department and the imposition of a fee for the training.

COMMENT: The schedule for selection, training, and approval of certifiers should be added. A recommended target would be the date employers are required to register with the Department.

COMMENT: The Department should consider charging a fee for certifier training to offset the cost of training since certifiers will be able to charge for their services. Employees of non-profit organizations should be exempt from such fees.

COMMENT: There should be a fee charged by NJDOT for the certifier's course, the certification of the certifier, and for yearly certifier renewal.

RESPONSE: The Department has solicited applications for candidate certifiers through an RFP and expects to train and approve certifiers early in 1994. The Department does not intend to charge potential certifiers for training, since certifiers would then want to recoup that expense in their fees to employers. The Department does not anticipate charging an additional fee for the annual renewal of the certifier's plan review authority.

COMMENT: If certifiers are required to complete a training course and pass a proficiency exam, then there seems no good rationale to require the credentials set forth in N.J.A.C. 16:50-9.1(a)1. Passing the exam should be sufficient to qualify a person as a certifier.

RESPONSE: The Department is concerned that a single training course will not be a sufficient foundation for understanding the intricacies of travel demand management. DOT feels strongly that prequalification criteria are necessary to ensure that employers are well-served and the plan reviews are conducted properly.

COMMENT: There should be a provision in subchapter 9 that allows NJDOT to revoke a certifier's license or deny renewal of the license if multiple complaints are heard about the conduct, fees, or review of an individual certifier.

RESPONSE: The Department concurs and this provision is included in the rule (N.J.A.C. 16:50-9.1(a)5).

N.J.A.C. 16:50-9.2 Certification procedures

COMMENT: Commenter suggests removing the phrase "or an organization that employs the certifier." If approval to certify is only conferred on an individual, not an organization, certifiers should not be penalized because his or her employer is involved in plan implementation.

COMMENT: Recommends that TMAs be permitted to review their members' compliance plans for certification so long as the TMA has not provided direct assistance in drafting the compliance plan under review.

COMMENT: If an employer is already paying a TMA, why can't the TMA be allowed to certify the employer's plan if the need for a certifier is so important.

COMMENT: Delete the third test for independence of a certifier: "The certifier or any organization by which the certifier is employed is currently under contract to the employer to provide or receive payment for any product, professional service, or membership fee; or was under such contract within the past six months."

COMMENT: The independence provision should be changed to specifically exclude TMAs from this requirement. A TMA that provides information and membership to an employer, but has not assisted in plan development or preparation should be allowed to certify a member's plan.

COMMENT: Urge that employees should be allowed to certifier their employer's plans.

COMMENT: If may be difficult for Burlington County to obtain a certifier since most of the certifiers may work for consultants that have already worked for the County.

COMMENT: The Department should allow in-house certification of compliance plans by an employee who is a licensed (that is, Department approved) certifier. This procedure is followed in other regulatory instances. NJDOT should not subject companies to outside force/obligation to pay additional fees.

COMMENT: Encourage simpler system where employers can be self-certified.

RESPONSE: The State law requires certifiers to be "independent" of the employers whose plans they review. The Department has interpreted an absence of independence, especially when caused by current or recent prior financial connections between the employer and certifier, to pose a potential conflict of interest. The situations these commenters describe falls into this category and thus would not be allowed. The Department anticipates that because at least 125 certifiers will be trained and approved throughout the state, it is unlikely an employer will have difficulty finding an independent certifier.

COMMENT: Under the wording of N.J.A.C. 16:50-9.2(a), a certifier who has previously certified a plan for an employer cannot do so again for six months. This could impact multiple site employers that file separately and want to use the same certifier. The language should be changed to exclude payment for services performed while certifying a trip reduction plan.

RESPONSE: The Department has considered this suggestion and has revised N.J.A.C. 16:50-9.2(a)1iii to clarify that the only ETRP or ECO activity that is excluded for purposes of independence is the review and certification of an employer's compliance plan.

COMMENT: Several commenters requested the Department regulate the maximum time for a certifier to review a plan. One commenter suggested certifiers should be given 30 days to review the plan. A second felt 21 days should be given.

COMMENT: The certifier should be required to review and return the plan to the employer within 60 days. If a certifier is not able to meet this time constraint, they should inform the employer within five business days.

RESPONSE: Because plans will vary in their complexity, the Department does not feel it is appropriate to set a time limit for a certifier's review of plans. Guidance provided by the Department will strongly suggest, however, that employers negotiate a contract in advance that defines the maximum time the certifier will take to review the plans. The Department has privatized this activity and the contract negotiation should be market driven.

COMMENT: A commenter asks that this section be amended to require the certifier to work with the employer to revise an incomplete plan and then recertify the plan at no additional cost to the employer.

COMMENT: If a certifier certifies a plan that is ultimately rejected by NJDOT, that certifier should have the duty to make it right.

COMMENT: Two commenters felt the Department should consider a povision to require the certifier to assist an employer at no cost in the event that a plan is rejected by the Department.

RESPONSE: The rules require the certifier and the Department to provide an explanation for why the plan was rejected and guidance about how to correct deficiencies. However, it is the responsibility of the plan preparer to correct the deficiencies on behalf of the employer. Certifiers will be audited by the Department to ensure compliance with certification guidelines and complaints will be investigated.

COMMENT: If an employer disagrees with or develops a poor relationship with the original certifier, the employer should not be held hostage to the original certifier. The employer should have the option to go to another certifier for approval of the revised plan.

COMMENT: There may be a reason why an employer may not want to resubmit its failed-to-make-certification plan to the same certifier. The commenter suggests the Department revise this section to read: "The employer shall revise its plan as appropriate, and unless it submits (to the Department with the plan), a written explanation of reasons for changing certifiers, it shall resubmit the plan to the same certifier as initially reviewed the plan."

RESPONSE: The Department concurs that employers should be permitted to submit revised plans to a different certifier and has modified N.J.JA.C. 16:50-9.2(a)3 to reflect this.

N.J.A.C. 16:50-9.3 Certification criteria

COMMENT: Commenter emphasizes the need for flexibility in the compliance review process.

COMMENT: Certifiers may create a situation where many different interpretations of the ETRP are made. Encourage simpler system where employers can be self-certified.

RESPONSE: The Department agrees that differences between work locations must be taken into account in the review of plans, but consistency among certifiers in plan review and judgement is equally important. The Department will strive, through its training for certifiers and its plan review tools to balance these two plan review needs. The State law allows an employer to certify its own plans after it has been found to be in compliance by the Department for two successive plan submissions, and after November 1996.

N.J.A.C. 16:50-9.4 Certification fees

COMMENT: Several commenters requested the Department regulate the maximum fees certifiers can charge for plan review and certification.

COMMENT: Commenter expressed discomfort with the fact that certifiers are allowed to set fees at their own discretion and alarmed by an obvious lack of responsibility on the part of certifiers to guarantee what each is paid to do.

COMMENT: Certifiers have to be accountable to the employer either as to the quality of their work or to their fees.

COMMENT: Certifier fee amounts should be dealt with in a generic form in the event that a plan has to be submitted even once after the original certification. An employer should not have to pay the full amount each time a plan is resubmitted.

COMMENT: The regulations should set limits on the fees that plan certifiers can charge, particularly where the certifier rejects a plan and requires one or more submissions.

COMMENT: Commenter expressed concern that certification fees be fair and reasonable.

COMMENT: No restrictions should be placed on the fees certifiers may charge. The free market will ensure that those who set fees too high will not get any requests for service. However,the Department needs to make sure that there is a sufficient number of certifiers to satisfy the demand for this work.

COMMENT: Commenter requests that limits be placed on certification fees with the requirement that certifiers guarantee their work.

COMMENT: The certifier is not restricted in the fees it can charge and no penalties are levied against the certifier for certifying a plan which is rejected by the Department.

RESPONSE: Because plans will vary in their complexity, the Department does not feel it is appropriate to set a maximum fee certifiers may charge. The Department expects to train and approve at least 125 certifiers in the first year, providing adequate competition in the marketplace. Certifiers will be required to adhere to a code of ethics developed by the Department and failure to do so will result in loss of approval to review and certify plans. The Department recommends, however, that employers concerned about the certifier's performance, responsibility, and/or fees, negotiate a contract with the certifier prior to submitting the plan to the certifier for review.

N.J.A.C. 16:50-10.2 Plan review guidelines

COMMENT: DOT's review of compliance plans should be at least as vigorous as the review conducted by certifiers.

COMMENT: NJDOT should either opt for the certifier's "OK" and adopt the recommendation of the certifier or do the certifying themselves.

COMMENT: Double plan review of both the certifiers and NJDOT is costly and wasteful.

COMMENT: As long as a plan must be certified by a DOT-approved certifier, why must the DOT also review all plans? The purpose of nondepartmental certification is to relieve the Department of the burden (staffing, economic, etc.) of review. The Department should review on a spot check basis only, but, as a matter of general course, accept a certified plan as complete and consistent with criteria taught to approved and licensed certifiers.

RESPONSE: Certifiers will conduct a thorough review of the plan for its "efficacy" and the Department will accept the judgement of certifiers. The Department is required by the state law to review plans for "completeness and consistency with the regulations." To ensure consistency and accuracy of plan review by certifiers, however, the Department will audit approximately 10 percent of plans submitted, including a sample from each certifier.

N.J.A.C. 16:50-10.3 Additional review by Department of sample of plans

COMMENT: The Department may wish to reinstate a provision that commits itself to perform a review and audit of at least 10 percent of the plans submitted so that regulated businesses know what is expected of the Department.

COMMENT: A 10 percent audit is not needed to determine the adequacy of the certification process.

RESPONSE: The Department's goal is a 10 percent audit. The Department feels it is important to alert both employers and certifiers that plans will be audited. However, the Department cannot guarantee that exactly 10 percent of the plans will be audited, but that is the Department's goal. This is a new function for the Department and it is difficult to predict staff time needed for all ETR program functions. To assist the Department in conducting these audits in a timely manner, N.J.A.C. 16:50-8.5(a)1 has been revised to require that all plan components be submitted to the Department.

N.J.A.C. 16:50-11.1 Work location audits

COMMENT: Remove development from the last sentence. Development information gets into the protected area of decision making processing and may be proprietary.

RESPONSE: The Department disagrees. As the regulatory agency responsible for verifying compliance to USEPA, the Department must have access to all pertinent information regarding an employer's ECO Program.

COMMENT: 48 hours should be the minimum notice for a "work location audit."

RESPONSE: The Department has considered this suggestion, but feels that a minimum of 24 hours is sufficient notice for work location audits.

N.J.A.C. 16:50-11.2 Noncompliance

COMMENT: The ETRP regulation should contain a provision which authorizes employers to establish a disciplinary sanction for failure of an employee to respond or to respond accurately to the APO survey form. The scope of the sanction should include disciplinary action and/or imposition of a monetary incentive sufficient to compel compliance.

RESPONSE: Neither the Federal CAAA nor the State law provide any authority for the Department to include such provision in the regulations. Further, an employer is required to offer options for employees to encourage their compliance. Disciplinary action toward employees should not be a criteria for compliance.

N.J.A.C. 16:50-11.3 Penalties for noncompliance

COMMENT: Include language describing the purpose or use of any fines collected.

COMMENT: Request that the DOT explain how its penalties will either dovetail or supplant Federal penalties and citizens suit actions under the CAAA.

COMMENT: Is there a point in time when fines for noncompliance will end?

RESPONSE: The Department has added language to N.J.A.C. 16:50-11.2 (now 12.2) that describes the purpose and use of the penalties. These State-imposed penalties are unrelated to any federal penalties imposed upon states for noncompliance. The Department does not derive income either from Federal penalties or from citizens suit actions brought against employers under the CAAA. State imposed penalties will end when the violating employer comes into compliance.

COMMENT: "Penalties for failing to meet the requirements of ETRP are up to $5,000 per month." For large employers, the cost of complying with ETRP could exceed the penalty. Hence, it is suggested that the penalties be made proportional to the number of employees, set at a value that ensures that the cost of noncompliance is higher than that of compliance.

RESPONSE: The Department concurs with the comment that the cost for complying with ETRP could exceed the penalty. However, employer incentives rather than disincentives were favored by the state legislature. USEPA guidance allows states to select appropriate compliance mechanisms, such as in-depth plan-by-plan review and they have indicated their intention to monitor New Jersey's ETRP progress and the level of enforcement. Additionally, the Department will consider using penalties for funding additional activities in support of employer programs.

COMMENT: Why do the laws that are mandated usually involve penalties rather than rewards or incentives?

COMMENT: We support this section ultimately providing for financial penalties against government employers, including State departments or agencies, if they don't comply with the requirements.

RESPONSE: The CAAA did not appropriate Federal funds to be earmarked for employer incentives. New Jersey is one of the few states that has provided financial incentives to private employers. Federal law allows $60.00 per month for transit or vanpools, and $155.00 per month for parking to be excluded from an employee's taxable income. Recent enactments have matched the Federal employee income tax exclusion and a State tax credit is available to New Jersey employers as well. New regulations will detail these provisions at a later date. The Department agrees with the commenter regarding penalties for government departments and refers the commenter to N.J.A.C. 16:50-12.3(e).

COMMENT: Insert in last line, after "N.J.A.C. 16:50-11.3," "at the Department's discretion taking into consideration the good faith efforts of the affected employer."

RESPONSE: The Department has considered this change and has modified N.J.A.C. 16:50-12.3(d) (previously 16:50-11.3(d)) to include the good faith criteria.

N.J.A.C. 16:50-12.1 Deadline extensions

COMMENT: Granting of extensions should be limited to deadlines associated with filing plans, not achievement of the APO target.

RESPONSE: The Department has considered this change, but feels that the provision for extensions is appropriate as proposed. If an extension is granted for filing of a compliance plan, the Department feels that in fairness the affected employer should have two years to achieve the APO target.

N.J.A.C 16:50-12.2 Exemptions

COMMENT: Request that the "Temporary" industry be exempt from ETRP rules and regulations.

COMMENT: Exempt home care agencies from the New Jersey ETR regulations and simplify the waiver process for New Jersey industry.

COMMENT: Commenter asks if police departments are exempted from this program?

COMMENT: Should Mercer County concern itself with Court employees in regard to the ETRP?

COMMENT: One commenter felt it unreasonable to expect retailers to not only file and implement the ETRP, but to maintain a certain performance level as well.

COMMENT: Some commenters were concerned that temporary agencies would find it hard to comply since their employees go to different locations every day.

COMMENT: Newspaper operations with reporters, editors, advertising sales reps, each with a specific territory to cover in a multi-county area, and each of whom operates independently of coworkers presents an impossible situation regarding complying with the regulations.

COMMENT: Requests that DOT encompass language allowing waiver provisions, when field work is essential to effectively deliver welfare and social services to residents of Bergen County and throughout New Jersey.

RESPONSE: USEPA will not allow the State to exempt any groups of employees or employers from the ETRP. The Department will consider an employer's "good faith effort" in trying to achieve the target. The Department intends to develop guidance for employers that have special needs as they develop ECO Programs.

COMMENT: The request by an employer for an exemption for having fewer than 100 employees or fewer than 33 reporting during the peak period should be included as part of the registration process. The process in this section should be consistent with provisions of N.J.A.C. 16:50-5.1(b) concerning registration deadlines.

RESPONSE: All "affected" employers must register. After registering, an employer may petition to Department for an exemption as described in this subchapter.

N.J.A.C. 16:50-12.3 Waivers

COMMENT: Hardship waivers should be granted only for waiver of penalties, not from compliance deadlines or other requirements of ETRP.

COMMENT: It may not be wise to limit waivers to hardship circumstances. The testimony by home health care providers suggests one example where a broader concept of waiver is necessary and appropriate. The State Legislature anticipated that waivers for reasons other than hardship might be appropriate. See N.J.A.C. 7:1E-4.10(e) for waiver applications in response to testimony and written comments on the proposed rules.

COMMENT: "Hardship" waivers should be broad and within the discretion of the DOT which should be able to decide such waivers on a case-by case basis. Financial hardships should not have to be "extreme" and other hardships, beyond financial should be considered.

COMMENT: The procedure for obtaining a waiver should be modified to include items other than "extreme financial hardship." Other hardships may exist for employers including employee characteristics or employment responsibilities (that is, law enforcement) which may prohibit them from compliance.

COMMENT: Asks that N.J.A.C. 16:50-12.3(a) be amended to make an employer's legal obligations grounds for applying for a hardship waiver, not just financial hardships.

COMMENT: Limiting the waivers to only "extreme financial hardships" is discriminatory against larger companies and businesses. It essentially denies those companies the opportunity to seek a waiver for valid hardship cases.

COMMENT: The meaning of "extreme financial hardship" as it relates to penalty waivers should be defined.

COMMENT: Hardship waivers should also be available to reduce the target APO for a work location or to exempt certain employees from the APO calculation.

RESPONSE: The Department understands these concerns and has clarified the language to restrict hardship waivers to employers on the basis of evidence that the costs of compliance would substantially impair its ability to continue as an ongoing concern. Further the rule has been modified to allow the Department to adjust the terms and conditions for the waiver. Under these terms, the Department will outline the specific non-financial strategies that an employer will be required to implement, if any. Waivers for reasons other than financial are covered under "good faith effort" waivers. Hardship waivers shall not remove the requirement to achieve the target APO.

COMMENT: Is it "ETRP" or "ETR Review" Board?

COMMENT: NJ Transit should be represented on the ETR Review Board.

COMMENT: Several commenters recommended changes to the composition of the ETRP Review Board. Specific suggestions for changes were: include representative of commuters and environmental interest groups, include New Jersey Transit Corporation, do not include certifiers, include additional employer representatives.

COMMENT: It is important that the public be represented on the Employer Trip Reduction Review Board which now has no public representation.

RESPONSE: It is the ETRP Review Board. The Department concurs with these suggestions and has made the revisions.

N.J.A.C. 16:50-12.4 Application fees for extensions, exemptions, and waivers

COMMENT: The Catholic Conference requests that certain nonprofit agencies incorporated under Title 16 and Title 15A be exempt from the application fees of $250.00 for extensions, exemptions, and waivers and penalties for noncompliance.

COMMENT: An employer who is not required to comply with the ETRP should be not be required to pay a fee when requesting an exemption.

COMMENT: The $250.00 fee per request is burdensome. Request why this appeal fee is required?

COMMENT: Is the $250.00 application request per location or per request for multiple locations?

COMMENT: The hardship waiver mechanism which the Department developed in response to the need for waiving fees from Home Health Care agencies (or anyone) is incredibly cumbersome and costly and should be simplified.

RESPONSE: The Department understands the concern that a $250.00 fee may be considered costly to an employer experiencing a legitimate hardship. However, the Department will incur a legitimate expense in reviewing these requests. Therefore, the Department has added language to allow a refund of the fee, if the request is granted. The waiver approval process was recommended by the business community as a peer review process. Further, the Department has clarified the language to require the fee for each work location request.

N.J.A.C. 16:50-12.5 Definition of "good faith effort"

COMMENT: Criteria for good faith effort waiver should be stringent, including mandatory completion of a 1995 survey and the implementation of contingency measures.

COMMENT: Believes that "good faith" implementation of the certified plan should be enough to waive fines in the future.

COMMENT: If the unique characteristics of the site are responsible for non-compliance, a good faith exemption should be granted.

COMMENT: The additional criteria that may be used in determining a good faith effort are all "over and above" what is required in the regulation.

COMMENT: The criteria for good faith efforts are too subjective. The only question should be whether or not the employer implemented an approved plan. If so, the waiver should be automatic.

RESPONSE: The Department has considered these changes, but has not modified the criteria for good faith effort waivers. The criteria proposed follows USEPA guidance which does not mandate contingency

measures or a 1995 survey for employers. USEPA guidance does not allow the Department to waive the enforcement mechanisms against employers for failure to achieve the APO target. Criteria such as management commitment are equally important to an employer's implementation of an approved plan in demonstrating a good faith effort. USEPA also does not permit exemptions for employers which have unique site characteristics, or any automatic waivers or exemptions.

COMMENT: At N.J.A.C. 16:50-12.5(a), spell out "program" instead of abbreviating in "ECOP."

RESPONSE: The Department agrees and has made the change.

COMMENT: The Commissioner's decisions are final only as far as the DOT is concerned. Further recourse to Administrative Law Judges and the Appeals Court may be had.

RESPONSE: The Department has revised the rules to clarify that the provisions of the Administrative Procedures Act (APA) (N.J.S.A. 52:14B-1 et seq.) apply to appeals filed under this chapter. The ETRP Review Board established in this chapter gives employers a preliminary appeal process which includes representatives from other affected employers. However, the ETRP Review Board does not replace the APA process if an affected employer seeks additional recourse.

Summary of Agency-Initiated Changes:

N.J.A.C. 16:50-2.1 Definitions

In the definition of "**affected employee**," "arrives at" has been changed to "scheduled to report" in order to provide clearer direction to employers regarding the definition of an affected employee for APO survey purposes. This change has been made throughout the adopted rules for consistency.

The definition of "**vehicle**" has been changed to include alternative fuel vehicles to clarify for employers that they are counted in the APO survey as zero vehicles.

N.J.A.C. 16:50-6.3 Number of AVO Zones

For consistency with USEPA guidance and for clarification purposes, references to "affected areas" have been changed to **AVO zones**.

N.J.A.C. 16:50-6.4 Baseline AVO

The baseline AVO for the Suburban Zone has been changed from 1.12 to 1.10, therefore the APO Target for the Suburban Zone shall be 1.38. This change was made after a review of the AVO Study revealed that there was a technical error in the calculation of non-employee drop-offs in the Suburban Zone. The change does not affect the AVO baseline or APO target for the Urban Zone and APO Target Areas.

N.J.A.C. 16:50-6.5 Target APO

The Department has replaced the terminology of "sub-area" with "target area" for purposes of better defining APO averaging and consolidated plans.

N.J.A.C. 16:50-7.4 Reporting of survey results

The Department has added language to specify the latest date that the Department will provide the standard survey forms to employers.

N.J.A.C. 16:50-8.6 Required components of APO Survey Reports

The Department has added language to clarify that employers must also include a commitment to continue program elements since the APO Survey Report is an integral part of the maintenance plan, if required by USEPA after 1997.

N.J.A.C. 16:50-9.1(a)1 Selection and approval of certifiers

The Department has added an additional qualifier of "other closely" related field to the experience requirement for candidate certifiers. It is important that the certifier be well versed in transportation demand management or transportation planning, since not all transportation experience may be pertinent to the skills and experience needed for reviewing and certifying compliance plans. Employers need to be assured that the certifiers will be proficient in this area and the training that will be provided by DOT, even though it will be intensive and thorough, will not be able to overcome the lack of previous experience in TDM or transportation planning. Clarification has also been provided that subsequent requests for qualifications (RFQs) for certifiers may be issued by the Department to ensure an adequate number of approved certifiers.

N.J.A.C. 16:50-12.3(e) Penalties for noncompliance

The Department has deleted the last 14 words of the fourth sentence, beginning at "as provided in a case of government employers . . .," because this part was redundant and unnecessary.

N.J.A.C. 16:50-13.3 Waivers

N.J.A.C. 16:50-13.3(b)1: To provide better direction to employers, the Department has added language to specify the information which must be submitted with a "good faith effort" waiver request.

N.J.A.C. 16:50-13.3(b)2: The Department has extended the time it has to review and act on a waiver request from 60 to 120 days. This change has been made to allow sufficient time for both the Department and the ETRP Review Board to consider the request. Additionally, the Department has added language which requires any representative to the ETRP Review Board to remove himself or herself from the review of a case in which a conflict of interest exists. Anyone having a personal or professional relationship with the affected employer who has come before the Board must remove themselves from the review and discussion of the case.

N.J.A.C. 16:50-13.3(b)3: The Department has added language allowing the ETRP Review Board to recommend an alternative time period for waivers, which could be more or less than the one year provided for in the proposed rules. This change has been made to be more requestor friendly and to allow for more flexibility in reviewing and granting waiver requests.

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

CHAPTER 50
EMPLOYER TRIP REDUCTION PROGRAM

SUBCHAPTER 1. STATUTORY AUTHORITY

16:50-1.1 Statutory authority

(a) To reduce traffic congestion in the State and comply with the ***1990 Federal*** Clean Air Act Amendments (CAAA), in June, 1992 the New Jersey State Legislature passed State legislation, P.L. 1992, c.32; N.J.S.A. 27:26A-1 to 27:26A-14, the "New Jersey Traffic Congestion and Air Pollution Control Act" (Act). The Act, which assigns responsibility for developing and administering the Employer Trip Reduction Progam to the New Jersey Department of Transportation, requires each employer with 100 or more employees at a single work location to develop and implement employee commute option (ECO) programs to reduce vehicle trips ***and vehicle miles travelled*** to the site by encouraging employees to use public transit, share rides in carpools and vanpools, or use another commute alternative. The Act further establishes a deadline, November 15, 1996, by which employers must achieve a target average passenger occupancy of passenger vehicles arriving at their work locations during the peak morning commuting period.

(b) Section 182(d)(1)(B) of the Clean Air Act Amendments (CAAA) of 1990 (42 U.S.C. Section 7511a(d)(1)(B)), requires states with pollution levels defined by the Federal government as "severe" or "extreme," of which New Jersey is one, to implement programs to reduce vehicular emissions. Further, states with severe or extreme ozone pollution are required to develop and implement "Employer Trip Reduction Programs," or ETRPs, designed to reduce work related vehicle trips and vehicle miles travelled during peak commuting periods in the ozone "non-attainment" areas.

(c) Consistent with the aforementioned State and Federal laws, this chapter establishes an Employer Trip Reduction Program to reduce traffic congestion and air pollution in the State of New Jersey.

SUBCHAPTER 2. DEFINITIONS

16:50-2.1 Definitions

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

"Act" means "New Jersey Traffic Congestion and Air Pollution Control Act" (P.L. 1992, c.32; N.J.S.A. 27:26A-1 to 14).

"Affected area" means a geographic area designated in N.J.A.C. 16:50-6, which is considered a highly congested area or is an ozone

non-attainment area for which an ETR program is required under the Clean Air Act.

"Affected employee" means an employee, employed by an affected employer, who *[arrives]* ***is scheduled to report*** at the ***affected*** work location during the peak period.

"Affected employer" means an employer that employs *[an average of]* 100 or more employees ***as averaged over the immediately preceding 12 month period*** *[in]* at *[least one]* ***any single*** work location in an affected area of New Jersey.

"Affected work location" or "affected location" means a work location of an affected employer where 100 or more employees report to work or are assigned primarily for the purpose of performing work for the employer.

"Alternative fuel vehicle" means a vehicle *[fueled or propelled]* ***solely powered*** by energy sources that are non-polluting or produce emissions substantially below those of gasoline-powered vehicles. Alternative fuels shall include: electricity, natural gas, propane, methanol, and other fuels as defined in The Comprehensive National Energy Policy Act of 1992, Title 3: Section 301, Public Law 102-486, approved October 24, 1992.

"Alternative work schedule" means a compressed work week schedule, flextime or other flexible work hours schedule, or staggered work hours schedule.

"Average passenger occupancy" or "APO" means the average passenger occupancy of commuting vehicles arriving at an employer's affected location during peak periods, as calculated by the formula in N.J.A.C. 16:50-7.

"APO Survey" means the survey of affected employees' commute patterns required to be conducted at an affected location by affected employers in accordance with N.J.A.C. 16:50-7.

"Average vehicle occupancy" or "AVO" means the average occupancy of all commuting vehicles arriving at all work locations within an AVO zone of an affected area during the peak period.

"Average vehicle occupancy zone" or "AVO zone" means an ozone non-attainment area or portion of a non-attainment area as described in N.J.A.C. 16:50-4.

"Carpool" means a group of two to six employees commuting to and from work by means of a vehicle with a seating capacity of 15 or fewer adult occupants.

"Clean Air Act" means the Federal Clean Air Act, as amended by Pub. L. 101-549 (42 U.S.C. §§7401 et seq.) and as subsequently amended or supplemented.

"Commissioner" means the Commissioner of Transportation of the State of New Jersey.

"Commute alternative" means ***the mode of*** travel between *[a person's]* ***an employee's*** place of residence and place of employment, ***which is*** other than in a motor vehicle occupied by one person. Commute alternatives include, but are not limited to, public transportation, carpools, vanpools, buspools, ferries, bicycling, and walking, which may be used independent of or in conjunction with alternative work schedules, teleworking and like measures. For purposes of these rules, teleworking and telecommuting are considered *[commuting]* ***commute*** alternatives.

"Compliance plan" *[or]***,*** "plan***,***" ***"update plan," "revised plan" or "maintenance plan"*** means a plan an affected employer is required to submit to the Department in accordance with N.J.A.C. 16:50-8.

"Compressed work week" or "compressed work schedule" means a schedule in which employees work ***either*** 35 or more hours in fewer than five ***consecutive*** *[work]* ***week*** days or ***70 or*** more *[than 70]* hours in fewer than 10 ***consecutive*** *[work]* ***week*** days. Compressed work schedules shall ***also*** include: "Four day-40 hour," "Three day-36 hour," "Nine day-80 hour," "Nine day-72 hour" schedules, and other work schedules that reduce the number or frequency of commute trips.

"Consolidated plan" means a plan, submitted by one employer for two or more of the employer's *[distinct]* ***affected*** work locations within *[a]* ***any*** target APO *[sub-area]* ***area***, or submitted by several employers with work locations within *[a]* ***any*** target APO *[sub-area]* ***area***, that satisfies the plan submittal requirement of N.J.A.C. 16:50-8 for each of the ***affected*** work locations.

"Department" or "DOT" means the New Jersey Department of Transportation.

"Employee" means a partner or limited partner in a partnership, or any person employed by an employer, in a full-time or part-time; permanent, temporary, or contract position, excluding volunteers, who either reports to work or is assigned primarily to a work location 80 or more hours per 28-day period for at least two ***consecutive*** months *[in any four consecutive months]*. ***A*** contract position is one in which the employee ***has a direct contractual relationship as an individual with the affected employer, and*** reports to the ***affected*** work location for a period of at least six ***consecutive*** months and whose work hours and assignments are defined by the employer *[at any time after (the effective date of this chapter)]*. ***A contract position shall not include those individuals employed through independent contract companies.***

"Employee commute options (ECO) program" means a program, required to be implemented by an affected employer at a work location in accordance with this chapter to reduce vehicle trips to the work location during the peak period, increase the location APO, *[or]* ***and*** reduce commute trip vehicle miles travelled by employees at the location.

"Employee transportation coordinator (ETC)" means an employee appointed by an employer to develop and administer an employee commute options (ECO) program at a work location.

"Employer" means any person, partnership, association, corporation, institution, trust, legal representative or any organized group of persons which hires or employs employees in New Jersey and shall also include all public and quasi-public employers, including without limitation the United States and any of its governmental instrumentalities, the State of New Jersey and its instrumentalities, State departments or agencies, and subdivisions, *[other government departments and agencies]* ***county governments, municipal governments***, and all State and bi-state authorities, corporations, commissions, boards, and like bodies.

"Employer trip reduction program" or "ETRP" means the program, required to be implemented by the State of New Jersey under the CAAA, to reduce vehicle trips arriving at work locations within the State and vehicle miles travelled by employees arriving at those work locations ***for commutation purposes***.

"Government employer" means the United States and any of its governmental instrumentalities, the State of New Jersey and its instrumentalities and subdivisions, and county and municipal governments.

"Highest ranking responsible officer" means the president, executive or managing director, other chief executive or operating officer, or other highest ranking employee located at an affected work location, who has primary responsibility for the operation and management of the work location.

"Independent government employer" means an independent or semi-autonomous State authority, corporation, commission, board or like body which does not receive State appropriations and shall also include any bi-state authority which has work locations within the State, and the South Jersey Port Corporation notwithstanding that it may receive a State appropriation.

"Peak period" means the time period between the hours of 6:00 A.M. and 10:00 A.M. inclusive, Monday through Friday.

"Public transportation" means rail passenger service, motorbus regular route service, paratransit service, and motorbus charter service or other transportation services ***such as ferry services,*** available to the traveling public whose purpose is to carry passengers between two or more points.

"Single occupant vehicle (SOV)" means a motor vehicle used for commuting purposes occupied by only one person.

"State department or agency" means a department or agency of the Executive, Legislative, or Judicial branches of State government.

"Subchapter" means a subchapter of these rules.

"Teleworking" or "telecommuting" means a strategy in which an employee substitutes ***for an entire day*** the location at which its

work is performed; that is, work *[usually]* ***assigned to be*** done at the ***affected*** work location is instead done at the employee's residence or *[satellite]* ***other*** work location ***that is not more than 10 miles and not more than 50 percent of the distance from the employee's home to the affected work location***, such that the employee makes a *[total or partial]* substitution for *[a]* ***the*** commute trip to the affected work location *[on a teleworking day]* ***for the entire day***.

"Transportation management association (TMA)" means a non-profit corporation that coordinates local commuter transportation services, including, but not limited to, public transportation, van-pools, carpools, bicycling and pedestrian modes, as well as ***trip reduction*** strategies such as alternative work *[hours]* ***schedules and teleworking***; and provides other similar services for New Jersey corporations, employees, developers, individuals, and other groups.

"Travel demand management (TDM)" means a system of actions whose purpose is to alleviate traffic-related problems through improved management of vehicle trip demand. These actions, which are primarily directed at commuter travel, are structured to reduce the dependence on and use of single occupant vehicles, or to alter the timing of travel to other, less congested time periods, or both.

"Vanpool" means a group of seven or more employees commuting to and from work by means of a vehicle with a seating capacity of not more than 15 adult occupants.

"Vehicle" means a highway vehicle powered by *[a]* gosoline or diesel internal combustion engine with fewer than nine seating positions for adults and used for commuting purposes. ***This shall include alternative fueled vehicles.***

"Work location" or "location" means an area, building, or grouping of buildings located within the target APO area, which are in actual physical contact or separated only by a private or public roadway or other private or public right-of-way, ***other than a limited access or center median divided highway,*** which are under the ownership, operation, or control of the same employer, and where employees perform work. Businesses that ***are owned by the same employer and are physically located in the same or adjacent buildings, shall be considered separate work locations, if they*** are operated separately and distinctly *[shall be considered separate work locations even if they are owned by the same employer and are physically located in the same or adjacent buildings]*.

SUBCHAPTER 3. SCOPE AND REQUIREMENTS

16:50-3.1 Scope

The requirements of this chapter apply to all affected employers as defined in N.J.A.C. 16:50-2, including government employers ***and independent government employers***, except that affected employers that have fewer than 33 employees reporting to work during the peak period or that employ ***an average of less than*** 100 employees *[for fewer than six months of any consecutive]* ***for the immediately preceding*** 12 month period may apply to the Department for an exemption from the requirements of this chapter.

16:50-3.1 Employer requirements

(a) Seven actions are required of affected employers. An affected employer shall:

1. Register with the Department as an employer subject to the provisions of this chapter (N.J.A.C. 16:50-5);
2. Designate an employee transporation coordinator (ETC) at each affected work location (N.J.A.C. 16:50-8);
3. Periodically conduct an APO survey of its employees at each affected work location to determine employees' current commute patterns and report the results of the survey to the Department (N.J.A.C. 16:50-7);
4. Develop and submit to the Department by November 15, 1994 and in subsequent years as required by this chapter, compliance plans that describe activities to be implemented at the location under an employee commute option (ECO) program (N.J.A.C. 16:50-8);
5. Implement the program outlined in the compliance plan (N.J.A.C. 16:50-8);
6. No later than November 15, 1996, increase the average passenger occupancy (APO) at each affected location *[by not less than 25 percent over the average vehicle occupancy (AVO) for the AVO zone (N.J.A.C. 16:50-6)]* ***to the target APO for the affected zone or subarea as defined in N.J.A.C. 16:50-6***; and
7. Maintain the target APO after achieving the target.

(b) An affected employer failing to undertake any or all of these actions shall be considered in violation of this chapter and shall be subject to penalties in accordance with N.J.A.C. 16:50-*[12]*** ***13***.

SUBCHAPTER 4. EMPLOYER NOTIFICATION

16:50-4.1 Notification mailing

(a) The Department shall notify employers, by the following procedure, of the requirements of this chapter:

1. *[Not later than October 31, 1993, or one week after the effective date of these rules, whichever is later,]* ***On or about January 3, 1994,*** the Department of Labor ***or the Department (DOT) as its designee,*** shall notify affected employers by certified mail*[, and all other employers by regular mail,]* of their obligations under the ETRP rules. ***On or about January 31, 1994, all other employers shall be notified by regular mail of the requirements of these rules.*** The notification letter shall outline the procedure for employer registration and be accompanied by a standard registration form described in N.J.A.C. 16:50-5.
2. In each year after the initial notices are mailed, DOL ***or DOT as its designee,*** shall send notices to any *[affected]* employer added to the list since the previous notification mailing.
3. DOL shall transmit copies of all mailing lists to DOT within seven calendar days of the date of each *[mailing of]* notification ***mailing***.

16:50-4.2 Published notice

[Not later than October 31, 1993, or two weeks after the effective date of this chapter, whichever is later] ***On or about January 3, 1994***, and annually threafter, the Department of Transportation shall publish a general informational notice of New Jersey employers' obligations under this chapter. The notice shall provide information on how employers can obtain required forms from the Department and shall establish a date by which affected employers must return a completed form to the Department. The Department shall publish the notice beginning on the date of the first notification mailings and shall run the notice for at least three days over a two week period in at least six newspapers having circulation in various parts of the State. The Department also shall publish the notice in the first New Jersey Register released after the date of the first notification mailings.

SUBCHAPTER 5. EMPLOYER REGISTRATION

16:50-5.1 Registration deadlines

(a) By the due date specified in the notification mailing and as published in the public notice (see N.J.A.C. 16:50-4), each affected employer shall submit a completed standard registration form to the Department. Notwithstanding that an employer may not have been mailed or received the notice or form *[from the Department of Labor]*, an affected employer shall in any event complete the required registration form, copies of which may be obtained upon request from the Department of Transportation, ***Bureau of Employer Group Reduction,*** and submit the completed form to the Department by the deadline specified in the published notice.

(b) Each employer that receives a notification packet shall respond even if the employer believes it is not subject to this rule. An employer that does not meet the definition of affected employer shall not be required to submit the standard registration form, but shall submit an ETRP return card for non-affected employers, included in the notification packet, indicating the reason for non-applicability. The Department may request the employer to submit additional documentation to verify the employer's non-affected status.

(c) An employer that is not subject to this chapter at the time the first notices are mailed, but that subsequently becomes an affected employer ***or an affected employer with a non-affected work***

site that subsequently becomes affected*, shall submit a registration form to the Department within 60 days of becoming an affected employer.

(d) An affected employer that moves its work location after registering with the Department must submit a new registration form within 60 days *[after]* ***of*** the date of the relocation.

16:50-5.2 Completion and submittal of registration form

(a) Each affected employer shall complete a standard registration form for each affected location in New Jersey. The form must be signed by the highest ranking responsible officer at the location who shall attest to the accuracy of the information reported. An ***affected*** employer shall provide the following information on the form:

1. The name of the ***affected*** employer and address of the ***affected*** work location;
2. The name and telephone of the highest ranking responsible officer at the ***affected work*** location;
3. Designation of the location as a single site, headquarters, or branch;
4. The total number of employees at the location and the number assigned to report to the work location during the peak period; *[and]*
5. The name, telephone number, and address (if different from that named in (a)1 and 2 above) of the *[employee transportation coordinator (ETC)]* ***person*** at the location *[to receive APO survey and compliance plan forms and]* who will serve as the employer's contact with the Department*[.]* ***and***

6. The name, telephone number and address of a contact person who is designated to receive APO survey and compliance plan forms.

(b) An affected employer with more than one location in New Jersey shall complete a separate registration form for each affected location, but individual registration forms may be submitted together. *[The employer shall designate an ETC the Department may contact at each location. Notwithstanding this provision, an]* ***An*** affected employer may designate a single contact person to receive APO survey and compliance plan forms for all affected locations.

SUBCHAPTER 6. AVERAGE VEHICLE OCCUPANCY (AVO) ZONES AND AVERAGE PASSENGER OCCUPANCY (APO) TARGETS

16:50-6.1 Designation of ETRP performance measure

The Department has established average passenger occupancy (APO) at an affected work location as the performance measure against which an employer's compliance with the State's ETR program will be measured. APO is a measure of the average occupancy of passenger vehicles arriving at a single affected location, and is equal to the number of employees arriving at the location during the peak period divided by the number of passenger vehicles in which the employees arrive at the same location during the peak period.

16:50-6.2 Designation of ETRP performance targets

The Department has established four performance targets, called target APOs, each to apply in a distinct, designated affected area of the State as described in (c) below. The performance target for each *[area]* ***AVO zone*** has been set as 125 percent of the average vehicle occupancy (AVO), the average occupancy of all ***commuting*** vehicles arriving at all work locations in the affected area, as measured by a 1992 telephone survey, conducted by the Department, of employees employed at New Jersey work locations.

16:50-6.3 Number of AVO Zones

(a) For the purpose of establishing ETRP performance targets, the Department has divided the State into two *[affected areas]* ***AVO zones***, hereinafter referred to as the Urbanized Area Zone and the Suburban Area Zone, that will be included in the ETRP. These areas, which were *[selected as areas with]* ***designated as severe ozone non-attainment areas by the CAAA, were also designated as separate AVO zones based on their*** substantially similar development characteristics and availability of transportation services and facilities*[,]***. The AVO zones*** are defined as follows:

1. The Urbanized Area Zone shall include the following New Jersey counties, inclusive except where otherwise noted:
   i. Bergen County;
   ii. Essex County;
   iii. Hudson County;
   iv. Union County; and
   v. Passaic County, municipalities of Clifton, Paterson, and Passaic only
2. The Suburban Area Zone shall include the following New Jersey counties, inclusive except where otherwise noted:
   i. Burlington County;
   ii. Camden County;
   iii. Cumberland County;
   iv. Gloucester County;
   v. Hunterdon County;
   vi. Mercer County;
   vii. Middlesex County;
   viii. Monmouth County;
   ix. Morris County;
   x. Ocean County;
   xi. Somerset County;
   xii. Salem County;
   xiii. Sussex County; and
   xiv. Passaic County, all municipalities EXCEPT Clifton, Paterson, and Passaic.

16:50-6.4 Baseline AVO

The Department has determined baseline AVOs, that is, baseline levels of vehicle occupancy, for each AVO zone for the base year 1992 as follows:

AVO Zone Designation	Baseline AVO
Urbanized Area Zone	1.22
Suburban Area Zone	*[1.12]* ***1.10***

16:50-6.5 Target APO

The Department has calculated the target APO for each AVO Zone at 25 percent above the baseline AVO for the zone (baseline AVO × 1.25). The Department further has established target APOs that affected employers in each zone must meet. In the Urbanized Area Zone, three *[sub-area targets]* ***target areas*** have been established based on the employment density of the *[sub-area]* ***target area***. In the Suburban Area Zone, a single target APO has been established. Target APOs for affected areas in each zone are as follows:

AVO Zone Designation	Target APO
1. Urbanized Area Zone	
i. *[Sub-]* ***Target*** area 1: Urban Core (Newark CBD, Jersey City CBD and Hoboken) covering zip codes: 07030, 07102, 07302, 07303, 07306, 07310, and 07311	1.97
ii. *[Sub-]* ***Target*** area 2: Remainder of Hudson County	1.73
iii. *[Sub-]* ***Target*** area 3: Bergen County, Union County, remainder of Essex County, and Clifton, Passaic, and Paterson in Passaic County.	1.46
2. Suburban Area Zone (entire zone)	*[1.40]* ***1.38***

16:50-6.6 Deadline for compliance with the target APO

Not later than November 15, 1996, each affected employer is required to increase the APO at the employer's affected work location during the peak period to the target APO of the *[zone]* ***target area*** in which the employer is located. An employer that has achieved the target APO is required to maintain the location APO at a level at least as high as the target APO, but is not required to increase its APO beyond the target APO. Each affected employer shall document achievement of the target APO at each affected

location through the APO survey, described in N.J.A.C. 16:50-7, and report the location's compliance with the target APO to the Department in the Update Plan, in accordance with N.J.A.C. 16:50-8.

SUBCHAPTER 7. AVERAGE PASSENGER OCCUPANCY (APO) SURVEY

16:50-7.1 Requirement to survey

For the purpose of documenting the work location APO, each affected employer shall *[in 1994 and 1996]* conduct APO surveys of the commute patterns of the employees who *[arrive at]* ***are scheduled to report to*** its ***affected*** location during the peak period. ***APO surveys shall be conducted no earlier than December 6, 1993 and in each year that the employer is required to make a submission to the Department.*** An employer that has not demonstrated achievement of the target APO by November 15, 1996 shall additionally conduct an APO survey in 1997 ***as specified in N.J.A.C. 16:50-7.3(a)***. An affected employer with more than one location in the State shall conduct a survey at each affected location.

16:50-7.2 Notice of requirement to survey

The Department shall, within 180 days of receiving completed registration forms from affected employers, but not later than May 1, 1994, notify each affected employer of the requirement to conduct an APO survey and to develop and implement a compliance plan in accordance with the requirements of N.J.A.C. 16:50-8. The notice shall include copies of the required APO survey and compliance plan forms.

16:50-7.3 Survey procedure

(a) An affected employer shall conduct an APO survey of all employees assigned to report to the work location during the peak period, except as provided in (a)4 below, using the following procedure:

1. An employer shall use the standard APO survey form provided by the Department, and designed to collect information on the commute patterns of affected employees to allow the employer to calculate the work location APO as described in N.J.A.C. 16:50-7.5. The standard form shall be used without alteration, except that the Department may permit an employer to substitute a different survey form that collects information that is substantially similar to that collected by the standard form if the employer's form has been submitted to and approved by the Department, prior to administration of the survey. The Department shall have the authority to refuse approval of any form that could be expected, in the Department's judgement, to produce different survey results than if the standard form had been used. An employer shall be permitted to attach additional sruvey forms to the standard form, if desired, without prior approval of the Department. ***Notwithstanding these provisions, alterations, such as photocopying the survey on company letterhead, that do not add or delete questions or change the wording or order of questions, will be permitted without prior written approval of the Department.***

2. Employers shall choose a typical week in which to conduct the APO survey. A week shall not be considered typical if it:

i. Includes a holiday observed by the employer;

ii. Immediately follows a week in which a holiday was observed on Friday or precedes a week in which a holiday will be observed on Monday;

iii. Is a week during which the employer holds a rideshare fair or other intensive information promotion related to the ECO program;

iv. Is a week in which the location has a partial or complete shutdown of its operation ***causing a significant fluctuation in the number of employees scheduled to report to the affected work location***; or

v. Is a week with any other anomalous change or fluctuation in the number of employees *[reporting]* ***scheduled to report*** to the ***affected*** work location.

3. APO surveys conducted for subsequent plan submittals (1996, 1997 and after, if required) shall *[not]* be conducted *[earlier than April in]* ***within one month of the anniversary date of the previous survey, but no earlier than January of*** the submittal year.

4. An affected employer shall survey all affected employees *[arriving at]* ***scheduled to report to*** the affected location during the peak period in the survey week, except that an employer with 1,000 or more employees arriving at a single location during the peak period may survey a random sample of those employees. Employers desiring to conduct a random sample survey shall submit to the Department***, Bureau of Employer Trip Reduction,*** a sampling methodology that is recognized as statistically valid with a 95 percent confidence level, and *[with]* documentation that the person or persons conducting the survey have the qualifications to ensure the survey will be conducted in a *[statistical]* ***statistically*** valid manner. The Department shall grant or deny approval for the random survey within 30 days of receipt of the methodology. ***Employers utilizing random sampling surveys shall be subject to the requirements for document recordkeeping (N.J.A.C. 16:50-8.10) and work location audits (N.J.A.C. 16:50-11.1) as employers using the standard survey procedures.***

[5. An affected employer shall achieve an APO survey response rate of at least 75 percent of all employees assigned to report to the affected work location during the peak period. An employer that fails to achieve at least a 75 percent response rate on any APO survey shall re-conduct the survey until the required response rate is achieved. Alternatively, an employer may choose to count each affected employee that did not respond to the survey as having arrived at the location in a single occupant vehicle.]

*[6.]***5.*** An affected employer may use its own staff to conduct the APO survey or arrange with a market research or transportation consultant, local government, TMA, or other entity outside the employer to conduct the survey.

16:50-7.4 Reporting of survey results

An affected employer shall tabulate the APO survey results and report the results to the Department on a standard form ***to be*** provided by the Department ***no later than May 1, 1994***. An employer shall submit the APO survey results as a component of the compliance plan in accordance with N.J.A.C. 16:50-8. In years in which the employer is required to document its work location APO to the Department but is not required to submit a plan, survey results shall be submitted alone as an APO survey report.

16:50-7.5 Calculating work location APO

(a) An affected employer shall demonstrate its compliance with the ETRP by documenting achievement of the target APO as described in ***N.J.A.C.*** 16:50-6. The Department shall measure each affected employer's performance, as documented by the work location APO, against the target APO.

1. An employer shall calculate the APO for its work location from the results of the APO survey as follows:

$$\text{Work Location APO} = \frac{\text{Number of Employees Arriving}}{\text{Number of Vehicles Arriving}}$$ where:

Employees Arriving is: total number of employees *[arriving]* ***scheduled to report*** at the location between 6:00 A.M. and 10:00 A.M., Monday through Friday of the survey week, and

Vehicles Arriving is: total number of passenger vehicles in which ***these*** employees arrive at the location between 6:00 A.M. and 10:00 A.M., Monday through Friday of the survey week.

To illustrate the calculation of APO, the following example is provided:

	Mon.	Tue.	Wed.	Thur.	Fri.	Total Week
No. Employees	200	200	200	200	200	1,000
No. Vehicles	165	170	180	175	170	860

$$\text{Work Location APO} = \frac{\text{1,000 Employees Arriving}}{\text{860 Vehicles Arriving}} = 1.16$$

2. Calculation of affected location APO shall count employees *[arriving]* ***scheduled to report*** at the location during the peak periods, Monday through Friday of the survey week as follows:

i. Each employee that *[arrives]* ***is scheduled to report*** at the location during the peak period shall be counted as one employee arriving for each of the days Monday through Friday of the survey week that the employee reports to the location, regardless of the ***actual arrival time or*** length of time the employee remains at the

location. ***An employee that is scheduled to report between 6:00 A.M. and 10:00 A.M., but that actually arrives at the primarily affected work location prior to 6:00 A.M. or after 10:00 A.M. shall be counted as arriving at the scheduled to report time.***

ii. Each employee that teleworks *[all day from the employee's home or a satellite work location]* shall be counted as one employee *[arriving]* ***scheduled to report during the peak period*** for each day the employee teleworks.

iii. Each employee that works a compressed work week shall be counted as one employee *[arriving]* ***scheduled to report during the peak period*** for each *[day not reporting to the affected work location]* ***day worked as well as each compressed work week day off*.**

***iv. An employee that is scheduled to report to the affected work location but that does not report at all shall not be counted for the day that he or she does not report to the affected work location.**

v. An employee that is scheduled to report at the affected work location during the peak period and then remains on-site or at work for more than 24 continuous hours shall be counted as arriving each consecutive day they remain on-site or at work.*

*[iv.]***vi.*** Beginning in 1995 and in any subsequent year, each employee ***whose scheduled to report time was in the peak period in 1994 and has now been purposefully changed to a time outside of the peak period, other than those caused regularly scheduled shift work changes and that was scheduled to report*** *[that arrives at the location at a time other than the peak period, but that arrived]* during the peak period during the survey week documented in the approved 1994 plan, shall be counted as one employee *[arriving]* ***scheduled to report*** for each survey day the employee arrives at the work location.

3. For calculation of APO, the count of vehicles arriving shall include:

i. Passenger cars and trucks, with fewer than seven employees; and

ii. Motorcycles and mopeds.

4. The following shall be counted as zero vehicles arriving:

i. Vanpools with seven or more employees;

ii. Public or private buses, trains, or other mass transportation vehicles;

iii. Bicycles and other non-motorized vehicles; and

iv. Alternative fuel vehicles.

5. An employee that works a compressed work week or teleworks *[the entire day at home]* shall be counted as arriving at the work location in a zero vehicle on the day he or she does not report to the affected work location.

6. An employee that is scheduled to report at the affected work location during the peak period and then remains on-site or at work for more than 24 continuous hours shall be counted as arriving in the commute mode in which they arrived the first day and then in a zero vehicle for each consecutive day they remain on-site or at work.

*[6.]***7.*** Beginning in 1995 and in any subsequent year, each employee *[that arrives at the location at a time other than the peak period, but that arrived]* ***that was scheduled to report during the peak period in 1994 and whose scheduled to report time gets changed to a time outside of the peak period, other than those caused by regularly scheduled shift work changes and that was scheduled to report*** during the peak period in the *[most recent]* survey week ***documented in the approved 1994 plan***, shall be counted as ***one employee*** arriving *[at the work location]* in a zero vehicle *[on]* ***for*** each survey day the employee arrives at the ***affected*** work location at a time other than the peak period.

*[7.]***8.*** An employee that is dropped off at the ***affected*** work location by another employee or employees commuting to their work location or locations shall be counted as arriving in a share of a vehicle proportional to the number of occupants in the vehicle***, even if the other employees do not work for an affected employer***.

9. An employee that is dropped off at the work location by a person **not** *[traveling to his or her]* ***proceeding on to a*** work location ***as an employee*** shall be counted as arriving in a single occupant vehicle.

*[8.]***10.*** An employee that commutes in a commute alternative for ***at least*** 50 percent *[or more]* of the total length of his or her *[work]* ***one way*** trip ***to work*** ***or*** in a commute alternative for *[10]* ***two*** or more one-way miles, whichever is less, shall be counted as arriving in that commute alternative in the APO calculation.

[9. An employee that works all day at a satellite work location which is not more than 10 miles and not more than 50 precent of the distance from the employee's home to the primary work location shall be counted as arriving in a zero vehicle.]

*[10.]***11.*** An affected employer shall not count employees who *[are handicapped]* ***have disabilities which*** require the use of a single-occupant vehicle for commuting in the APO calculation. ***The vehicles of such employees shall not be counted in the APO calculation.***

*[11.]***12.*** An affected employee that does not respond to the APO survey as described in N.J.A.C. 16:50-7.3(a)4 shall be *[considered for purposes of the APO calculation to have arrived at the work location in a single-occupant vehicle and be]* counted as one employee arriving in one vehicle ***for the purposes of the APO calculation***. Notwithstanding this provision, however, if the employer has achieved a response rate among employees scheduled to report during the peak period of the survey week of 90 percent or higher, nonresponding employees shall be assumed to have commute patterns proportional to the ***commute*** patterns of respondents.

SUBCHAPTER 8. COMPLIANCE PLANS AND APO REPORTS

16:50-8.1 Requirements

Each affected employer shall prepare and implement compliance plans and ***shall prepare*** APO reports in accordance with the procedures and schedules established in this subchapter.

16:50-8.2 Plan and report submittal schedule

(a) Each affected employer shall submit compliance plans and APO reports, as described in N.J.A.C. 16:50-8.4 and 8.5, respectively, to the Department ***of Transportation, Bureau of Employer Trip Reduction, ATTENTION Compliance Unit, 1035 Parkway Avenue, Trenton, NJ 08625*** in accordance with the following schedule:

1. Not later than November 15, 1994, each affected employer shall prepare and submit to the Department an initial compliance plan for each of its affected work locations. An employer that becomes an affected employer ***or an affected employer with a non-affected work location that becomes affected*** after May 1, 1994 shall be given a minimum of 180 days from the date it registers with the Department, as required by N.J.A.C. 16:50-6, to prepare and submit an initial compliance plan. This employer further shall not be required to demonstrate achievement of the target APO in effect on the date of the initial submittal ***for the newly affected work location*** until *[one]* ***two*** year***s*** following submittal of the initial plan *[or November 15, 1996, whichever is later]*.

2. Not later than November 15, 1996, each affected employer ***that has achieved the required APO target*** shall prepare and submit to the Department *[an update plan]* ***a maintenance plan*** for each ***affected*** work location as described in N.J.A.C. 16:50-8.4***(c)***.

3. Not later than November 15, 1996, each affected employer that has not achieved the required APO target shall prepare and submit to the Department an update plan as for each affected work location as described in N.J.A.C. 16:50-8.4(c).

*[3.]***4.*** After November 15, 1996, each employer shall maintain the target APO for the employer's ***target*** area. *[Additional compliance plans]* ***Maintenance plans*** demonstrating achievement and maintenance of the target APO shall be required if mandated by the Federal Environmental Protection Agency (EPA), or if required by the New Jersey Department of Environmental Protection and Energy to comply with EPA's mandated State Implementation Plan requirements, or if an employer is not in compliance with the required target APO.

*[4.]**5.* Not later than November 15, 1997, each affected employer whose 1996 APO survey showed it did not meet the target APO for an affected work location shall prepare and submit to the Department an APO Survey Report for each such work location documenting the results of a 1997 survey.

*[5.]**6.* An affected employer that moves its work location within the State, desires to modify the elements of its compliance plan, or experiences a change in its work location operations that could reasonably be expected to affect the appropriateness or effectiveness of an approved compliance plan, shall submit a revised plan within 90 days of the change. ***A revised compliance plan must be reviewed by a certifier prior to submittal to the Department when the revision is necessitated by a relocation of the affected work location. Other compliance plans revised for other minor corrections may be submitted directly to the Department for review and approval.***

16:50-8.3 Plan filing fees

(a) Each affected employer shall submit a filing fee upon submittal of a compliance plan in accordance with the following fee schedule:

1. For locations with 100 to 499 employees, $200.00 for the initial filing and $400.00 for each subsequent biennial filing.

2. For locations with 500 to 749 employees, $400.00 for the initial filing and $800.00 for each subsequent biennial filing.

3. For locations with 750 to 999 employees, $600.00 for the initial filing and $1,200 for each subsequent biennial filing.

4. For locations with 1,000 or more employees, $800.00 for the initial filing and $1,600 for each subsequent biennial filing.

(b) Notwithstanding the fee schedule described in (a)1 above, an employer with more than five affected locations shall not pay a combined fee of more than $4,000 for an initial filing or more than $8,000 for *[future]* ***subsequent*** biennial filings.

(c) *[An employer]* ***The filing fee for*** submitting a consolidated plan shall *[pay a filing fee equal to the fee the]* ***be equal to the highest fee any of the employers participating in the consolidated plan*** *[employer]* would pay if filing a plan for its work location alone.

(d) Government employers other than independent government employers shall be exempt from the payment of filing fees.

16:50-8.4 Components of a standard ***compliance*** plan

(a) An affected employer shall prepare the compliance plan using a standard compliance plan form developed by the Department. The plan will include all information required by the standard plan form, including the following:

1. The name of the affected employer, address of the work location, and name, title, and *[signature]* ***telephone number*** of the Employee Transportation Coordinator (ETC) at the work location appointed by the employer;

2. The ***tabulated*** results of the *[latest and most recent past annual]* ***current APO survey and any previously required*** APO surveys and a description of the procedure used to conduct the APO survey;

3. A description of the physical and transportation service characteristics of the work location, and demographic, work, and travel-related characteristics of the employee population;

4. A description of ECO strategies currently available to employees at the work location and additional ECO strategies the employer will implement at the work location. An employer desiring advice and suggestions on ECO strategies should refer to resource materials provided by the Department. One strategy that could be included, as encouraged by the Act (Section 5(l)) is a reduction in the number of parking spaces available for employees at work locations and designation of the most desirable parking spaces as reserved for high occupancy vehicles;

5. Activities planned by the employer to implement the ECO program and a time schedule for implementation of the program; ***and***

6. A description of the process by which the employer will periodically monitor and review progress toward the APO target*[; and]***.***

[7. For update plans only; a discussion of the employer's "good faith efforts," described in N.J.A.C. 16:50-12.5, to achieve the target APO, an explanation of why the ECO strategies included in the last plan did not produce the target, and a discussion of how the employer plans to achieve the target within one year.]

(b) Each affected employer shall provide information included in (a)1 through 6 above in the initial plan to establish a baseline against which future years can be compared.

(c) Beginning with the 1996 update plan and for any subsequent update plan, an affected employer that has not achieved the target APO also shall provide the ***following:*** *[information described in (a)7 above]*

1. A discussion of the employer's "good faith efforts," described in N.J.A.C. 16:50-13.5, to achieve the target APO;

2. An explanation of why the ECO strategies included in the initial plan did not produce the target; and

3. A discussion of how the employer plans to achieve the target within one year*.

(d) Maintenance plans, only if required by USEPA after 1997, shall consist of an APO Survey Report, as described in N.J.A.C. 16:50-8.6. If the employer's APO has fallen below the target APO, the maintenance plan shall include an explanation of why the APO is less than the target and a description of activities that are intended to be undertaken by the employer in order to meet the target within six months of filing the maintenance plan.*

16:50-8.5 Required components of compliance plan submittals

(a) A complete compliance plan submittal to the Department shall consist of the following elements:

1. *[An executive summary plan that shall consist of a cover sheet that includes information]* ***The plan elements*** described in N.J.A.C. 16:50-8.4(a)1 *[and 2]* ***through 6****, and a summary, prepared by the certifier as described in N.J.A.C. 16:50-9, of ***plan*** information included in N.J.A.C. 16:50-8.4(a)3 through 6. ***Update plan submittals also shall include the information required in N.J.A.C. 16:50-8.4(c)****;

2. The appropriate filing fee as specified in N.J.A.C 16:50-8.3***(c)****;

3. Letter signed by the highest ranking responsible officer at the work location who shall attest that the employer will implement the plan as described, retain all ECO documents on file, as required by N.J.A.C. 16:50-8.10, and make such documents available for review by the Department or its agent;

4. A letter signed by the highest ranking responsible officer at the work location or plan preparer, if different from the employer, who shall attest to the correctness of the information included in the plan; and

5. A letter signed by an approved certifier who has reviewed and certified the plan in accordance with the procedures established in N.J.A.C. 16:50-9.

16:50-8.6 Required components of APO survey reports

(a) A complete APO survey report submittal will consist of the following elements:

1. A completed APO survey report, prepared on standard forms provided by the Department; *[and]*

2. A summary of current program elements which the employer agrees to continue; and*

*[2.]**3.* A letter signed by the highest ranking responsible officer at the work location or report preparer, if different from the employer, who attests to the accuracy of the information included in the report.

16:50-8.7 Consolidated plans and ***averaging*** APO reports

(a) Beginning in 1996 and in any future year for which an affected employer is required to submit an update plan or APO survey report, an affected employer may submit a consolidated plan or report, as defined in N.J.A.C. 16:50-2, subject to the following provisions:

1. An employer with more than one affected location or two or more separate affected employers may submit a consolidated plan or report for any or all of the affected locations***, provided that collectively the affected work locations reach the appropriate average target APO****.

2. Employers submitting consolidated plans or APO ***Survey*** reports ***for affected work locations located within a single APO target area*** shall average the APOs for *[the]* ***all of the*** work locations participating in the consolidated plan. The average APO shall be calculated *[as follows:

i. The average APO for two or more work locations within a single target APO area shall be calculated]* as the total number of employees *[arriving]* ***scheduled to report*** at all participating locations during the peak period of the survey week, divided by the total number of vehicles in which those employees arrive.

*[ii. The average APO for two or more work locations in different target APO areas shall be calculated as:

$$\text{Average APO} = \frac{\text{Sum of Employee Miles}}{\text{Sum of Vehicle Miles}}$$ Where:

Employee Miles is: Total number of employees arriving at a participating location during the peak period of the survey week multiplied by the average commute distance of employees arriving at that location; and

Vehicle Miles is: Total number of passenger vehicles in which employees arrive at a participating location during the peak period of the survey week multiplied by the average commute distance of employees arriving at that location.

Both the number of affected employees and the average commute distance of affected employees at each participating location shall be determined from individual APO surveys conducted at each location.

To illustrate the calculation of average APO, the following example is provided:

	Employer "A"	Employer "B"
Employees Arriving	1,000	500
Vehicles Arriving	500	400
Average Distance	10 miles	20 miles

$$\text{Average APO} = \frac{(1{,}000 \text{ empl.} \times 10 \text{ mi.}) + (500 \text{ empl.} \times 20 \text{ mi.})}{(500 \text{ veh.} \times 10 \text{ mi.}) + (400 \text{ veh.} \times 20 \text{ mi.})}$$

$$\text{Average APO} = \frac{20{,}000 \text{ employee miles}}{13{,}000 \text{ vehicle miles}}$$

Average APO = 1.54]*

***3. Employers submitting consolidated plans or APO survey reports for two or more work locations located in different APO target areas shall determine the averaged target APO for the participating work locations. This shall be done by first determining the theoretical maximum vehicles allowed for the individual participating work locations, as if the individual work location were to come into compliance itself. This shall be calculated as:**

$$\text{Maximum vehicles allowed (at each work location)} = \frac{\text{Affected employees at each location}}{\text{APO Target at each location}}$$

	Employer "A"	Employer "B"
Affected Employees	1,000	500
Individual APO Target	1.40	1.97
Maximum Vehicles Allowed	714	254

The Averaged "Target" APO shall be as calculated as:

$$\text{Average Target APO} = \frac{\text{Sum of Affected Employees}}{\text{Sum of Maximum Vehicles Allowed}}$$ Where:

Employees are: Total number of employees scheduled to report at a participating location during the peak period of the survey week; and

Maximum Vehicles are: The maximum number of passenger vehicles that could arrive at the affected work location and still have the individual work location meet its APO target. Using the employer examples shown above, the Averaged APO Target would be calculated as:

$$\text{Averaged APO} = \frac{1{,}000 \text{ employees} + 500 \text{ employees}}{714 \text{ vehicles} + 254 \text{ vehicles}}$$

Averaged APO Target = 1.54

Both the number of affected employees and the maximum number of vehicles allowed at each participating location shall be determined for each location.* Each ***participating affected work*** location *[participating in the consolidated plan or report]* shall be assigned the *[average]* ***averaged*** APO ***target*** as the APO ***target*** for each individual location. *[If participating work locations are in different target APO areas, the participating employers also shall average the target APOs.]* ***To determine compliance, the*** *[The]* ***actual*** average *[target]* APO shall be calculated as the sum ***of employees scheduled to report at each work location*** *[over all participating employers of the target APO for each participating employer multiplied by the number of employees at that participating location,]* divided by the *[total]* ***the sum of the actual*** number of *[employees at all participating locations]* ***arriving vehicles at each location*.**

4. An employer *[participating in]* ***that submits*** a consolidated plan ***for multiple affected work locations and averages its APO*** shall *[individually prepare a compliance plan for each participating work location, and shall individually implement its plan as if the employer had submitted an individual plan]* ***prepare a consolidated maintenance plan*.**

5. *[The]* ***Multiple employers participating in a*** consolidated plan shall *[include the]* individually *[prepared]* ***prepare*** plan sections ***for each participating affected work location*,** *[as defined in (a)4 above, for each participating employer,]* accompanied by a jointly-prepared APO survey report, signed by the highest ranking responsible officer for each employer participating in the plan. The APO calculation shall present the results of the APO calculation as though the participating locations were one employer or one location.

16:50-8.8 Alternative plan preparers

An employer may contract with a transportation planning consultant, TMA or outside entity to prepare or assist in preparation of a compliance plan or report. The use of an outside entity for this purpose shall not, however, remove or reduce the responsibility of the employer with regard to any of the requirements of this chapter.

16:50-8.9 Requirement for an ETC

An affected employer shall designate an employee transportation coordinator (ETC) at each work location with 100 or more employees to administer the ECO program at that work location.

16:50-8.10 Document recordkeeping

(a) An affected employer shall maintain copies of all documents prepared or used in the document preparation by the employer or by other entities acting on behalf of the employer in accordance with these rules. These documents shall include, but not be limited to, documents related to:

1. Conduct of the APO survey;
2. Calculation of work location APO;
3. Preparation of compliance plans and reports;
4. Program implementation, including all organizational policies and procedures; *[and]*
5. Program monitoring and evaluation***; and**
6. **Development of the affected employer's ECO Program, including survey forms and results, policies and procedures related to the ECO Program, etc. Such documentation need not include draft writings or preliminary policies and procedures developed by the affected employer*.**

(b) An affected employer shall maintain the documents set forth in (a) above in the office of the ETC for a period not less than five years from the date the documents were first generated.

SUBCHAPTER 9. PLAN CERTIFICATION

16:50-9.1 Selection and approval of certifiers

(a) Prior to submittal to the Department, compliance plans shall be certified as to accuracy and efficacy by a person approved by the Department as qualified to so certify plans. Notwithstanding this provision, an employer that submits a revised plan in accordance with N.J.A.C. 16:50-8 shall not be required to have the plan certified

prior to its submittal to the Department. Certification shall be conducted in accordance with the following procedure:

1. The Department shall issue a request for qualifications (RFQ) for certifiers and select candidate certifiers from among certifier applicants. ***Following the initial RFQ, the Department may issue subsequent RFQs at its discretion to ensure an adequate number of approved certifiers.*** To be considered for selection as a candidate certifier by the Department, applicants must have a Bachelor's degree from an accredited college or university, and four years of experience in transportation demand management, transportation planning, or ***other closely*** related field.

i. Applicants not possessing one of either the required minimum education or experience may substitute years of experience and years of education at the rate of two years of experience in the fields listed above, for one year of college education.

2. If the number of candidate certifiers that the Department can train and approve is *[constrained]* ***limited*** by the time constraints of the Act, the Department may select a lesser number of candidate certifiers, based on the amount and degree of experience in transportation demand management, from the applicants that meet the minimum qualifications.

3. Applicant certifiers may be independently employed or employed by an organization, but approval to certify shall be conferred only on individuals, not on organizations.

4. To be approved as certifiers, candidate certifiers must complete a training course developed and sponsored by the Department and must pass a proficiency examination at the completion of the course.

5. The Department shall *[certify]* ***approve*** certifiers for one-year, renewable periods. Approved certifiers shall sign and abide by a certifier's code of ethical conduct in certifying plans, including notifying the Department of any potential conflict of interest between themselves and an ***affected client*** employer. The Department may deny renewal or may revoke the certifier's approval if the Department receives multiple complaints from employers regarding the certifier's conduct, fees or review of plans, or if a Department audit of a sample of plans reviewed by the certifier indicates the certifier has not followed the certification procedures and criteria set forth in this chapter. The certifier may appeal revocation of *[certification]* ***approval*** as provided for in N.J.A.C. 16:50-*[13]*14***.

16:50-9.2 Certification procedures

(a) The following procedure shall govern plan certification:

1. The Department shall provide to each affected employer, along with required compliance plan forms, a list of approved certifiers. Employers shall select a certifier from among those on the list and send prepared plans directly to the certifier of their choice for review. An employer shall choose a certifier who is independent of the employer. A certifier shall not be considered independent if:

i. The certifier is currently an employee of the employer or was employed by the employer within the past six months;

ii. The certifier or an organization that employs the certifier prepared and/or will assist the employer to implement the plan; or

iii. The certifier or any organization by which the certifier is employed is currently under contract to the employer to provide or receive payment for any ***ETR or ECO related*** product, ***other than review and certification of a compliance plan,*** professional service, or membership fee, or was under such contract within the past six months.

2. The certifier shall review the plan utilizing training from the Department and the criteria described in N.J.A.C. 16:50-9.3. The certifier may contact the employer to clarify questions related to the plan or to request reasonable additional documentation from the employer.

3. If the certifier deems the plan to meet the certification criteria, the certifier shall certify the plan and return it to the employer for submittal to the Department. Plans not meeting the certification criteria shall be returned to the employer with an explanation of the reasons the plan was returned, indication of the sections of the plan that are unacceptable, and guidance on additions or changes that the employer could consider to bring the plan into compliance. The employer shall revise its plan as appropriate and re-submit the revised plan *[to the same certifier as initially reviewed the plan]* ***any approved certifier***.

4. It is the responsibility of an affected employer to allow adequate time for certification. Failure of the certifier to certify the employer's plan in time to allow submittal of the plan to the Department prior to the deadline shall not excuse the employer from this obligation. Notwithstanding this provision, however, an employer that submits a certifiable plan to a certifier at least 90 days prior to the plan submittal deadline shall not be considered in violation of the plan submittal deadline until 60 days after the scheduled submittal date to the Department.

16:50-9.3 Plan certification criteria

(a) In assessing whether a compliance plan can be certified, a certifier shall consider the following criteria:

1. The completeness of the plan and its consistency with the provisions of this chapter;

2. The accuracy of the work location APO computation.

3. The appropriateness of the commute alternatives proposed in the plan to the location and employee population;

4. The appropriateness of the ECO program services and incentives selected by the employer to the commute alternatives;

5. The likely effectiveness of the ECO strategies in producing the target APO by the scheduled deadline;

6. The ability of the proposed implementation schedule to ensure ECO strategies included in the plan are implemented in a timely and thorough manner; and

7. The ability of the proposed monitoring process to allow a timely and effective review of the employer's progress toward the target APO.

16:50-9.4 Certification fees

Notwithstanding any other provisions of this chapter, there is no prohibition against a certifier charging a fee for its services.

SUBCHAPTER 10. COMPLIANCE PLAN REVIEW

16:50-10.1 Plan review schedule

(a) Within 180 days of receipt of ***a*** plan*[s]*, the Department shall review *[all submitted]* ***the*** plan*[s]* for completeness and consistency with the provisions of this chapter and shall return ***an*** incomplete and inconsistent plan*[s]* to the employer*[s]* for revisions. If a plan is returned to the employer*[s]*, concurrently, the Department shall notify the appropriate certifier that the plan was returned and the reason(s) it was returned. An employer whose plan is returned shall have 60 days from the date of return to revise and resubmit the plan to the Department. The employer shall not be required to have the plan recertified prior to resubmittal to the Department ***if the revised plan is not precipitated by a relocation of the affected work location***. A plan not returned to the employer by the Department within 180 days of submittal shall be considered approved by the Department.

16:50-10.2 Plan review guidelines

(a) The Department shall review plans for completeness and consistency, using the following criteria:

1. The presence of all required plan sections and minimum plan requirements, as described in N.J.A.C. 16:50-8;

2. The presence of the correct filing fee, as established in N.J.A.C. 16:50-8;

3. The accuracy of the APO calculation, in accordance with the formula provided in N.J.A.C. 16:50-7; and

4. A demonstration of approval by a certifier, in accordance with the procedures defined in N.J.A.C. 16:50-9.

16:50-10.3 Additional review by Department of sample of plans

The Department shall select a portion of the affected employers' ECO programs reviewed and certified by each certifier for review and audit, in accordance with the criteria presented in N.J.A.C. 16:50-9 for plan review and certification.

SUBCHAPTER 11. (RESERVED)

SUBCHAPTER *[11]**12*. ENFORCEMENT AND PENALTIES

16:50-*[11.1]**12.1* Work location audits

To verify implementation of work location programs, the Department shall have the authority to conduct or cause to be conducted audits of an employer's affected location. The Department shall notify an employer selected for an audit not less than 24 hours in advance of the audit. The employer shall provide the Department access to all records pertaining to the development, implementation, and administration of the ECO program described in the employer's plan, and access to employees at the location.

16:50-*[11.2]**12.2* Noncompliance

An affected employer shall be considered in noncompliance and subject to civil administrative penalties for violations of any provisions of this chapter. Upon determining that a violation has occurred, the Department shall issue the affected employer a notice of noncompliance that shall describe the violation, the actions required to correct the violation, the deadline by which the violation shall be corrected, and the penalty that shall be assessed for continued noncompliance. If the affected employer has not corrected the violation by the deadline specified in the notice of noncompliance, the Department shall have the authority to assess penalties in accordance with N.J.A.C. 16:50-*[11.3]**12.3*.

16:50-*[11.3]**12.3* Penalties for noncompliance

(a) An affected employer**, including an independent government employer,*** found to be in noncompliance, as defined by N.J.A.C. 16:50-*[11.2]**12.2*, shall be subject to a penalty of not more than $250.00 for each violation, except as follows:

i. A penalty of not more than $250.00 per month for the first two months and not more than $500.00 per month thereafter for each work location for which an employer fails to submit a registration form as required by N.J.A.C. 16:50-6;

ii. A penalty of not more than $1,000 per month for each work location for which an employer fails to file a plan or report as required by N.J.A.C. 16:50-8; and

iii. A penalty of not more than $5,000 per month for each work location which fails to achieve the APO target required by N.J.A.C. 16:50-4.

(b) Each month of noncompliance with the provisions of this chapter shall be considered an additional, separate, and distinct offense. However, the Commissioner shall impose no initial penalties for a period of one year following the date of adoption of this rule, unless the employer has been notified in writing of the violation and the assessment of the penalty, been given a 30-day grace period from the date of the notice of violation to correct the violation, and failed during that time to comply. In addition to the penalties in (a) above, an employer filing a plan during the grace period shall be subject to a $100.00 late filing fee.

(c) An employer that fails to meet the target APO in 1996, but whose 1996 update plan is approved by the Department, shall not be subject to the $5,000 penalty for failure to meet the target APO until one year after the date by which the update plan is required to be filed. An employer that fails to meet the target APO in 1996 and who fails to submit an update plan or submits an update plan the Department does not approve, shall be subject to the penalty for failure to reach the target APO in accordance with the provisions of (b) above.

(d) The Commissioner may assess the above mentioned penalties at *[the Commissioner's]* ***his or her*** discretion, taking into account the nature, seriousness, and circumstances of the violation, whether there is a pattern of noncompliance, and ***the good faith*** efforts that are being made by the employer to achieve compliance.

(e) A government employer failing to comply with any provision of this chapter shall, in the case of the State departments or agencies, receive a notice of violation addressed to the head of the department or agency. Upon receipt of the notice, the head of the department or agency shall consult with the Commissioner as to actions to be taken by the department or agency to comply with the provisions of this chapter. Failing appropriate action by the department or agency, the Commissioner may recommend to the Attorney General that action be taken to effect compliance *[as provided in a case of government employers other than State departments or agencies]*. In the case of government employers other than State departments or agencies, the department may request the Attorney General to institute civil proceedings in the Superior Court to enjoin the government employers to comply with the provisions of this chapter. The Court is authorized to impose fines for continued noncompliance in the same amount as the civil administrative penalties provided for in (a) above.

SUBCHAPTER *[12.]**13.* EXTENSIONS, EXEMPTIONS, AND WAIVERS

16:50-*[12.1]**13.1* Deadline extensions

An employer that, for reasons beyond its control, is unable to meet a deadline established in this chapter may petition the Department for an extension of the deadline. All requests shall be submitted in writing and signed by the highest ranking responsible officer at the site. A request for an extension of the deadline to register as an affected employer shall be submitted not less than 30 days in advance of the deadline for registration. A request for extension of the deadline to submit a compliance plan or report shall be submitted not less than 90 days in advance of the deadline. The Department shall have 15 days from receipt of the request to rule on extensions of scheduled deadlines. Extensions may be considered for hardship circumstances or other unusual circumstances that may make it impossible to meet the deadlines established in this chapter.

16:50-*[12.2]**13.2* Exemptions

(a) An employer that meets any of the criteria described in (a)1 and 2 below may apply to the Department for an exemption from the requirements of this chapter. Requests for exemptions shall be made in writing and shall be signed by the highest ranking responsible officer at the work location.

1. An employer that employs 100 or more employees at a single work location, but that has fewer than 33 employees arriving during the peak period; or

2. An *[employer that]* ***affected work location which changes status due to a decrease in employment and that can document that it now*** employs ***an average of less than*** 100 *[or more]* employees *[at a single work location for fewer than six months of any 12 consecutive months]* ***for the immediately preceding 12 month period***.

16:50-*[12.3]**13.3* Waivers

(a) Each affected employer is required to comply with all provisions of this chapter, including the requirement to achieve the target APO as specified in N.J.A.C. 16:50-4. However, an affected employer that would suffer extreme financial hardship *[in meeting the deadlines or reporting requirements established in this chapter,]* may petition the Department for a "hardship" waiver. *[A hardship waiver may be requested to allow for a reduced compliance plan to be certified.]* ***An employer seeking a hardship waiver must demonstrate, on the basis of evidence submitted to the Department, that the costs of compliance would substantially impair its ability to continue as a going concern.*** *[In considering an employer's petition for a "hardship waiver," the Department may require the employer to produce documentation adequate to support the employer's claim of hardship. A hardship waiver shall not remove the requirement to achieve the target APO. An employer complying under the terms of a hardship waiver is still expected to implement its approved plan in "good faith." An affected employer may petition the Department for a hardship waiver in the same manner as provided for "good faith effort" waivers as established in this subchapter.]* ***The Department may adjust the terms and conditions of the waiver, and will outline the specific non-financial strategies that an employer will be required to implement, if any. Hardship waivers shall not remove the requirement to achieve the APO target. Hardship waivers may be applied for upon notification of intent to impose penalties for non-compliance and in the manner further provided for "good faith effort" waivers established in this subchapter. An affected employer for which a hardship waiver is approved shall not be assessed a penalty for non-compliance.***

(b) An affected employer that has implemented an approved plan in "good faith," as defined in N.J.A.C. 16:50-*[12.5]***13.5***, but that has not achieved the target APO by November 1997, may petition the Department for a "good faith" waiver of the penalty for failure to achieve the target as follows:

1. A request for a waiver shall be made in writing***, shall include the results of the employer's 1997 APO survey, an explanation of why the ECO strategies included in the 1996 update plan did not achieve the APO target,*** and shall be signed by the highest ranking responsible officer at the work location. A request for a good faith waiver shall not be made sooner than November 15, *[1996]* ***1997***.

2. The Department shall grant or deny a request for a waiver within *[60]* ***120*** days of receipt of such a request. If the employer so chooses, prior to the decision on the request, the Department shall forward the request to a ETRP Review Board, for its consideration. The ETR***P*** Review Board, consisting of *[seven]* ***11*** members, the membership of which shall include one representative each from the Departments of Transportation, Environmental Protection and Energy, and Labor; ***New Jersey Transit Corporation***; *[two]* ***one*** independent certifiers; ***one representative from an environmental interest group; and one citizen;*** and *[two]* ***four*** affected employers, *[one]* ***two*** each from an affected employer having between 100 and 500 employees, and an employer affected employer having more than 500 employees, selected and trained by the Department, shall review employers' requests for waivers and make a recommendation on disposition of the request to the Assistant Commissioner. ***Each representative to the ETRP Review Board shall be responsible for identifying any conflicts of interest which may arise in the review of requests and shall remove themselves from such review while such conflict or appearance of conflicts exists.***

3. A waiver, when granted, shall be in effect for a one-year period ***from the time the waiver is granted, unless otherwise determined by the ETRP Review Board***. An employer desiring an extension of a waiver shall submit a subsequent request to the Department.

16:50-*[12.4]***13.4*** Application fees for extensions, exemptions and waivers

All requests for extensions, exemptions, and waivers shall be accompanied by an application of $250.00 per request. ***If the request is granted, the application fee shall be refunded.***

16:50-*[12.5]***13.5*** Definition of "Good Faith Effort"

(a) An affected employer shall develop and implement an ECO*[P]* ***Program*** in good faith at each affected location. In determining an employer's good faith, the Department shall first consider whether the employer implemented an approved plan in accordance with an approved implementation plan, but may consider any or all of the following additional criteria:

1. Did management at the location demonstrate significant commitment to implementation of the program and institute written employee policies that encouraged the use of commute alternatives?

2. Did the employer assess the transportation needs and interests of employees through employee surveys or other techniques?

3. Did the employer periodically review its progress toward the target APO, at a minimum through conduct of an APO survey of its employees in 1995, and through other actions designed to assess the continuing appropriateness of the employer's ECO program services and incentives?

4. If the employer's 1995 APO survey showed the APO increase was less than 50 percent of that needed to achieve the target APO, did the employer increase and/or modify its program to include appropriate contingency strategies?

5. Did the employer seek advice from a certifier, the Department, a TMA, a transportation consultant, or other entity with TDM experience, prior to November 1996, regarding desirable future actions to increase APO?

6. Did the ETC attend a Department-authorized ETC training course?

7. Did the APO at the work location increase a reasonable amount compared to other employers with similar work location characteristics and employee populations?

8. Did the employer consider, and utilize feasible, options for consolidated plans and APO averaging?

16:50-13.6 Scope of waivers

All waiver requests shall be made based on work location and all fees shall be applied per work location.*

SUBCHAPTER *[13]***14***. APPEALS

16:50-*[13.1]***14.1*** Requirements

(a) An employer that is found to be in noncompliance with any provision of this chapter and on which a penalty was assessed in accordance with this chapter shall have the opportunity to appeal such penalty in accordance with the procedures set forth in the New Jersey Administrative Procedures Act (NJAPA), N.J.S.A. 52:14B-1 et seq ***and N.J.A.C. 1:1***. An appeal shall be submitted to the Department in writing not later than 30 days after receipt of notification of the violation.

(b) A certifier whose approval to certify is revoked shall have the opportunity to appeal such revocation in accordance with the procedures set forth in the New Jersey Administrative Procedures Act (NJAPA)***, N.J.S.A. 52:14B-1 et seq***. An appeal shall be submitted to the Department in writing not later than 30 days after receipt of notification of the revocation.

(c) The Department shall, if desired by the employer or the certifier, submit the request for appeal to the ETRP Review Board prior to its disposition through the procedures of the *[NJAPA]* ***Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq., and N.J.A.C. 1:1***. An employer or certifier is not required to utilize the Review Board, and may choose to appeal directly to the Commissioner through the *[NJAPA procedures]* ***provisions of the Administrative Procedures Act***. The ***ETRP*** Review Board, described in N.J.A.C. 16:50-*[12]***13***, shall make a recommendation to the Assistant Commissioner, Policy and Planning, of the Department, who shall rule on the request for appeal. If the ruling is not satisfactory to the employer or the certifier, the employer or the certifier may appeal the ruling of the Assistant Commissioner to the Commissioner ***as provided for N.J.S.A. 52:14B-1 et seq, and N.J.A.C. 1:1*** *[through the NJAPA procedures. The decision of the Commissioner in such appeals shall be final]*.

OTHER AGENCIES

(a)

CASINO CONTROL COMMISSION ADMINISTRATIVE OPERATIONS

Disability Discrimination Grievance Procedure

Adopted New Rules: N.J.A.C. 19:40-6

Proposed: April 5, 1993 at 25 N.J.R. 1503(a).

Adopted: August 18, 1993 by the Casino Control Commission, Steven P. Perskie, Chairman.

Filed: November 3, 1993 as R.1993 d.613, **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. 5:12-69, 42 U.S.C. §12101 et seq., and 28 C.F.R. §35.107.

Effective Date: December 6, 1993.

Expiration Date: Exempt under 28 C.F.R. Part 35.

On April 5, 1993 a notice of proposed rulemaking was published in the New Jersey Register announcing the proposed adoption by this agency of a grievance procedure to be followed when and if this agency receives a complaint that it had violated or was violating the Americans with Disabilities Act, 42 U.S.C. §12101 et seq. That notice was part of a joint coordinated rulemaking process intended to produce a uniform

grievance procedure for all participating agencies with the Department of Law and Public Safety as the lead agency. This notice of adoption concludes the process.

After publication of the notices of proposed rulemaking participating agencies received public comments, which were forwarded to the Department of Law and Public Safety for consolidated review, formulation of replies and revision of the proposed rules, where appropriate. The Summary of Public Comments and Agency Responses is being published under the heading of the Department of Law and Public Safety in this issue of the New Jersey Register. The reader is directed to that agency's notice of adoption to find the comments and replies. The final text of the grievance procedure appears below.

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

SUBCHAPTER 6. DISABILITY DISCRIMINATION GRIEVANCE PROCEDURE

19:40-6.1 Definitions

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

"ADA" means the Americans with Disabilities Act, 42 U.S.C.A. §12101 et seq.

"Agency" means the New Jersey Casino Control Commission.

"Designated decision maker" means the Chairman of the Casino Control Commission or his or her designee.

19:40-6.2 Purpose

(a) These rules are adopted by the agency in satisfaction of the requirements of the ADA and regulations promulgated pursuant thereto, 28 C.F.R. 35.107.

(b) The purpose of these rules is to establish a designated coordinator whose duties shall include assuring that the agency complies with and carries out its responsibilities under the ADA. Those duties shall also include the investigation of any complaint filed with the agency pursuant to N.J.A.C. 19:40-6.5 through 6.8.

19:40-6.3 Required ADA Notice

In addition to any other advice, assistance or accommodation provided, a copy of the following notice shall be given to anyone who inquires regarding the agency's compliance with the ADA or the availability of accommodation which would allow a qualified individual with a disability to receive services or participate in a program or activity provided by the agency.

AGENCY NOTICE OF ADA PROCEDURE

The agency has adopted an internal grievance procedure providing for prompt and equitable resolution of *[complaints]* ***grievances*** alleging any action prohibited by the U.S. Department of Justice regulations implementing Title 11 of the Americans with Disabilities Act. Title 11 states, in part, that "no otherwise qualified disabled individual shall, solely by reason of such disability, be excluded from participation in, be denied the benefits of or be subjected to discrimination" in programs or activities sponsored by a public entity.

Rules describing and governing the internal grievance procedure can be found in the New Jersey Administrative Code, N.J.A.C. 19:40-6. As those rules indicate, *[complaints]* ***grievances*** should be addressed to the agency's designated ADA Coordinator, who has been designated to coordinate ADA compliance efforts, at the following address:

[(The following address will be specific to the Agency)]
ADA Coordinator
New Jersey Casino Control Commission
Arcade Building
Tennessee Avenue and Boardwalk
Atlantic City, New Jersey 08401

1. A *[complaint]* ***grievance*** may be filed in writing or orally, but should contain the name and address of the person filing it, and briefly describe the alleged violation. A form for this purpose is available from the designated ADA coordinator. In cases of employment related *[complaints]* ***grievances***, the procedures established by the Department of Personnel, N.J.A.C. 4A:7-1.1 et seq. will be followed where applicable.

2. A *[complaint]* ***grievance*** should be filed promptly within *[20]* ***30*** days after the *[complainant]* ***grievant*** becomes aware of the alleged violation. (Processing of allegations of discrimination which occurred before this grievance procedure was in place will be considered on a case-by-case basis.)

3. An investigation, as may be appropriate, will follow the filing of a *[complaint]* ***grievance***. The investigation will be conducted by the agency's designated ADA Coordinator. The rules contemplate informal but thorough investigations, affording all interested persons and their representatives, if any, an opportunity to submit evidence relevant to a *[complaint]* ***grievance***.

4. In most cases a written determination as to the validity of the *[complaint]* ***grievance*** and a description of the resolution, if any, will be issued by the designated decision maker and a copy forwarded to the *[complainant]* ***grievant*** no later than 45 days after its filing.

5. The ADA coordinator will maintain the files and records of the agency relating to the *[complaints]* ***grievances*** filed.

6. The right of a person to a prompt and equitable resolution of the *[complaint]* ***grievance*** filed hereunder will not be impaired by the person's pursuit of other remedies such as the filing of an ADA *[complaint]* ***grievance*** with the responsible Federal department or agency or the New Jersey Division on Civil Rights. Use of this grievance procedure is not a prerequisite to the pursuit of other remedies.

7. The rules will be construed to protect the substantive rights of interested persons, to meet appropriate due process standards and to assure that the agency complies with the ADA and implementing Federal rules.

19:40-6.4 Designated ADA coordinator

(a) The designated coordinator of ADA compliance and complaint investigation for the agency is:

[(The following address will be specific to the Agency)]
ADA Coordinator
New Jersey Casino Control Commission
Arcade Building
Tennessee Avenue and Boardwalk
Atlantic City, New Jersey 08401

(b) All inquiries regarding the agency's compliance with the ADA and the availability of accommodation which would allow a qualified individual with a disability to receive services or participate in a program or activity provided by the agency should be directed to the designated coordinator identified in (a) above.

(c) All *[complaints]* ***grievances*** alleging that the agency has failed to comply with or has acted in a way that is prohibited by the ADA should be directed to the designated ADA coordinator identified in this section, in accordance with the procedures set forth in N.J.A.C. 19:40-6.5 through 6.8.

19:40-6.5 *[Complaint]* ***Grievance*** procedure

A *[complaint]* ***grievance*** alleging that the agency has failed to comply with the ADA or has acted in a way that is prohibited by the ADA shall be submitted either in writing or orally to the designated ADA coordinator identified in N.J.A.C. 19:40-6.4 ***within 30 days of the grievant becoming aware of the alleged violation***. A *[complaint]* ***grievance*** alleging employment discrimination will be processed pursuant to the rules of the Department of Personnel, N.J.A.C. 4A:7-1.1 through 3.4, if those rules are applicable.

19:40-6.6 *[Complaint]* ***Grievance*** contents

(a) A *[complaint]* ***grievance*** submitted pursuant to this subchapter may be submitted in or on the form set forth at N.J.A.C. 19:40-6.7.

(b) A *[complaint]* ***grievance*** submitted pursuant to this subchapter shall include the following information:

1. The name of the *[complainant]* ***grievant*** and/or any alternate contact person designated by the *[complainant]* ***grievant***

to receive communication or provide information for the *[complainant]* ***grievant***;

2. The address and telephone number of the *[complainant]* ***grievant*** or alternate contact person; and

3. A description of manner in which the ADA has not been complied with or has been violated, including times and locations of events and names of witnesses if appropriate.

19:40-6.7 *[Complaint]* ***Grievance*** form

The following form may be utilized for the submission of a *[complaint]* ***grievance*** pursuant to this subchapter:

Americans with Disabilities Act Grievance Form

Date: _____

Name of grievant: _____

Address of grievant: _____

Telephone number of grievant: _____

[Disability of grievant: _____]

Name, address and telephone number of alternate contact person:

_____

_____

Agency alleged to have denied access:

Department: _____

Division: _____

Bureau or office: _____

Location: _____

Incident or barrier: _____

Please describe the particular way in which you believe you have been denied the benefits of any service, program or activity or have otherwise been subject to discrimination. Please specify dates, times and places of incidents, and names and/or positions of agency employees involved, if any, as well as names, addresses and telephone numbers of any witnesses to any such incident. Attach additional pages if necessary.

_____

_____

_____

_____

_____

_____

Proposed access or accommodation:

If you wish, describe the way in which you feel access may be had to the benefits described above, or that accommodation could be provided to allow access.

_____

_____

_____

A copy of the above form may be obtained by contacting the designated ADA coordinator identified at N.J.A.C. 19:40-6.4.

19:40-6.8 Investigation

(a) Upon receipt of a *[complaint]* ***grievance*** submitted pursuant to this subchapter, the designated ADA coordinator will notify the *[complainant]* ***grievant*** of the receipt of the *[complaint]* ***grievance*** and the initiation of an investigation into the matter. The designated ADA coordinator will also indicate a date by which it is expected that the investigation will be completed, which date shall not be later than 45 days from the date of receipt of the *[complaint]* ***grievance if practicable or*** unless a later date is agreed to by the *[complainant]* ***grievant***.

(b) Upon completion of the investigation, the designated ADA coordinator shall prepare a report for review by the designated decision maker for the agency. The designated decision maker shall render a written decision within 45 days of receipt of the *[complaint]* ***grievance, if practicable or*** unless a later date is agreed to by the *[complainant]* ***grievant***, which decision shall be transmitted to the *[complainant]* ***grievant*** and/or the alternate contact person if so designated by the *[complainant]* ***grievant***.

(a)

CASINO CONTROL COMMISSION

Rules of the Games
Minimum and Maximum Wagers
Adopted 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, 8.3 and 9.3
Adopted Repeals: N.J.A.C. 19:47-4.2, 6.6, 10.10, 11.12 and 12.10
Adopted Repeal and New Rule: N.J.A.C. 19:47-8.2

Proposed: September 7, 1993 at 25 N.J.R. 3953(a).

Adopted: November 4, 1993 by the Casino Control Commission, Steven P. Perskie, Chairman.

Filed: November 8, 1993 as R.1993 d.630, **with technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 5:12-63(c), 69(a), 70(f), 99(a)16 and 100(e).

Effective Date: December 6, 1993.

Expiration Dates: August 15, 1997, N.J.A.C. 19:45;
April 15, 1996, N.J.A.C. 19:47.

Summary of Public Comment and Agency Response:

COMMENT: The Division of Gaming Enforcement indicated that it does not object to the reproposal.

RESPONSE: Accepted.

Upon adoption, references in adopted N.J.A.C. 19:47-2.3(i) to N.J.A.C. 19:47-2.3(j) are corrected to reflect that subsection's recodification as subsection (i).

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[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 on such table games shall be $25.00;

2. The minimum wager 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

(a)-(e) (No change.)

19:47-2.3 Wagers

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

Recodify existing (f)-(h) as (e)-(g) (No change in text.)

(h) No dealer or other casino employee or casino key employee shall permit any player to engage in conduct violative of (f) or (g) above.

Recodify existing (j) as (i) (No change in text.)

(j) If a casino licensee implements any of the options in *[(j)]* ***(i)*** above, the option shall be uniformly applied to all persons at that table; provided, however that if a casino licensee has implemented either of the options in *[(j)3]* ***(i)3*** or 4 above, an exception may be made for a person who temporarily leaves the table if, at the time the person leaves, the casino licensee agrees to reserve the person's spot until his or her turn.

(k) If a double shoe is utilized, the term "first card" as used in (a), (c) and (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(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.)

19:47-4.2 (Reserved)

19:47-5.1 Wagers

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

19:47-5.6 Big Six Wheel; wagers and rotation of the wheel

Recodify existing (b)-(f) as (a)-(e) (No change in text.)

19:47-6.6 (Reserved)

19:47-7.2 Wagers

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

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

19:47-8.2 Minimum and maximum wagers

(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 five 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.)

Recodify existing N.J.A.C. 19:47-10.11 as 10.10 (No change in text.)

Recodify existing N.J.A.C. 19:47-11.13 as 11.12 (No change in text.)

(a)

CASINO CONTROL COMMISSION

Accounting and Internal Controls

Procedure for Filling Payout Reserve Containers of Slot Machines and Hopper Storage Areas

Adopted Amendment: N.J.A.C. 19:45-1.41

Proposed: September 20, 1993 at 25 N.J.R. 4474(a).

Adopted: November 4, 1993 by Casino Control Commission, Steven P. Perskie, Chairman.

Filed: November 8, 1993 as R.1993 d.631, **with a technical change** not requiring additional public notice or comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 5:12-63(c), 69(a), 70(l), and 99(4) and (10).

Effective Date: December 6, 1993.

Expiration Date: August 15, 1997.

Summary of Public Comments and Agency Responses:

COMMENT: The Division of Gaming Enforcement indicated that it does not object to the proposed amendments.

RESPONSE: Accepted.

COMMENT: Greate Bay Hotel and Casino, Inc. (The Sands Hotel and Casino) also does not object to the proposed amendments, but suggested a technical change, deleting the term "preparer" in N.J.A.C. 19:45-1.41(b)5, which would make it consistent with the proposed changes to N.J.A.C. 19:45-1.41(b)1.

RESPONSE: Accepted, the phrase "preparer shall record" has been replaced with "Hopper Fill shall include."

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

19:45-1.41 Procedure for filling payout reserve containers of slot machines and hopper storage areas

(a) (No change.)

(b) The filling of a hopper or a hopper storage area by means of a Hopper Fill Slip shall be accomplished as follows:

1. Whenever a slot supervisor, attendant or mechanic requests coins or tokens to fill a payout reserve container ("Hopper") or a hopper storage area of a slot machine, he or she shall obtain a properly completed and signed Hopper Fill Slip ("Hopper Fills") from a slot booth cashier ("Slot Cashier").

2.-4. (No change.)

5. On originals, duplicates and triplicates, or in stored data, the *[preparer shall record]* ***Hopper Fill shall include***, at a minimum, the following information:

i.-vi. (No change.)

vii. The signature or identification code of the person requesting coins to fill the hopper (on the original and the duplicate only); and

viii. (No change.)

6.-11. (No change.)

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

(a)

CASINO REINVESTMENT DEVELOPMENT AUTHORITY

Hotel Development Project Eligibility And Conditions
Concurrent Amendments: N.J.A.C. 19:65-1.2, 2.4, 2.5, 2.6 and 2.10
Adopted Concurrent New Rule: N.J.A.C. 19:65-2.10

Proposed: September 20, 1993 at 25 N.J.R. 4514(a).
Adopted: October 26, 1993 by the Casino Reinvestment Development Authority, Nicholas R. Amato, Executive Director.
Filed: October 29, 1993 as R.1993 d.605, **with a technical change** not requiring additional public notice of comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 5:12-144.1; N.J.S.A. 5:12-161(f); P.L. 1993, c.159.

Effective Date: October 29, 1993.
Expiration Date: October 5, 1997.

Summary of Public Comments and Agency Responses:

Written comments were submitted on behalf of the Casino Association of New Jersey by Thomas D. Carver, president; on behalf of the Casino Control Commission by Jeannine LaRue, Commissioner; on behalf of Greate Bay Hotel and Casino, Inc. t/a Sands Hotel & Casino, by Stephen R. Nehmad, Esq.; and by Jack Plackter, Esq. of Horn, Goldberg, Gorny, Daniels, Paarz, Plackter & Weiss.

COMMENT: The Authority has received comments from the Casino Control Commission in which the Authority's existing emergency amendments and emergency rule are criticized as lacking a process and criteria for establishing priorities among Hotel Development Projects, given that proposals are likely to substantially exceed the CRDA's funding capacity.

The Casino Control Commission's view is that the Authority should pick and choose among projects which satisfy the minimum criteria currently set forth in the regulations, and select those projects which most advance or complement the Authority's other development projects. To accomplish this prioritization, it suggests that the Authority by regulation set forth specific additional criteria that the Authority would apply in making its eligibility determination, including the location of the hotel rooms (relative to Authority supported development areas), the extent to which the proposal is part of a neighborhood development or rehabilitation program that has been approved by the City and the Authority, and the extent to which the proposal involves new and added rooms (as opposed to rehabilitated rooms).

The Casino Control Commission also suggests that regulations be adopted which apply these factors to the determination of the extent of funding which will be afforded to a hotel development project, with a variance on funding up to the full 35 percent statutory maximum based on the project's priority. It suggests this approach in lieu of a proportional distribution of available funds among projects eligible under the CRDA's current rules.

RESPONSE: First, the enabling statute, P.L. 1993, c.159, and the Authority's existing and proposed rules establish certain minimum qualifications for Hotel Development Projects, including that the project must be one which will create 200 or more first class room units in Atlantic City (N.J.A.C. 19:65-1.2), will be completed by December 31, 1996 unless the time for completion is extended by the Authority (N.J.A.C. 19:65-2.4(b)5iv), and will provide rooms which are reserved for a certain period of time for use by Convention attendees at the new Convention facilities (see proposed N.J.A.C. 19:65-2.5(d)4, 25 N.J.R. 4479 (Sept. 20, 1993)). Moreover, the existing rules establish priorities for approval of projects. N.J.A.C. 19:65-2.6.

Second, the Authority believes the advantages of the suggested further prioritization of projects in terms of eligibility and funding are outweighed by the disadvantages and also that the goals of P.L. 1993, c.159 are best served by the current regulatory scheme. While the prospect of targeting funding among eligible projects, as opposed to a proportional distribution of available funds among all such projects, presents an obvious advantage in terms of the advancement of other interests of the Authority and while the Authority agrees that the provisions of P.L. 1993, c.159 would permit it to set priorities among projects which meet minimal eligibility criteria, the targeting of funds rather than a pro rata distribution of available funds among all qualifying projects has a distinct disadvantage. Specifically, the failure of the Authority to provide funding to certain projects because they do not advance the Authority's other interests may lead to the abandonment or deferral of those projects. This result would mean fewer hotel units will be constructed in time to support the new Atlantic City Convention Center. The Authority understands that the principal objective of P.L. 1993, c.159 with respect to Hotel Development Projects is to maximize the amount of first class hotel units to be created in Atlantic City within the time frame of the opening of the new Convention Center. That being so, the Authority believes the best way to achieve that goal is to fund all eligible projects, although only in proportionate amounts, rather than to reject an eligible project because it does not mesh nicely with the Authority's other project priorities; otherwise, the Authority will not be maximizing the number of new rooms being created to complement the new Convention Center.

While an argument can be made that the absence of full funding may cause the abandonment of some projects, this has not proven to be the case to date with respect to Hotel Development projects. Projects continue to move forward even though the casino licensees recognize that, at this time, only a fraction of the statutory maximum of 35 percent projects costs will be available to their projects.

COMMENT: With respect to N.J.A.C. 19:65-2.5(d)3, the Authority has received comments which suggest that the blanket prohibition of projects involving hotel units in existence as of July 1, 1993 is unwarranted. Comments expressed that the use of CRDA funding to rehabilitate existing rooms would accomplish the intent of the Legislature to increase the number of first class hotel rooms in Atlantic City, and that the use of CRDA funds for the rehabilitation of hotel rooms is consistent with P.L. 1993, c.159. Comments further expressed that the definition of first class hotel unit should not be tied to the Casino Control Act definition of an "approved hotel" which would require a 325 square foot minimum and thereby exclude a number of worthy projects.

RESPONSE: The Authority agrees that the blanket prohibition of projects involving hotel units in existence as of July 1, 1993 is unwarranted and will separately propose a rule amendment which will remove this blanket prohibition.

The Legislature clearly intended that it was permissible to use the $100,000,000 hotel development fund for "reconstruction" or "rehabilitation" of existing space because it expressly so stated. P.L. 1993, c.159, §8. It is also clear that the Legislature's object was not simply to create hotel rooms, but rather "first class hotel rooms" since only "first class units" are eligible for funding. Id. Obviously, therefore, the Legislature was of the view that to attract conventioneers and other visitors to Atlantic City, additional first class hotel space was needed. Inferior units were not suitable for or attractive to convention attendees or other visitors. The Authority remains convinced that all renovations of existing space should not qualify for funding out of the $100,000,000 fund set aside by P.L. 1993, c.159. However, a limited subset of renovation projects should be permitted. The Authority is persuaded that "reconstruction" or "rehabilitation" projects which involve substantial improvements to existing properties and result in the upgrading of existing hotel units to first class pace are within the legislative intendment of P.L. 1993, c.159. Accordingly, the Authority will separately propose an amendment to N.J.A.C. 19:65-2.5(d)3 which will permit the funding of such projects. Under the amendment to be proposed, whether a project involves substantial improvements will be determined by the relationship of project costs to the value of the existing structure. If project costs exceed 50 percent of the appraised value of the structure, the test of substantiality is met.

The amendment to be proposed, in furtherance of the legislative object discussed above, will restrict projects for the rehabilitation of units in existence and available for use as of July 1, 1993, to those which will result in the upgrade of units to "first class hotel units". The Authority's definition of "first class hotel unit" which will be proposed is patterned on the legislative definition of "qualifying sleeping unit" as set forth in N.J.S.A. 5:12-27. Only hotels containing the requisite number of qualifying sleeping units qualify as approved casino hotels. Only approved hotels having "at least 500 qualifying sleeping units" may have casino space. N.J.S.A. 5:12-83b. Only by the addition of "qualifying sleeping units" may a casino hotel expand its casino floor space. N.J.S.A. 5:12-83b(2)(c). The Authority is of the view that the new rooms being constructed by casino licensees minimally should be of similar class and kind as those contained in their existing facilities, including space dimensions. Mindful that with respect to rehabilitation projects the unit size may well be

constrained by the existing space and that some units might otherwise fall just short of the 325 square foot requirement, the Authority will provide in its proposed definition that first class hotel units must contain at least "approximately" 325 square feet to provide necessary discretion to the Authority.

The CRDA notes that the emergency amendments and new rule addressing Hotel Development Project Eligibility and Criteria published at 22 N.J.R. 4514(a) (Sept. 20, 1993) will expire on October 29, 1993, if not readopted and filed with the OAL by that date. Accordingly, it has followed the procedure of readoption of the amendments and new rule coupled with the simultaneous adoption of a resolution authorizing the separate proposal of an additional amendment, rather than the reproposal of N.J.A.C. 19:65-2.5(d)3 in its entirety. This will maintain the necessary continuity of the rules establishing Hotel Development Project approval criteria in order to timely implement P.L. 1993, c.159. See: 25 N.J.R. 4514-15 (September 20, 1993) (Summary).

COMMENT: The Casino Association of New Jersey has commented that because the $100 million fund established by P.L. 1993, c.159 may not be sufficient to satisfy the financial needs of projects proposed at the maximum 35 percent funding level, it urges the CRDA to explore alternatives to address the projected shortfall in funding in order that a greater number of projects may receive maximum Authority funding.

RESPONSE: While the Authority is aware based on applications received that it will not be able to fund individual projects to the maximum allowable statutory level, it notes that the establishment of a limited $100 million dollar fund was a legislative determination. The Authority has accordingly provided for a pro rata distribution between applicants (see N.J.A.C. 19:65-2.10(a)2). Nonetheless, the Authority remains willing to assist an applicant, to the extent permissible under law, in locating additional funding sources.

COMMENT: Several technical changes have been proposed to the published concurrent proposed amendment and new rule, including: (1) deletion of the word "by" which precedes the phrase "the construction, reconstruction or rehabilitation of appurtenant facilities" in the definition of "Hotel Development Project" in N.J.A.C. 19:65-1.2; (2) addition of the word "however," after the word "provided," in N.J.A.C. 19:65-2.4(b)5ii; (3) changing the word "licensee" which follows the word "respective" in N.J.A.C. 19:65-2.10(a)1, to "licensees"; (4) deletion of the phrase "of such units" from the first sentence of the definition of "appurtenant facilities" in N.J.A.C. 19:65-1.2 to clarify that other hotel guests may use such facilities; and (5) changing the phrase "a facility" in the definition of Hotel Development Project in N.J.A.C. 19:65-1.2 to the plural "facilities."

RESPONSE: The Authority agrees with the first technical change and has deleted the unnecessary word "by." The Authority disagrees with the second change as unnecessary, and disagrees with the third change because the intention is to refer to the respective individual licensee for each approved hotel development project. The Authority disagrees with the fourth change as unnecessary because it is clear that other hotel guests may use such facilities; the definition reflects the relationship between the size of the appurtenant facilities and the number of units. The Authority disagrees with the fifth change as unnecessary because the intent is to refer to a facility which is composed of a minimum number of units and appurtenant facilities. Accordingly, these technical changes have not been adopted.

Full text of the adoption follows (deletion from proposal in brackets with asterisks *[thus]*):

19:65-1.2 Definitions

As used in this chapter, the following words and terms shall have the following meanings unless a different meaning clearly appears from the context:

...

"Appurtenant facilities" shall mean facilities which are necessary or convenient to facilities with units for overnight visitors, including, but not limited to, parking facilities and recreational and park facilities to the extent reasonably commensurate in size for use by the overnight visitors of such units. In no event shall appurtenant facilities include casino space or facilities related thereto.

...

"Hotel development project" shall mean the construction of a facility in the City of Atlantic City to provide at least 200 units for overnight visitors or the reconstruction or rehabilitation of at least 200 units for overnight visitors (together with ancillary reconstruction or rehabilitation) of an existing facility in the City of Atlantic City, which are operated as part of a licensed facility of the licensee or in a facility otherwise approved by the Authority, and *[by]* the construction, reconstruction or rehabilitation of appurtenant facilities.

...

19:65-2.4 Application review and approval

(a) (No change.)

(b) Project approval and the reservation of funds for an approval project shall occur as follows:

1.-3. (No change.)

4. (Reserved)

5. The reservation of funds for an approved hotel development project shall be subject to such terms and conditions as the Authority shall deem necessary and appropriate, provided, that such reservation of funds shall be subject to the following:

i. The approval of the execution of an agreement between the Authority and a licensee setting forth the terms and provisions by which investment credit (as permitted under section 3 of P.L. 1984, c.218 (N.J.S.A. 5:12-144.1)) is to be calculated;

ii. The amount of the reservation cannot exceed the lesser of the amount of investment credit (as permitted under section 3 of P.L. 1984, c.218 (N.J.S.A. 5:12-144.1)) to which a licensee is entitled or 35 percent of the costs of the hotel development project; provided, that in no event shall the amount reserved exceed $52,500 per unit;

iii. The receipt of financing or other commitments by September 1, 1994 for the costs of the hotel development project in excess of those set forth in (a)5ii above; and

iv. The establishment of a schedule of the stages of development of and incurrence of the costs in connection with the hotel development project to provide for the completion of the hotel development project on or before December 31, 1996 (or such later date as extended by the Authority upon a good faith showing of special circumstances or unforeseen occurrences).

v. Agreement by the casino licensee that the investment in the hotel development project shall be credited at the times that the licensee's investment alternative tax obligation becomes due as set forth in section 3 of P.L. 1984, c.218 (N.J.S.A. 5:12-144.1), provided that, in the case of the licensee's Atlantic City investment obligation, in no event shall the investment credit exceed 75 percent of that portion of the licensee's Atlantic City obligation that is available for purposes other than the construction, rehabilitation or reconstruction of facilities for low and moderate income housing for any year.

(c) (No change.)

19:65-2.5 Approval criteria

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

(c) (Reserved)

(d) The Authority shall require that the applicant establish, among other things, with respect to hotel development projects, the following:

1. The construction, reconstruction or rehabilitation of the units is to be accomplished pursuant to a schedule of development so as to be completed on or before December 31, 1996;

2. The cost of the construction, reconstruction or rehabilitation of appurtenant facilities shall be an amount commensurate with appurtenant facilities of a scope and size reasonable for use for the total number of units so constructed, reconstructed or rehabilitated; and

3. The project does not include the construction, reconstruction or rehabilitation of any unit which was in existence and used or available for use as a hotel unit as of July 1, 1993.

19:65-2.6 Priorities

(a) In considering whether to approve a project, the Authority shall be guided by and accord priority to projects which, among other things:

1.-3. (No change.)

4. As to a hotel development project, the Authority will give priority to those hotel development projects for which the Authority, by September 1, 1993, has either received a fully complete application, as determined by the Authority, or for which the Authority

has received a notice in writing from a casino licensee indicating the licensee's intent to proceed with such project, a description of the project, the number of units involved and the estimated cost of the project and the investment credit sought. No other hotel development projects shall receive consideration, unless, after giving consideration to projects for which application or notices of intent are received by September 1, 1993, amounts are available after the process described in N.J.A.C. 19:65-2.10.

5. Only those hotel development projects which shall have received all approvals from the Authority and have financing or other commitments in place to cover costs in excess of the Authority's allocable investment amount for a hotel development project by September 1, 1994, or such later date as may be fixed by the Authority, shall receive financing from the Authority.

19:65-2.10 Approval of hotel development projects and allocation of investment credit

(a) With respect to approved hotel development projects for which, on or prior to September 1, 1993, the Authority received either a fully complete application, or a notice by the casino licensee of its intent to proceed as set forth in N.J.A.C. 19:65-2.6(a)4, the Authority shall determine the estimated cost of each approved hotel development project and the amount of investment credit available to each licensee based upon the estimated costs of each approved hotel development project and proceed as follows:

1. In the event that the estimated aggregate amount of investment credit available to all licensees for approved hotel development projects, as determined in accordance with the provisions of N.J.A.C. 19:65-2.4 through 2.6, inclusive, hereof, is equal to or less than $100,000,000, the Authority shall allocate the full amount of investment credit available for hotel development projects to the respective licensee for each approved hotel development project; and

2. In the event that the estimated aggregate amount of investment credit available to all licensees for approved hotel development projects, as determined in accordance with the provisions of N.J.A.C. 19:65-2.4 through 2.6, inclusive, hereof, is in excess of $100,000,000, the Authority shall allocate the full amount of the investment credit available for hotel development projects proportionately among the licensees for the approved hotel development projects based upon a formula pursuant to which the amount of investment credit allocated to each licensee bears the same relationship to $100,000,000 as the estimated amount of investment credit available to such licensee for such licensee's approved hotel development project, as determined in accordance with the provisions of N.J.A.C. 19:65-2.4 through 2.6, inclusive, hereof, bears to the estimated aggregate amount in investment credit available to all licensees for approved hotel development projects, as determined in accordance with the provisions of N.J.A.C. 19:65-2.4 through 2.6, inclusive, hereof.

(b) If an approved hotel development project does not receive all Authority approvals or financing or other commitments are not received on or prior to September 1, 1994 or such later date as may be fixed by the Authority or is otherwise abandoned or terminated, the Authority shall recapture the investment credit with respect to such hotel development project and allocate such amount first in accordance with the provisions of (a) above and second in accordance with the provisions of (c) below.

(c) With respect to approved hotel development projects not described in (a) above, the Authority shall allocate any investment credit available pursuant to (a)1 above or any other unused investment credit not otherwise used to such hotel development project.

19:65-2.11 (No change in text.)

(a)

CASINO CONTROL COMMISSION

Notice of Temporary Adoption of Amendments
Gaming Equipment
Rules of the Games
Pai Gow Poker

Authority: N.J.S.A. 5:12-69(e), 70(f), 99(a) and 100.

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:

(1) Whether an automatic card shuffling and dealing device known as the ShuffleMaster, Model B-3, is suitable for use in the authorized game of Pai Gow Poker; and

(2) Whether the procedure for dealing cards in the game of Pai Gow Poker should be revised to permit an optional method of dealing, in which a mechanical dealing shoe dispenses cards in a stack of seven consecutive cards which is then delivered to each of the players, rather than dealing one card at a time to each player in turn; and

(3) Whether the procedure for selecting the first player at the table to receive cards should be revised to permit the use of a computerized random number generator, instead of the shaker and dice which are now used.

The experiment will be conducted in accordance with the temporary rules, which will be posted in each casino participating in this experiment, and which will also be available from the Commission upon request.

This test would allow a casino licensee which wishes to participate in the experiment, and which meets all the terms and conditions established by the Commission, to utilize the ShuffleMaster Model BG-3 device in the game of Pai Gow Poker, to use a mechanical dealing shoe to dispense cards in stacks of seven consecutive cards, rather than dealing one card at a time to each player in turn, and to conduct the game using the ShuffleMaster's random number generator to determine the first person to receive cards, instead of the dice and dice shaker now being used.

This experiment could begin on or after December 13, 1993, and continue for a maximum of 180 days from that date, unless otherwise terminated by the Commission or any of the participating casino licensees prior to that time, pursuant to the terms and conditions of the experiment.

Should the temporary amendments prove successful, in the judgment of the Commission, the Commission will propose them for final adoption, in accordance with the public notice and comment requirements of the Administrative Procedure Act and N.J.A.C. 1:30.

(b)

CASINO CONTROL COMMISSION

Notice of 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).

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 December 13, 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.

HUMAN SERVICES

(a)

Disability Discrimination Grievance Procedure
Adopted New Rules: N.J.A.C. 10:4

Proposed: April 5, 1993 at 25 N.J.R. 1323(a).
Adopted: August 31, 1993 by William Waldman, Commissioner, Department of Human Services.
Filed: November 3, 1993 as R.1993 d.616, **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. 30:1-12, 42 U.S.C. §12101 et seq., and 28 C.F.R. §35.107.
Effective Date: December 6, 1993.
Expiration Date: Exempt under 28 C.F.R. Part 35.

On April 5, 1993 a notice of proposed rulemaking was published in the New Jersey Register announcing the proposed adoption by this agency of a grievance procedure to be followed when and if this agency receives a complaint that it had violated or was violating the Americans with Disabilities Act, 42 U.S.C. §12101 et seq. That notice was part of a joint coordinated rulemaking process intended to produce a uniform grievance procedure for all participating agencies with the Department of Law and Public Safety as the lead agency. This notice of adoption concludes the process.

After publication of the notices of proposed rulemaking participating agencies received public comments, which were forwarded to the Department of Law and Public Safety for consolidated review, formulation of replies and revision of the proposed rules, where appropriate. The Summary of Public Comments and Agency Responses is being published under the heading of the Department of Law and Public Safety in this issue of the New Jersey Register. The reader is directed to that agency's notice of adoption to find the comments and replies. The final text of the grievance procedure appears below.

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

CHAPTER 4
DISABILITY DISCRIMINATION GRIEVANCE PROCEDURE

SUBCHAPTER 1. DEFINITIONS

10:4-1.1 Definitions

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

"ADA" means the Americans with Disabilities Act, 42 U.S.C.A. §12101 et seq.

"Agency" means the New Jersey Department of Human Services.

"Designated decision maker" means the Commissioner of Human Services or his or her designee.

SUBCHAPTER 2. GENERAL PROVISIONS

10:4-2.1 Purpose

(a) These rules are adopted by the agency in satisfaction of the requirements of the ADA and regulations promulgated pursuant thereto, 28 C.F.R. 35.107.

(b) The purpose of these rules is to establish a designated coordinator whose duties shall include assuring that the agency complies with and carries out its responsibilities under the ADA. Those duties shall also include the investigation of any complaint filed with the agency pursuant to N.J.A.C. 10:4-4.

10:4-2.2 Required ADA Notice

In addition to any other advice, assistance or accommodation provided, a copy of the following notice shall be given to anyone who inquires regarding the agency's compliance with the ADA or the availability of accommodation which would allow a qualified individual with a disability to receive services or participate in a program or activity provided by the agency.

AGENCY NOTICE OF ADA PROCEDURE

The agency has adopted an internal grievance procedure providing for prompt and equitable resolution of *[complaints]* ***grievances*** alleging any action prohibited by the U.S. Department of Justice regulations implementing Title 11 of the Americans with Disabilities Act. Title 11 states, in part, that "no otherwise qualified disabled individual shall, solely by reason of such disability, be excluded from participation in, be denied the benefits of or be subjected to discrimination" in programs or activities sponsored by a public entity.

Rules describing and governing the internal grievance procedure can be found in the New Jersey Administrative Code, N.J.A.C. 10:4. As those rules indicate, *[complaints]* ***grievances*** should be addressed to the agency's designated ADA Coordinator, who has been designated to coordinate ADA compliance efforts, at the following address:

[(The following address will be specific to the Agency)]
ADA Coordinator
New Jersey Department of Human Services
CN 700
Trenton, New Jersey 08625

1. A *[complaint]* ***grievance*** may be filed in writing or orally, but should contain the name and address of the person filing it, and briefly describe the alleged violation. A form for this purpose is available from the designated ADA coordinator. In cases of employment related *[complaints]* ***grievances***, the procedures established by the Department of Personnel, N.J.A.C. 4A:7-1.1 et seq. will be followed where applicable.

2. A *[complaint]* ***grievance*** should be filed promptly within *[20]* ***30*** days after the *[complainant]* ***grievant*** becomes aware of the alleged violation. (Processing of allegations of discrimination which occurred before this grievance procedure was in place will be considered on a case-by-case basis.)

3. An investigation, as may be appropriate, will follow the filing of a *[complaint]* ***grievance***. The investigation will be conducted by the agency's designated ADA Coordinator. The rules contemplate informal but thorough investigations, affording all interested persons and their representatives, if any, an opportunity to submit evidence relevant to a *[complaint]* ***grievance***.

4. In most cases a written determination as to the validity of the *[complaint]* ***grievance*** and a description of the resolution, if any, will be issued by the designated decision maker and a copy forwarded to the *[complainant]* ***grievant*** no later than 45 days after its filing.

5. The ADA coordinator will maintain the files and records of the agency relating to the *[complaints]* ***grievances*** filed.

6. The right of a person to a prompt and equitable resolution of the *[complaint]* ***grievance*** filed hereunder will not be impaired by the person's pursuit of other remedies such as the filing of an ADA *[complaint]* ***grievance*** with the responsible Federal department or agency or the New Jersey Division on Civil Rights. Use of this grievance procedure is not a prerequisite to the pursuit of other remedies.

7. The rules will be construed to protect the substantive rights of interested persons, to meet appropriate due process standards and to assure that the agency complies with the ADA and implementing Federal rules.

SUBCHAPTER 3. DESIGNATED ADA COORDINATOR

10:4-3.1 Designated ADA coordinator

(a) The designated coordinator of ADA compliance and complaint investigation for the agency is:

[(The following address will be specific to the Agency)]
ADA Coordinator
New Jersey Department of Human Services
CN 700
Trenton, New Jersey 08625

(b) All inquiries regarding the agency's compliance with the ADA and the availability of accommodation which would allow a qualified individual with a disability to receive services or participate in a program or activity provided by the agency should be directed to the designated coordinator identified in (a) above.

(c) All *[complaints]* ***grievances*** alleging that the agency has failed to comply with or has acted in a way that is prohibited by the ADA should be directed to the designated ADA coordinator identified in this section, in accordance with the procedures set forth in N.J.A.C. 10:4-4.

SUBCHAPTER 4. ADA *[COMPLAINT]* ***GRIEVANCE*** PROCEDURE

10:4-4.1 *[Complaint]* ***Grievance*** procedure

A *[complaint]* ***grievance*** alleging that the agency has failed to comply with the ADA or has acted in a way that is prohibited by the ADA shall be submitted either in writing or orally to the designated ADA coordinator identified in N.J.A.C. 10:4-3.1 ***within 30 days of the grievant becoming aware of the alleged violation***. A *[complaint]* ***grievance*** alleging employment discrimination will be processed pursuant to the rules of the Department of Personnel, N.J.A.C. 4A:7-1.1 through 3.4, if those rules are applicable.

10:4-4.2 *[Complaint]* ***Grievance*** contents

(a) A *[complaint]* ***grievance*** submitted pursuant to this subchapter may be submitted in or on the form set forth at N.J.A.C. 10:4-4.3.

(b) A *[complaint]* ***grievance*** submitted pursuant to this subchapter shall include the following information:

1. The name of the *[complainant]* ***grievant*** and/or any alternate contact person designated by the *[complainant]* ***grievant*** to receive communication or provide information for the *[complainant]* ***grievant***;

2. The address and telephone number of the *[complainant]* ***grievant*** or alternate contact person; and

3. A description of manner in which the ADA has not been complied with or has been violated, including times and locations of events and names of witnesses if appropriate.

10:4-4.3 *[Complaint]* ***Grievance*** form

The following form may be utilized for the submission of a *[complaint]* ***grievance*** pursuant to this subchapter:

Americans with Disabilities Act Grievance Form

Date: _____

Name of grievant: _____

Address of grievant: _____

Telephone number of grievant: _____

[Disability of grievant: _____]

Name, address and telephone number
of alternate contact person:

_____

_____

Agency alleged to have denied access:

Department: _____

Division: _____

Bureau or office: _____

Location: _____

Incident or barrier: _____

Please describe the particular way in which you believe you have been denied the benefits of any service, program or activity or have otherwise been subject to discrimination. Please specify dates, times and places of incidents, and names and/or positions of agency employees involved, if any, as well as names, addresses and telephone numbers of any witnesses to any such incident. Attach additional pages if necessary.

_____

_____

_____

_____

_____

_____

Proposed access or accommodation:

If you wish, describe the way in which you feel access may be had to the benefits described above, or that accommodation could be provided to allow access.

_____

_____

_____

A copy of the above form may be obtained by contacting the designated ADA coordinator identified at N.J.A.C. 10:4-3.1.

10:4-4.4 Investigation

(a) Upon receipt of a *[complaint]* ***grievance*** submitted pursuant to this subchapter, the designated ADA coordinator will notify the *[complainant]* ***grievant*** of the receipt of the *[complaint]* ***grievance*** and the initiation of an investigation into the matter. The designated ADA coordinator will also indicate a date by which it is expected that the investigation will be completed, which date shall not be later than 45 days from the date of receipt of the *[complaint]* ***grievance if practicable or*** unless a later date is agreed to by the *[complainant]* ***grievant***.

(b) Upon completion of the investigation, the designated ADA coordinator shall prepare a report for review by the designated decision maker for the agency. The designated decision maker shall render a written decision within 45 days of receipt of the *[complaint]* ***grievance, if practicable or*** unless a later date is agreed to by the *[complainant]* ***grievant***, which decision shall be transmitted to the *[complainant]* ***grievant*** and/or the alternate contact person if so designated by the *[complainant]* ***grievant***.

(a)

DIVISION OF DEVELOPMENTAL DISABILITIES

Manual of Standards for Licensed Community Residences for the Developmentally Disabled

Readoption: N.J.A.C. 10:44A

Proposed: September 20, 1993 at 25 N.J.R. 4378(a).
Adopted: November 5, 1993 by William Waldman, Commissioner, Department of Human Services.
Filed: November 8, 1993 as R.1993 d.633, **without change.**

Authority: N.J.S.A. 30:11B-1 et seq.

Effective Date: November 8, 1993.
Expiration Date: November 8, 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. 10:44A.

(b)

DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

Increase in Income Eligibility Limits Hearing Aid Assistance for the Aged and Disabled (HAAAD); Pharmaceutical Assistance to the Aged and Disabled Eligibility (PAAD); and Lifeline Credit Program/Tenants Lifeline Assistance Program (TLAP)

Adopted Amendments: N.J.A.C. 10:69-5.1; 10:69A-1.2 and 6.2; and 10:69B-4.2

Proposed: August 2, 1993 at 25 N.J.R. 3407(a).
Adopted: October 27, 1993 by William Waldman, Commissioner, Department of Human Services.
Filed: October 29, 1993 as R.1993 d.608, **without change.**

Authority: N.J.S.A. 30:4D-20 through 24, 36 through 42; N.J.S.A. 48:2-29.15, 16, 17, 48:2-29.31; P.L. 1993, c.3 (approved January 13, 1993).

Effective Date: December 6, 1993.
Expiration Date: N.J.A.C. 10:69, May 14, 1998;
N.J.A.C. 10:69A, March 26, 1998;
N.J.A.C. 10:69B, October 21, 1998.

Summary of Public Comments and Agency Response:
No comments were received. Subsequent to the proposal of these amendments, N.J.A.C. 10:51 was repealed and a new chapter adopted. The increase in PAAD income eligibility standards proposed at N.J.A.C. 10:51-5.6 is reflected in the current rule N.J.A.C. 10:51-4.23.

Full text of the adoption follows:

10:69-5.1 Age and income standards

(a) To be eligible for HAAAD, the applicant must be 65 years of age or older or must be under 65 and over 18 years of age and receive Social Security Title II disability benefits and have an annual income below $16,171 if single or $19,828 combined income if married.

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

10:69A-1.2 Legal authority

(a) The New Jersey Program of Pharmaceutical Assistance to the Aged and Disabled (PAAD) was established by Chapter 194, Laws of 1975, as amended by:

1.-8. (No change.)

9. Chapter 84, Laws of 1991, effective April 3, 1991 and retroactive to January 1, 1991; and

10. Chapter 3, Laws of 1993, effective January 13, 1993 and retroactive to January 1, 1993.

(b) (No change.)

10:69A-6.2 Income standards

(a) Any single permanent resident of New Jersey who is 65 years of age and over or who is under 65 and over 18 years of age and is receiving Social Security Title II disability benefits must have an annual income of less than $16,171 to be eligible for PAAD.

(b) Any married permanent resident of New Jersey who is 65 years of age and over or who is under 65 and over 18 years of age and receiving Social Security Title II disability benefits must have a combined (applicant and spouse) annual income of less than $19,828 to be eligible for PAAD.

1.-2. (No change.)

(c)-(i) (No change.)

10:69B-4.2 Income standards

(a) Any single, permanent resident of New Jersey who is 65 years of age or over or who is under 65 and over 18 years of age and is receiving Social Security Title II disability benefits must have an annual income of less than $16,171 to be eligible for Lifeline.

(b) Any married permanent resident of New Jersey who is 65 years of age or over or who is under 65 and over 18 years of age and receiving Social Security Title II disability benefits must have a combined (applicant and spouse) annual income of less than $19,828 to be eligible for Lifeline.

1.-2. (No change.)

(c)-(h) (No change.)

(c)

DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

Independent Clinic Services, N.J.A.C. 10:66

Adopted Repeal and New Rules: N.J.A.C. 10:66

Authorized: November 10, 1993 by William Waldman, Commissioner, Department of Human Services.
Filed: November 10, 1993 as R.1993 d.641, **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. 30:4D-6b(3); 30:4D-7, 7a, b, and c; 30:4D-12; 42 CFR 405.2401(b); 42 CFR 440.40(b); 42 CFR 440.90; 42 CFR 441 Subpart B; 42 CFR 441.20; 42 CFR 491 and 493; 1902(a)(9) of the Social Security Act, 42 U.S.C. 1396a; 1902(a)(13)(E) of the Social Security Act, 42 U.S.C. 1396a; 1902(a)(55) of the Social Security Act, 42 U.S.C. 1396a; 1905(a)(2)(C) of the Social Security Act, 42 U.S.C. 1396d; 1905(a)(4)(C) of the Social Security Act, 42 U.S.C. 1396d; N.J.A.C. 13:35; N.J.A.C. 13:39A.

Effective Date: December 6, 1993.
Expiration Date: December 6, 1998.

Summary of Public Comments and Agency Responses:
The following persons submitted comments:

1. Agnes M. Clarke, Executive Director, New Jersey Board of Dentistry;

2. Ervin Moss, M.D., Consultant, New Jersey State Society of Anesthesiologists;

3. Marci Shapiro Goldman, Corporate Director, Planning, Kennedy Memorial Hospitals—University Medical Center;

4. Anita Leone, Executive Director, Family Planning Association of New Jersey;

5. Jeff Brand, Executive Director, Planned Parenthood of Greater Northern New Jersey, Inc.; and

6. Antoinette Y. Snead, Associate Executive Director of Health Services, Planned Parenthood of Essex County.

COMMENT: The commenter, Agnes M. Clarke, provides a clarifying comment concerning the definition of a "specialist in dentistry," appear-

ing at N.J.A.C. 10:66-1.2. The commenter points out, for informational purposes only, that a dental specialist, by virtue of his or her plenary dental license, may perform any aspect of dentistry.

RESPONSE: The agency appreciates this point of clarification that is provided for informational purposes only. Accordingly, the agency is proceeding to adopt this definition without change.

COMMENT: The commenter, Ervin Moss, M.D., indicates that the limitation of 90 minutes operating time for Medicaid-covered surgical procedures in an ambulatory surgical center (ASC), as required in N.J.A.C. 10:66-5.1, is too restricting.

The commenter points out that many procedures require in excess of 90 minutes and are performed without additional risk to the patient. The commenter suggests that the agency consider raising the 90 minutes to take into account general anesthesia and conscious sedation anesthesia.

RESPONSE: The agency is adding the word "generally" to N.J.A.C. 10:66-5.1(b)3 on adoption, which qualifies the time limit. The word "generally" was inadvertently omitted by the agency. Agency policy, as stated in existing text at N.J.A.C. 10:66-1.6(j)4i and ii, reflects the use of this word.

The addition of the word "generally" is also consistent with Federal regulations at 42 CFR 416.65. However, under Federal regulations, the agency cannot further extend the surgical time frame.

COMMENT: The commenter indicates that: "... no mention is made of conscious sedation which is the most commonly performed anesthetic in an ASC setting."

RESPONSE: With respect to conscious sedation anesthesia, Federal regulations at 42 CFR 416.65(b)(2) indicate: "If the covered surgical procedures require anesthesia, the anesthesia must be—(i) Local or regional anesthesia; or (ii) General anesthesia of 90 minutes or less duration."

The agency, in conformity with the Federal regulation cited above, is proceeding to adopt the rule as proposed. The agency, however, considers the comment to be valid and will notify the Federal Bureau of Policy Development, Health Care Financing Administration, of the need for consideration of revised regulations in this area.

COMMENT: The commenter, Marci Shapiro Goldman, asks if there is a difference between an independent clinic and a hospital-based clinic, and whether or not the proposed rules affect hospital-based clinics.

RESPONSE: The proposed rules at N.J.A.C. 10:66 set forth the New Jersey Medicaid program's rules (policies and procedures) pertaining to the provision of, and reimbursement for, Medicaid-covered services in an independent clinic setting. An independent clinic means a facility that is not part of a hospital but is organized and operated to provide medical care to outpatients.

The New Jersey Medicaid program's rules pertaining to hospital-based clinics, referred to as outpatient hospitals by the Program, are located at N.J.A.C. 10:52, the Medicaid program's hospital services chapter.

The proposed rules at N.J.A.C. 10:66, therefore do not pertain to hospital-based clinics, with the exception of certain HealthStart program services. Health Support Services for pregnant women and Continuity of Care for children under two years of age when the physician does not bill independently are considered clinic services, subject to the rules located in proposed N.J.A.C. 10:66-3.

COMMENT: The commenter requests that the agency add, in N.J.A.C. 10:66-3.13, eligibility for board certification by the American Osteopathic Board of Pediatrics.

RESPONSE: The agency is adding eligibility for board certification by the American Osteopathic Board of Pediatrics at N.J.A.C. 10:66-3.13, in order to reflect existing policy. The agency's policy is to allow board certification by both the American Academy of Pediatrics and the American Osteopathic Board of Pediatrics.

COMMENT: The commenter also asks for clarification as to whether a HealthStart pediatric care provider can be a family practice physician who is Board certified by either the American Osteopathic Board of General Practice or the American Board of Family Practice.

RESPONSE: Family practitioners, including osteopathic physicians, may be certified as pediatric HealthStart providers if they meet the requirements of proposed N.J.A.C. 10:66-3.13 concerning hospital admitting privileges in pediatrics.

COMMENT: Jeff Brand provided a comment concerning proposed N.J.A.C. 10:66-2.4. Family planning agencies should be allowed to perform laboratory procedures that are within the scope of practice of a license without prior approval from the New Jersey State Department of Health. Clarification is needed as to who will grant this approval in the New Jersey State Department of Health.

RESPONSE: In order to clarify the rule in question, the agency has amended the text of N.J.A.C. 10:66-2.4(b) on adoption to read "A clinic shall only claim reimbursement for those laboratory services that have been performed by them on their premises, for their patients, and for which they have received approval by the New Jersey Medicaid program, as indicated in N.J.A.C. 10:66-1.3(a)."

The following comments and responses are summarized together because they represent similar points of view shared by the following commenters: Anita Leone, Executive Director, Family Planning Association of New Jersey; Jeff Brand, Executive Director, Planned Parenthood of Greater Northern New Jersey, Inc.; and Antoinette Y. Snead, Associate Executive Director of Health Services, Planned Parenthood of Essex County.

COMMENT: In proposed N.J.A.C. 10:66-1.3(a), it is unreasonable to require a clinic to obtain approval by the New Jersey Medicaid program when a clinic wishes to add a service(s). Clinics should simply be required to notify Medicaid when adding or expanding services. Licensing authorities and other regulatory channels establish parameters for scope of service.

RESPONSE: Clinics are approved for Medicaid participation in accordance with the authority granted by the New Jersey State Department of Health, through licensure or other authorization, if required. The New Jersey Medicaid Management Information System's claims processing matrix is set up to process claims for clinics only after approval is granted by the Medicaid program.

For example, if a licensed, Medicaid-enrolled family planning clinic obtains approval from the New Jersey State Department of Health for primary care, the clinic must request Medicaid approval for the new service and support the request by forwarding a revised license to the Program.

The Medicaid program must be assured that clinics meet relevant Federal and State Medicaid regulations before approval for additional services can be granted. Provider approval, and the services rendered to Medicaid recipients, is required by State law, N.J.S.A. 30:4D-3h.

Accordingly, the agency is proceeding to adopt this rule without change.

COMMENT: In proposed N.J.A.C. 10:66-1.3(f), the terms of a clinic's arrangements with its physicians are of a contractual, private nature that are complex, varied, and built upon mutual needs; compensation is a matter determined by agreement between a physician and a clinic. (**Agency Note:** The rule in question is proposed N.J.A.C. 10:66-1.3(h), not 10:66-1.3(f) as cited by the above-mentioned commenters.)

RESPONSE: The agency's intent in proposed N.J.A.C. 10:66-1.3(h) is to assure that the Medicaid program does not reimburse a physician, on a fee-for-service basis, for a service for which the physician is receiving compensation from the clinic by way of salary, contract, or other arrangement. A precedent for this proposed rule exists at N.J.A.C. 10:54-1.2(a)5 and 1.2(a)6, in which similar rules are set forth for physician services provided in the inpatient and outpatient hospital setting.

Accordingly, the agency is proceeding to adopt this rule without change.

COMMENT: Proposed N.J.A.C. 10:66-1.3(i) is unnecessary because the relationship between clinic size, type of service, and the number of affiliated physicians is adequately reviewed, monitored, and governed by the New Jersey State Department of Health and other regulatory agencies. Additional regulations or guidelines are not needed.

RESPONSE: The agency's intent in proposed N.J.A.C. 10:66-1.3(i) is to assure that a clinic meets the Federal physician direction requirements by maintaining sufficient professional staff (coverage) for the services it provides and for which the Medicaid program is billed.

Proposed N.J.A.C. 10:66-1.3(f) through (j) outline the physician direction requirements by those individuals directly affiliated with an independent clinic for the care of a clinic's Medicaid recipients, pursuant to 42 CFR 440.90, and policy guidance provided by the Health Care Financing Administration.

Accordingly, the agency is proceeding to adopt this rule without change.

COMMENT: A code for Depo-Provera (N.J.A.C. 10:66-6) is vital to the provision of equitable service to the women of New Jersey.

RESPONSE: A coverage policy for Depo-Provera is under development by the agency.

Summary of Changes Between Proposal and Adoption:

The following technical changes have been made to correct print errors:

1. In proposed N.J.A.C. 10:66-1.2, the word "Enrollment" has been added to correct the reference to N.J.A.C. 10:49-3.2 in the definition "ambulatory surgical center";

2. In proposed N.J.A.C. 10:66-1.5(a), the reference to "(c) through (f)" is corrected to "(c) through (e)." There is no N.J.A.C. 10:66-1.5(f);

3. In proposed N.J.A.C. 10:66-1.5(d), the number "3." is restored to its proper location following N.J.A.C. 10:66-1.5(d)2iii, in front of the sentence that begins: "The interim encounter rate shall . . .";

4. In proposed N.J.A.C. 10:66-2.8, the incorrect codification "(e)" following N.J.A.C. 10:66-2.8(k) is changed to "(l)"; and

5. In proposed N.J.A.C. 10:66-5.2(a), "ed" is added to the word "cover" and the word "of" is deleted. The corrected sentence now reads: "If a covered surgical procedure requires anesthesia, the anesthesia shall be:".

The following technical, non-substantive changes are made by the agency in the text of the adopted rule. The changes are listed in the order in which they appear in the text of the adoption. The changes do not alter the nature, scope or impact of the proposed rule, and do not require re-publication:

1. In proposed N.J.A.C. 10:66-2.4(b), text is amended in order to clarify the agency's policy with respect to laboratory services performed by clinics. The corrected sentence is consistent with agency requirements in proposed N.J.A.C. 10:66-1.3(a).

This requirement is based upon State law, N.J.S.A. 30:4D-3h, and does not impose any additional burden on providers, who should already be in compliance with all applicable laws and rules.

This change is the result of a comment received (see Summary above).

2. In proposed N.J.A.C. 10:66-3.13(a), the second sentence is amended to add eligibility for board certification by the American Osteopathic Board of Pediatrics, which reflects existing policy. The agency's policy is to allow board certification by both the American Academy of Pediatrics and the American Osteopathic Board of Pediatrics.

This change is the result of a comment received (see Summary above).

3. In proposed N.J.A.C. 10:66-5.1(b)3, the word "generally" is added to the sentence. The corrected sentence conforms to Federal regulations at 42 CFR 416.65. The corrected sentence at N.J.A.C. 10:66-5.1(b)3 now reads: "Do not generally exceed a total of 90 minutes operating time . . .".

This change does not impose an additional burden on providers because it qualifies the time limit.

This change is the result of a comment received (see Summary above).

4. In proposed N.J.A.C. 10:66-6.2(a), incorrect entries of "N" are deleted from the "IND" column in 19 instances.

Explanation: As indicated at N.J.A.C. 10:66-6.1(b), an "N" preceding any procedure code means that qualifiers are applicable to that code. The incorrect entries of "N" are being deleted in these 19 instances because no qualifiers are applicable.

Generally, qualifiers are limitations on procedure codes imposed by the Medicaid program on CPT-4 codes. The removal of entries of "N" means the provider can rely on the CPT-4 narrative when billing. The agency did not intend to impose any restrictions on the use of these codes.

5. In proposed N.J.A.C. 10:66-6.2(c), incorrect entries of "N" are deleted from the "IND" column in three instances, for the same reason as indicated in the explanation above.

6. In proposed N.J.A.C. 10:66-6.2(c), incorrect entries of "N" in the "IND" column are replaced by an "L" in eight instances, to correct Agency typographical errors.

Explanation: As indicated at N.J.A.C. 10:66-6.1(b), an "L" preceding any procedure code indicates that the complete narrative for the code is located at N.J.A.C. 10:66-6.3.

7. In proposed N.J.A.C. 10:66-6.2(o), the entries of "Z" in the "IND" column (six instances) are relocated to their correct position at the beginning of the respective HCPCS code and replaced by the correct entry of "L".

Explanation: As indicated at N.J.A.C. 10:66-6.1(b), an "L" preceding any procedure code indicates that the complete narrative for the code is located at N.J.A.C. 10:66-6.3.

8. In N.J.A.C. 10:66-6.3, narratives are being added that correspond to the codes appearing at N.J.A.C. 10:66-6.2(o). (See explanation above and narratives adopted on September 20, 1993 at 25 N.J.R. 4498(a).)

9. In proposed N.J.A.C. 10:66-6.5(b)4viii, two "NOTES" are added.

Explanation: This material was inadvertently omitted from the published proposal dated September 20, 1993, and is therefore being restored to its proper location at N.J.A.C. 10:66-6.5(b)4viii. The addition of this material does not represent a change in current policy, and is consistent with the proposed language at N.J.A.C. 10:66-2.4(b).

10. In proposed N.J.A.C. 10:66-6.5(b)4viii, the phrase ". . . outside non-clinic hours" is changed to ". . . outside clinic hours", in the procedure description for HCPCS Code W9070. Explanation: The phrase ". . . outside non-clinic hours" is contradictory to the rest of the text and does not convey the intended meaning of the rule. The rule requires 24-hour telephone access for medical consultation when such access is not available at the clinic, in other words, ". . . outside clinic hours".

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]*):

CHAPTER 66
INDEPENDENT CLINIC SERVICES

SUBCHAPTER 1. GENERAL PROVISIONS

10:66-1.1 Scope of service

(a) This chapter (N.J.A.C. 10:66) describes the policies and procedures of the New Jersey Medicaid program pertaining to the provision of, and reimbursement for, medically necessary Medicaid-covered services in an independent clinic setting. An independent clinic setting includes, but is not limited to, clinic types such as an ambulatory care facility, ambulatory surgical center, ambulatory care/family planning/surgical facility, and a Federally qualified health center.

(b) Medically necessary services provided in an independent clinic setting shall meet all applicable State and Federal Medicaid laws, and all applicable policies, rules and regulations as specified in the appropriate provider services manual of the New Jersey Medicaid program.

(c) Independent clinic services are preventive, diagnostic, therapeutic, rehabilitative, or palliative services that are provided by a facility (freestanding) that is not part of a hospital but is organized and operated to provide medical care to outpatients, including such services provided outside the clinic by clinic personnel to any Medicaid recipient who does not reside in a permanent dwelling or does not have a fixed home or mailing address. Clinic services do not include services provided by hospitals to outpatients.

(d) The chapter is divided into six subchapters, as follows:

1. N.J.A.C. 10:66-1 contains scope of service, definitions, provisions for provider participation, prior authorization, basis for reimbursement, and recordkeeping requirements.

2. N.J.A.C. 10:66-2 contains policies and procedures pertaining to specific Medicaid-covered services provided in an independent clinic setting. Where unique characteristics or requirements exist concerning a particular Medicaid-covered service, the service is separately identified and discussed.

3. N.J.A.C. 10:66-3 contains information about HealthStart, a program for pregnant women and children.

4. N.J.A.C. 10:66-4 and its Appendix contain information about Federally qualified health centers, including (a) rules governing the provision of services; (b) the Medicaid cost report containing the forms used by Federally qualified health centers to determine Medicaid reimbursement amounts; and (c) instructions for the proper completion of the forms contained in the cost report.

5. N.J.A.C. 10:66-5 contains information about ambulatory surgical centers, including covered services, anesthesia, medical justification, facility services, and medical records.

6. N.J.A.C. 10:66-6 pertains to the Health Care Financing Administration's Common Procedure Coding System (HCPCS). The HCPCS procedure code system contains procedure codes and maximum fee allowances corresponding to Medicaid-reimbursable services.

(e) The Appendix following N.J.A.C. 10:66-6 pertains to the Fiscal Agent Billing Supplement. The Fiscal Agent Billing Supplement contains billing instructions and samples of forms (claim forms, prior authorization forms, and consent forms) used in the billing process.

10:66-1.2 Definitions

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

"Ambulatory care facility" means a health care facility or a distinct part of a health care facility, licensed by the New Jersey State Department of Health, which provides preventive, diagnostic, and treatment services to persons who come to the facility to receive services and depart from the facility on the same day.

"Ambulatory care/family planning/surgical facility" means a health care facility or a distinct part of a health care facility, licensed by the New Jersey State Department of Health to provide specified surgical procedures.

"Ambulatory surgical center" means any distinct entity that operates exclusively for the purpose of providing surgical services to patients not requiring hospitalization; has an agreement with the Health Care Financing Administration (HCFA) under Medicare to participate as an ambulatory surgical center; is licensed as an ambulatory surgical center, if required, by the New Jersey State Department of Health; and meets the enrollment requirements as indicated in the Administration chapter at N.J.A.C. 10:49-3.2, ***Enrollment*** process, and at N.J.A.C. 10:66-1.3, Provisions for provider participation.

"Dental clinic" means a freestanding independent facility, or a distinct component of a multi-service ambulatory care facility, which meets the standards for dental clinics established by the New Jersey State Board of Dentistry.

"Drug treatment center" means a facility or a distinct part of a facility which is licensed or approved by the New Jersey State Department of Health to provide health care for the prevention and treatment of drug addiction and drug abuse, as indicated in the Manual of Standards for Licensure of Drug Treatment Facilities, N.J.A.C. 8:42B.

"Federally qualified health center" means an entity that is receiving a grant under Section 329, 330, or 340 of the Public Health Service Act; or is receiving funding from such a grant under a contract with the recipient of such a grant and meets the requirements to receive a grant under Section 329, 330, or 340 of the Public Health Service Act; or based on the recommendation of the Health Resources and Services Administration within the Public Health Service, is determined by the Secretary to meet the requirements for receiving such a grant; or was treated by the Secretary, for purposes of Medicare Part B, as a Federally Funded Health Center as of January 1, 1990.

"Freestanding facility" means a facility which is not located in a hospital but may, or may not, be under its auspices.

"Independent clinic" means a facility that is not part of a hospital but is organized and operated to provide medical care to outpatients.

"Mental health clinic" means a freestanding independent community facility or distinct component of a multi-service ambulatory care facility, which meets the minimum standards established by the Community Mental Health Services Act implementing rules at N.J.A.C. 10:37.

"Personal care assistant" means a person who has:

1. Successfully completed a minimum 40 hours training program in personal care services approved by the New Jersey Medicaid program. The individual is assigned and supervised by a registered professional nurse of a Medicaid-approved personal care provider agency.

i. The individual is primarily involved in the treatment and care of mentally handicapped and developmentally disabled patients in community settings, and is employed by a State agency or by an agency under contract with a State agency.

"Satellite" means an affiliate of a separately enrolled independent clinic. A satellite is located at a site distinct from that of the separately enrolled independent clinic but shares the same governing authority.

"Specialist" means a fully licensed physician who:

1. Is a diplomate of a specialty board approved by the American Board of Medical Specialties or the Advisory Board of the American Osteopathic Association;

2. Is a fellow of the appropriate American specialty college or a member of an osteopathic specialty college;

3. Is currently admissable to take the examination administered by a specialty board approved by the American Board of Medical Specialties or the Advisory Board of the American Osteopathic Association, or has evidence of completion of an appropriate qualifying residency approved by the American Medical Association or American Osteopathic Association;

4. Holds an active staff appointment with specialty privileges in a voluntary or governmental hospital which is approved for training in the specialty in which the physician has privileges; or

5. Is recognized in the community as a specialist by his or her peers.

"Specialist in dentistry" means an individual who is licensed to practice dentistry in the state in which treatment is provided, and whose practice is limited solely to his or her specialty, which is recognized by the American Dental Association. Additional conditions regarding the qualifications for a dental specialist for the New Jersey Medicaid program are located in the New Jersey Medicaid program's Dental Services chapter, N.J.A.C. 10:56.

"Specialist in podiatry" means an individual who is licensed to practice podiatry in the state in which treatment is provided, and who is a Diplomate of the appropriate American Podiatry Association-recognized board or has been notified of admissibility to examination by the appropriate American Podiatry Association-recognized board.

"Specialist in psychology" means an individual who is licensed to practice psychology in the state in which treatment is provided, and who is a Diplomate of the American Board of Professional Psychology (Diplomate Qualified) or has been notified of admissibility to the examination by the American Board of Professional Psychology (Diplomate Eligible).

10:66-1.3 Provisions for provider participation

(a) Each independent clinic, including each satellite, shall be individually approved by the New Jersey Medicaid program in conjunction with the Program's fiscal agent, for each service provided. If a clinic wishes to add a service(s), approval from the New Jersey Medicaid program shall be obtained before reimbursement for the service(s) may be claimed. For additional details, see the Administration chapter, N.J.A.C. 10:49-3.2, Enrollment process, and N.J.A.C. 10:49-3.3, Providers with multi-locations.

1. A clinic's medical staff, including physicians, dentists, and other practitioners, shall enroll in the New Jersey Medicaid program, as indicated in the Administration chapter at N.J.A.C. 10:49-3.4, in order to obtain an individual Medicaid Provider Services Number to be used when the clinic submits a claim to the Division's fiscal agent.

(b) Each independent clinic seeking enrollment in the New Jersey Medicaid program shall possess a certificate of need and/or license, if required, from the New Jersey State Department of Health.

1. The facility shall provide only those services for which it is licensed or authorized to provide by the New Jersey State Department of Health.

2. A photocopy of the license shall be forwarded to the New Jersey Medicaid program as an attachment to a clinic's initial application for enrollment and when the license is renewed on an annual basis.

(c) In addition to N.J.A.C. 10:66-1.3(a) and (b) above, each independent clinic shall obtain approval from the relevant Federal and State agency(ies), if required. For example:

1. For an ambulatory surgical center, an agreement with the Health Care Financing Administration (HCFA) under Medicare to participate as an ambulatory surgical center and licensure as an ambulatory surgical center, if required, by the New Jersey State Department of Health;

2. For a Federally qualified health center, approval by the Health Care Financing Administration as a Federally qualified health center and licensure by the New Jersey State Department of Health as an ambulatory care facility;

3. For an ambulatory care/family planning/surgical facility, licensure as an ambulatory care/family planning/surgical facility by the New Jersey State Department of Health;

4. For a dental clinic, approval by the New Jersey State Board of Dentistry and the Bureau of Dental Services, Division of Medical Assistance and Health Services (DMAHS) of the New Jersey Department of Human Services;

5. For a mental health clinic, approval by the Division of Mental Health and Hospitals (DMH&H) of the New Jersey Department of Human Services; and

6. For child health conferences, approval by the New Jersey State Department of Health as indicated at N.J.A.C. 10:66-3.3.

(d) Requests for approval to perform radiological services, with Medicaid reimbursement, shall be submitted to the New Jersey Medicaid program and shall include:

1. The radiologist's name(s) and copy(ies) of the license(s); and

2. Documentation from the New Jersey State Department of Health relating to the installation and safety of X-ray equipment.

(e) Each out-of-State clinic seeking reimbursement for services provided to New Jersey Medicaid recipients shall enroll, if the clinic is approved by Title XIX (Medicaid) in its own state, in the New Jersey Medicaid program as indicated in the Administration chapter at N.J.A.C. 10:49-3.2(c). Services are reimbursable under the following circumstances:

1. If the services are provided to Division of Youth and Family Services children residing out-of-State; or

2. If the services are provided in an emergency.

(f) Each Medicaid recipient's care in an independent clinic shall be under the supervision of a physician directly affiliated with the clinic. The physician shall assume professional responsibility for the services provided and thus assure that the services are medically appropriate.

(g) A physician affiliated with a clinic shall spend as much time in the facility as is necessary to assure that Medicaid recipients are receiving services in a safe and efficient manner in accordance with accepted standards of medical and dental practice.

(h) For a physician to be affiliated with a clinic, there shall be a contractual agreement or some other type of formal, written arrangement on file at the facility between the physician and the facility by which the physician is obligated to supervise the care provided to the clinic's Medicaid recipients.

1. The contractual agreement or formal, written arrangement shall indicate the physician's responsibilities and compensation.

(i) The size of the clinic and the type of services it provides determines the number of physicians that must be affiliated with the clinic.

(j) The clinic's medical staff, including physicians, dentists, and other practitioners, shall be appropriately licensed in order to provide the medical care delivered to Medicaid recipients.

10:66-1.4 Prior authorization

(a) In addition to N.J.A.C. 10:49-6.1, this section outlines prior authorization requirements for dental, mental health, rehabilitative, and vision care services, in (b), (c), (d) and (e) below, respectively. Prior authorization requirements by the Physician Case Manager for persons participating in the Garden State Health Plan or other managed health care programs are located at N.J.A.C. 10:49-20.5(a)3.

(b) Dental services require prior authorization as indicated in the New Jersey Medicaid program's Dental Services chapter, N.J.A.C. 10:56.

(c) Mental health services provided to each Medicaid recipient require prior authorization when payment to an independent clinic exceeds $6,000 for that Medicaid recipient in any 12-month period, commencing with the recipient's initial visit.

1. The maximum period of authorization is up to 12 months for all mental health services. Additional authorizations may be requested.

2. When requesting prior authorization, Form FD-07, Request for Authorization of Mental Health Services, shall be completed and forwarded to: Mental Health Consultant, Division of Medical Assistance and Health Services, Mail Code #18, CN-712, Trenton, New Jersey 08625-0712. See the Fiscal Agent Billing Supplement, N.J.A.C. 10:66—Appendix, for instructions on the completion of the prior authorization form.

3. The "Brief Clinical History" and "Present Clinical Status" sections of the prior authorization form are particularly important and must provide sufficient medical information to justify and support the proposed treatment request. Failure to comply may result in a reduction or denial of requested services.

4. A departure from the plan of care requires a new request for prior authorization when a change in the recipient's clinical condition necessitates an increase in the frequency and intensity of services, or change in the type of services which exceeds the cost of the services authorized.

5. Similarly, a new request for authorization is required for a medical/remedial therapy session or encounter that departs from the plan of care in terms of increased need, scheduling, frequency, or duration of services furnished (for example, unscheduled emergency services furnished during an acute psychotic episode).

6. If the request for prior authorization is approved, the Division's fiscal agent shall notify the provider in writing regarding the Division's decision; authorized date or time frame; and activation of the prior authorization number. If the request is modified, denied, or if the Division requires additional information, the provider is so notified in writing by the fiscal agent.

(d) Rehabilitative services require prior authorization from the appropriate Medicaid District Office (MDO) after the initial evaluation visit.

1. When requesting prior authorization or reauthorization, Form FD-06, Request for Prior Authorization for Rehabilitative Services, shall be completed and forwarded to the recipient's respective MDO. See the Fiscal Agent Billing Supplement for instructions on the completion of the prior authorization form.

2. Authorization shall be considered only when the request includes a written prescription from a licensed physician.

3. The prescription shall substantiate the need, type of treatment, objective of treatment, and an estimate of the number of treatment days.

4. The prescription shall be definitive as to type and scope. A prescription for "Physical therapy three times a week" is not acceptable.

5. The maximum period of authorization is 60 days.

i. Reauthorizations for periods not exceeding 60 days may be approved by the MDO when the request is supported by:

(1) The physician's written prescription;

(2) A statement of the anticipated number of treatments required; and

(3) A progress report of the recipient's condition.

6. If the request for prior authorization is approved, the Division's fiscal agent shall notify the provider in writing regarding the Division's decision; authorized date or time frame; and activation of the prior authorization number. If the request is modified, denied, or if the Division requires additional information, the provider is so notified in writing by the fiscal agent.

(e) Vision care services require prior authorization as indicated in the New Jersey Medicaid program's Vision Care Services chapter, N.J.A.C. 10:62.

10:66-1.5 Basis for reimbursement

(a) Except as indicated at (c) through *[(f)]* ***(e)*** below, reimbursement to independent clinics is in accordance with the maximum fee schedule indicated at N.J.A.C. 10:66-6.2 and is based on the same fees, conditions, and definitions for corresponding services governing the reimbursement of Medicaid-participating practitioners in "private" (independent) practice. Reimbursement is made directly to the clinic.

1. An independent clinic shall make a charge for services to all patients, except as provided by legislation, with the proviso that no charge will be made directly to the Medicaid patient, and the charge to the New Jersey Medicaid program may not exceed the charge by the clinic for identical services to other groups or individuals in the community.

(b) The HCPCS procedure code system, N.J.A.C. 10:66-6, contains procedure codes and maximum fee allowances corresponding to Medicaid-reimbursable services. An independent clinic may claim reimbursement for only those HCPCS procedure codes that correspond to the allowable services included in the clinic's provider enrollment approval letter, as indicated at N.J.A.C. 10:66-1.3(a).

1. If the HCPCS procedure code(s), approved for use by a specific clinic, is assigned both a specialist and non-specialist maximum fee allowance, the amount of the reimbursement will be based upon the status (specialist or non-specialist) of the individual practitioner who actually provided the billed service. To identify this practitioner, enter the Medicaid Provider Services Number in the appropriate section of the claim, as indicated in the Fiscal Agent Billing Supplement, N.J.A.C. 10:66—Appendix.

(c) The basis for reimbursement of services provided in an ambulatory surgical center (ASC) is as follows:

1. Reimbursement shall be made for services rendered by both the ASC facility and the attending physician, if the physician is not reimbursed for surgical/medical services by the facility.

2. For facility reimbursement, surgical procedures performed in an ASC are separated into an eight-group classification system as designated at 42 CFR 416.65(c), the Federal regulations governing ASC services.

i. A single payment is made to an ASC which encompasses all facility services furnished by the ASC in connection with a covered procedure performed on a patient in a single operative session.

ii. If more than one covered surgical procedure is performed on a patient during a single operative session, payment is limited to two procedures, provided that the two procedures are performed at separate operative body sites.

(1) Full payment shall be made for the procedure with the highest Medicaid reimbursement allowance. Payment for the other procedure shall be at 50 percent of the applicable reimbursement allowance for that procedure. Total reimbursement may not exceed 150 percent of the primary procedure allowance.

iii. The ASC facility payment for all procedures in each group is established at a single rate, as follows:

Group	Maximum Fee Allowance
1	$195.00
2	$261.00
3	$300.00
4	$369.00
5	$421.00
6	$541.00
7	$585.00
8	$627.00

Note: Should the Health Care Financing Administration (HCFA) amend the group designation for any procedure(s), the maximum fee allowance for the newly designated group shall apply and shall not be construed as a fee increase/decrease to the affected procedure(s).

3. Physician reimbursement shall be in accordance with the New Jersey Medicaid Program's Physician Maximum Fee Allowance for specialist and non-specialist, N.J.A.C. 10:54, and the following:

i. When submitting a claim, the physician performing the surgical procedure shall use the applicable claim form, billing the New Jersey Medicaid program either as an individual provider or as a member of a physician's group.

ii. A physician on salary for administrative duties (such as a medical director) shall be permitted to submit claims for surgical/medical services performed if outside his or her administrative duties and not billed by the facility. Administrative duties shall be considered a direct cost of the facility and shall be included in the clinic payment.

(d) The basis for reimbursement of services provided in a Federally qualified health center (FQHC) is as follows:

1. For cost reporting periods beginning prior to January 1, 1994, FQHC reimbursement shall be made at an interim encounter rate as described in (d)3 below. The interim encounter rate includes an add-on for the cost expended by a FQHC for the outstationing of county welfare agency staff to determine Medicaid eligibility. An FQHC's financial responsibility for outstationing activities is equivalent to the non-Federal share (currently 50 percent) of estimated CWA costs for the calendar year.

i. Estimated outstationing charges for each FQHC shall be used to determine the amount to be withheld from Medicaid payments and disbursed to CWAs each calendar quarter.

ii. Withholdings (see (d)1i above) shall be made at the beginning of each calendar quarter in an amount equal to one-fourth of the estimated annual outstation charge for each FQHC.

2. For cost reporting periods beginning on and after January 1, 1994, FQHC reimbursement shall be based on the same HCPCS procedure code fees, conditions and definitions for corresponding services governing the reimbursement of Medicaid-participating practitioners in "private" (independent) practice, in accordance with N.J.A.C. 10:54-4 and 10:56-3.

i. FQHC reimbursement shall include an interim encounter rate as described in (d)3 below to be billed once for each FQHC visit. The interim encounter rate shall be based upon all reasonable costs not reimbursed by the HCPCS procedure code fees, and shall include an add-on for the cost expended by a FQHC for the outstationing of county welfare agency staff to determine Medicaid eligibility. An FQHC's financial responsibility for outstationing activities is equivalent to the non-Federal share (currently 50 percent) of estimated CWA costs for the calendar year.

ii. Estimated outstationing charges for each FQHC shall be used to determine the amount to be withheld from Medicaid payments and disbursed to CWAs each calendar quarter.

iii. Withholdings (see (d)2ii above) shall be made at the beginning of each calendar quarter in an amount equal to one fourth of the estimated annual outstation charge for each FQHC.

3. The interim encounter rate shall be determined as follows:

i. For cost reporting periods beginning prior to January 1, 1992:

(1) For those FQHCs that have filed a Medicare cost report, the interim encounter rate shall be the current Medicare interim encounter rate.

(2) For those FQHCs that have not filed a Medicare cost report, the interim encounter rate shall be an average of the interim encounter rates described in (d)3i(1) above.

ii. For cost reporting periods beginning on and after January 1, 1992:

(1) The interim encounter rate shall be the prior year's actual encounter rate as calculated from the Medicaid cost report which shall be incremented by the medical care component of the Consumer Price Index. The interim encounter rate may be adjusted to approximate the reimbursable cost the FQHC is currently incurring to provide covered services to Medicaid recipients.

(2) If there is no prior year actual encounter rate available, the interim encounter rate shall be the Medicare state limit for FQHCs. In this case, the Medicare state limit may be adjusted for Medicaid-only costs which are not included in the Medicare state limit.

iii. For cost reporting period beginning on and after January 1, 1994:

(1) For those FQHCs that have filed a Medicaid cost report, the interim encounter rate shall be calculated from data on prior years' cost reports.

(2) For those FQHCs that have not filed a Medicaid cost report, the interim encounter rate shall be an average of the interim encounter rates of all FQHCs that have filed a Medicaid cost report.

iv. For cost reporting periods beginning on and after January 1, 1995:

(1) For those FQHCs that have filed a Medicaid cost report, the interim encounter rate shall be the prior year's actual encounter rate as calculated from the Medicaid cost report which shall be incremented by the medical care component of the Consumer Price Index. The interim encounter rate may be adjusted to approximate the reimbursable cost the FQHC is currently incurring in providing covered services to Medicaid recipients.

(2) The FQHC's that have not filed a Medicaid cost report, the interim encounter rate shall be an average of the interim encounter rates described in (d)3iv(1) above.

v. The interim encounter rate shall approximate the reimbursable cost the FQHC is currently incurring in furnishing covered services to Medicaid recipients.

vi. The interim encounter rate may be adjusted during an accounting period. Such adjustment may be made either upon request of the facility, or if there is evidence available to the Medicaid program showing that actual costs will be significantly higher or lower than the computed rate. When a facility requests an adjustment of the interim encounter rate, the request shall be supported by a schedule showing that actual costs incurred to date plus estimated costs to be incurred will be significantly higher or lower than the computed rate.

4. The actual encounter rate shall be calculated from the facility's Medicaid cost report, in accordance with N.J.A.C. 10:66-4.2.

i. The actual encounter rate shall be calculated based upon reasonable costs of Medicaid services provided to Medicaid recipients.

ii. FQHCs are subject to guidelines to test the reasonableness of the productivity of the staff employed by an FQHC, as follows:

(1) At least 2.1 encounters per hour, per physician;

(2) At least 1.1 encounters per hour, per nurse practitioner or nurse midwife; and

(3) At least 1.25 encounters per hour, per dentist or dental hygienist.

iii. The actual encounter rate shall be subject to adjustment based upon any audits of the Medicaid cost report.

5. If a provider wishes to appeal the final rate determination, a written request shall be filed with the Assistant Director, Office of Budget, Fiscal and Informational Systems, Division of Medical Assistance and Health Services, Mail Code #23, CN 712, Trenton, New Jersey 08625-0712, or the Assistant Director's designee, no later than the 180th day following the date of the provider's receipt of the Notification of Final Settlement. See N.J.A.C. 10:49-10.

i. The appeal shall identify the specific items of disagreement and the amount(s) in question, and provide reasons and documentation to support the provider's position.

6. The total reimbursement amount due is compared with total payments made to the FQHC for the reporting period, and the difference constitutes the amount of the reconciliation.

i. If the reconciliation results in an underpayment, a lump sum payment shall be made to the FQHC.

ii. If the reconciliation results in an overpayment made to the FQHC, Medicaid shall arrange repayment from the FQHC through a lump-sum refund or through an offset against subsequent payments, or a combination of both. The FQHC shall be charged the maximum legal rate of interest on the overpayment as of the date of the notice of Medicaid reimbursement.

7. A Medicaid cost report shall be submitted to the Assistant Director, Office of Budget, Fiscal and Informational Systems, Division of Medical Assistance and Health Services, Mail Code, #23, CN 712, Trenton, New Jersey 08625-0712, or the Assistant Director's designee. The cost report shall be legible and complete in order to be considered acceptable. See N.J.A.C. 10:66-4 Appendix, incorporated herein by reference.

i. The Medicaid cost report shall be filed following the close of a provider's reporting period. Cost reports are due on or before the last day of the third month following the close of the period covered by the report.

ii. A 30-day extension of the due date of a cost report may, for good cause, be granted by the New Jersey Medicaid program. Good cause means a valid reason or justifiable purpose in seeking an extension; it is one that supplies a substantial reason, affords a legal excuse for delay, or is the result of an intervening action beyond one's control.

iii. To be granted this extension the provider must submit a written request to, and obtain written approval from, Assistant Director, Office of Budget, Fiscal and Informational Systems, Division of Medical Assistance and Health Services, Mail Code, #23, CN 712, Trenton, New Jersey 08625-0712, or the Assistant Director's designee.

iv. A request for an extension must be received by the Assistant Director, Office of Budget, Fiscal and Informational Systems, Division of Medical Assistance and Health Services or the Assistant Director's designee, at least 30 days before the due date of the Medicaid cost report.

v. If a provider's agreement to participate in the Medicaid program terminates or the provider experiences a change of ownership, the cost report is due no later than 45 days following the effective date of the termination of the provider agreement or change of ownership. An extension of the cost report due date cannot be granted when the provider agreement is terminated or a change in ownership occurs.

vi. Failure to submit an acceptable cost report on a timely basis may result in suspension of interim payments. Payments for claims received on or after the date of suspension may be withheld until an acceptable cost report is received.

(e) The basis for reimbursement of services provided in an ambulatory care/family planning/surgical facility is as follows:

1. Reimbursement for the services of an ambulatory care/family planning/surgical facility shall be made for services rendered by both the facility and the attending physician, if the physician is not reimbursed for surgical/medical services by the facility.

2. The facility reimbursement rate shall equal 70 percent of the applicable ambulatory surgical center rate for the procedures, in accordance with reimbursement rates, N.J.A.C. 10:66-1.5(c).

3. Physician reimbursement shall be in accordance with the New Jersey Medicaid program's Physician Maximum Fee Allowance for specialist and non-specialist, N.J.A.C. 10:54, and the following:

i. When submitting a claim, the physician performing the surgical procedure shall use the applicable claim form, billing the New Jersey Medicaid program either as an individual provider or as a member of a physician's group.

ii. A physician on salary for administrative duties (such as a medical director shall be permitted to submit claims for surgical/medical services performed if outside his or her administrative duties and not billed by the facility. Administrative duties shall be considered a direct cost of the facility and shall be included in the clinic payment.

10:66-1.6 Recordkeeping

(a) An individual record shall be prepared and retained by an independent clinic that fully discloses the kind and extent of the service provided to a Medicaid recipient, as well as the medical necessity for the service.

(b) At a minimum, a clinic shall include a progess note in the Medicaid recipient's medical/health record for each visit which supports the procedure code(s) billed, except where specified otherwise. The progress note shall include a description of signs and symptoms, treatment and/or medication(s) given, the recipient's response, and any changes in physical or emotional condition.

(c) Additional requirements governing medical records in an ambulatory surgical center are located in N.J.A.C. 10:66-5.

(d) The information described in this subsection shall be made available to the New Jersey Medicaid program or its agents upon request.

SUBCHAPTER 2. PROVISION OF SERVICES

10:66-2.1 Introduction

This subchapter describes the New Jersey Medicaid program's policies and procedures for the provision of Medicaid-covered services in an independent clinic setting. Services are separately identifed and discussed only where unique characteristics or requirements exist. Unless indicated otherwise, reimbursement issues are located in N.J.A.C. 10:66-1.5, Basis for reimbursement.

10:66-2.2 Early and periodic screening, diagnosis, and treatment (EPSDT)

(a) Early and periodic screening, diagnosis and treatment (EPSDT) is a Federally mandated comprehensive child health pro-

gram for Medicaid recipients from birth through 20 years of age. (See 42 CFR 441 Subpart B.)

(b) EPSDT includes screening services; vision services; dental services; hearing services; and other necessary health care, diagnostic services, treatment and other measures to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services.

1. An expanded program for Medicaid recipients up to the age of two is known as HealthStart. For additional information, including provider enrollment requirements, see N.J.A.C. 10:66-3.

(c) Components of an EPSDT screening are as follows:

1. A comprehensive health and developmental history including assessment of both physical and mental health development;

2. A comprehensive unclothed physical exam including vision and hearing screening, dental inspection, and nutritional assessment;

3. Appropriate immunizations according to age and health history;

4. Appropriate laboratory tests, including:

i. Hemoglobin/hematocrit;

ii. Urinalysis;

iii. Tuberculin test;

iv. Lead blood level assessment, appropriate to age and risk, which shall be performed annually for children between six months and six years of age; and

v. Other appropriate medically-necessary procedures;

5. Health education, including anticipatory guidance; and

6. Referral for further diagnosis and treatment or follow up of all correctable abnormalities, uncovered or suspected. Referral may be to the provider conducting the screening examination, or to another provider, as appropriate.

(d) EPSDT screening services (unless modified as follows in (e), (f) and (g) below) shall be provided periodically according to the following schedule which reflects the age of the child:

1. Under six weeks;
2. Two months;
3. Four months;
4. Six months;
5. Nine months;
6. 12 months;
7. 15 months;
8. 18 months;
9. 24 months; and
10. Annually through age 20.

(e) Vision screening includes:

1. A newborn examination including general inspection of the eyes, visualization of the red reflex, and evaluation of ocular motility;

2. An appropriate medical and family history;

3. An evaluation, by age six months, of eye fixation preference, muscle imbalance, and pupillary light reflex; and

4. A second examination with visual acuity testing by age three or four years.

5. Periodicity testing for school aged children is as follows:

i. Kindergarten or first grade (five or six years);

ii. Second grade (seven years);

iii. Fifth grade (10/11 years);

iv. Eighth grade (13/14 years); and

v. Tenth or eleventh grades (15/17 years).

6. Children should be referred for vision screening if they:

i. Cannot read the majority of the 20/40 line before their fifth birthday;

ii. Have a two-line difference of visual acuity between the eyes;

iii. Have suspected strabismus; or

iv. Have an abnormal light or red reflex.

(f) The following apply to dental screening:

1. Intraoral examination is an integral part of a general physical examination.

2. A formal referral to a dentist is recommended at one year of age. It is mandatory for children three years of age and older.

3. Dental inspection and prophylaxis should be carried out every six months until 17 years of age, then annually.

(g) The following apply to hearing screening:

1. An individual hearing screening should be administered annually to all children through age eight and to all children at risk of hearing impairment.

2. After age eight, children should be screened every other year.

10:66-2.3 Family planning

(a) Family planning services include medical history and physical examination (including pelvic and breast), diagnostic and laboratory tests, drugs and biologicals, medical supplies and devices, counseling, continued medical supervision, and continuity of care, including services related to infertility.

(b) The Norplant System (NPS) is a Medicaid-covered service when provided as follows:

1. The NPS is used only in reproductive age women with established regular menstrual cycles;

2. The Food and Drug Administration-approved physician prescribing information is followed; and

3. Patient education and counseling are provided relating to the NPS, including pre and post insertion instructions, indications, contraindications, benefits, risks, side effects, and other contraceptive modalities.

4. A clinic visit relating only to the insertion or removal of the Norplant System (NPS) is not reimbursable on the day of the insertion or removal.

5. Only two insertions and two removals of the NPS per recipient are permitted during a five year continuous period.

6. The clinic shall not be reimbursed for the NPS in conjunction with other forms of contraception, for example, intra-uterine device.

(c) Sterilization is any medical procedure, treatment, or operation performed for the purpose of rendering an individual permanently incapable of reproducing.

1. The individual to be sterilized shall be at least 21 years of age at the time the sterilization consent form is signed by the individual to be sterilized.

2. The individual to be sterilized shall not be mentally incompetent or institutionalized.

i. A mentally incompetent individual is an individual who has been declared mentally incompetent by a Federal, State, or local court of competent jurisdiction for any purpose, unless the individual has been declared competent for purposes which include the ability to consent to sterilization.

ii. An institutionalized individual is an individual who is:

(1) Involuntarily confined or detained, under a civil or criminal statute, in a correctional or rehabilitative facility, including a mental hospital or other facility for the care and treatment of mental illness; or

(2) Confined, under a voluntary commitment, in a mental hospital or other facility for the care and treatment of mental illness.

3. The individual to be sterilized shall have voluntarily given informed consent in accordance with all the requirements prescribed in 42 CFR 441.257 through 441.258.

4. At least 30 days, but not more than 180 days, shall have passed between the date of informed consent and the date of the sterilization, except in the case of premature delivery or emergency abdominal surgery. An individual may consent to be sterilized at the time of premature delivery or emergency abdominal surgery, if at least 72 hours have passed since he or she gave informed consent for the sterilization.

i. In the case of premature delivery, the informed consent shall have been given at least 30 days before the expected date of delivery.

ii. If an individual desires to be sterilized at the time of delivery, the consent form should be signed by the individual no earlier than the fifth month of pregnancy to minimize the possibility of exceeding the 180 day limit.

5. Informed consent is considered to be given only if:

i. The person who obtained consent for the sterilization procedure offered to answer any questions the individual may have concerning the procedure, provided a copy of the consent form and provided orally all of the following information or advice to the individual to be sterilized:

(1) Advice that the individual is free to withhold or withdraw consent to the procedure at any time before the sterilization without

affecting the right to future care or treatment and without loss or withdrawal of any federally funded program benefits to which the individual might otherwise be entitled;

(2) A description of available alternative methods of family planning and birth control;

(3) Advice that the sterilization procedure is considered to be irreversible;

(4) A thorough explanation of the specific sterilization procedure to be performed;

(5) A full description of the discomforts and risks that may accompany or follow the performing of the procedure, including an explanation of type and possible effects of any anesthetic to be used;

(6) A full description of the benefits or advantages that may be expected as a result of the sterilization; and

(7) Advice that the sterilization shall not be performed for at least 30 days, except under the circumstances specified in (c)4 above.

ii. Suitable arrangements were made to insure that the information specified in (c)5i above was effectively communicated to any individual who is blind, deaf, or otherwise handicapped;

iii. An interpreter was provided if the individual to be sterilized did not understand the language used on the consent form or the language used by the person obtaining consent;

iv. The individual to be sterilized was permitted to have a witness of his or her choice present when consent was obtained;

v. The consent form requirements of 42 CFR 441.258 were met; and

vi. Any additional requirement of state or local law for obtaining consent, except a requirement for spousal consent, was followed.

6. Informed consent may not be obtained while the individual to be sterilized is:

i. In labor or childbirth;

ii. Seeking to obtain or obtaining an abortion; or

iii. Under the influence of alcohol or other substances that affect the individual's state of awareness.

7. The consent form shall be an exact replica of the Federal form.

i. The consent form shall be signed and dated by the individual to be sterilized; the interpreter, if one was provided; the person who obtained the consent; and the physician who performed the sterilization procedure. A copy of the consent form shall be given to the individual.

ii. The Fiscal Agent Billing Supplement, N.J.A.C. 10:66—Appendix, contains additional information and instructions for the consent form's proper completion.

8. Claims for sterilization services are hard-copy restricted; electronic billing is not permitted.

10:66-2.4 Laboratory

(a) As required by the Clinical Laboratory Improvement Amendments of 1988 (CLIA), referenced at 42 CFR 493, all facilities or entities that perform clinical laboratory testing shall have their CLIA identification number on file with the New Jersey Medicaid program.

(b) A clinic shall only claim reimbursement for those laboratory services that have been performed by them on their premises, for their patients, and for which they have received approval by the New Jersey *[State Department of Health]* ***Medicaid program, as indicated in N.J.A.C. 10:66-1.3(a).***.

(c) Laboratory procedures are reimbursable only when performed in accordance with the applicable CLIA-mandated certificate of registration, certificate of waiver, or certificate of physician-performed microscopy procedures.

(d) Specific laboratory procedures are reimbursable when performed in conjunction with an EPSDT screening, if the requirements of (a), (b) and (c) above are met.

10:66-2.5 Mental health

(a) Mental health services include: comprehensive intake evaluation, individual psychotherapy, off-site crisis intervention, family therapy, family conference, group psychotherapy, psychological testing, partial care, and medication management.

(b) Only one type of mental health service per recipient is reimbursable to an independent clinic on a given day. Exception: Medication management may be reimbursed when provided to a Medicaid recipient in addition to one of the following mental health services: individual psychotherapy, group psychotherapy, family therapy, and family conference.

(c) Mental health clinics shall provide mental health services by, or under the direction of, a psychiatrist.

(d) For purposes of partial care, full day means five or more hours of participation in active programming exclusive of meals; half day means at least three hours but less than five hours of participation in active programming exclusive of meals. Additional details are located at N.J.A.C. 10:66-6.

(e) An intake evaluation shall be performed within 14 days of the first encounter or by the third clinic visit, whichever is later, for each recipient being considered for continued treatment. This evaluation shall consist of a written assessment that:

1. Evaluates the recipient's mental condition;

2. Determines whether treatment in the program is appropriate, based on the recipient's diagnosis;

3. Includes certification (signed statement) by the evaluation team that the program is appropriate to meet the recipient's treatment needs; and

4. Is made part of the recipient's records.

5. The evaluation for the intake process shall include a physician and an individual experienced in diagnosis and treatment of mental illness. Both criteria may be satisfied by the same individual, if appropriately qualified.

(f) A written, individualized plan of care shall be developed for each recipient who receives continued treatment. The plan of care shall be designed to improve the recipient's condition to the point where continued participation in the program (beyond occasional maintenance visits) is no longer necessary. The plan of care shall be included in the recipient's records and shall consist of:

1. A written description of the treatment objectives including both the treatment regimen and the specific medical/remedial services, therapies, and activities that shall be used to meet the objectives;

2. A projected schedule for service delivery which includes the frequency and duration of each type of planned therapeutic session or encounter;

3. The type of personnel that will be furnishing the services; and

4. A projected schedule for completing reevaluations of the recipient's condition and updating the plan of care.

(g) The mental health clinic shall develop and maintain written documentation to support each medical/remedial therapy service, activity, or session for which billing is made.

1. This documentation, at a minimum, shall consist of:

i. The specific services rendered, such as individual psychotherapy, group psychotherapy, family therapy, etc., and a description of the encounter itself (that is, statement of patient progress noted, significant observations noted, etc.);

ii. The date and time that services were rendered;

iii. The duration of services provided (one hour, ½ hour, etc.);

iv. The signature of the practitioner or provider who rendered the services;

v. The setting in which services were rendered; and

vi. A notation of unusual occurrences or significant deviations from the treatment described in the plan of care.

2. Clinical progress, complications and treatment which affect prognosis and/or progress shall be documented in the recipient's medical record at least once a week, as well as any other information important to the clinical picture, therapy, and prognosis.

3. The individual services under partial care shall be documented on a daily basis. More substantive documentation, including progress notes and any other information important to the clinical picture, are required at least once a week.

(h) Periodic review of the recipient's plan of care shall take place on a regular basis (at least every 90 days during the first year and every six months thereafter).

1. The periodic review shall determine:

i. The recipient's progress toward the treatment objectives;

ii. The appropriateness of the services being furnished; and

iii. The need for the recipient's continued participation in the program.

2. Periodic reviews shall be documented in detail in the recipient's records and made available upon request to the New Jersey Medicaid program or its agents.

10:66-2.6 Rehabilitation

(a) Rehabilitative services include physical therapy, occupational therapy, and speech-language pathology and audiology, including the use of such supplies and equipment as are necessary in the provision of such services. Rehabilitative services and other restorative services are provided for the purpose of attaining maximum reduction of physical or mental disability and restoration of a Medicaid recipient to his or her best functional level. Rehabilitative services shall be made available to Medicaid recipients as an integral part of a comprehensive medical program.

(b) Rehabilitative services shall be provided by or under the direction of a physical therapist, occupational therapist, speech-language pathologist or audiologist employed by or under contract to the clinic. These therapy services are discussed at (c), (d), and (e) below, respectively.

1. All treatments shall be individual and shall consist of a minimum of 30 minutes.

2. A plan of treatment shall be completed during the Medicaid recipient's initial evaluation visit and retained on file.

i. The plan of treatment shall be definitive as to the type, amount, frequency, and duration of the rehabilitative services that are to be furnished and shall include the recipient's diagnosis and the anticipated goal(s) of the treatment.

(c) Physical therapy is a service prescribed by a physician and provided to a Medicaid recipient by or under the direction of a qualified physical therapist. Physical therapy does not include therapy which is purely palliative, such as the application of heat in any form; massage; routine calisthenics; group exercises; assistance in any activity; use of a simple mechanical device; or other services not requiring the special skill of a licensed physical therapist.

1. A physical therapist is an individual who is:

i. Licensed by the State of New Jersey as a physical therapist in accordance with N.J.A.C. 13:39A; and

ii. A graduate of a program of physical therapy approved by both the Committee on Allied Health Education and Accreditation of the American Medical Association and the American Physical Therapy Association or its equivalent.

2. If treatment or services are provided in a state other than New Jersey, the physical therapist shall meet the requirements of that state, including licensure if applicable, and all applicable Federal requirements.

(d) Occupational therapy is a service prescribed by a physician and provided to a Medicaid recipient by or under the direction of a qualified occupational therapist.

1. An occupational therapist is an individual who is:

i. Registered by the American Occupational Therapy Association; or

ii. A graduate of a program in occupational therapy approved by the Committee on Allied Health Education of the American Medical Association and engaged in the supplemental clinical experience required before registration by the American Occupational Therapy Association.

2. If treatment or services are provided in a state other than New Jersey, the occupational therapist shall meet the requirements of that state, including licensure if applicable, and all applicable Federal requirements.

(e) Speech-language pathology services and audiology services are diagnostic, screening, preventive, or corrective services prescribed by a physician and provided to a Medicaid recipient by or under the direction of a speech-language pathologist or audiologist.

1. A speech-language pathologist or audiologist is an individual who is licensed by the State of New Jersey as a speech-language pathologist or audiologist, in accordance with N.J.A.C. 13:44C, and meets all applicable Federal requirements including:

i. A Certificate of Clinical Competence in Speech-Language Pathology or Audiology from the American Speech-Language-Hearing Association;

ii. Completion of the equivalent educational requirements and work experience necessary for the certificate(s); or

iii. Completion of the academic program and in the process of acquiring supervised work experience in order to qualify for the certificate(s).

2. If treatment or services are provided in a state other than New Jersey, the speech-language pathologist or audiologist shall meet the requirements of that state, including licensure if applicable, and all applicable Federal requirements.

(f) No portion of the time spent on therapy treatments may be considered as part of the time parameters of a clinic visit. Clinic visits billed during the same day shall clearly and separately meet the time and other parameters described in the applicable HCPCS procedure codes, N.J.A.C. 10:66-6.

(g) When prior authorized, reimbursement to a clinic may be made for more than one type of rehabilitative service performed on a Medicaid recipient on the same day, for example, physical therapy and speech-language pathology.

(h) When the same type of rehabilitative service is performed on a Medicaid recipient more than once on the same day, for example, two physical therapy services, reimbursement shall be made for one service only. Likewise, when the treatment performed on a Medicaid recipient is merely a different modality within the same type of rehabilitative service, reimbursement shall be made for only one service per recipient per day.

10:66-2.7 Transportation

(a) Transportation service is Medicaid covered when the following conditions are met:

1. The clinic is approved to provide transportation service by the New Jersey Medicaid program.

i. Approval by the New Jersey Medicaid program shall not be granted for the provision of ambulance or invalid coach service.

2. Transportation service is provided either:

i. By the clinic, in a clinic owned or leased vehicle; or

ii. By a transportation company under contract to the clinic.

3. The purpose of providing transportation, one way or round trip, is to enable a Medicaid recipient to obtain a Medicaid-covered service at the clinic.

4. A Medicaid recipient is transported:

i. To the clinic, from the recipient's residence or a designated central point; or

ii. From the clinic, to the recipient's residence or a designated central point.

10:66-2.8 Miscellaneous

(a) The following applies to the provision of dental services:

1. All diagnostic, preventive or corrective dental procedures shall be administered by, or under, the direct supervision of a dentist enrolled in the New Jersey Medicaid program.

2. Dental services provided in an independent clinic shall follow the policies and procedures outlined in the New Jersey Medicaid program's Dental Services chapter, N.J.A.C. 10:56.

3. The New Jersey Medicaid program's Dental Services chapter, N.J.A.C. 10:56-3 (HCPCS), contains dental procedure codes and maximum fee allowances.

(b) The following applies to the provision of drug treatment services:

1. Medicaid-covered services delivered to Medicaid recipients in a drug treatment center are only those services that are:

i. Prescribed by a physician;

ii. Eligible for Federal financial participation under Title XIX of the Social Security Act; and

iii. Included in the facility's Medicaid approval letter.

2. Only one type of mental health service per recipient is reimbursable to a drug treatment center on a given day. See N.J.A.C. 10:66-2.5(b) for the exception concerning medication management.

3. For the purposes of the AIDS Community Care Alternatives Program (ACCAP) only, certain services as indicated at N.J.A.C. 10:66-6.2(m) may be provided to ACCAP-eligible individuals in the home.

(c) The following applies to hospital visits:

1. An inpatient hospital visit performed by a clinic physician for a registered patient of a Federally qualified health center shall be reimbursed only if the clinic is specifically approved to provide this service by the Program.

i. For a salaried physician in a Federally qualified health center (FQHC), an inpatient hospital visit shall be billed by the FQHC as a medical encounter.

ii. For a physician under contract with a Federally qualified health center (FQHC), the physician may receive reimbursement as an individual provider as long as the clinic is not also billing for the same service. The only contracted physician's cost that may be reported in the FQHC's Medicaid cost report are for visits that are billed by the FQHC.

(d) Obstetrical services, which may include obstetrical delivery, may be reimbursed when performed by a licensed physician and/or certified nurse-midwife in a licensed ambulatory care facility which is specifically approved to perform such services by the New Jersey Medicaid program.

(e) Podiatric services that are medically necessary are Medicaid reimbursable when performed by a licensed podiatrist in an independent clinic which is specifically approved to perform such services by the New Jersey Medicaid program. See the New Jersey Medicaid program's Podiatry Services chapter, N.J.A.C. 10:57, for additional information.

(f) For covered pharmaceutical services, see the New Jersey Medicaid program's Pharmaceutical Services chapter, N.J.A.C. 10:51. See N.J.A.C. 10:51-1.22 for bundled drug services.

(g) Specified radiological services may be reimbursed when provided in a clinic that is specifically approved to provide such services by the New Jersey Medicaid program, and performed by a physician who is recognized as a specialist in radiology by the New Jersey Medicaid program. See the New Jersey Medicaid program's Physician's Services chapter, N.J.A.C. 10:54, for additional information.

(h) An independent clinic providing renal dialysis service for end-stage renal disease (ESRD) shall comply with all applicable Federal regulations and State regulations as indicated at N.J.A.C. 8:43A.

(i) Termination of pregnancy is a Medicaid-covered service when the following conditions are present:

1. If performed in an appropriately licensed ambulatory care facility, an ambulatory surgical center, or an ambulatory care/family planning/surgical facility licensed and authorized by the New Jersey State of Health to perform abortions with specific approval of the New Jersey Medicaid program;

2. If performed in accordance with the requirements of the New Jersey Board of Medical Examiners, N.J.A.C. 13:35;

3. If performed by a physician licensed to practice medicine and surgery in the State of New Jersey; and

4. If medically necessary. A physician may take the following factors into consideration in determining whether a termination of pregnancy is medically necessary:

i. Physical, emotional, and psychological factors;

ii. Family reasons; and

iii. Age.

5. Claims for termination of pregnancy services are hard-copy restricted; electronic billing is not permitted.

6. A Physician Certification (Form FD-179) must be attached to any Medicaid claim form relating to termination of pregnancy services.

i. The Fiscal Agent Billing Supplement contains a sample Physician Certification (Form FD-179) and item-by-item instructions for the form's proper completion.

(j) Vision care services are reimbursable when administered by a licensed ophthalmologist or optometrist as indicated in the New Jersey Medicaid program's Vision Care Services chapter, N.J.A.C. 10:62. See the New Jersey Medicaid program's Vision Care Services chapter, N.J.A.C. 10:62-3 (HCPCS), for procedure codes and maximum fee allowance for reimbursement of both professional services and optical appliances and services.

(k) The following applies to the provision of personal care assistant services:

1. Personal care assistant services (mental health) are health related tasks performed by a qualified individual in a recipient's home under the supervision of a registered professional nurse, as certified by a physician in accordance with a written plan of care.

i. Each personal care provider employing personal care assistants shall be individually approved by the New Jersey Medicaid program before it will be reimbursed for services rendered to Medicaid recipients. The Division of Medical Assistance and Health Services will recognize upon approval, agencies under contract to the Division of Mental Health and Hospitals.

(1) For information and rules pertaining to personal care assistant services provided by a home health or homemaker agency, refer to N.J.A.C. 10:60-1.7 in the New Jersey Medicaid program's Home Care Services chapter.

2. Personal care assistant services provided by a family member are not covered services.

3. Personal care assistant services shall be provided only in instances where a family support system or other informal care giver is unavailable, inaccessible or inappropriate.

4. The registered professional nurse, in accordance with the physician's plan of care, prepares written instructions for the personal care assistant to include the amount and kind of supervision needed, the specific needs of the patient and the resources of the patient, the family and other interested persons.

5. Supervision of the personal care assistant shall be provided by a registered nurse at a minimum of one visit every 60 days to assess the patient's health condition, as well as the quality of personal care assistant services received.

6. An initial nursing assessment visit must be made to evaluate the need for personal care assistant service. Following the initial visit, a nursing reassessment visit may be provided at least once every six months, or more frequently if the recipient's condition warrants, to reevaluate the recipient's need for continued care.

7. The personal care assistant shall enter progress notes on a weekly basis in the recipient's record, including the recipient's progress toward goals. These progress notes shall be signed and dated by the personal care assistant.

*[(e)]**(l)* Other services, such as evaluation and management, minor surgery, etc. are reimbursable when billed by an independent clinic individually approved to provide the service(s) as indicated in N.J.A.C. 10:66-1.3, Provisions for provider participation. See N.J.A.C. 10:66-6 (HCPCS) for the procedure codes and maximum fee allowances corresponding to the Medicaid-reimbursable service(s).

SUBCHAPTER 3. HEALTHSTART

10:66-3.1 Purpose

(a) The purpose of HealthStart is to provide for comprehensive maternity care services to pregnant Medicaid recipients, including those determined to be presumptively eligible, and preventative child health care services for Medicaid recipients up to the age of two.

1. Pediatric HealthStart services are an expansion of the EPSDT program as described at N.J.A.C. 10:66-2.2.

10:66-3.2 Scope of services

(a) HealthStart maternity care services provided by a HealthStart-certified provider are obstetrical care services and a program of health support services provided in accordance with the recommendations of the American College of Obstetricians and Gynecologists. HealthStart pediatric care services include up to nine preventive visits, as recommended by the American Academy of Pediatrics, provided by a HealthStart-certified provider who assumes the primary responsibility for coordination and continuity of care.

(b) HealthStart comprehensive maternity care includes both medical maternity care services and health support services, which are described below in (b)1 and 2, respectively.

1. Medical maternity care services include:

i. Ambulatory prenatal services;

ii. Admission arrangements for delivery;

iii. Obstetrical delivery services; and
iv. Postpartum medical services.
2. Health support services include:
i. Case coordination services;
ii. Health education assessment and counseling services;
iii. Nutrition assessment and counseling services;
iv. Social-psychological assessment and counseling services;
v. Home visitation; and
vi. Outreach, referral and follow-up services.

(c) HealthStart comprehensive pediatric care includes nine preventive child health visits; all the recommended immunizations; case coordination and continuity of care including, but not limited to, the provision or arrangement for sick care, 24 hour telephone access, and referral and follow-up for complex or extensive medical, social, psychological, and nutritional needs.

10:66-3.3 HealthStart provider participation criteria

(a) The following Medicaid-enrolled provider types are eligible to participate as HealthStart providers: independent clinics, hospital outpatient departments, local health departments meeting the New Jersey State Department of Health's Improved Pregnancy Outcome criteria and/or approved as Child Health Conferences, physicians and physician groups, and certified nurse midwives.

(b) In addition to New Jersey Medicaid program rules applicable to provider participation, HealthStart providers shall:

1. Sign an Addendum to the New Jersey Medicaid program's Provider Agreement;

2. Have a valid HealthStart Provider Certificate for HealthStart Maternity Care Service, HealthStart Medical Maternity Service, HealthStart Health Support Service, or HealthStart Pedatric Care Service; and

3. Provide maternity care and/or pediatric care services in accordance with the requirements for issuance of a HealthStart Provider Certificate and in accordance with the New Jersey State Department of Health's Guidelines for HealthStart Maternity Care Providers and HealthStart Pediatric Care Providers.

(c) In addition to (a) and (b) above, a HealthStart maternity care provider with more than one care site or more than one maternity clinic at the same site that uses different staff, shall apply for a separate HealthStart Provider Certificate for each separate clinic. Only those sites which hold a HealthStart Provider Certificate shall be reimbursed for HealthStart services. Such sites:

1. Shall participate in program evaluation and training activities, including, but not limited to, site monitoring, agency and patient record review, and submission of required summary information on each patient according to the New Jersey State Department of Health's Guidelines for HealthStart Providers; and

2. May determine presumptive eligibility for the New Jersey Medicaid program if approved by the Division of Medical Assistance and Health Services.

(d) In addition to (a) and (b) above, a HealthStart pediatric care provider shall participate in program evaluation and training activities including, but not limited to, documentation of outreach and follow-up activities in the patient's record.

(e) A site review may be required to ascertain an applicant's ability to meet the standards for a HealthStart Provider Certificate and to provide services in accordance with the New Jersey State Department of Health's Guidelines for HealthStart Providers in the appropriate area.

(f) A HealthStart Provider Certificate shall be reviewed by the New Jersey State Department of Health at least every 18 months from the date of issuance.

(g) An application for a HealthStart Provider Certificate is available from:

HealthStart Program
New Jersey State Department of Health
CN 364
Trenton, NJ 08625-0364

(h) A HealthStart Program Provider Agreement is available from:

Chief, Provider Enrollment Unit
Division of Medical Assistance and Health Services
Mail Code #9
CN 712
Trenton, N.J. 08625-0712

10:66-3.4 Termination of HealthStart Provider Certificate

(a) The New Jersey State Department of Health shall be responsible for enforcement of its requirements for HealthStart Provider Certificates and for evaluation and enforcement of its requirements within the Standards and Guidelines for HealthStart Providers.

(b) Failure to comply with HealthStart standards shall be cause for termination of the HealthStart Provider Certificate by the New Jersey State Department of Health.

1. Termination of the HealthStart Provider Certificate shall result in the termination of the HealthStart Provider Agreement with the New Jersey Medicaid program. Providers who are terminated by the New Jersey Medicaid program have the right to request a hearing as indicated in the Administration chapter in N.J.A.C. 10:49-10.3, Opportunity for fair hearing.

2. A HealthStart Provider Certificate is time limited. Failure to complete the recertification process shall result in termination of the provider's HealthStart provider status by the New Jersey State Department of Health.

10:66-3.5 Standards for a HealthStart Comprehensive Maternity Care Provider Certificate

(a) Comprehensive maternity care services must be integrated and coordinated.

(b) HealthStart maternity care providers, excluding physicians and nurse midwives who are in private practice, shall provide comprehensive maternity care services within the following organizational requirements:

1. The provider shall provide directly or through an approved agreement, at one contiguous site, the following services: ambulatory prenatal and postpartum care, case coordination services; nutrition assessment, guidance and counseling serivces; health education assessment and instruction; social-psychological assessment, guidance and counseling;

2. The provider shall provide or arrange for the admission of the patient to the appropriate level of care facility for obstetrical delivery services;

3. The provider shall provide or arrange for all necessary laboratory services;

4. The provider shall provide one or more prenatal home visits for each high risk patient;

5. The provider shall provide at least one postpartum home visit for each high risk patient;

6. The provider shall adopt procedures and policies which assure the delivery of coordinated, integrated and comprehensive care; and

7. The provider shall provide referral and follow-up services, which must include, but not be limited to: referral for specialized evaluation, counseling and treatment for extensive social, psychological, nutritional and medical needs.

(c) The provider shall be responsible for linking the mother and newborn infant to a pediatric care provider; if feasible, the linkage should be with a HealthStart pediatric care provider.

(d) An independent clinic may provide the HealthStart health support services component alone upon entering into a written agreement with a private practitioner(s) who shall provide the HealthStart medical care services component. This agreement shall delineate which party is to take primary responsibility for provision of all HealthStart services.

10:66-3.6 Access to service

(a) All HealthStart services shall be accessible to patients.

(b) HealthStart maternity care providers shall facilitate patient access to services by scheduling an initial medical visit appointment within two weeks of the patient's first request for services.

(c) HealthStart maternity care providers shall provide or arrange for 24 hour access to case coordination and medical services for emergency situations.

(d) HealthStart maternity care providers shall arrange for language translation and/or interpretation services.

(e) HealthStart maternity care providers may implement a presumptive eligibility processing if so approved by the Division of Medical Assistance and Health Services.

(f) HealthStart maternity care providers shall undertake community outreach activities to encourage women to seek early prenatal care and increase awareness of the availability of maternity care services.

10:66-3.7 Care plan

(a) A care plan shall be developed and maintained by the case coordinator for each patient.

(b) A care plan shall be based on the medical, nutritional, social-psychological and health education assessments.

(c) A care plan shall include, but not be limited to: identification of risk conditions and/or problems, prioritization of needs, outcome objectives, planned interventions, time frames, referrals and follow-up activities, and identification of staff persons responsible for the services.

(d) The care plan shall be developed and revised in consultation with the patient and staff providing services to the patient.

(e) The initial care plan shall be completed after a case conference and no later than one month after the initial registration visit.

10:66-3.8 Maternity medical care services

(a) Maternity medical care services include antepartum, intrapartum and postpartum care provided by the obstetrical care practitioner(s) in accordance with the New Jersey State Department of Health's Guidelines for HealthStart Maternity Care Providers.

(b) Prenatal services are as follows:

1. Frequency of prenatal visits for an uncomplicated pregnancy shall be every four weeks during the first 28 weeks, then every two weeks until 36 weeks, and weekly thereafter. Prenatal visits for complications should be scheduled as needed.

2. Initial prenatal visit content shall include, but not be limited to:

i. History;
ii. Review of systems;
iii. Comprehensive physical examination;
iv. Risk assessment;
v. Patient counseling;
vi. Routine laboratory tests;
vii. Development of the care plan; and
viii. Special tests and/or procedures as medically indicated.

3. Subsequent prenatal visit content shall include, but not be limited to:

i. Review and revision of the patient care plan;
ii. Interim history;
iii. Physical examination;
iv. Patient counseling and treatment;
v. Laboratory tests;
vi. Special tests and/or procedures which are medically indicated;
vii. Identification of new or developing problems; and
viii. Management, including transfer, of any new or persistent problems.

4. Transfer of the prenatal records to the hospital of delivery shall occur no later than 34 weeks gestation.

(c) Obstetrical delivery services shall include, but not be limited to:

1. Determination of and arrangements for delivery site;
2. Attendance at or provision for obstetrical delivery by a qualified physician or certified nurse midwive; and
3. Medical care during the entire period of confinement.

(d) A postpartum visit shall be provided by the 60th day after delivery, and shall include, but not be limited to:

1. History;
2. Review of the prenatal, labor and delivery record;
3. Physical examination;
4. Patient counseling and treatment;
5. Patient/infant assessment;
6. Referral/consultation, as indicated; and
7. Procedures/tests, as indicated.

(e) All HealthStart maternity care providers shall have policies and protocols which are consistent with national standards regarding consultation, and/or transfer of medically high risk patients to tertiary-level maternity care facilities or specialists, and to genetic counseling and testing facilities.

10:66-3.9 Health support services

(a) Case coordination services shall facilitate the delivery of continuous, coordinated and comprehensive services for each patient in accordance with the New Jersey State Department of Health's Guidelines for HealthStart Maternity Care Providers as follows:

1. A permanent case coordinator shall be assigned to each patient no later than two weeks after the HealthStart enrollment visit.

2. Prenatal case coordination activities shall include, but not be limited to:

i. Orienting the patient to all services;
ii. Developing, maintaining and coordinating the care plan in consultation with the patient;
iii. Coordinating and monitoring the delivery of all services and referrals;
iv. Monitoring and facilitating the patient's entry into and continuation with maternity services;
v. Facilitating and providing advocacy for obtaining referral services;
vi. Reinforcing health teachings and providing support;
vii. Providing vigorous follow up for missed appointments and referrals;
viii. Arranging home visits;
ix. Meeting with the patient and coordinating patient care conferences; and
x. Reviewing, monitoring and updating the patient's complete record.

3. Postpartum care coordination activities shall include, but not be limited to:

i. Arranging and coordinating the postpartum visit and any home visit;
ii. Arranging with the obstetrical care provider to obtain the labor, delivery and postpartum hospital summary record information no later than two weeks after delivery;
iii. Linking the patient to appropriate service agencies including: the Special Supplemental Food Program for Women, Infants and Children (WIC), pediatric care (preferably with a HealthStart pediatric care provider), future family planning, Special Child Health Services County Case Management Unit, and other health and social agencies, if needed;
iv. Arranging for the transfer of pertinent information or records to the pediatric care and/or future family planning service providers;
v. Coordinating referrals and following up on missed appointments and referrals; and
vi. Reinforcing health instructions for mother and baby.

(b) Nutrition assessment and basic guidance services must be provided to orient and educate all patients to nutritional needs during pregnancy and educate the patient to good dietary practices in accordance with the New Jersey State Department of Health's Guidelines for HealthStart Maternity Care Providers. Specialized nutrition assessment and counseling must be provided to those women with additional needs. Services shall be provided as follows:

1. Initial assessment services, which shall include, but not be limited to:

i. Review of the patient's chart;
ii. Identification of dental problems which may interfere with nutrition;
iii. Nutritional history;
iv. Current nutritional status;
v. Determination of participation in WIC or other food supplement programs; and
vi. Identification of need for specialized nutritional counseling;

2. Subsequent nutritional assessment, which shall include, but not be limited to:
i. Monitoring of weight gain/loss;
ii. Identification of special dietary needs; and
iii. Identification of need for specialized nutritional counseling services;
3. Prenatal nutritional guidance, which shall include, but not be limited to:
i. Basic instruction on nutritional needs during pregnancy including balanced diet, vitamins and recommended daily allowances;
ii. Review and reinforcement of other nutritional and dietary counseling services the patient may be receiving;
iii. Instruction on food purchase, storage and preparation;
iv. Instruction on food substitutions, as indicated;
v. Discussion of infant feeding and nutritional needs; and
vi. Referral to food supplementation programs through the case coordinator;
4. Specialized nutrition assessment and counseling, which shall be provided to those women with additional needs;
5. Referral for extensive specialized nutritional services which shall be initiated by the medical care provider or the nutritionist under the supervision of the medical care provider in coordination with the case coordinator; and
6. Postpartum nutritional assessment and basic guidance services which shall include, but not be limited to:
i. Review and reinforcement of good dietary practices;
ii. Review of instruction on dietary requirement changes; and
iii. Instruction on breast feeding and/or formula preparation and feeding.

(c) Social-psychological assessment and basic guidance services shall be provided to all patients to assist the patient in resolving social-psychological needs, in accordance with the New Jersey State Department of Health's Guidelines for HealthStart Maternity Care Providers. Specialized social-psychological assessment and short-term counseling shall be provided to those women with additional needs. Services shall be provided as follows:
1. Initial social-psychological assessment services which shall include, but not be limited to:
i. Determining financial resources and living conditions;
ii. Determining the patient's personal support system;
iii. Determining the patient's attitudes and concerns regarding the pregnancy;
iv. Ascertaining present and prior involvement by the patient with other social programs or agencies and current social service needs;
v. Ascertaining educational and/or employment status and needs; and
vi. Identification of the need for specialized social-psychological and/or mental health evaluation and counseling services;
2. Subsequent social-psychological assessment services which shall include, but not be limited to:
i. Determination of patient's reaction to pregnancy;
ii. Ascertaining the reaction of family, friends and actual support person to the pregnancy;
iii. Identification of the need for social service interventions and advocacy; and
iv. Identification of the need for specialized social-psychological and/or mental health evaluation and counseling;
3. Basic social-psychological guidance, which shall include, but not be limited to:
i. Orientation and information on available community resources;
ii. Orientation regarding stress and stress reduction during pregnancy; and
iii. Assistance with arrangements for transportation, child care and financial needs;
4. Specialized, short-term social-psychological counseling, which shall be provided to women who are identified through assessment or basic counseling as having need for more intense service;
5. Referral for extensive specialized social-psychological services, which shall be initiated by the medical care provider or by the social worker under the supervision of the medical care provider and in coordination with the case coordinator; and
6. Postpartum social-psychological assessment and guidance which shall include, but not be limited to:
i. Review of prenatal, labor, delivery and postpartum course;
ii. Assessment of the patient's current social-psychological status, including mother and infant bonding and the acceptance of the infant by the father and/or family, as applicable;
iii. Identification of the need for additional social-psychological services;
iv. Review of available community resources for mother and infant, as applicable;
v. Counseling regarding fetal loss or infant death, if applicable; and
vi. Counseling regarding school/employment planning.

(d) Health education assessment and instruction shall be provided to all patients at intervals throughout the pregnancy, based on the patient's needs and in accordance with the New Jersey State Department of Health's Guidelines for HealthStart Maternity Care Providers. Services shall be provided as follows:
1. Initial assessment of health educational needs, which shall include, but not be limited to:
i. Identification of general educational background;
ii. Patient's health education needs; and
iii. Previous education and experience concerning pregnancy, birth and infant care;
2. Health education instruction, which shall be provided for all patients based on their identified health education needs, shall include at least the following:
i. Normal course of pregnancy;
ii. Fetal growth and development;
iii. Warning signs, such as signs of pre-term labor, and identification of emergency situations;
iv. Personal hygiene;
v. Exercise and activity;
vi. Childbirth preparation, including management of labor and delivery;
vii. Preparation for hospital admission;
viii. Substance, occupational and environmental hazards;
ix. Need for continuing medical and dental care;
x. Future family planning;
xi. Parenting, basic infant care and development;
xii. Availability of pediatric and family medical care in the community; and
xiii. Normal postpartum physical and emotional changes;
3. Health education services, which shall include guidance in decision making and in the implementation of decisions concerning pregnancy, birth and infant care; and
4. Postpartum assessment of health education needs shall be conducted.

(e) One face-to-face preventive health care contact must be provided or arranged for during the time after hospital discharge and prior to the required medical postpartum visit. This requirement is in accordance with the New Jersey State Department of Health's Guidelines for HealthStart Maternity Care Providers, as follows:
1. This contact shall include, but not be limited to:
i. Review of the mother's health status;
ii. Review of the infant's health status;
iii. Review of mother/infant interaction;
iv. Revision of the care plan; and
v. Provision of additional services, as indicated; and
2. The provider shall provide or arrange for one or more home visits for each high risk patient in accordance with the New Jersey State Department of Health's Guidelines for HealthStart Maternity Care Providers.

(f) HealthStart maternity care providers shall utilize existing community services to enhance the maternity care services.

(g) HealthStart maternity care providers shall have written procedures which identify specific agencies or practitioners and criteria for referral of patients requiring services which are extensive, complex or expected to extend beyond the pregnancy. These procedures shall include but are not limited to: nutritional and food supplementation services, substance abuse treatment facilities, men-

tal health services, county/local social and welfare agencies, parenting and child care educational programs, future family planning services, fetal alcohol syndrome and AIDS counseling services.

10:66-3.10 Professional staff requirements for HealthStart comprehensive maternity care services

(a) All HealthStart comprehensive maternity care services shall be delivered through a team approach by qualified professionals.

(b) Physicians and/or certified nurse midwives shall be Medicaid providers and have obstetrical admitting privileges at a licensed maternity care facility.

(c) Case coordinators shall have as a minimum a license as a registered nurse; or a bachelor's degree in social work, health or behavioral science.

(d) Health professionals shall have a valid license to practice their professions as required by the State of New Jersey.

(e) All other professionals, for whom no license to practice is required, shall meet generally accepted professional standards for qualification.

(f) Paraprofessionals shall be familiar with the local community, have knowledge and/or skills in maternal and child health services and be supervised by a health professional.

(g) Prenatal, delivery, and postpartum medical services shall be delivered by a physician and/or a certified nurse midwife.

(h) Nutritional, social-psychological and health education assessment and development of the care plan shall be provided by the appropriate professional in each of the specialty areas or the case coordinator or medical care professional. If the nutritional or social-psychological assessment portion of the care plan are provided by the case coordinator or medical care professional, then they shall be reviewed by the nutritionist or social worker, respectively.

(i) Nutritional and social-psychological basic counseling shall be provided by a case coordinator with at least one year of experience in providing services to maternity patients or by the appropriate specialist in each of the areas or by a registered nurse or obstetrical care provider.

(j) Short term specialized social-psychological and nutritional counseling services shall be provided by a social worker and nutritionist respectively. The social worker and nutritionist shall be available on site during patient visits.

(k) There shall be adequate professional, paraprofessional and clerical staff to provide, in a timely manner, maternity care services as described herein which meet the needs of the patients.

10:66-3.11 Records: documentation, confidentiality and informed consent for HealthStart comprehensive maternity care providers

(a) Healthstart maternity care providers shall have policies which protect patient confidentiality, provide for informed consent, and document prenatal, labor, delivery and postpartum services in accordance with the New Jersey State Department of Health's Guidelines for HealthStart Maternity Care Providers.

(b) An individual record shall be maintained for each patient throughout the pregnancy.

(c) Each record shall be confidential and shall include at least the following: history and physical examination findings, assessment, a care plan, treatment services, laboratory reports, counseling and health instructions provided, and documentation of referral and follow-up services.

(d) There shall be policies and procedures for appropriate informed consent for all HealthStart services.

10:66-3.12 Standards for HealthStart pediatric care certificate

(a) Pediatric care services shall be comprehensive, integrated and coordinated.

(b) HealthStart pediatric care providers shall:

1. Directly provide preventive child health care, maintenance of complete patient history, outreach for preventive care, initiation of referrals for appropriate medical, educational, social, psychological and nutritional services, and follow-up of referrals and sick care;

2. Directly provide or arrange for non emergency room-based, 24-hour physician telephone access to eligible patients; and

3. Directly provide or arrange for sick care and emergency care.

10:66-3.13 Professional requirements for HealthStart pediatric care providers

(a) All HealthStart pediatric care providers shall be pediatricians or have a physician on staff who possesses a knowledge of pediatrics. This may be demonstrated by eligibility for board certification by the American Academy of Pediatrics*, **the American Osteopathic Board of Pediatrics,*** and/or by hospital admitting privileges in pediatrics.

10:66-3.14 Preventive care services by HealthStart pediatric care providers

(a) HealthStart pediatric care providers shall provide preventive health visits in accordance with the recommended guidelines of the American Academy of Pediatrics and the New Jersey State Department of Health Guidelines for HealthStart Pediatric Care. The schedule shall include a two to four week visit, a two month visit, a four month visit, a six month visit, a nine month visit, a 12 month visit, a 15 month visit, an 18 month visit and a 23-24 month visit. Each visit shall include, at a minimum, medical, family and social history, unclothed physical examination, developmental and nutritional assessment, vision and hearing screening, dental assessment, assessment of behavior and social environment, anticipatory guidance, age appropriate laboratory examinations and immunizations. Referrals shall be made as appropriate.

(b) Each provider shall provide or arrange for sick care and 24 hour telephone physician access during non-office hours. If not directly provided by the HealthStart provider, sick care and 24 hour telephone access shall be provided for each child by a single designated provider via a documented agreement. Information on care given shall be communicated to the primary HealthStart pediatric care provider. Telephone access provided exclusively via emergency room staff is not permitted. Referral to the emergency room should occur only for emergency medical care or urgent care.

(c) Case coordination, outreach and follow-up services shall include letter and/or telephone call reminders to the child's parent or guardian for preventive well-child visits and letters and/or telephone follow-up of missed appointments. Referrals for home visit services for follow-up shall be made when appropriate. For all referrals and follow-up visits, the provider shall document the completion of such referrals and/or visits. If the referral is not completed, a letter or phone call to the child's parent or guardian and/or to the referred agency shall be sent or made. All of the activity shall be recorded on the patient's chart.

10:66-3.15 Referral services by HealthStart pediatric care providers

(a) All HealthStart pediatric care providers shall make provision for consultation for specialized health and other pediatric services. Services shall include medical services, as well as social, psychological, educational and nutritional services.

1. This may include, but is not limited to: the Special Supplemental Food Program for Women, Infants and Children (WIC); Division of Youth and Family Services, Special Child Health Services Case Management Units and Child Evaluation Centers; early intervention programs; county welfare agencies/boards of social services; certified home health agencies; community mental health centers; and local and county health departments.

10:66-3.16 Records: documentation, confidentiality and informed consent for HealthStart pediatric care providers

(a) HealthStart pediatric care providers shall have policies which protect patient confidentiality, provide for informed consent and document comprehensive care services in accordance with the New Jersey State Department of Health's Guidelines for HealthStart Pediatric Care Providers.

(b) An individual record shall be maintained for each patient.

(c) Each record shall be confidential and shall include at least the following: history and physical examination, results of required assessments, care plan, treatment services, laboratory reports, counseling and health instruction provided and documentation of referral and follow-up services.

(d) There shall be policies and procedures for appropriate informed consent for all HealthStart pediatric services.

SUBCHAPTER 4. FEDERALLY QUALIFIED HEALTH CENTER (FQHC)

10:66-4.1 Federally qualified health center services

(a) Federally qualified health center (FQHC) services are services provided by physicians, physician assistants, nurse practitioners, nurse midwives, psychologists, dentists, clinical social workers, and services and supplies incident to such services as would otherwise be covered if furnished by a physician or as an incident to a physician's services.

(b) FQHC rules are as follows:

1. FQHCs shall accommodate an outstationed county welfare agency (CWA) employee(s) for the purpose of determining Medicaid eligibility, pursuant to 1902 (a)(55) of the Social Security Act, 42 U.S.C. 1396a.

2. Each visit by an individual seeking services at a FQHC is called an encounter, which may be medical, psychiatric, or dental.

3. A medical encounter is a face-to-face contact between a recipient and a physician or other licensed practitioner acting within his or her respective scope of practice, including a podiatrist, optometrist, chiropractor, nurse practitioner, or nurse midwife.

i. Normally, only one medical encounter is covered per recipient, per day. More than one medical encounter is covered, however, when the recipient is seen by more than one licensed practitioner for the prevention, treatment or diagnosis of different injuries or illnesses, and practitioners of appropriate different specialties are involved.

ii. More than one medical encounter is also allowed if a recipient leaves the center after having been seen by a practitioner, then returns to the center and is seen by another practitioner on the same day.

iii. More than two medical encounters during a week for a recipient requires clear documentation in the recipient's medical record demonstrating the medical necessity of the encounter(s).

iv. Interpretation of results of tests or procedures not requiring face-to-face contact between a recipient and a practitioner, and referrals to specialists, do not constitute a medical encounter.

4. A psychiatric encounter is a face-to-face contact between a recipient and a licensed mental health professional in which a covered mental health clinic service is provided.

5. A dental encounter is a face-to-face contact between a recipient and a dentist or a licensed dental professional in which a covered dental procedure is provided. All procedures shall be administered by or under the direct supervision of a dentist.

APPENDIX

Cost Report

(a) Each Federally qualified health center (FQHC) participating as an independent clinic provider in the Medicaid program shall complete a cost report, as indicated at N.J.A.C. 10:66-1.5(e). This requirement is necessary to determine the amount of reimbursement to be paid to the FQHC for services provided to a Medicaid recipient.

(b) All Worksheets, Statistical Information, and a Certification Page must be completed as appropriate. Additional documentation in the form of sub-worksheets, etc. may be provided by a FQHC to support a particular cost or reclassification, adjustment to expenses, or other item(s). Calculations requiring a percentage shall be carried to five places.

(c) The completion of a cost report serves as the basis for an FQHC's interim reimbursement rate and the total Medicaid reimbursement due to an FQHC for services provided to Medicaid recipients.

(d) The following pages contain the cost report forms and instructions for their proper completion.

(See pages 4400 through 4402 for copy of Federally Qualified Health Center Medicaid Cost Reporting Forms)

FQHC-93-01 (Certification) (i)(ii)
COMPLETION INSTRUCTIONS

Field Explanation

1. Enter the Federally qualified health center mailing address;
2. Enter the Medicaid Provider Number assigned to the FQHC;
3. Enter the fiscal period of the FQHC being reported;
4. Circle the category of control most representative of the FQHC.
5. List each owner possessing an amount of ownership in the FQHC, regardless of the level.
6. All other Federally qualified health centers, providers of service, or suppliers and other entities related to the center through common ownership or control must be listed here. The use of a sub-schedule is permitted as necessary.
7. All grants received by the FQHC are to be listed here. The name, number and source of the grant (i.e., State of New Jersey Grant #XXXXX, Public Health Service Grant #XXXXX, etc.,) duration of the grant and the total grant dollars under each grant are to be listed. This information is purely for informational purposes. If additional space is required attach a supporting sub-schedule listing.
8. The names and Medicaid Physician Billing numbers of physicians furnishing services at the center are to be entered here. As appropriate a sub-schedule may be used.
9. Enter the name and number of hours worked by the supervisory physician(s) during the reporting period. Sub-schedules may be used as necessary.

Certification statement:

Enter the full name of the FQHC and the reporting period covered by the report. Note: Enter the signature of the officer/owner of the FQHC and his/her title and date after the completion of the cost report.

(See pages 4403 through 4405 for copy of Federally Qualified Health Center Supporting Documentation forms)

FQHC-93-01 (Reclassification and Adjustment of Trial Balance of Expenses)—(Worksheet 1)—(iii)(iv)(v)

COMPLETION INSTRUCTIONS:

Worksheet 1 is used to record the trial balance of expense accounts from the books and records of the center for the year being reported. (For budgeted reports an estimated trial balance should be utilized). This worksheet provides for any adjustments or reclassification to the center's cost centers that may be required.

The order of the cost centers is designed to flow to subsequent worksheets, where applicable, to aid in the cost report preparation. It is recognized that not all of the cost centers will apply to every center. For example, not every facility will offer dental services. Where a cost center is listed that doesn't apply, leave that center blank.

Blank lines for use by the center are provided wherein a unique cost center or situation may exist. If these are used, the center must identify what specific cost (center/service) are included.

Columns 1 and 2—Compensation and Fringe Benefits:

The compensation and fringe benefit expenses recorded on the books of the center, for the period of the cost report, are to be entered on the appropriate cost center lines. These expenses come directly from the trial balance of the center without adjustment. Any needed reclassification or adjustment must be recorded in columns 5 and 7, as appropriate.

Column 3—Other:

Enter the expenses of the various cost centers that are not compensation or fringe benefits. These expenses come directly from the trial balance of the center without adjustment. Any needed reclassification or adjustment must be recorded in columns 5 and 7, as appropriate.

Column 4—Sub-Totals:

The sum of columns 1, 2 and 3, for each line is entered here.

Column 5—Expense Reclassifications:

Enter any reclassification among cost centers in column 4 which are necessary to effect proper cost recognition and allocation. Reclassifications are to be used when the expenses of a particular cost center are applicable to more than one of the cost centers listed on the worksheet, and are maintained in a single cost center on the books and records of the center. For example, where a physician performs certain administrative duties, the appropriate portion of his/her compensation and fringe would need to be reclassified from the "Physician" cost center to "Administrative Costs Staff—Administration" cost center. Thus, his/her administrative time (cost) would be properly recognized.

Introduction to Column 6:

All reclassifications shall be specifically identified via supporting schedules to the cost report as prepared by the center. The supporting schedules must provide an appropriate explanation to each of the affected cost centers. Any reduction of expense is to be shown in < > brackets. The net total of the supporting schedule and column must equal zero.

Worksheet 1, Support Schedule A is to be used for all reclassifications. See instructions for specifics of this schedule.

Column 6—Reclassified Trial Balance:

This column is the total of column 4, plus or minus column 5. The total of column 6, all pages, as found on Worksheet 1, line 108, Total Center Costs, must equal that of column 4, line 108, Total Center Costs.

Column 7—Adjustments (Decreases) Increases:

Enter the amount of any adjustment to the center's reclassified trial balance expenses. Adjustments are required to adjust (increase or <decrease>) actual expenses in accordance with Medicaid rules on allowable cost. An example of a situation in which adjustment to expense would be required is where the clinic receives an allocation from a central (home) office, has a practitioner assigned by the National Health Service Corps, or the identification of pneumococcal vaccine administration costs.

All adjustments reflected in column 7 shall be detailed on a supporting schedule prepared by the clinic. The schedule shall provide an explanation or rationale for the adjustment, whether the adjustment basis is cost or amount received and the identification of any and all cost centers affected.

Worksheet 1, Support Schedule B is to be used to document and detail the adjustments contained in column 7. See instructions for specifics of this schedule.

Column 8—Adjusted Net Expenses:

This column is used to combine the reclassified trial balance amounts in column 6 with the adjustment amounts found in column 7 by individual cost center. The amounts resulting in column 8 will be used in later schedules in the determination of reimbursement of cost for services rendered to Medicaid recipients.

(See page 4406 for copy of FQHC-93-01)

FQHC-93-01 Worksheet 1—Support Schedule A—Reclassifications—(vi)

COMPLETION INSTRUCTION:

This supporting schedule is designed to document any reclassification of cost performed on the Trial Balance of Expenses, column 4. A full explanation of the reclassification must accompany each reclassification. A letter code (A), (B), (C), etc., should be used to identify each reclassification shown. This will enable identification of reclassifications should this be necessary. An example of a reclassification would be the identification of the administration and the pharmaceutical expenses for pneumococcal vaccine. Cost could be reclassified from pharmacy and the physician assistant cost centers to the pneumococcal vaccine services cost center.

For every cost amount reclassified a specific cost center (columns 3 or 6) and line (columns 4 & 7) must be recorded. Increases are to be identified in columns 3, 4, & 5, with decreases shown in columns 6, 7, & 8. The totals of column 5 and column 8 must equal.

(See page 4407 for copy of FQHC-93-01)

FQHC-93-01 Worksheet 1—Support Schedule B—Adjustments to Expense Detail—(vii)

COMPLETION INSTRUCTIONS:

This supporting schedule is used to provide the necessary detail for all adjustments, either (decreases) or increases, effecting cost centers on Worksheet 1, Pages 1, 2, & 3.

A full explanation of the adjustment is to be entered in column 1. In column 2 an alpha identifier of either C (cost) or R (revenue) should be entered. This designates the amount of the adjustment as either a revenue (received) offset or an actual cost offset.

An example of a revenue offset would be the revenues received from the operation of a vending machine in the center. The revenue received should be offset against the cost of providing the service. An actual expense offset would be made where the cost could actually be determined, such as when an adjustment to depreciation is necessary due to an independent audit firm finding.

The total of column 3 must agree to the total found on Worksheet 1, line 108, column 7.

(See page 4408 for copy of FQHC-93-01)

FQHC-93-01 Worksheet 2—ENCOUNTERS—(viii)

COMPLETION INSTRUCTIONS:

General:

Worksheet 2, is used by the center to summarize the total encounters actually occurring during the cost reporting period. The form is divided into two primary sections, that of core services, and that of other ambulatory services. Space has been provided in the other specialized service area for a service that may be unique to a center and not specifically identified.

It should be noted, that some services are specifically identified under the specialized services category, yet they would be provided by a physician, such as Norplant, and would be considered physician services. However, for purposes of reporting and to uniquely track these expenses for rate establishment, they are to be identified separately and the encounter associated with these services shown under their specific category. (Note: A time allocation and/or other reclassification may be necessary on Worksheet A using Support Schedule A.)

While care has been taken to account for the variety of services provided in a center and establish a corresponding service line, blank lines have been provided for reporting of additional special service centers and associated cost. Refer to N.J.A.C. 10:66-4.1(b) for the appropriate definition of a medical encounter.

Column 1 & 4:—Enter the total number of Medicaid encounters for the period according to their respective core service area and place of encounter (on site or off site).

Column 2 & 5:—Enter the total number of Medicaid encounters for the period according to their respective service area and place of encounter (on site or off site).

Column 3 & 6:—Enter other third party or non-payer encounters and place of encounter.

Line 7—All Columns:—Enter the sum of lines 1 through 6, Core Services—all columns.

Line 26—Columns 2, 3, 5, 6 & 7:—Enter the sum of lines 10 through 25 for each column as appropriate.

Line 28—All Columns:—Enter the sum of lines 7 and 26. Cross foot all columns to column 7.

(See page 4409 for copy of FQHC-93-01)

FQHC-93-01 Worksheet 3—PRODUCTIVITY SCREENING—(ix)

COMPLETION INSTRUCTIONS:

This Worksheet is used to determine if the productivity screens of the various core and other services are being met. It develops the various visits that will be used in the determination of an encounter rate for each core and specialized service. Additionally, it reflects the numbers of staff assigned to each of the areas.

Column 1—Number of FTE's:—Staffing is to be reported on the basis of full time equivalents. The total number of hours per specialty or position listed on Worksheet 3 is determined from the center's time records. The total hours actually worked is then divided by the number of hours the clinic considers to be full-time for that position. (Example 40 hours per week times 52 weeks = 2080 hours = 1 FTE). The resultant rounded to the nearest two decimal places is the full time equivalent for the position. If the cost report is for less than a full reporting period (i.e., less than 52 weeks) then the numbers of weeks in the reporting period multiplied by the weekly hours 40 should be used as the standard required (FTE) hours. Partial weeks should be rounded up to a full week. Note: The lines for the Pneumococcal Vaccine, line 16, column 1, is to be left blank. The physician(s) (FTEs) involved in the center is/are to be reported in line 1.

Column 1a—Number of On Site Hours:—The total on site hours worked by all FTE's in a cost center category, as recorded and taken from the center's records, are entered here.

Column 2—Total Visits:—The total number of visits taken from the center's patient log for the reporting period is entered by cost center category. A visit should be recorded in **one category only** on the worksheet. (Refer to N.J.A.C. 10:66 for the definition of an encounter). For Norplant Services, line 15, the number of Norplant insertions/removals are to be recorded. The actual visit should not be included in the Physician Cost Center, line 1, column 2.

For Pneumococcal Vaccine Services, line 16, the number of injections given are to be shown in this column. The actual encounter would be recorded in one of the other service categories, as appropriate.

Column 4—Minimum Visits:—The result of multiplying column 1a by column 3 for all service lines is to be entered here. The resultant is the minimum visit requirement for the appropriate center (Productivity Screen).

Column 5:—Enter here the greater of column 2 or column 4 for all services. This will reflect the productivity standard application where applicable and the resultant will be used for development of the actual per encounter rate on subsequent worksheets.

(See page 4410 for copy of FQHC-93-01)

FQHC-93-01 Worksheet 4—Encounter Rate Calculation—(x)

COMPLETION INSTRUCTIONS:

General: This worksheet is used to determine the per visit encounter rate by specific service category that is to be used in the Medicaid reconciliation process on Worksheet 5.

Part I:—Item (A) reflects the total actual facility direct health service cost derived from taking Worksheet 1, line 36 column 8 **plus** the sum of Worksheet 1, lines 52 & 56, column 8.

Part I: Item (B) reflects the total facility overhead costs associated with providing services during the period as derived from taking Worksheet 1, line 71, column 8 and Worksheet 1, line 105, column 8.

Part II—Specialized Services

Column 1—Direct Cost:

Transfer to the appropriate line the total cost of each specialized service area as found on Worksheet 1, Page 1, column 8. Note: The total expense of the dentist/dental hygienist is the sum of worksheet 1, lines 17 & 18, column 8.

Column 2—Ratio of Special Service Center to Total Direct Health Services:

Enter here the resultant of column 1 of this section divided by the total facility direct health service cost (Worksheet 4, Part 1, Item (A)). The percentage derived will be the percentage of each of the special service centers direct cost to total cost. Remember to carry all decimal figures to 5 places.

Column 3—Facility Overhead Applicable To the Special Service Center:

Enter here the percentage shown in column 2 of this section multiplied by Worksheet 4, Page 1-2, Part 1, Item (B). The amount derived is the percentage of total facility overhead attributed to the individual special service cost center.

Column 4—Total Cost of Special Service Cost:

Enter the sum of column 1 and 3 of this section for each special service cost center. This amount reflects the total calculated cost for each of the special service cost centers.

Column 5—Productivity Screening Visits:

Enter the productivity screening visit from Worksheet 3, Page 1, column 5 for each special service cost center. Amount shown as Total should agree to Worksheet 3, Page 1-1, column 5, line 26. [Note: The visits for Norplant are the actual Norplant Implant Procedures done and the Pneumococcal Vaccine line will reflect the actual number of injections given as shown on Worksheet 3, Page 1-1, line 15 and 16, column 2. Dental/Dental Hygienist visits are the sum of Worksheet 3, line 10 and line 11, column 5.]

Column 6—Computed Per Visit Encounter Rate:

Divide column 4 by column 5 and enter the answer here. This is your computer per visit rate for each specialized service to include direct and facility overhead costs.

(See page 4411 for copy of FQHC-93-01)

FQHC-93-01 Worksheet 4—Encounter Rate Calculation—(xi)

COMPLETION INSTRUCTIONS:

Part III—Core Services: The function of this Part of Worksheet 4 is to isolate the cost of direct core and other health service costs and to allocate overhead based on the ratio of these costs to total direct health care service costs. This amount is then divided by the total number of Core Service encounters to arrive at an average Per Encounter Rate for the facility.

Line 15:—The amount from Worksheet 4, Page 1-2, Part I, Item (A) is transferred to this line.

Line 16:—The total direct cost of specialized services is transferred to this line from Worksheet 4, page 1-2, Part II, line 14, column 1.

Line 17:—The non-reimbursable cost centers expenses, as found on Worksheet 1—Trial Balance of Expense, line 56, column 8, is transferred to this line.

Line 18:—Add amounts appearing on line 16 and line 17 and place resulting figure here.

Line 19:—Subtract line 18 from line 15 and enter remainder here.

Line 20:—Divide line 19 by line 15 to determine percentage of direct core and other health service cost to total health service cost.

Line 21:—Enter the total facility overhead from Worksheet 4, Page 1-2, Part I, Item (B).

Line 22:—To determine the amount of total facility overhead applicable to direct Core and other health services multiply line 20 by line 21. Enter the resultant here.

Line 23:—Enter the sum of line 19 plus line 22. This is the total direct and allocated core and other health services reimbursable cost.

Line 24:—Enter the total core service encounters from Worksheet 3, Page 1, line 8, column 5 on this line.

Line 25:—Divide line 23 by line 24 to obtain the average cost per encounter for core services.

(See page 4412 for copy of FQHC-93-01)

FQHC-93-01 Worksheet 5—Reconciliation Determination—(xii)

COMPLETION INSTRUCTIONS:

General:—This worksheet will determine the actual total reimbursable cost for all Medicaid encounters covered during the cost reporting period and the final reconciliation amount either due to or <from> a facility.

All Services—Lines 1 through 14:

Column 1:—For each of the line items, enter the Medicaid covered Encounters from Worksheet 2, Page 1-1, column 2 plus column 5, as appropriate. These amounts should agree to the facility's State produced summary report for the same period as that of the cost report.

Line 1:—Enter the figure from Worksheet 2, Page 1-1, line 8, column 2 plus column 5.

Lines 2-14:—Enter the figures from appropriate line item on Worksheet 2, Page 1-1, column 2 plus column 5.

Column 2:—Enter the computed per visit encounter rate for each applicable line item from Worksheet 4, Page 1-2, column 6, (Specialized Services) or Worksheet 4, Page 2-2, line 25, (Core Services).

Column 3:—To determine the Medicaid Reimbursable cost for each type of service, multiply the amounts found in column 1 by column 2. Enter the result here.

Line 15:—For columns 1 and 3, enter the sum of lines 1 through 13. Column 3, line 15, is the total reimbursable Medicaid cost for all Medicaid services provided by the facility for the period covered by the cost report.

Line 16:—Enter the total amount of interim payments received by the facility for Medicaid services it rendered during the period of the cost report. Please note, that this figure is arrived at using the accrual method of accounting and not a cash or modified cash etc., basis. This amount must agree to the summary report issued by the State for the respective period of the cost report. The figure should include all payments regardless of payment methodology. That is to say fee for service, as well as per encounter interim payments, should be reflected.

Line 17:—Subtract line 16 from line 15 and enter the amount here. If line 16 is less than the amount shown on line 15, the resulting figure is the amount owed to the facility based on the cost contained in the cost report. If the amount on line 16 is greater than the amount shown on line 15, the resultant figure is the amount the facility has been overpaid during the period of the cost report for Medicaid services rendered. This amount <negative> should be placed in parenthesis. If the figure on line 17 reflects an overpayment, the facility should expect the State Agency to adjust current interim payments until the recoupment/repayment of the entire amount has been accomplished. Any and all amounts recouped must be treated as payments to the facility for the subsequent cost reporting period.

(See page 4413 for copy of FQHC-93-01)

FQHC-93-01 Worksheet 6—AVERAGE PER ENCOUNTER INTERIM RATE CALCULATION—(xiii)

COMPLETION INSTRUCTIONS:

General:—This worksheet will enable the facility to determine an average per encounter interim reimbursement rate for the succeeding cost report period based on the file report. In certain instances, such as for new facilities or when major financial or patient population changes occur during the year, the facility may wish to prepare an interim cost report to determine the effect on their Medicaid interim rate. In this manner they may avoid large under or over payment situations, as well as provide a needed management tool for managing the facility. The completion of this worksheet will identify what the rate should be for the given cost contained on the report and the patient activity. Note that major changes in services provided or numbers of encounters, as well as the type of population served, (referred to as payer mix) will impact the development of the interim payment rate.

SUBCHAPTER 5. AMBULATORY SURGICAL CENTER (ASC)

10:66-5.1 Covered services

(a) Medicaid-covered procedures in an ambulatory surgical center (ASC) are those surgical and medical procedures which appear at 42 CFR 416.65(c), the Federal regulations governing ASC services. Surgical procedures performed in an ASC are separated into an eight-group classification system.

1. A request by an ASC to add additional surgical procedures not specifically included in one of the eight Medicare payment groups must be reviewed and evaluated by the Division of Medical Assistance and Health Services (New Jersey Medicaid program).

i. If additional surgical procedures are approved, each procedure will be assigned to one of the existing eight Medicare payment groups.

(b) Medicaid-covered surgical procedures include, but are not limited to, those procedures that:

1. Are commonly performed in a hospital, but may be safely performed in an ASC;

i. Are not commonly or safely performed in a physician's office;

2. Require a dedicated operating room or suite, and require a postoperative recovery room or short-term (not overnight) convalescent room;

3. Do not ***generally*** exceed a total of 90 minutes operating time and four hours recovery or convalescent time; and

4. Are not emergent or life threatening in nature, for example:

i. Do not generally result in extensive blood loss;

ii. Do not require major or prolonged invasion of body cavities; or

iii. Do not directly involve major blood vessels.

10:66-5.2 Anesthesia

(a) If a *[cover]* ***covered*** surgical procedure requires anesthesia, the anesthesia shall be:

1. Local or regional anesthesia; or

2. General anesthesia of 90 minutes or less duration.

10:66-5.3 Facility services

(a) Facility services include, but are not limited to:

1. Nursing services, services of technical personnel, and other related services;

2. The use by the patient of the ASC's facilities;

3. Drugs, biologicals, surgical dressings, supplies, splints, casts, appliances and equipment commonly furnished in connection with a surgical procedure. Drugs and biologicals are limited to those which cannot be self administered;

4. Diagnostic or therapeutic items and services furnished by ASC staff in connection with a covered surgical procedure, for example, simple tests such as urinalysis, blood hemoglobin, or hematocrit, administered in conjunction with the surgical procedure;

5. Administrative, recordkeeping and housekeeping items and services;

6. Blood, blood plasma, platelets, etc.; and

7. Material for anesthesia.

(b) ASC facility services do not include medical or other health services for which payment could be made under other provisions of the Medicaid program such as laboratory, x-ray, or diagnostic procedures (other than those directly related to performance of the surgical procedure). Examples of items or services that are not ASC facility services include:

1. Physicians' services;

2. The sale, lease, or rental of durable medical equipment to ASC patients for use in their homes;

3. Prosthetic devices (including artificial legs and arms);

4. Transportation services;

5. Leg, arm, back, and neck braces;

6. Artificial eyes; and

7. Services furnished by an independent clinical laboratory.

10:66-5.4 Medical records

(a) In addition to the requirements set forth at 42 CFR 416.47, medical records in an ASC shall include, but are not limited to:

1. Patient identification;
2. Significant medical history and results of physical examination;
3. Pre-operative diagnostic studies (entered before surgery), if performed;
4. Findings and techniques of the operation, including a pathologist's report on all tissues removed during surgery, except those exempted by the governing body.
5. Any allergies and abnormal drug reactions;
6. Entries related to anesthesia administration;
7. Documentation of properly executed informed consent; and
8. Discharge diagnosis.

SUBCHAPTER 6. HCFA COMMON PROCEDURE CODING SYSTEM (HCPCS)

10:66-6.1 Introduction

(a) The New Jersey Medicaid program utilizes the Health Care Financing Administration's (HCFA) Common Procedure Code System (HCPCS). HCPCS follows the American Medical Association's Physicians' Current Procedure Terminology—4th Edition (CPT-4) architecture, employing a five-position code and as many as two 2-position modifiers. Unlike the CPT-4 numeric design, the HCFA-assigned codes and modifiers contain alphabetic characters. HCPCS was developed as a three-level coding system.

1. Level I codes (narratives found in CPT-4): These codes are adapted from CPT-4 for utilization primarily by physicians, podiatrists, optometrists, certified nurse-midwives, independent clinics and independent laboratories. CPT-4 is a listing of descriptive terms and numeric identifying codes and modifiers for reporting medical services and procedures performed by physicians. Copyright restrictions make it impossible to print excerpts from CPT-4 procedure narratives for Level I codes. Thus, in order to determine those narratives it is necessary to refer to CPT-4, which is incorporated herein by reference, as amended and supplemented.

2. Level II codes (narratives found at N.J.A.C. 10:66-6.3): These codes are assigned by HCFA for physician and non-physician services which are not in CPT-4.

3. Level III codes (narratives found at N.J.A.C. 10:66-6.3): These codes are assigned by the Division to be used for those services not identified by CPT-4 codes or HCFA-assigned codes. Level III codes identify services unique to New Jersey.

(b) Regarding specific elements of HCPCS codes which require the attention of providers, the lists of HCPCS code numbers for independent clinic services are arranged in tabular form with specific information for a code given under columns with titles such as: "IND", "HCPCS CODE", "MOD", "DESCRIPTION", "FOLLOW-UP DAYS" and "MAXIMUM FEE ALLOWANCE". The information given under each column is summarized below:

COLUMN TITLE	Description
IND	(Indicator-Qualifier) lists alphabetic symbols used to refer the provider to information concerning the New Jersey Medicaid program's qualifications and requirements when a procedure or service code is used. An explanation of the indicators and qualifiers used in this column are located below and in paragraph 1, "Alphabetic and numeric symbols", as follows: "L" preceding any procedure code indicates that the complete narrative for the code is located at N.J.A.C. 10:66-6.3. "N" preceding any procedure code means that qualifiers are applicable to that code. These qualifiers are listed by procedure code number at N.J.A.C. 10:66-6.4.
HCPCS CODE	HCPCS procedure code numbers.
MOD	Alphabetic and numeric symbols: Services and procedures may be modified under certain circumstances. When applicable, the modifying circumstances are identified by the addition of alphabetic and/or numeric characters at the end of the code. The New Jersey Medicaid program's recognized modifier codes for independent clinic services are as follows:

MODIFIER CODE	DESCRIPTION
22	Unusual services: When the service provided is greater than that usually required for the listed procedure, it may be identified by adding modifier "22" to the usual procedure number.
50	Bilateral procedures: Unless otherwise identified in the listings, bilateral procedures requiring a separate incision that are performed at the same operative session should be identified by the appropriate five-digit code describing the first procedure. The second (bilateral) procedure is identified by adding modifier "50" to the procedure number.
52	Reduced services: Under certain circumstances a service or procedure is partially reduced or eliminated at the physician's election. Under these circumstances the service provided can be identified by its usual procedure number and the addition of the modifier "52", signifying that the service is reduced. This provides a means of reporting reduced services without disturbing the identification of the basic service. NOTE: Providers billing for the injection only should use the modifier "52" (reduced service) with the appropriate HCPCS procedure code on the claim form when billing for any immunizations. The provider will be reimbursed $2.50 for an injection. Do not use HCPCS procedure code 90799 when billing for immunizations with free vaccine.
WF	Family planning: To identify procedures performed for the sole purpose of family planning, add the modifier "WF" to only those procedure codes so indicated at N.J.A.C. 10:66-6.2.
WM	Certified nurse-midwife: To identify procedures performed by a certified nurse-midwife, add the modifier "WM" to only those procedure codes so indicated at N.J.A.C. 10:66-6.2.
WY	Only applies to billing by an ambulatory surgical center: To identify the trimester (1st trimester) of an abortion procedure, add the modifier "WY" to the procedure code.
WZ	Only applies to billing by an ambulatory surgical center: To identify the trimester (2nd trimester) of an abortion procedure, add the moidifier "WZ" to the procedure code.
YR	Routine foot care podiatry: To identify routine foot care provided by a podiatrist, add the modifier "YR" to only those procedure codes so indicated at N.J.A.C. 10:66-6.2(h).
ZI	Independent clinic: To identify certain mental health services provided by independent clinic providers, add the modifier "ZI" to only those procedure codes so indicated at N.J.A.C. 10:66-6.2(f) and 10:66-6.2(o).
DESCRIPTION	Code narrative: Narratives for Level I codes are found in CPT-4. Narratives for Level II and III codes are found at N.J.A.C. 10:66-6.3.
FOLLOW-UP DAYS	Number of days for follow-up care.

MAXIMUM FEE ALLOWANCE — New Jersey Medicaid program's maximum reimbursement allowance for specialist and non-specialist: If the symbols "B.R." (By Report) are listed instead of a dollar amount, it means that additional information will be required in order to properly evaluate the service. Attach a copy of the report to the claim form.

1. Alphabetic and numeric symbols under "IND" & "MOD": These symbols, when listed under the "IND" and "MOD" columns, are elements of the HCPCS coding system used as qualifiers or indicators ("IND" column) and as modifiers ("MOD" column). They assist the provider in determining the appropriate procedure codes to be used, the area to be covered, the minimum requirements needed, and any additional parameters required for reimbursement purposes.

i. These symbols and/or letters must not be ignored because they reflect requirements, in addition to the narrative which accompanies the CPT/HCPCS procedure code as written in the CPT-4, for which the provider is liable. These additional requirements must be fulfilled before reimbursement is requested.

ii. If there is no identifying symbol listed, the CPT/HCPCS procedure code narrative prevails.

(c) Listed below are both general and specific policies of the New Jersey Medicaid program that pertain to HCPCS. Specific information concerning the responsibilities of an independent clinic provider when rendering Medicaid-covered services and requesting reimbursement are located at N.J.A.C. 10:66—Subchapters 1 through 5, and 10:66—Appendix.

1. General requirements are as follows:

i. When filing a claim, the appropriate HCPCS procedure codes must be used in conjunction with modifiers when applicable.

ii. The use of a procedure code will be interpreted by the New Jersey Medicaid program as evidence that the provider personally furnished, as a minimum, the services for which it stands.

iii. When billing, the provider must enter onto the claim form a CPT/HCPCS procedure code as listed in CPT-4 or in this subchapter (N.J.A.C. 10:66-6). If an appropriate code is not listed, place a "N/A" (not applicable) in the procedure code column and submit a narrative description of the service. If possible, insert a CPT code closest to the narrative description you have written.

iv. Date(s) of service(s) must be indicated on the claim form and in the provider's own record for each service billed.

v. The "MAXIMUM ALLOWANCE" as noted with these procedure codes, "S" for specialist and "NS" for non-specialist, represents the maximum payment for the given procedure. When submitting a claim, the clinic must always use its usual and customary fee.

(1) Listed values for all surgical procedures include the surgery and the follow-up care for the period indicated in days in the column titled "Follow-Up Days."

(2) All references to time parameters shall mean the practitioner's personal time in reference to the service rendered unless it is otherwise indicated.

vi. Written records in substantiation of the use of a given procedure code must be available for review and/or inspection if requested by the New Jersey Medicaid program.

vii. All references to performance of any or all parts of a history or physical examination shall mean that for reimbursement purposes these services were personally performed by a physician, dentist, podiatrist, optometrist, certified nurse midwife, psychologist, and other program recognized mental health professionals in a mental health clinic, whichever is applicable. (Exception: Procedure Code W9820, EPSDT, permits the services of a pediatric nurse practitioner under the direct supervision of a physician.)

2. Specific requirements concerning medicine are as follows:

i. To qualify as documentation that the service was rendered by the practitioner during an inpatient stay, the medical record must contain the practitioner's notes indicating that he or she personally:

(1) Reviewed the patient's medical history with the patient and/or his or her family, depending upon the medical situation;

(2) Performed an examination as appropriate;

(3) Confirmed or revised the diagnosis; and

(4) Visited and examined the patient on the days for which a claim for reimbursement is made.

iii. The practitioner's involvement must be clearly demonstrated in notes reflecting his or her personal involvement with the service rendered. This refers to those occasions when these notes are written into the medical record by interns, residents, other house staff members, or nurses. A counter-signature alone is not sufficient.

3. Specific requirements concerning surgery are as follows:

i. Certain of the listed procedures are commonly carried out as an integral part of a total service and, as such, do not warrant a separate charge. When such a procedure is carried out as a separate entity not immediately related to other services, the indicated value for "separate procedure" is applicable.

4. Specific requirements concerning radiology are as follows:

i. Values include usual contrast media, equipment and materials.

ii. Values include consultation and written report to the referring physician.

iii. S&I (Supervision and Interpretation) only for the procedure given. This code is used only when a procedure is performed by more than one physician. Values include consultation and written report.

iv. All films taken of an area which is to be subject to a contrast study will, for reimbursement purposes, be considered part of the contrast study unless stated otherwise.

v. The fee listed represents the combined technical and professional component of the reimbursement for the procedure code notwithstanding any statement to the contrary in the narrative. It will be paid only to one provider and will not be broken down into its component parts.

10:66-6.2 HCPCS procedure code numbers and maximum fee allowance schedule

(a) Evaluation and management and other procedures

*An asterisk preceding any procedure code may be performed in a drug treatment center.

Ind	HCPCS Code	Mod	Follow Up Days	Maximum Fee Allowance S	$	NS	Anes. Basic Units
*N	36415			1.80		1.80	
	90701			16.34		16.34	
	90701	52		2.50		2.50	
	90702			3.29		3.29	
	90702	52		2.50		2.50	
	90703			3.40		3.40	
	90703	52		2.50		2.50	
	90704			23.60		23.60	
	90704	52		2.50		2.50	
	90705			18.39		18.39	
	90705	52		2.50		2.50	
	90706			22.04		22.04	
	90706	52		2.50		2.50	
	90707			39.87		39.87	
	90707	52		2.50		2.50	
	90712			14.44		14.44	
	90712	52		2.50		2.50	
	90713			22.80		22.80	
	90713	52		2.50		2.50	
	90714			3.03		3.03	
	90714	52		2.50		2.50	
	90717			3.03		3.03	
	90717	52		2.50		2.50	
	90718			3.35		3.35	
	90718	52		2.50		2.50	
	90724			6.97		6.97	
	90724	52		2.50		2.50	
	90732			14.35		14.35	
	90732	52		2.50		2.50	
	90733			17.48		17.48	
	90733	52		2.50		2.50	
	90737			25.79		25.79	

	90737	52	2.50	2.50
	90741		Prior authorization required	
	90742		Prior authorization required	
N	90799		2.50	2.50
N	90801		37.00	26.00
	93000		16.00	16.00
N	99150		45.00	40.00
			Per Hour	Per Hour
N	99151		45.00	40.00
			Per Hour	Per Hour
N	*99201		16.00	14.00
N	*99202		16.00	14.00
N	*99203		22.00	17.00
N	*99204		22.00	17.00
N	*99205		22.00	17.00
N	*99211		16.00	14.00
N	99211	WM	NA	11.20
N	*99212		16.00	14.00
N	99212	WM	NA	11.20
N	*99213		16.00	14.00
N	99213	WM	NA	11.20
N	*99214		16.00	14.00
N	99214	WM	NA	11.20
N	*99215		16.00	14.00
N	99215	WM	NA	11.20
N	99241		44.00	NA
N	99242		44.00	NA
N	99243		44.00	NA
N	99244		62.00	NA
N	99245		62.00	NA
N	99251		44.00	NA
N	99252		44.00	NA
N	99253		44.00	NA
N	99254		62.00	NA
N	99255		62.00	NA
[N]	99261		16.00	14.00
[N]	99262		16.00	14.00
[N]	99263		16.00	14.00
N	99271		44.00	NA
N	99272		44.00	NA
N	99273		44.00	NA
N	99274		62.00	NA
N	99274	YY	50.00	NA
N	99274	ZZ	50.00	NA
N	99275		62.00	NA
N	99291		45.00	40.00
N	99292		22.50	20.00
[N]	99382		22.00	17.00
[N]	99383		22.00	17.00
[N]	99384		22.00	17.00
[N]	99385		22.00	17.00
[N]	99386		22.00	17.00
[N]	99387		22.00	17.00
[N]	99391		16.00	14.00
[N]	99392		22.00	17.00
[N]	99393		22.00	17.00
[N]	99394		22.00	17.00
[N]	99395		22.00	17.00
[N]	99396		22.00	17.00
[N]	99397		22.00	17.00
L*[N]*	J2790		20.40	20.40
L*[N]*	J2790	22	72.07	72.07
L	W9050		27.00	NA
L	W9055		27.00	23.00
L	W9060	WT	23.00	18.00
L	W9061	WT	23.00	18.00
L	W9062	WT	23.00	18.00
L	W9063	WT	23.00	18.00
L	W9064	WT	23.00	18.00
L	W9065	WT	23.00	18.00
L	W9066	WT	23.00	18.00
L	W9067	WT	23.00	18.00
L	W9068	WT	23.00	18.00
L	W9096		17.46	17.46
L	W9096	52	2.50	2.50
L	W9096	22	32.79	32.79
L	W9096	2252	2.50	2.50
L	W9097		17.46	17.46
L	W9097	52	2.50	2.50
L	W9098		32.79	32.79
L	W9098	52	2.50	2.50
L	W9099		63.57	63.57
L	W9099	52	2.50	2.50
L	W9333		27.88	27.88
L	W9333	52	2.50	2.50
L	W9334		27.88	27.88
L	W9334	52	2.50	2.50
L	W9335		62.09	62.09
L	W9335	52	2.50	2.50
L	W9338		30.27	30.27
L	W9338	52	2.50	2.50
L*[N]*	W9820		23.00	18.00

(b) Dental services (See N.J.A.C. 10:56-3).

(c) Family planning services:

Ind	HCPCS Code	Mod	Follow Up Days	Maximum Fee Allowance $	NS	Anes. Basic Units
N	11975	22	30	Direct package price plus		
				100.00	85.00	
N	11976		90	100.00	85.00	
N	11977	22	90	Direct package price plus		
				200.00	170.00	
N	55250		30	90.00	79.00	3
N	55450		30	42.00	37.00	3
N	57451		45	182.00	158.00	6
	58301			16.40	16.40	
	58301	WM		NA	16.40	
N	58600		45	211.00	184.00	6
N	58605		45	151.00	131.00	6
N	58982		45	182.00	158.00	6
N	58983		45	182.00	158.00	6
[N]	88150			6.00	6.00	
[N]	88151			6.00	6.00	
[N]	88155			6.00	6.00	
N	99201	WF		45.00	45.00	
N	99201	WFWM		NA	31.50	
N	99202	WF		45.00	45.00	
N	99202	WFWM		NA	31.50	
N	99203	WF		45.00	45.00	
N	99203	WFWM		NA	31.50	
N	99204	WF		45.00	45.00	
N	99204	WFWM		NA	31.50	
N	99205	WF		45.00	45.00	
N	99205	WFWM		NA	31.50	
N	99211	WF		7.60	7.60	
N	99211	WFWM		NA	5.35	
N	99212	WF		7.60	7.60	
N	99212	WFWM		NA	5.35	
N	99213	WF		7.60	7.60	
N	99213	WFWM		NA	5.35	
N	99214	WF		23.00	23.00	
N	99214	WFWM		NA	16.40	
N	99215	WF		23.00	23.00	
N	99215	WFWM		NA	16.40	
N	99395	WF		45.00	45.00	
N	99395	WFWM		NA	31.50	
[N]						
L	W0001	WF		188.00	188.00	
[N]						
L	W0001	WFWM		NA	177.00	

[N]				
L	W0002	WF	123.00	123.00
[N]				
L	W0002	WFWM	NA	112.00
[N]				
L	W0004	WF	204.00	204.00
[N]				
L	W0004	WFWM	NA	188.00
[N]				
L	W0008	WF	139.00	139.00
[N]				
L	W0008	WFWM	NA	123.00

(d) Laboratory services (See N.J.A.C. 10:61-3).

(e) Minor surgery:

*An asterisk preceding any procedure code may also be performed by a podiatrist.

Ind	HCPCS Code	Mod	Follow Up Days	Maximum Fee $ S	Allowance NS	Anes. Basic Units
N	10040			18.00	16.00	
*	10060			13.00	11.00	
*	10061		30	48.00	42.00	
	10080			30.00	26.00	
*	10120			18.00	16.00	
*	10121		30	34.00	29.00	
*	10140			18.00	16.00	
*	10160			13.00	11.00	
*	11000			13.00	11.00	
*	11001			6.00	5.00	
*	11040			13.00	11.00	
*	11041			13.00	11.00	
*	11042			16.00	14.00	
*	11043			16.00	14.00	
*	11100		7	13.00	11.00	
*	11400		15	18.00	16.00	
*	11401		15	22.00	20.00	
*	11402		15	27.00	24.00	
*	11403		15	32.00	27.00	
*	11404		15	32.00	27.00	
*	11406		15	32.00	27.00	
*	11420		15	18.00	16.00	
*	11421		15	22.00	20.00	
*	11422		15	27.00	24.00	
*	11423		15	32.00	27.00	
*	11424		15	32.00	27.00	
*	11426		15	32.00	27.00	
	11440		15	18.00	16.00	
	11441		15	22.00	20.00	
	11442		15	27.00	24.00	
	11443		15	32.00	27.00	
	11444		15	32.00	27.00	
	11446		15	32.00	27.00	
*	11600		90	37.00	32.00	
*	11601		90	47.00	42.00	
*	11602		90	61.00	53.00	
*	11620		90	61.00	53.00	
*	11621		90	90.00	79.00	
*	11622		90	121.00	105.00	
	11640		90	90.00	79.00	
	11641		90	121.00	105.00	
	11642		90	150.00	131.00	
*	11700			13.00	11.00	
*	11701			6.00	6.00	
*	11710			13.00	11.00	
*	11711			6.00	6.00	
*	11730			10.00	10.00	
*	11750		30	42.00	37.00	
*	12001			18.00	16.00	
*	12002			24.00	21.00	
*	12004			30.00	26.00	
	12005		7	46.00	39.00	
	12006		7	57.00	48.00	
	12007		7	82.50	70.00	
	12011			18.00	16.00	
	12013			24.00	21.00	
	12014		7	30.00	26.00	
	12031		30	30.00	26.00	
	12032		30	48.00	42.00	
*	12041		30	30.00	26.00	
*	12042		30	67.00	59.00	
	12051		30	38.00	33.00	
	12052		30	67.00	59.00	
	13100		30	34.00	29.00	
	13101		30	68.00	63.00	
	13120		30	48.00	42.00	
	13121		30	106.00	92.00	
*	13131		30	67.00	59.00	
*	13132		30	145.00	126.00	
	13150		30	38.00	33.00	
	13151		30	82.00	71.00	
	13152		30	193.00	168.00	
*	17000			16.00	14.00	
*	17010			42.00	36.00	
*	17100			18.00	15.00	
*	17105			100.00	85.00	
*	17110			16.00	14.00	
*	17200			16.00	14.00	
*	17304			100.00	85.00	
L*	W1650			24.00	21.00	
L*	W1650	22		37.00	32.00	

(f) Mental health services

Ind	HCPCS Code	Mod	Follow Up Days	Maximum Fee $ S	Allowance NS	Anes. Basic Units
N	90801	ZI		45.00	45.00	
N	90843	ZI		13.00	13.00	
N	90844	ZI		26.00	26.00	
N	90847	ZI		26.00	26.00	
N	90847	ZI22		32.00	32.00	
	90862	ZI		4.50	4.50	
N	90887	ZI		13.00	13.00	
LN	H5025	ZI		8.00	8.00	
L	Z0100			22.50	22.50	
L	Z0130			25.00	25.00	
L	Z0150			8.00	8.00	
L	Z0160			15.50	15.50	
L	Z0170			46.00	46.00	
L	Z0180			77.00	77.00	

(g) Obstetrical services (maternity)

Ind	HCPCS Code	Mod	Follow Up Days	Maximum Fee $ S	Allowance NS	Anes. Basic Units
N	59400		60	468.00	403.00	4
N	59400	WM	60	NA	328.00	4
N	59410		60	320.00	272.00	4
N	59420			16.00	14.00	
N	59420	WM		NA	11.20	
N	59420	22		22.00	17.00	
N	59420	WM22		NA	15.40	
N	59410	WM	60	NA	224.00	4
N	59430		0	20.00	18.00	0
N	59430	WM	0	NA	14.00	0
	59510		45	598.00	516.00	7
	59515		45	450.00	385.00	7
	59525		45	362.00	308.00	8
	59812		45	105.00	91.00	3
L	Z0250	WM		NA	40.00	

(h) Podiatry Services

Ind	HCPCS Code	Mod	Follow Up Days	Maximum Fee Allowance S	$	NS	Anes. Basic Units
	29580			18.00		16.00	3
N	99211	YR		16.00		14.00	
N	99212	YR		16.00		14.00	
N	99213	YR		16.00		14.00	
N	99214	YR		16.00		14.00	
N	99215	YR		16.00		14.00	
L	W2650			21.00		21.00	
L	W2655			5.00		5.00	

NOTE: See N.J.A.C. 10:66-6.2(f), Surgery, for additional procedures.

(i) Radiology services:

Ind	HCPCS Code	Mod	Follow Up Days	Maximum Fee Allowance S	$	NS	Anes. Basic Units
	70030				15.00		
	70100				15.00		
	70110				20.00		
	70120				15.00		
	70130				20.00		
	70140				15.00		
	70150				20.00		
	70160				15.00		
	70170				20.00		
	70190				15.00		
	70200				25.00		
	70210				20.00		
	70220				25.00		
	70240				15.00		
	70250				15.00		
	70260				25.00		
	70300				5.00		
	70310				10.00		
	70320				15.00		
	70328				13.00		
	70330				20.00		
	70350				8.00		
	70360				10.00		
	70370				20.00		
	70380				15.00		
	70390				15.00		
	70551				300.00		
MN	71010				10.00		
MN	71020				15.00		
MN	71030				20.00		
MN	71034				20.00		
	71100				15.00		
	71110				20.00		
	71120				15.00		
	71130				20.00		
	72010				40.00		
	72040				15.00		
	72050				20.00		
	72052				25.00		
	72070				15.00		
	72080				15.00		
	72100				20.00		
	72110				25.00		
	72114				20.00		
N	72170				15.00		
	72190				20.00		
	72200				20.00		
	72220				15.00		
	73000				10.00		
	73010				15.00		
	73020				15.00		
	73030				15.00		
	73040				15.00		
	73050				18.00		
	73060				15.00		
	73070				15.00		
	73080				15.00		
	73085				15.00		
	73090				10.00		
	73092				20.00		
	73100				10.00		
	73110				15.00		
	73115				15.00		
	73120				10.00		
	73130				15.00		
	73140				5.00		
N	73500				18.00		
N	73510				20.00		
	73520				25.00		
	73525				15.00		
	73530				30.00		
	73540				15.00		
	73550				15.00		
	73560				15.00		
	73562				15.00		
	73580				15.00		
	73590				15.00		
	73592				20.00		
	73600				10.00		
	73610				13.00		
	73615				15.00		
	73620				10.00		
	73630				13.00		
	73650				10.00		
	73660				5.00		
	74000				10.00		
	74010				15.00		
	74020				15.00		
N	74220				20.00		
N	74240				40.00		
N	74241				45.00		
N	74245				50.00		
N	74250				30.00		
	74270				30.00		
	74280				40.00		
	74290				35.00		
	74305				25.00		
	74400				35.00		
	74405				50.00		
	74420				35.00		
	74430				15.00		
	74450				20.00		
	74455				20.00		
	74470				20.00		
N	74710				25.00		
	74740				20.00		
	76000				45.00		
	76020				15.00		
	76040				20.00		
	76061				35.00		
	76062				90.00		
	76080				15.00		
	76090				26.00		
	76091				36.00		
	76100				35.00		
	76100	50			50.00		
	76805				55.00		
	76815				25.00		
	76816				25.00		

(j) Rehabilitation services:

Ind	HCPCS Code	Mod	Follow Up Days	Maximum Fee Allowance S	$	NS	Anes. Basic Units
N	92507			7.00		7.00	

Ind	HCPCS Code	Mod	Follow Up Days	Maximum Fee Allowance S	$	NS	Anes. Basic Units
N	92552			11.00		11.00	
N	92553			14.00		14.00	
N	92557			19.00		19.00	
	92562			3.00		NA	
	92563			3.00		NA	
	92564			4.00		NA	
N	92567			5.00		NA	
N	92568			5.00		NA	
N	92572			20.00		NA	
N	92576			30.00		NA	
N	92582			14.00		14.00	
	92585			45.00		NA	
N	92589			10.00		NA	
	92590			40.00		NA	
	92591			40.00		NA	
N	97799			7.00		7.00	
L	H5300			7.00		7.00	
L	Z0270			7.00		7.00	
L	Z0280			7.00		7.00	
L	Z0300			7.00		7.00	
L	Z0310			45.00		45.00	

(k) Vision care services (See N.J.A.C. 10:62-4).

(l) Transportation services:

Ind	HCPCS Code	Mod	Follow Up Days	Maximum Fee Allowance S	$	NS	Anes. Basic Units
LN	Z0330			4.50		4.50	
LN	Z0335			9.00		9.00	

(m) Drug treatment center services:

*An asterisk preceding any procedure code indicates that the procedure may only be provided to ACCAP-eligible individuals in the home.

Ind	HCPCS Code	Mod	Follow Up Days	Maximum Fee Allowance S	$	NS	Anes. Basic Units
*LN	Z1830			3.50		3.50	
*LN	Z1831			4.50		4.50	
*LN	Z1832			24.00		24.00	
*LN	Z1833			12.00		12.00	
*LN	Z1834			30.00		30.00	
*LN	Z1835			22.50		22.50	
LN	Z2000			22.50		22.50	
LN	Z2001			15.00		15.00	
LN	Z2002			4.50		4.50	
LN	Z2003			16.00		16.00	
LN	Z2004			8.00		8.00	
LN	Z2005			15.00		15.00	
LN	Z2006			2.50		2.50	
LN	Z2007			8.00		8.00	
LN	Z2010			4.50		4.50	

NOTE: See N.J.A.C. 10:66-6.2(a), Evaluation and management and other procedures, for additional procedures preceded by an asterisk.

(n) Federally qualified health care services:

Ind	HCPCS Code	Mod	Follow Up Days	Maximum Fee Allowance S	$	NS	Anes. Basic Units
	90844	22		150.00		150.00	
L	W9840			150.00		150.00	
L	Y3333			150.00		150.00	

(o) Personal care assistant services:

Ind	HCPCS Code	Mod	Follow Up Days	Maximum Fee Allowance S	$	NS	Anes. Basic Units
*[Z	1600	ZI]*					
***L**	**Z1600**	**ZI***		13.02		13.02	
*[Z	1605	ZI]*					
***L**	**Z1605**	**ZI***		10.23		10.23	
*[Z	1610	ZI]*					
***L**	**Z1610**	**ZI***		35.00		35.00	
*[Z	1611	ZI]*					
***L**	**Z1611**	**ZI***		6.51		6.51	
*[Z	1612	ZI]*					
***L**	**Z1612**	**ZI***		5.12		5.12	
*[Z	1613	ZI]*					
***L**	**Z1613**	**ZI***		35.00		35.00	

(p) Miscellaneous services:

Ind	HCPCS Code	Mod	Follow Up Days	Maximum Fee Allowance S	$	NS	Anes. Basic Units
	57820		15	72.00		63.00	
	58120		15	72.00		63.00	
N	59840		45	79.00		68.00	
N	59841		45	79.00		68.00	

10:66-6.3 HCPCS procedure codes and maximum fee allowance schedule for Level II & Level III codes and narratives (not located in CPT-4)

(a) Evaluation and Management and other procedures:

Ind	HCPCS Code	Mod	Description	Follow Up Days	Maximum Fee Allowance S	$	NS
	J2790		RhoGAM, Rho (D) Immune Globulin (Human); single dose—Micro-Dose		20.40		20.40
	J2790	22	RhoGAM, Rho (D) Immune Globulin (Human); single dose—Full dose		72.07		72.07
	W9060	WT	Under six weeks				
	W9061	WT	Six weeks to three months				
	W9062	WT	Three months to five months				
	W9063	WT	Five months to eight months				
	W9064	WT	Eight months to 11 months				
	W9065	WT	11 months to 14 months				
	W9066	WT	14 months to 17 months				
	W9067	WT	17 months to 20 months				
	W9068	WT	20 months to 24 months				

1. History including behavior and environmental factors;

		2. Developmental assessment; and 3. Complete, unclothed physical examination by a physician or a nurse practitioner under the personal supervision of a physician, to include: (a) Measurements: height, weight and head circumference; (b) Vision and hearing screening; and (c) Nutritional assessment. 4. Assessment and administration of immunizations (see appropriate HCPCS procedure codes for reimbursement amounts); 5. Anticipatory guidance; 6. Arrangement for diagnosis and treatment of medical problems uncovered during the visit. This includes self-referrals and/or referrals to other providers as medically indicated; 7. Appropriate laboratory procedures performed, or referred, in accordance with HealthStart Pediatric Care Guidelines. (a) Sickle cell, PKU screening, as appropriate; (b) Hemoglobin or hematocrit twice: at six to nine months and 20 to 24 months of age. (When done in conjunction with lead screening, this test is not reimbursable as a separate procedure.); (c) Urinalysis, twice: at six to nine months and 20 to 24 months of age; (d) Tuberculin test, twice: at 12 to 14 months and 20 to 24 months; and (e) Lead screening (EP) at 12 to 14 months and 20 to 24 months. 8. Case coordination: referral for nutritional, psychological, social and other community services, as appropriate; and provision or arrangement for 24-hour telephone physician access and sick care; and outreach and follow-up activities in accordance with the HealthStart Pediatric Care Guidelines. **NOTE:** Laboratory procedures performed by a physician in his or her office are not reimbursable to the physician; if such procedures are performed by an outside laboratory, the laboratory shall submit a separate claim.		
W9096		Hepatitis B immunoprophylaxis with Recombivax HB, 0.25 ml dose. This code applies only to newborns of HBsAg negative mothers.	17.46	17.46
W9096	22	Hepatitis B immunoprophylaxis with Recombivax HB, 0.5 ml dose. This code applies only to newborns of HBsAg negative mothers.	32.79	32.79
W9097		Hepatitis B immunoprophylaxis with Recombivax HB, 0.25 ml dose. This code applies only to high risk recipients under 11 years of age (exclusive of newborns).	17.46	17.46
W9098		Hepatitis B immunoprophylaxis with Recombivax HB, 0.5 ml dose. This code applies only to high risk recipients 11 to 19 years of age.	32.79	32.79

	W9099	Hepatitis B immunoprophylaxis with Recombivax HB, 1.0 ml dose. This code applies only to high risk recipients over 19 years of age.	63.57		63.57
	W9333	Hepatitis B immunoprophylaxis with Engerix-B, 0.5 ml dose. This code applies only when immunizing newborns.	27.88		27.88
	W9334	Hepatitis B immunoprophylaxis with Engerix-B, 0.5 ml dose. This code applies only to high risk recipients under 11 years of age (exclusive of newborns).	27.88		27.88
	W9335	Hepatitis B immunoprophylaxis with Engerix-B, 1.0 ml dose. This code applies only to high risk recipients over 11 years of age	62.09		62.09
	W9338	Tetramune. This code is used when administering the primary immunization series to infants and toddlers. It eliminates the need for two separate injections of DTP and Haemonphilus b Conjugate Vaccine.	30.27		30.27
N	W9820	Early and Periodic Screening, Diagnosis and Treatment (EPSDT) through age 20. **NOTE:** If performed by outside independent laboratories, the laboratory must submit the claim. Blood sample for lead screening test should be sent to the New Jersey State Department of Health. **NOTE:** Procedure code W9820 shall be used only once for the same patient during any 12-month period by the same physician, group, shared health care facility, or practitioner(s) sharing a common record. Reimbursement for code W9820 is contingent upon the submission of both a Completed Report and Claim For EPSDT/ HealthStart Screening and Related Procedures (MC-19) and the appropriate claim form within 30 days of the date of service. In the absence of a completed MC-19 form, reimbursement will be reduced to the level of an annual health maintenance examination, that is, $22.00-$17.00	23.00		18.00

(b) Dental services (See N.J.A.C. 10:56-3).

(c) Family planning services:

Ind	HCPCS Code	Mod	Description	Follow Up Days	Maximum Fee Allowance S	$	NS
	W0001	WF	Supplying and inserting the intrauterine device "Paragard" by a physician including the post-insertion visit.		188.00		188.00
	W0001	WMWF	Supplying and inserting the intrauterine device "Paragard" by a certified nurse-midwife including the post-insertion visit.		NA		177.00
	W0002	WF	Supplying and inserting the intrauterine device "Progestasert" by a physician including the post-insertion visit.		123.00		123.00
	W0002	WMWF	Supplying and inserting the intrauterine device "Progestasert" by a certified nurse-midwife including the post-insertion visit.		NA		112.00

W0004	WF	Removal of an IUD by a physician followed at the same visit by the insertion of the IUD "Paragard" and including the post-insertion visit.	204.00	204.00
W0004	WMWF	Removal of an IUD by a certified nurse-midwife followed at the same visit by the insertion of the IUD "Paragard" and including the post-insertion visit.	NA	188.00
W0008	WF	Removal of an IUD by a physician followed at the same visit by the insertion of the IUD "Progestasert" and including the post-insertion visit.	139.00	139.00
W0008	WMWF	Removal of an IUD by a certified nurse-midwife followed at the same visit by the insertion of the IUD "Progestasert" and including the post-insertion visit.	NA	123.00

(d) Laboratory services (See N.J.A.C. 10:61-3).

(e) Minor surgery:

Ind	HCPCS Code	Mod	Description	Follow Up Days	Maximum Fee Allowance S	$	NS
	W1650		Excision of plantar verruca, single site unilateral		24.00		21.00
	W1650	22	Excision of plantar verruca, multiple sites, unilateral		37.00		32.00

(f) Mental health services:

Ind	HCPCS Code	Mod	Description	Follow Up Days	Maximum Fee Allowance S	$	NS
	H5025	ZI	Group therapy: Verbal or other therapy methods provided by one or more psychiatrists, or professional counsellors under the direction of a psychiatrist, in a personal involvement with two or more patients, with a maximum of eight patients. A minimum session of 1½ hours is required. This includes preparation time in addition to the 1½ hours session time.		8.00		8.00
	Z0100		Off-Site Crisis Intervention—An emergency procedure by personnel of a mental health clinic to an outpatient individual at locations other than the grounds or buildings of the clinic. Request for this service shall be initiated by the patient or other interested individual to meet the immediate needs of the patient, who is unable to present himself at the clinic. The procedure includes rapid intervention, written evaluation and a treatment plan. Use of procedure is limited to twice in six months for any one patient. This procedure is not applicable to institutionalized patients.		22.50		22.50
	Z0130		Psychological testing: Maximum of five hours of psychometric and/or projective tests with a written report.		25.00 Per Hour		25.00 Per Hour
			Partial Care: A mental health service whose primary purpose is to maximize the client's independence and community living skills in order to reduce unnecessary hospitalization. It is directed toward the acute and chronically disabled individual. Partial Care programs shall provide, as listed below, a full system of services necessary to meet the comprehensive needs of the individual client. Services shall be provided or arranged				

for, to meet the individual needs of participating clients. These services shall include:

Assessment and evaluation;
Service procurement;
Therapy;
Information and referral;
Counseling;
Daily living education;
Community organization;
Pre-vocational therapy;
Recreational therapy; and
Health related services.

Partial Care programs shall be available daily for five days a week, with additional planned activities each week during evening and/or weekend hours as needed. Individual clients need not attend every day but as needed.

Partial Care programs specifically developed for children may be available four days a week, with one evening and/or weekend activity(ies).

The staff of the Partial Care program should include a Director who shall be a qualified professional from the specialties of psychiatry, psychology, social work, psychiatric nursing, vocational rehabilitation, or a related field with training and/or experience in direct service provision and administration.

A qualified psychiatrist shall be available to the Partial Care program on a regularly scheduled basis, for consultation. Other staff deemed necessary to implement a Partial Care program which meets the requirement of this section should include qualified mental health professionals, paraprofessionals and volunteers.

In order to qualify as an approved Partial Care program the Program must be certified by the Department.

Z0170	Partial Care, half day*	46.00	46.00
	*At least three hours but less than five hours of participation in active programming exclusive of meals.		
Z0180	Partial Care, full day*	77.00	77.00
	*Five or more hours of participation in active programming exclusive of meals.		

NOTE: Except for transportation these rates reflect full payments with a prohibition against multiple billing for more than one service to a Medicaid patient in a given day.

(g) Obstetrical services (maternity):

Ind	HCPCS Code	Mod	Description	Follow Up Days	Maximum Fee Allowance S	$	NS
	Z0250	WM	Home Delivery Pack. All drugs and supplies, etc., necessary for delivery in this setting.		NA		40.00

(h) Podiatry services:

Ind	HCPCS Code	Mod	Description	Follow Up Days	Maximum Fee Allowance S	$	NS
	W2650		Casting for molded shoes Prior authorization is required.		21.00		21.00
	W2655		Casting for arch support Prior authorization is required.		5.00		5.00

(i) Radiology services:

Ind	HCPCS Code	Mod	Description	Follow Up Days	Maximum Fee Allowance S	$	NS
	W7200		Foot, complete (incl. special or calcis views)		20.00		20.00
	W7250		Colon, barium enema, with or without K.U.B. air contrast only (with fluoroscopy by the radiologist).		30.00		30.00

(j) Rehabilitation services:

Ind	HCPCS Code	Mod	Description	Follow Up Days	Maximum Fee Allowance S	$	NS
	H5300		Occupational therapy		7.00		7.00
	Z0270		Physical therapy—initial visit, per individual, per provider		7.00		7.00
	Z0280		Occupational therapy—initial visit, per individual, per provider		7.00		7.00
	Z0300		Speech-language therapy—initial visit, per individual, per provider		7.00		7.00

(k) Vision care services (See N.J.A.C. 10:62-4).

(l) Transportation services:

Ind	HCPCS Code	Mod	Description	Follow Up Days	Maximum Fee Allowance S	$	NS
	Z0330		Transportation, one way.		4.50		4.50
	Z0335		Transportation, round trip.		9.00		9.00

(m) Drug treatment center services:

*An asterisk preceding any procedure code indicates that the procedure may only be provided to ACCAP-eligible individuals in the home.

Ind	HCPCS Code	Mod	Description	Follow Up Days	Maximum Fee Allowance S	$	NS
	*Z1830		Methadone treatment rendered by a drug treatment center at home, per visit.		3.50		3.50
	*Z1831		Urinalysis for drug addiction at home, per visit.		4.50		4.50
	*Z1832		Psychotherapy rendered by a drug treatment center at home—full session, per visit.		24.00		24.00
	*Z1833		Psychotherapy rendered by a drug treatment center at home—half session, per visit.		12.00		12.00
	*Z1834		Family therapy rendered by a drug treatment center at home, per visit.		30.00		30.00
	*Z1835		Family conference rendered by a drug treatment center at home, per visit.		22.50		22.50
	Z2000		Family therapy rendered in a drug treatment center.		22.50		22.50
	Z2001		Family conference rendered in a drug treatment center.		15.00		15.00
	Z2002		Prescription visit rendered in a drug treatment center.		4.50		4.50
	Z2003		Psychotherapy rendered in a drug treatment center—full session.		16.00		16.00
	Z2004		Group therapy rendered in a drug treatment center, per person.		8.00		8.00
	Z2005		Psychological testing rendered in a drug treatment center, per hour; maximum of five hours.		15.00		15.00
	Z2006		Methadone treatment rendered in a drug treatment center.		2.50		2.50

Z2007	Psychotherapy rendered in a drug treatment center—half session.	8.00		8.00
Z2010	Urinalysis for drug addiction.	4.50		4.50

(n) Federally qualified health center services:

Ind	HCPCS Code	Mod	Description	Follow Up Days	Maximum Fee Allowance S	$	NS
	W9840		Medical encounter		150.00		150.00
	Y3333		Dental encounter		150.00		150.00
	90844	22	Medical psychotherapy		150.00		150.00

***(o) Personal care assistant services:**
(Applicable to clinics under contract to the Division of Mental Health and Hospitals of the Department of Human Services.)

Ind	HCPCS Code	Mod	Description	Follow Up Days	Maximum Fee Allowance S	$	NS
	Z1600	**ZI**	**Personal Care Assistant Services Individual, per hour**		**13.02**		**13.02**
	Z1605	**ZI**	**Personal Care Assistant Services Group, per hour**		**10.23**		**10.23**
	Z1610	**ZI**	**Personal Care Assistant Services Initial Nursing Assessment, per visit**		**35.00**		**35.00**
	Z1611	**ZI**	**Personal Care Assistant Services Individual, per hour**		**6.51**		**6.51**
	Z1612	**ZI**	**Personal Care Assistant Services Group, per hour**		**5.12**		**5.12**
	Z1613	**ZI**	**Nursing Reassessment Visit, per visit**		**35.00**		**35.00***

10:66-6.4 HCPCS procedure codes—qualifiers

(a) Evaluation and management and other procedures:

2. Drawing of blood: 36415.

i. Once per visit, per patient. (Not applicable if laboratory study, in any part, is performed by the clinic.)

2. Injection (intradermal, subcutaneous, or intra-arterial): 90799.

i. Reimbursement for the above injections are on a flat-fee basis and are all inclusive for the cost of the service as well as the materials. Be advised of the following:

(1) A visit for the sole purpose of an injection is reimbursable only as an injection and not as a clinic visit and injection. However, if the criteria of a clinic visit is met, an injection may, if medically indicated, be considered as an add-on to the visit. The drug administered shall be consistent with the diagnosis and shall conform to accepted medical and pharmacological principles with respect to dosage, frequency and route of administration.

(2) Intravenous and intraarterial injections are reimbursable only when performed by the physician.

(3) No reimbursement will be made for vitamins, liver or iron injections or combinations thereof except in laboratory proven deficiency states requiring parenteral therapy.

(4) No reimbursement will be made for placebos or any injections containing amphetamines or derivatives thereof.

(5) No reimbursement will be made for injections given for the treatment of obesity.

(6) No reimbursement will be made for an injection given as a pre-operative medication or as a pre-operative local anesthetic which is part of an operative or surgical procedure since this injection would normally be included in the listed fee for such a procedure.

(7) Insert procedure code 90799 as a separate item on the claim, followed by the name, dose of drug, and route of administration. The complete diagnosis, for which the injection was given, shall be indicated on the claim.

3. General clinical psychiatric diagnostic or evaluative interview procedures: 90801.

i. This code requires for reimbursement purposes a minimum of 50 minutes of direct personal clinical involvement with the patient or family member. The CPT narrative otherwise remains applicable.

ii. No more than one claim for the code 90801 is reimbursable per the same recipient, per the same physician, per year.

4. Prolonged detention: 99150 and 99151.

i. Prolonged detention with or without critical care will be covered under CPT 99150 and 99151, but the service shall be consistent with the following narrative in order to be reimbursed:

(1) The patient's situation requires constant physician attendance which is given by the physician to the exclusiion of other patients and duties. This must be verified by the applicable records as defined by the setting.

(2) Records shall show in the physician's handwriting the time of onset and time of completion of the service.

ii. This code may not be used simultaneously with procedure codes that pay a reimbursement for the same time or type of service.

iii. The basis for this type of claim should be apparent on the claim form. The listed fees of $37.00 for specialist and $32.00 for non-specialist are per hour.

5. Evaluation and management—new patient (excludes preventive health care for patients through 20 years of age): 99201, 99201WF, 99201WFWM, 99202, 99202WF, 99202WFWM, 99203, 99203WF, 99203WFWM, 99204, 99204WF, 99204WFWM, 99205, 99205WF, 99205WFWM and 99432.

i. When reference is made in the CPT manual to "Office—New Patient," the intent of the Medicaid program is to consider this service as the initial visit.

ii. Reimbursement for an initial clinic visit will be disallowed, if a preventive medicine service, EPSDT examination or clinic consultation were billed within a twelve month period by a clinic.

iii. It is also to be understood that in order to receive reimbursement for an initial visit, the following minimal documentation must be on the record regardless of the setting where the examination was performed. For example:

(1) Chief complaint(s);

(2) Complete history of the present illness and related systemic review, including recordings of pertinent negative findings;

(3) Pertinent past medical history;

(4) Pertinent family history;

(5) A full physical examination pertaining to but not limited to the history of the present illness and includes recording of pertinent negative findings; and

(6) Working diagnoses and treatment plan including ancillary services and drugs ordered.

6. Evaluation and management services—established patient (excludes preventive health care for patients through 20 years of age): 99211, 99211WM, 99211WF, 99211WFWM, 99212, 99212WF, 99212WFWM, 99212WM, 99213, 99213WF, 99213WFWM,

99213WM, 99214, 99214WF, 99214WFWM, 99214WM, 99215, 99215WF, 99215WFWM, and 99215WM.

i. Routine visit or follow-up care visit is defined for purposes of Medicaid reimbursement as the care and treatment by a physician or certified nurse-midwife, as appropriate, which includes those procedures ordinarily performed during a health care visit, which are dependent upon the setting and the physician's discipline.

ii. In order to document the record for reimbursement purposes, a progress note for the noted visits should include the following:

(1) Purpose of visit;

(2) Pertinent history obtained;

(3) Pertinent physical findings including pertinent negative findings based on the above;

(4) Procedures, if any, with results;

(5) Lab, X-ray, EKG, etc., ordered with results; and

(6) Diagnosis.

7. Consultations: A consultation is recognized for reimbursement only when performed by a specialist recognized as such by this Program and the request has been made by or through the patient's attending physician and the need for such a request would be consistent with good medical practice.

i. Comprehensive consultation: 99244, 99245, 99254, 99255, 99274 and 99275.

(1) In order to receive reimbursement for these HCPCS codes, the performance of a total systems evaluation by history and physical examination, including a total systems review and total system physical examination are required.

(2) An alternative to (a)7i(1) above would be the utilization of one or more hours of the consulting physician's personal time in the performance of the consultation.

(3) Reimbursement for HCPCS codes 99244, 99245, 99254, 99255, 99274 and 99275 (Comprehensive Consultation) requires the following applicable statements, or language essentially similar to those statements, to be inserted in the "remarks section" of the claim form. The form is to be signed by the provider who performed the consultation.

(A) I personally performed a total (all) systems evaluation by history and physical examination; or

(B) This consultation utilized 60 or more minutes of my personal time.

(4) The following rules regarding consultations shall also be recognized.

(A) If a consultation is performed and the patient is then transferred to the consultant's service during the course of that illness, the provider may not, in addition, bill for an Initial Visit if he or she has or intends to bill for the consultation.

(B) If there is no referring physician, then an Initial Visit code should be used instead of a consultation code.

(C) If the patient is seen for the same illness on repeated visits, by the same consultant, then these visits are considered as routine visits or follow-up care visits and not as consultations.

(D) Consultation codes will be declined in a clinic setting if the consultation has been requested by or between members of the same group, shared health care facility or physicians sharing common records. A routine visit code is applicable under these circumstances.

(E) If a prior claim for comprehensive consultation visit has been made within the preceding 12 months, then a repeat claim for this code will be denied if made by the clinic except in those instances where the consultation required the utilization of one hour or more of the physician's personal time. Otherwise, applicable codes would be limited consultation code if their criteria are met.

ii. Limited consultation: 99241, 99242, 99243, 99251, 99252, 99253, 99271, 99272, and 99273.

(1) The area being covered for reimbursement purposes is "limited" in the sense that it requires less than the requirements designated as "comprehensive" as noted above.

iii. Second opinion program consultation: 99274YY.

(1) A consultation to satisfy the requirements of the mandated "Second Opinion" program will be reimbursed only if the requirements of that program are met and the consultation has been performed by the appropriate board certified specialist who has signed a separate provider agreement and whose selection has been through the Second Opinion Referral Service (1-800-676-6562).

iv. Third opinion consultation: 99274ZZ.

(1) In the event that a patient receives two different points of view relative to a "Second Opinion" procedure, he or she may, if unable to reach a decision, request a third opinion.

(2) A third opinion consultation must be at the patient's request and under the circumstances described.

8. Critical care services: 99291 and 99292.

i. Critical care is reimbursable under codes 99291 and 99292 if the service is consistent with the following:

(1) The patient's situation requires constant physician attendance which is given by the physician to the exclusion of his or her other patients and duties and, therefore, represents what is beyond the usual service. This must be verified by the applicable records as defined by the setting and which records must show in the physician's handwriting the time of onset and time of completion of the service.

(2) All settings are applicable, such as clinic and hospital.

(3) These codes may not be used simultaneously with procedure codes that pay a reimbursement for the same time or type of service.

(b) Dental services (See N.J.A.C. 10:56-3).

(c) Family planning services:

1. Norplant—insertion, implantable contraceptive capsules: 1197522.

i. The maximum fee allowance includes the cost of the NPS kit, the insertion of the "Norplant System" (six levonorgestrel implants), and the post-insertion visit.

ii. Modifier "22" indicates that the billing includes the cost of the kit.

2. Norplant—removal, implantable contraceptive capsules: 11976.

i. The maximum fee allowance includes the removal of the "Norplant System" (six levonorgestrel implants) and the post-removal visit.

3. Norplant—removal with reinsertion, implantable contraceptive capsules: 1197722.

i. The maximum fee allowance includes the removal/insertion of the "Norplant System" (six levonorgestrel implants) and post-removal/reinsertion visit.

4. Sterilization (male): 55250 and 55450.

i. Primary sterilization (family planning) procedure.

ii. A completed consent form shall be attached to the claim form, in accordance with N.J.A.C. 10:66-2.3.

5. Sterilization (female): 58600, 58605, 58982, and 58983.

i. These procedures are always considered a sterilization procedure. Therefore, a completed consent form shall be attached to the claim form, in accordance with N.J.A.C. 10:66-2.3.

ii. 57451: If the procedure is performed for sterilization purposes, a completed consent form shall be attached to the claim form, in accordance with N.J.A.C. 10:66-2.3.

6. Initial medical visit: 99201WF, 99201WFWM, 99202WF, 99202WFWM, 99203WF, 99203WFWM, 99204WF, 99204WFWM, 99205WF, and 99205WFWM.

i. Family planning to include each of the following:

(1) Medical, social, obstetrical history

(2) Complete pelvic examination—including visual inspection of the cervix

(3) Breast examination

(4) Papnicolaou smear (excludes cytology study)

(5) Contraceptive counseling with referral as indicated.

ii. Includes the cost of birth control drugs dispensed. A prescription cannot be substituted.

iii. These procedure codes (initial medical visit) will be disallowed if procedure codes 99201, 99201WF, 99201WFWM, 99202, 99202WF, 99202WFWM, 99203, 99203WF, 99203WFWM, 99204, 99204WF, 99204WFWM, 99205, 99205WF, 99205WFWM and 99432 have been performed during the prior 12 months by the same provider.

7. Routine or follow-up visit—brief: 99211WF, 99211WFWM, 99212WF, 99212WFWM, 99213WF, and 99213WFWM.

i. May include pelvic examination, changes in method or physician's or certified nurse-midwife's instructions at a minimum average time of five minutes, or a visit solely for a refill supply of birth control drugs for which a prescription cannot be substituted and professional contact is not necessary.

8. Medical revisit—family planning: 99214WF and 99214WFWM.

i. May include pelvic examination or changes in method or physician's or certified nurse-midwife's instructions. This code includes the cost of birth control drugs dispensed. A prescription cannot be substituted.

9. Routine or follow-up visit—prolonged: 99215WF and 99215WFWM.

i. May include pelvic examination or changes in method or physician's or certified nurse-midwife's instructions. Involves 20 or more minutes of personal time in patient contact, including documentation of time as well as adequate significant progress notes on the clinic record. This procedure code includes the cost of birth control drugs dispensed. A prescription cannot be substituted.

10. Annual medical revisit: 99395WF and 99395WFWM.

(1) Updating medical, social, obstetrical history;

(2) Complete pelvic examination including visual inspection of cervix;

(3) Breast examination; and

(4) Papanicolaou smear (excludes cytology study) with referral when indicated.

ii. This code includes the cost of birth control drugs dispensed. A prescription cannot be substituted.

iii. Procedure code 99395WF will be disallowed if procedure codes 99201, 99201WF, 99201WFWM, 99202, 99202WF, 99202WFWM, 99203, 99203WF, 99203WFWM, 99204, 99204WF, 99204WFWM, 99205, 99205WF, 99205WFWM and 99432 have been performed during the prior 12 months by the same provider.

(d) Laboratory services (See N.J.A.C. 10:61-3).

(e) Minor surgery:

1. Acne surgery (for example, marsupialization, opening or removal of multiple milia, comedones, cysts, pustules): 10040.

i. Excision must involve the use of a scalpel and an expressor, but not an expressor alone. This code is limited to severe acne. For less than severe acne, utilize the procedure codes for routine office visits.

(f) Mental health services:

1. Comprehensive intake evaluation: 90801ZI.

i. An initial procedure performed at a mental health clinic to assess a new patient and recommend an appropriate treatment plan or additional diagnostic studies. The procedure includes initial interviews with the patient and other involved individuals, conferences with referral sources, examination of written material provided by the patient or others, staff conferences and written evaluation and treatment plan including recommendations for further consultations, studies or additional information.

ii. Although this procedure may be performed by a single individual, it is expected that it should be a team approach and of one and one-half hours duration. Use of procedure is limited to once per year for any one patient.

2. Individual psychotherapy—25 minute session: 90843ZI.

i. This code requires, for reimbursement purposes, a minimum of 25 minutes of direct personal clinical involvement with the patient and/or family member.

3. Individual psychotherapy—50 minute session: 90844ZI.

i. This code requires, for reimbursement purposes, a minimum of 50 minutes of direct personal clinical involvement with the patient and/or family member.

4. Family therapy: 90847ZI.

i. This code requires, for reimbursement purposes, a minimum of 50 minutes of direct personal clinical involvement with the patient and/or family member. The CPT narrative otherwise remains applicable.

5. Family therapy: 90847ZI22.

i. This code requires, for reimbursement purposes, a minimum of 80 minutes of direct personal clinical involvement with the patient and/or family member. The CPT narrative otherwise remains applicable.

6. Family conference: 90887ZI.

i. This code requires, for reimbursement purposes, a minimum of 25 minutes of direct personal clinical involvement with patient, family member or caretaker. The CPT narrative otherwise remains applicable.

7. Group psychotherapy: H5025ZI.

i. This code requires, for reimbursement purposes, a minimum of 90 minutes of direct clinical involvement with the patient as a member of a group of which 10 minutes can be used for documentation. The maximum number of the group is eight and the reimbursement is per person, per group session.

(g) Obstetrical services (maternity):

1. Total obstetrical care: 59400.

i. Antepartum care consisting of initial antepartum visits and seven subsequent antepartum visits. Specific date of all visits are to be listed on the claim form.

(1) Reimbursement will be decreased by the fee for the initial antepartum visit (5942022) if not seen for this visit. The total fee will also be decreased by the reimbursement sum for each subsequent antepartum visit (59420) which is less than seven.

(2) If medical necessity dictates, corroborated by the record, additional visits above seven antepartum may be reimbursed under the procedure codes for routine or follow-up clinic visit. The claim form shall clearly indicate the reason for the medical necessity and date for each listed.

ii. Obstetrical delivery with in-hospital postpartum care (with or without low forceps and/or episiotomy or a vaginal delivery full term or premature following completion of at least 28 weeks of gestation or if baby lives over 24 hours).

(1) This shall also include one visit between the 15th and 60th day postpartum day following delivery and out of hospital. Include name of hospital and delivery date on the claim.

2. Vaginal delivery: 59410.

i. Vaginal delivery full term or premature following completion of at least 28 weeks of gestation or if baby lives over 24 hours.

ii. This shall also include one visit between the 15th and 60th postpartum day following delivery and out of hospital. Include name of hospital and delivery date on the claim.

3. Subsequent antepartum visit: 59420.

i. Subsequent antepartum visit (separate procedure). Indicate specific dates of service.

4. Initial antepartum visit: 5942022.

i. Initial antepartum visit (separate procedure).

5. Postpartum care: 59430.

i. Postpartum care (other than delivery physician).

ii. This shall also include one visit between 15th and 60th postpartum day following delivery and out of hospital. Include name of hospital and delivery date on the claim.

6. Total obstetrical care by a certified nurse-midwife: 59400WM.

i. Total obstetrical care when given by a certified nurse-midwife, including:

(1) Antepartum care consisting of initial antepartum visit and seven subsequent antepartum visits. Specific dates of all visits are to be listed on the claim form.

(2) Reimbursement will be decreased by the fee for the initial antepartum visit (code 5942022WM) if patient not seen for this visit. The total fee will also be decreased by the reimbursement sum for each subsequent antepartum visit (code 59420WM) which is less than seven.

(3) If medical necessity dictates, corroborated by the record, additional visits above seven antepartum may be reimbursed under the procedure codes for routine or follow-up visit. The claim shall clearly indicate the reason for the medical necessity and date for each code listed.

ii. Obstetrical delivery per vagina with or without episiotomy include postpartum care when provided by the certified nurse-midwife in the home, birthing center or in the hospital (inpatient setting).

(1) This applies to a vaginal delivery at full term or premature following completion of at least 28 weeks of gestation or if baby lives over 24 hours.

(2) This shall also include one visit between the 15th and 42 postpartum day following delivery and out of the hospital. Include delivery date on the claim form.

7. Vaginal delivery by a certified nurse-midwife: 59410WM.

i. Obstetrical delivery per vagina with or without episiotomy including postpartum care when provided by the certified nurse-midwife in the home, birthing center or in the hospital (inpatient setting).

(1) This applies to a vaginal delivery at full term or premature following completion of at least 28 weeks of gestation or if baby lives over 24 hours.

(2) This shall also include one visit between the 15th and 42nd post-partum day following delivery and out of hospital. Include delivery date on the claim form.

8. Subsequent antepartum visit provided by a certified nurse-midwife: 59420WM.

i. Indicate specific date of service.

9. Initial antepartum visit provided by a certified nurse-midwife: 59420WM22.

i. Initial antepartum visit provided by a certified nurse-midwife (separate procedure).

10. Postpartum care provided by a certified nurse-midwife: 59430WM.

i. Postpartum care provided by a certified nurse-midwife who is other than the individual who performed the delivery and who is not related to this individual by any financial or contractual arrangement, e.g. group, clinic, employee, etc.

ii. One visit between the 15th and 60th postpartum day following delivery. Include delivery date on the claim (separate procedure).

(h) Podiatry service:

1. Routine or follow-up clinic visit: 99211YR, 99212YR, 999213YR, 99214YR, and 999215YR.

i. Routine or follow-up clinic visit. A podiatry service consisting of routine care and treatment by the podiatrist.

ii. Include significant written progress notes and office records which demonstrate positive findings and treatment changes.

2. See N.J.A.C. 10:66-6.4(f), Surgery, for additional procedures.

(i) Radiology services:

1. Chest: 71010, 71020, 71030, and 71034.

i. Routine chest X-rays without medical necessity in an office (clinic) are not reimbursable under Program guidelines.

2. Pelvis: 72170.

i. Pelvis X-ray is not eligible for separate payment when performed in conjunction with Complete Lumbosacral Spine X-rays (72110).

3. Hip: 73500 and 73510.

i. Procedure 73520 should be used for bilateral hip X-rays when both hips are X-rayed instead of billing separately for each hip (73500 and 73510).

4. Esophagus (with fluoroscopy by the radiologist): 74220.

i. Not eligible for separate payment when performed in conjuction with a GI or Small Bowel Series (74240, 74241, 74245, and 74250).

5. Pelvimetry: 74710.

i. Use of the code for pelvimetry requires written evidence of medical necessity to accompany the claim.

(j) Rehabilitation services:

1. Speech therapy: 92507.

i. Minimum time, 30 minutes. Prior authorization required.

ii. Prescribed by a licensed physician, performed by a qualified speech-language pathologist.

2. Audiometric tests: 92552, 92553, 92557, 92567, 92568, 92572, 92576, 92582, and 92589.

i. May be reimbursed when prescribed by a physician and performed by an audiologist.

ii. Tympanometry (92567) and acoustic reflex testing (92568) are reimbursable only to a specialist.

ii. Acoustic reflex testing, 92568, shall include at least two frequencies per ear. Brief reflex screening at one frequency per ear is not reimbursable. Documentation of these tests shall appear in the patient's record.

3. Physical therapy: 97799.

i. Individual treatment session—minimum time, 30 minutes. No more than three patients can be treated simultaneously.

ii. Prior authorization required. Consists of any one or a combination of the following modalities, prescribed by a licensed physician, performed by a qualified physical therapist and related to the patient's active treatment regimen.

(1) Appropriate use of accepted mechanical device (such as parallel bar, weights, pulley system, friction wheels, steps, etc.).

(2) Graduated range of motion exercises.

(3) Therapeutic ultrasound, only when included as part of other forms of accepted therapy.

(4) Therapeutic use of physical agents (other than drugs) including heat, light, water, electricity and radiation.

(5) Instructions to responsible persons for follow-up procedures between therapy visits.

4. Occupational therapy: H5300.

i. Minimum time, 30 minutes. Prior authorization required.

ii. Prescribed by a licensed physician, performed by a qualified occupational therapist.

(k) Vision care services (See N.J.A.C. 10:62-4).

(l) Transportation services:

1. Transportation, one way: Z0330.

i. Applicable when the clinic transports a recipient either to or from the clinic in any one day.

ii. Reimbursement is limited to two trips per day for the same recipient by the same clinic.

2. Transportation, round trip: Z0335.

i. Applicable when the clinic transports a recipient on a round trip basis to/from the clinic in any one day.

ii. Reimbursement is limited to one round trip per day for the same recipient by the same clinic.

(m) Drug treatment center services:

1. Methadone treatment rendered by a drug treatment center for an ACCAP-eligible individual at home, per visit: Z1830.

i. A per diem payment based on the number of days a recipient is supplied methadone during the billing period. This rate includes the cost of the drug, packaging, nursing time, and administrative costs.

2. Urinalysis for drug addiction for an ACCAP-eligible individual at home, per visit: Z1831.

i. To be used only when the drug treatment center is approved for this service; to determine what level if any, a drug is present in the urine.

3. Psychotherapy rendered by a drug treatment center for an ACCAP-eligible individual at home—full session, per visit: Z1832.

i. Verbal, drug augmented, or other therapy methods provided by a physician, or a professional counsellor under the direction of a physician, in a personal involvement with one patient to the exclusion of other patients and/or duties.

ii. A minimum of 50 minutes personal involvement with the patient is required. This includes a prescription visit when necessary.

4. Psychotherapy rendered by a drug treatment center for an ACCAP-eligible individual at home—half session, per visit: Z1833.

i. Verbal, drug augmented, or other therapy methods provided by a physician, or a professional counsellor under the direction of a physician in a personal involvement with one patient to the exclusion of other patients and/or duties.

ii. A minimum of 25 minutes personal involvement with the patient is required. This includes a prescription visit when necessary.

5. Family therapy rendered by a drug treatment center for an ACCAP-eligible individual at home, per visit: Z1834.

i. Therapy with the patient and with one or more family members present. Verbal or other therapy methods are provided by a physician, or a professional counsellor under the direction of a physician, in personal involvement with the patient and the family to the exclusion of other patients and/or duties.

ii. A minimum session of one and one half hours is required with a minimum of 80 minutes personal involvement with the patient and the family and up to 10 minutes for the recording of data.

iii. The clinic may bill only for the patient and not for other family members.

6. Family conference rendered by a drug treatment center for an ACCAP-eligible individual at home, per visit: Z1835.

i. Meeting with the family or other significant persons to interpret or explain medical, psychiatric or psychological examinations and procedures, other accumulated data and/or advice to the family or other significant persons on how to assist the patient.

ii. A minimum of 50 minutes of personal involvement with the family is required. The clinic may bill only for the patient and not for other family members.

7. Family therapy rendered in a drug treatment center: Z2000.

i. Therapy with the patient and with one or more family members present. Verbal or other therapy methods are provided by a physician, or a professional counsellor under the direction of a physician, in personal involvement with the patient and the family to the exclusion of other patients and/or duties.

ii. A minimum session of one and one half hours is required with a minimum of 80 minutes personal involvement with the patient and the family and up to 10 minutes for the recording of data.

iii. The clinic may bill only for the patient and not for other family members.

8. Family conference rendered in a drug treatment center: Z2001.

i. Meeting with the family or other significant persons to interpret or explain medical, psychiatric or psychological examinations and procedures, other accumulated data and/or advice to the family or other significant persons on how to assist the patient.

ii. A minimum of 50 minutes of personal involvement with the family is required. The clinic may bill only for the patient and not for other family members.

9. Prescription visit rendered in a drug treatment center: Z2002.

i. A visit with a physician for review and evaluation of the medication history of the patient and the writing, or renewal of prescription, as necessary.

10. Psychotherapy rendered in a drug treatment center—full session: Z2003.

i. Verbal, drug augmented, or other therapy methods provided by a physician, or a professional counsellor under the direction of a physician, in a personal involvement with one patient to the exclusion of other patients and/or duties.

ii. A minimum of 50 minutes personal involvement with the patient is required. This includes a prescription visit when necessary.

11. Group therapy rendered in a drug treatment center, per person: Z2004.

i. Verbal or other therapy methods provided by one or more physicians, or professional counsellors under the direction of physician, in a personal involvement with two or more patients, with a maximum of eight patients.

ii. A minimum session of one and one half hours is required. This includes preparation time in addition to the one and one half hours session time.

12. Psychological testing rendered in a drug treatment center, per hour; maximum of five hours: Z2005.

i. Psychometric and/or projective tests with a written report.

13. Methadone treatment rendered in a drug treatment center: Z2006.

i. A per diem payment based on the number of days a recipient is supplied methadone during the billing period. This rate includes the cost of the drug, packaging, nursing time, and administrative costs.

14. Psychotherapy rendered in a drug treatment center—half session: Z2007.

i. Verbal, drug augmented, or other therapy methods provided by a physician, or a professional counsellor under the direction of a physician in a personal involvement with one patient to the exclusion of other patients and/or duties.

ii. A minimum of 25 minutes personal involvement with the patient is required. This includes a prescription visit when necessary.

15. Urinalysis for drug addiction: Z2010.

i. To determine what level, if any, a drug is present in the urine.

ii. To be used only by a drug treatment center specifically approved by the Program to provide this service.

16. Drawing of blood; see CPT-4 for narrative: 36415.

i. Once per visit per patient. Not applicable if lab study, in any part, is to be performed by the clinic.

(n) Miscellaneous services:

1. Abortion: 59840 and 59841.

2. See N.J.A.C. 10:66-2.8; FD-179 form shall be attached to the claim form.

3. For claims submitted by ambulatory surgical centers only, the trimester of pregnancy shall be identified on the claim form by using modifier "WY" for first trimester or "WZ" for second trimester.

10:66-6.5 HealthStart

(a) HealthStart Maternity Care code requirements are as follows:

1. Separate reimbursement shall be available for Maternity Medical Care Services and Maternity Health Support Services.

2. Maternity Medical Care Services shall be billed as a total obstetrical package when feasible, but may also be billed as separate services.

3. The enhanced reimbursement (that is, HealthStart procedure codes) for delivery and postpartum care shall be claimed only for a patient who received at least one antepartum HealthStart Maternity Medical or Health Support Service.

4. The modifier "WM" in the HCPCS lists of codes refers to those services provided by certified nurse midwives; include the modifier at the end of each code.

5. Laboratory, other diagnostic procedures, and all necessary medical consultations are eligible for separate reimbursement.

i. Laboratory procedures performed by an outside laboratory shall be reimbursed to the laboratory. The clinic may submit a claim for a venipuncture using procedure code 36415 when necessary to collect blood specimens.

6. HealthStart Maternity Medical Care Services codes are as follows:

HCPCS Code	Mod	Procedure Description	Maximum Fee Allowance S	$	NS	$	WM
W9025		HealthStart Initial Antepartum Maternity Medical Care Visit	72.00		69.00		
W9025	WM	HealthStart Initial Antepartum Maternity Medical Care Visit by Certified Nurse Midwife 1. History, including system review 2. Complete physical examination 3. Risk assessment 4. Initial care plan 5. Patient counseling and treatment 6. Routine and special laboratory tests on site, or by referral, as appropriate 7. Referral for other medical consultations, as appropriate (including dental)					67.00

		8. Coordination with the HealthStart Health Support Services provider, as applicable.			
W9026		HealthStart Subsequent Antepartum Maternity Medical Care Visit	22.00	21.00	
W9026	WM	HealthStart Subsequent Antepartum Maternity Medical Care Visit by Certified Nurse Midwife 1. Interim history 2. Physical examination 3. Risk assessment 4. Review of plan of care 5. Patient counseling and treatment 6. Laboratory services on site or by referral, as appropriate 7. Referrals for other medical consultations, as appropriate 8. Coordination with HealthStart case coordinator. **NOTE:** This code may be billed only for the 2nd through 15th antepartum visit. **NOTE:** If medical necessity dictates, corroborated by the record, additional visits above the fifteenth visit may be reimbursed under procedure code, that is, 99211, 99211WM, 99212, 99212WM, 99213, 99213WM, 99214, 99214WM, 99215, and 99215WM. The date and place of service shall be included on each claim detail line on the 1500 N.J. claim form. The claim form should clearly indicate the reason for the medical necessity and date for each additional visit.			19.00
W9027		HealthStart Regular Delivery	465.00	418.00	
W9027	WM	HealthStart Regular Delivery by Certified Nurse Midwife 1. Admission history 2. Complete physical examination 3. Vaginal delivery with or without episiotomy and/or forceps 4. Inpatient postpartum care 5. Referral to postpartum follow-up care provider including: (a) Mother's hospital discharge summary and the (b) Infant's discharge summary, as appropriate **NOTE:** Obstetrical delivery applies to a full term or premature vaginal delivery and includes care in the home, birthing center or in the hospital (inpatient setting). Include the delivery date on the 1500 N.J. claim form in Item 24A.			371.00
W9028		HealthStart Postpartum Care Visit	22.00	21.00	
W9028	WM	HealthStart Postpartum Care Visit by Certified Nurse Midwife 1. Outpatient postpartum care by the 60th day after the vaginal or caesarean section delivery (a) Review of prenatal, labor and delivery course (b) Interim history, including information on feeding and care of the newborn			19.00

		(c) Physical examination (d) Referral for laboratory services, as appropriate (e) Referral for ongoing medical care when appropriate (f) Patient counseling and treatment **NOTE:** The postpartum visit shall be made by the 60th postpartum day. Include the delivery date on the 1500 N.J. claim form in Item 24A.			
W9029		HealthStart Regular Delivery and Postpartum	487.00	439.00	
W9029	WM	HealthStart Regular Delivery and Postpartum by Certified Nurse Midwife includes: 1. Admission history 2. Complete physical examination 3. Vaginal delivery with or without episiotomy and/or forceps 4. Inpatient postpartum care 5. Referral to postpartum follow-up care provider including: (a) Mother's hospital discharge summary (b) Infant's discharge summary, as appropriate 6. Outpatient postpartum care by the 60th day after the delivery (a) Review of prenatal, labor and delivery course (b) Interim history, including information on feeding and care of the newborn (c) Physical examination (d) Referral for laboratory services, as appropriate (e) Referral for ongoing medical care when appropriate (f) Patient counseling and treatment **NOTE:** This code applies to a full term or premature vaginal delivery and includes care in the home, birthing center or in the hospital (inpatient setting). Include delivery date on the 1500 N.J. claim form in Item 24A.			390.00
W9030		HealthStart Total Obstetrical Care	867.00	802.00	
W9030	WM	HealthStart Total Obstetrical Care by Certified Nurse Midwife Total obstetrical care consists of: 1. Initial antepartum visit and 14 subsequent antepartum visits. Specific dates are to be listed on the claim form. **NOTE:** Reimbursement will be denied if the services delivered do not meet the criteria for the visits. The elements of the visits shall include the following: a. History (initial or review), including system review b. Complete physical examination c. Risk assessment d. Initial and ongoing care plan e. Patient counseling and treatment f. Routine and special laboratory tests on site, or by referral, as appropriate g. Referral for other medical consultations, as appropriate (including dental) h. Coordination with the HealthStart Health Support Services provider, as applicable.			723.00

	2. Regular vaginal delivery by certified nurse midwife: The elements of the care shall include the following: a. Admission History b. Complete physical examination c. Vaginal delivery with or without episiotomy and/or forceps d. Inpatient postpartum care **NOTE:** Include the delivery date on the 1500 N.J. claim form in Item 24. 3. Postpartum care visit by certified nurse midwife: Outpatient postpartum care by the 60th day after the vaginal delivery (full term or premature): a. Review of prenatal, labor and delivery course b. Interim history, including information on feeding and care of the newborn c. Physical examination d. Referral for laboratory services, as appropriate e. Referral for ongoing medical care when appropriate f. Patient counseling and treatment		
W9031	HealthStart Cesarean Section Delivery 1. Admission history 2. Complete physical examination 3. Cesarean section delivery 4. Inpatient postpartum care 5. Referral to postpartum follow-up care provider, including: a. Mother's hospital discharge summary b. Infant's discharge summary, as appropriate **NOTE:** Include the delivery date on the claim form.	595.00	531.00
W9040	HealthStart enrollment process 1. Assistance with the presumptive eligibility determination for Maternity Care recipients, when and if applicable 2. Patient registration and scheduling of the initial appointments 3. Counseling and referral for WIC, food stamps, and other community-based services 4. Assignment of HealthStart case coordinator 5. Outreach and follow-up on missed appointments **NOTE:** This code may be billed only once during pregnancy by the same provider.	30.00	
W9041	HealthStart Development of Maternity Plan of Care 1. Case coordination services 2. Initial assessments a. nutrition b. health education c. social/psychological 3. Case conference with Maternity Medical Care provider 4. Initial plan of care developed by the HealthStart case coordinator 5. Basic guidance and health education services 6. Referral for other needed services including follow-up with County Boards of Social Services	120.00	

	7. Outreach, referral and follow-up activities including phone calls and letters. **NOTE:** This code may be billed only once during the pregnancy by the same provider.	
W9042	HealthStart Subsequent Maternity Health Support Services Visit 1. Case coordination 2. Review and update of care plan 3. Coordination with maternity medical care provider 4. Health education instruction 5. Social/psychological guidance 6. Nutrition guidance 7. Home visit for high risk clients 8. Outreach, referral and follow-up activities including phone calls and letters. **NOTE:** This code may be billed only once per trimester and not more than twice per pregnancy.	50.00
W9043	HealthStart Postpartum Maternity Health Support Services 1. Case coordination services 2. Review of the plan of care 3. Review of the summary of hospital stay records and current medical status 4. Nutrition assessment and counseling 5. Social/psychological assessment and counseling 6. Health education assessment and instruction 7. Home visit(s) as applicable 8. Referral, outreach and follow-up services 9. Referral for pediatric preventive care and follow-up 10. Transfer of pertinent information to pediatric, future family planning and medical care providers 11. Completion of the plan of care	100.00

(b) HealthStart Pediatric Preventive Care code requirements are as follows:

1. HealthStart Pediatric Care Guidelines provide for up to nine preventive child health visits for a child under two years of age.

i. All preventive child health visits shall be billed using the HealthStart Preventive Child Health Visit codes appropriate to the child's age at the time of visit. Each preventive child health visit HCPCS procedure code may be claimed only once per child.

ii. Claims shall be submitted using Form MC-19, EPSDT/ HealthStart Screening and Related Procedures.

HCPCS Code	Mod	Procedure Description	Maximum Fee Allowance S	$	NS	$	WM
W9060		Under six weeks	31.00		26.00		
W9061		Six weeks to three months	31.00		26.00		
W9062		Three months to five months	31.00		26.00		
W9063		Five months to eight months	31.00		26.00		
W9064		Eight months to 11 months	31.00		26.00		
W9065		11 months to 14 months	31.00		26.00		
W9066		14 months to 17 months	31.00		26.00		
W9067		17 months to 20 months	31.00		26.00		
W9068		20 months to 24 months	31.00		26.00		

2. Laboratory, other diagnostic procedures, and all necessary medical consultations shall be eligible for separate reimbursement.

i. Laboratory procedures performed by an outside laboratory shall be reimbursed to the laboratory. The clinic may submit a claim for a venipuncture using procedure code 36415 when necessary to collect blood specimens.

3. HealthStart Pediatric Preventive Care codes represent visits based on an infant's age according to the following schedule:

4. A HealthStart Pediatric Preventive Care Visit includes the following elements:

i. History including behavior and environmental factors;

ii. Developmental assessment; and

iii. Complete, unclothed physical examination by a physician or a nurse practitioner under the personal supervision of a physician, to include:

(1) Measurements: height, weight and head circumference;
(2) Vision and hearing screening; and
(3) Nutritional assessment.
iv. Assessment and administration of immunizations (see appropriate HCPCS procedure codes for reimbursement amounts);
v. Anticipatory guidance;
vi. Arrangement for diagnosis and treatment of medical problems uncovered during the visit. This includes self-referrals and/or referrals to other providers, as medically indicated;
vii. Appropriate laboratory procedures performed, or referred, in accordance with HealthStart Pediatric Care Guidelines.
(1) Sickle cell, PKU screening, as appropriate;
(2) Hemoglobin or hematocrit twice, at six to nine months and 20 to 24 months of age;
(3) Urinalysis, twice: at six to nine months and 20 to 24 months of age;
(4) Tuberculin test, twice: at 12 to 14 months and 20 to 24 months; and
(5) Lead screening at six to 12 months and annually thereafter, or more often if clinically indicated.
viii. Case coordination: referral for nutritional, psychological, social and other community services, as appropriate; provision or arrangement for 24-hour telephone physician access and sick care; and outreach and follow-up activities in accordance with the HealthStart Pediatric Care Guidelines.

***NOTE: As indicated in N.J.A.C. 10:66-2.4(b), laboratory procedures performed by a clinic are reimbursable to the clinic; if such procedures are performed by an outside laboratory, the laboratory shall submit a separate claim.**

NOTE: As indicated in N.J.A.C. 10:66-Appendix, as referenced in N.J.A.C. 10:66-1.1(e), claims for HealthStart Preventive Care visits shall include a completed Health Insurance Claim Form, 1500 N.J., and a HealthStart Preventive Child Health Form.*

HCPCS Code	Mod	Procedure Description	Maximum Fee Allowance S	$	NS	$	WM
W9070		HealthStart Pediatric Continuity of Care This is a service by a certified HealthStart Pediatric Care Services Provider which is a hospital outpatient department where physicians do not bill Medicaid independently for professional services. This code shall include reimbursement for the following service components: —Assignment of a case coordinator responsible for outreach, referral and follow-up activities; —24-hour telephone access for medical consultation outside non-clinic hours; and —Provision or arrangement for sick care. (Referral to the emergency room shall only occur for emergency medical care or urgent care as recommended by the physician responsible for sick care.) **NOTE:** This code may be billed only in conjunction with a pediatric preventive health care visit provided in accordance with HealthStart Regulations and Guidelines for HealthStart Providers. Claims shall be submitted using Form MC-19, EPSDT/HealthStart Screening and Related Procedures.	13.00	13.00			

APPENDIX

FISCAL AGENT BILLING SUPPLEMENT

AGENCY NOTE: The Fiscal Agent Billing Supplement is appended as a part of this chapter but is not reproduced in the New Jersey Administrative Code. When revisions are made to the Fiscal Agent Billing Supplement, replacement pages shall be distributed to providers and copies shall be filed with the Office of Administrative Law.

For a copy of the Fiscal Agent Billing Supplement, write to:
Paramax/Unisys Corporation
CN-4801
Trenton, New Jersey 08650-4801
or contact:
Office of Administrative Law
Quakerbridge Plaza, Bldg. 9
CN-049
Trenton, New Jersey 08625-0049

(a)

DIVISION OF FAMILY DEVELOPMENT

Public Assistance Manual

Review and Adjustment of Child Support Orders (AFDC, Foster Care and Medicaid Only Cases)

Adopted New Rule: N.J.A.C. 10:81-11.21

Proposed: July 6, 1993 at 25 N.J.R. 2818(a).
Adopted: November 3, 1993 by William Waldman, Commissioner, Department of Human Services.
Filed: November 4, 1993 as R.1993 d.627, **without change.**
Authority: N.J.S.A. 44:10-3, Family Support Act of 1988 (Public Law 100-485), Section 103, and 45 C.F.R. 303.8.
Effective Date: December 6, 1993.
Expiration Date: August 24, 1994.

Summary of Public Comments and Agency Responses:

Comments were received from the Hunterdon County Board of Social Services and Hudson County Division of Social Services.

COMMENT: The Department of Human Services lacks the authority to make foster care cases the responsibility of the county welfare agency and include foster care cases in the three year review and adjustment process. The commenters contended that these cases are the responsibility of the State Office of this Department's Division of Youth and Family Services (DYFS).

RESPONSE: The Department of Human Services derives its authority to promulgate the proposed rule from Federal and State laws and regulations at 45 C.F.R. 302.31, 45 C.F.R. 302.33, 45 C.F.R. 303.2, 45 C.F.R. 303.8, N.J.S.A. 30:4C-13, N.J.S.A. 30:4C-22, N.J.S.A. 30:4C-29.1, N.J.S.A. 30:4C-34 and N.J.A.C. 10:81-11.2(d). These Federal and State laws and regulations clearly give DYFS the authority to take necessary action to obtain financial assistance from any legal responsible relative by making the proper referral to the agency charged with the administration of such financial assistance and direct the IV-D agency to provide IV-D services to these cases. The inter-agency agreement between the Division of Family Development (DFD) and DYFS was implemented based on these laws and regulations.

It is also noted that the Child Support Enforcement Amendments of 1984 (P.L. 98-378) added a new section 471(a)(17) to the Social Security Act which requires that in order for a state to be eligible for IV-E payments, that state must have a plan that is approved by the Secretary. That plan must provide "that where appropriate, all steps will be taken, including cooperative efforts with the State agencies administering the plans approved under parts A and D, to secure an assignment to the State of any rights to support on behalf of each child receiving foster care maintenance under this part."

In addition, specifically in regard to the review and adjustment of child support orders, page 61562 of the Federal Register, Volume 57, No. 249, dated December 28, 1992, states as follows:

"... we are using our authority under section 1102 of the Act to publish regulations that are necessary for the efficient administration of the IV-D program to require such reviews in all IV-D cases in which support rights are assigned to the State. This includes, in addition to cases assigned as a condition of receipt of AFDC under 45 C.F.R. 232.11, Title IV-E foster care cases in which the support rights are assigned under section 471(a)(17) of the Act ..."

Therefore, pursuant to the above-noted legal authority, it is DFD's position that the rule requires no change.

COMMENT: In transferring the responsibility of IV-E cases to the CWAs, DFD is also transferring the non-Federal share of administrative expenses to the counties. One of the commenters stated that "these are not IV-D activities."

RESPONSE: In response to the requirement that the IV-E agency take all appropriate steps, including cooperative efforts with the IV-A and IV-D agencies, to secure an assignment to the State of any rights to support on behalf of each child receiving foster care maintenance, the Federal agency sent Informational Memorandum ACYF-IM-84-27 to the states. This memorandum specifies that the state IV-D agency is required to pursue support payments on all title IV-E foster care cases where an assignment is made. The memorandum also states that the IV-D agency may pursue support for foster care cases which do not involve Federal funding to the DYFS agency.

In a February 1993 letter from the Federal Office regarding clarification of this Informational Memorandum, it is specified that Federal Financial Participation (FFP) is available for services under Title IV-D on behalf of Title IV-E foster care children whose cases are referred by the IV-E agency and for non-IV-E foster care cases for which there is an application for IV-D services and the application fee has been paid.

Therefore, once these cases become IV-D cases, they are entitled to the same Federal funding as any other IV-D case and are not a greater burden to the State or county. As well as receiving FFP, the counties receive incentive payments for DYFS cases. In addition, these cases are counted in the total CWA caseload for the purpose of determining staffing standards.

COMMENT: The agreement between DFD and DYFS does not have proper authority. The agreement includes the evaluation of non-IV-E cases and the responsibility for these evaluations is clearly that of DYFS as provided under N.J.S.A. 30:4C-29.1 et seq. and can not be delegated without a legislative change to another entity or level of government. The evaluation cannot be charged as a child support case to the Federal government for reimbursement of a Federal share of costs. In doing so, the CWAs would assume liability for any Federal audit exception concerning activities in this regard.

RESPONSE: N.J.S.A. 30:4C-29.1 et seq. states that in a case where DYFS is providing for a child, when the child is in a foster home, any person legally responsible for the child, who has sufficient financial ability, is liable for the full costs of maintenance of the child. If the legally responsible person does not have sufficient financial ability, then that person is liable for reimbursing the Department for monies expended by DYFS for maintenance of the child. If that legally responsible person fails to reimburse the Department, a court of competent jurisdiction may summon the legally responsible person and order that person to pay an amount to the Department, according to a scheduled rate approved by DYFS.

In addition, N.J.S.A. 30:4C-13 specifies that DYFS shall make the proper referral of the matter to such a legally responsible relative, or the agency charged with the administration of such financial assistance.

As authorized under these State laws, DYFS refers IV-E and non-IV-E cases for which an application is filed and an application fee is paid to the IV-D agency and requests the evaluation and assignment of support rights on behalf of the child. The IV-D agency then takes necessary action to establish an order before the court.

These State laws are supported by Federal and State regulation and, as noted above, FFP is available for services under Title IV-D on behalf of Title IV-E foster care children whose cases are referred by the IV-E agency as well as for non-IV-E foster care cases for which there is an application for IV-D services and the application fee has been paid. Therefore, the appropriate legislation authorizing the IV-D agency to provide services to those cases referred by DYFS is in place.

COMMENT: Objection was raised to the inclusion of foster care cases in the regulation governing CWA duties under the Title IV-D Child Support Program.

RESPONSE: Although these cases are serviced by DYFS in regard to providing care and custody for the child, when the case is referred to the IV-D agency, it becomes an IV-D case and therefore it is the responsibility of the Title IV-D Child Support Program as any other IV-D case would be.

Full text of the adoption follows:

10:81-11.21 Review and adjustment of child support orders (AFDC, foster care and Medicaid Only cases)

(a) The CWA/CSP Unit shall review all AFDC, foster care and Medicaid Only cases with a court order at least once every three years, or at the request of either parent subject to the order, for possible adjustment. If a request for review is made before the three year time frame, and the request is detemined to be frivolous by the CWA/CSP Unit, the request may be denied.

1. An adjustment is an upward or downward change in the amount of child support based upon an application of State guidelines under New Jersey Court Rule 5:6A for setting and adjusting child support awards and/or provision for the child's health care needs, through health insurance coverage or other means.

2. Review means an objective evaluation by the CWA/CSP Unit of information necessary for application of the New Jersey Child Support Guidelines, New Jersey Court Rule 5:6A, to determine:

i. The appropriate support award amount; and

ii. The need to provide for the child's health care needs, through health insurance coverage or other means.

3. Examples of a frivolous request would be as follows:

i. An obligor's income has not increased or decreased by a minimum of 20 percent.

ii. An obligor is temporarily out of work or temporarily injured and unable to work.

(b) The procedure for the review of cases shall be as follows:

1. An Automated Child Support Enforcement Systems (ACSES) report has been developed to identify appropriate cases for review for possible adjustment. The review date field on the ACSES USM1 and USM2 screens will trigger a report of cases in which the date is equal to or greater than two years and 11 months from the run date of the report.

2. The CWA/CSP shall screen cases on the report to identify those cases that should be adjusted to bring them into compliance with the Child Support Guidelines at New Jersey Court Rule 5:6A.

3. A case can be eliminated from the screening if it is found that:

i. There is a good cause determination that the review of the case is not in the best interest of the child(ren);

ii. The current order is less than three years old or the case has been reviewed in the last three years, unless a review was requested by either parent subject to the order and it has not been determined to be a frivolous request by the CWA/CSP Unit. Examples of a frivolous request would be as outlined in (a)3 above; or

iii. The obligor is institutionalized.

4. The review date filed on the USM1 and USM2 shall be updated indicating the date that a review was completed. If the case was eliminated from the adjustment cycle, the reason should be documented.

i. The CWA/CSP shall determine within 15 calendar days after October 13, 1993, or the date the child support order is 36 months old, whichever is later, whether a review should be conducted.

ii. In handling a request for a review, the CWA/CSP has up to 15 calendar days from the receipt of a request to determine whether a review should be conducted.

iii. Within 180 calendar days of determining that a review should be conducted or locating the non-requesting parent, whichever occurs later, the State must complete the process by adjusting the order or determining the order should not be adjusted and completing the steps outlined at (c) and (d)1 through 4 below.

iv. Interstate cases should also follow the 180 calendar day timeframe for completing the review and adjustment process.

5. When it is determined that a review should be conducted on an interstate case and New Jersey is the initiating state, a request for review shall be sent to the responding state within 20 calendar days of receipt of sufficient information to conduct a review.

i. The information the responding state needs to act on the request must be provided.

ii. If the request for review is the first contact between the initiating and responding states in the case, the initiating state must send the request for review to the interstate central registry in the responding state.

iii. If the initiating state has previously referred the case to a responding state for action, the request for review may be sent directly to the appropriate agency in the responding state for processing.

iv. The initiating state is also responsible for sending to the parent in its state a copy of any notice issued by a responding state in connection with the review and adjustment of an order. This notice must be sent to the parent within five working days of receipt in the initiating state.

6. When acting as the responding state in a case which another state has determined a review is necessary, the laws and procedures for review and adjustment of the responding state apply. This includes the use of the responding state's child support guidelines.

i. Within 15 calendar days of receipt of a request for review from another state, a determination must be made as to whether or not the review will be conducted.

ii. The determination not to conduct a review because it would not be in the best interest of the child cannot be made by the responding state. This determination must be made by the initiating state.

(c) The CWA/CSP shall process cases for review in the following manner:

1. Information on the obligor's current income and employment should be obtained via the USM2 screen and/or on-line access to the Department of Labor's Wage Reporting File through the Honeywell terminals. Information obtained will be verified through a letter generated to the employer. Medical insurance information shall also be verified.

2. The case shall be cross-referenced on ACSES to determine if multiple cases exist (the amount of the obligor's court orders will figure in the use of the guidelines).

3. Verification of the obligor's address shall also be obtained.

4. In cases where there has been no change in the income, however, medical support is not currently ordered, a motion shall be filed to have the order adjusted to include medical support when health insurance is available to the obligor at a reasonable cost. If health insurance is not available to the obligor at a reasonable cost at the time of the modification, this order for support will go into effect when health insurance at a reasonable cost is actually available.

i. Health insurance is considered reasonable in cost if it is employment related or other group health insurance, regardless of service delivery mechanism.

(d) Recommendations for adjustment shall be based on the New Jersey Child Support Guidelines, New Jersey Court Rule 5:6A.

1. If the recommended amount of adjustment is a 20 percent or more increase over the current order, a motion shall be filed to have the order modified.

2. If the recommended amount of adjustment is a 20 percent or more decrease, the obligor should be directed to file appropriate application with the court.

3. Each parent subject to a child support order shall be notified of any review of the order at least 30 calendar days before commencement of the review.

i. This notification requirement may be satisfied by filing a notice of motion, provided both parties are notified 30 calendar days prior to the hearing.

ii. If modification is warranted, the notice of motion may serve as a notice to both parties of the review determination. If either party disagrees with the determination, they may challenge the decision to a judge. If no adjustment is warranted based on a review, a notice shall be issued as outlined in (d)4i and ii below.

4. Following any review the CWA/CSP shall notify each parent subject to the child support order of the following:

i. Any adjustment or a determination that there should be no change; and

ii. Each parent's right to initiate proceedings to challenge the adjustment or determination within 30 calendar days after the date of the notice.

(e) The CWA Statistical Report shall be completed each month to reflect the number of cases reviewed and the number of cases adjusted.

(f) The Family Support Act of 1988 (Public Law 100-485), Section 103(c), mandates that between October 13, 1990 and October 13, 1993 the CWA/CSP Unit must target for review and adjustment, if appropriate, the existing IV-D cases in which support is assigned to the county welfare agency and which have not been reviewed or adjusted within 36 months. These cases shall be addressed by reviewing one-third of the caseload per year, over a three year period.

ENVIRONMENTAL PROTECTION AND ENERGY

(a)

ENVIRONMENTAL REGULATION

Surface Water Quality Standards
Ground Water Quality Standards; Definitions
New Jersey Pollutant Discharge Elimination System
Adopted Recodification with Amendments: N.J.A.C. 7:9-4 to 7:9B-1
Adopted Amendments: N.J.A.C. 7:9-6.3, 7:14A-1.9 and 7:14A-3.14

Proposed: November 2, 1992 at 24 N.J.R. 3983(a) and December 21, 1992 at 24 N.J.R. 4471(a); see also 25 N.J.R. 404(a).

Adopted: October 29, 1993 by Jeanne M. Fox, Acting Commissioner, Department of Environmental Protection and Energy.

Filed: November 1, 1993 as R.1993 d.610, **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. 13:1D-1 et seq., 58:10A-1 et seq., and 58:11A-1 et seq.

DEPE Docket Number: 46-92-09.
Effective Date: December 6, 1993.
Expiration Date: January 18, 1996, N.J.A.C. 7:9 and 7:9B;
June 2, 1994, N.J.A.C. 7:14A.

Summary of Hearing Officer's Recommendations and Agency Responses:

The New Jersey State Department of Environmental Protection and Energy (DEPE) is recodifying the State's Surface Water Quality Standards at N.J.A.C. 7:9-4 to N.J.A.C. 7:9B-1, adopting amendments to the State's Surface Water Quality Standards at N.J.A.C. 7:9B-1, Ground Water Quality Standards at N.J.A.C. 7:9-6.3, and the New Jersey Pollutant Discharge Elimination System at N.J.A.C. 7:14A-1.9 and 3.14(c).

As part of the 1989 Triennial Review of the Surface Water Quality Standards, the DEPE proposed chemical-specific numerical criteria (criteria are promulgated concentration levels which specify the water quality supporting the designated uses) for toxic pollutants but withdrew them after receiving many critical comments. These comments fell into two general categories: those criticizing appropriateness of criteria that incorporated economic and technological considerations and those critical of criteria based on considerations relevant to finished drinking water and public water supplies. The DEPE then began to reevaluate the criteria for toxic pollutants. On November 19, 1991, USEPA proposed surface water quality criteria for 14 states, including New Jersey, to bring those states that had not already adopted sufficient criteria for toxic pollutants into compliance with section 303(c)(2)(B) of the Clean Water Act. This action was taken despite the fact that New Jersey has a provision at N.J.A.C. 7:9B-1.6(c)4iii (previously codified at N.J.A.C. 7:9-4.6(c)4iii) which allows the DEPE to use USEPA's 304(a) criteria or other best available scientific information when New Jersey had not formally adopted its own criteria for pollutants. Subsequently, on November 2, 1992, New Jersey proposed changes to the Surface Water Quality Standards, (commonly referred to as the "toxics proposal"), the Ground Water Quality Standards (N.J.A.C. 7:9-6), and the NJPDES regulations (N.J.A.C. 7:14A) which include:

1. Aquatic life protection numeric criteria for 37 toxic substances including revisions to design flows to reflect the different exposure periods associated with each type of criteria (short exposure periods for acute toxicity and longer periods for chronic toxicity);
2. Human health protection numeric criteria for 110 toxic substances including revisions to design flows to reflect the different exposure periods associated with each type of criteria (a lifetime exposure of 70 years for carcinogens and a 30 day average for non-carcinogens);
3. Recodification of the Surface Water Quality Standards so as to place them in their own chapter of the New Jersey Administrative Code;
4. Explicit inclusion of wetlands in the definition of surface waters of the state as a first step toward amending the Surface Water Quality Standards to incorporate criteria for wetlands;
5. Addition of a severability clause that is intended to ensure that the entire contents of the chapter are not overturned should any portion of the chapter be found invalid;
6. Revision to the carcinogen policy so as to utilize a risk management approach;
7. Addition of an explicit provision allowing for compliance schedules;
8. Specific provisions to remove outdated and redundant language regarding the issuance of permits in conformance with areawide water quality management plans;
9. Language requiring expression and measurement of ambient criteria for metals as total recoverable metals;
10. Incorporation into the Surface Water Quality Standards by reference of the Delaware River Basin Commission's designated uses and water quality criteria for the Mainstem Delaware River in order to avoid different rule making schedules resulting in conflicting criteria;
11. Changes in descriptive place names, towns, roadways and waterbodies within the surface water classification tables as well as the addition of surface water classifications and antidegradation categories accidentally omitted from the listings;
12. Addition of definitions into the Ground Water Quality Standards to maintain regulatory consistency with the Surface Water Quality Standards; and
13. Addition of or changes in definitions in the NJPDES regulations to maintain regulatory consistency with the Surface Water Quality Standards, and a change requiring permit limitations to be expressed as total recoverable metal.

The public comment period started on October 12, 1992, with the publication of notice of the proposal in selected newspapers throughout the State. This was followed by a mass mailing of the proposal to individuals, groups, and other parties who had previously expressed an interest in receiving information on revisions to the Surface Water Quality Standards.

The proposal appeared in the November 2, 1992, New Jersey Register in conjunction with an Interested Party Review for Practical Quantitation Levels (PQLs) and an Invitation for Informal Input regarding appropriate surface water quality criteria for phosphorus. Three public hearings were held by the DEPE on the following dates with the listed hearing officers:

December 2, 1992, Pleasantville, Assistant Commissioner Richard V. Sinding;

December 8, 1992, Lawrenceville, Assistant Commissioner John Weingart; and

December 10, 1992, Parsippany, Administrator Martin A. Bierbaum.

As New Jersey had not yet adopted criteria for toxic pollutants sufficient to satisfy the USEPA, criteria applicable to New Jersey surface waters were adopted by USEPA (40 CFR Part 131; 57 Fed. Reg. 246; Pages 60848-60923; December 22, 1992). The USEPA adopted surface water quality criteria for pollutants for which New Jersey had not adopted chemical specific criteria.

The DEPE conducted a workshop ("round table") on February 18, 1993, at which the public was invited to participate in discussions regarding the November 2, 1992, proposed revisions to the Surface Water Quality Standards. Separate meetings were also held with the following groups or associations:

Association of Environmental Authorities
N.J. Professional Engineers Society
Various water purveyors
New Jersey Business and Industry Association
Industrial Advisory Group
New Jersey Water Pollution Control Federation
New Jersey League of Municipalities
Various environmental groups.

The public comment period was originally scheduled to close on December 18, 1992, but the DEPE extended the comment period until March 18, 1993, as requested by several commenters.

Review of the full set of comments revealed several issues that arose frequently in regard to the DEPE's proposal. The following summary provides a general review and response for each of these issues, in addition to the specific responses to comments provided in the Summary of Public Comments and Agency Responses, below. The six general issues are as follows:

1. Water purveyor concern with design flows: Design flows are average flows for a given point on a waterbody. Different design flows are associated with the different types of criteria (that is, lower design flows are used to protect against shorter term toxic impacts while higher ones are used for longer term toxic and carcinogenic impacts).

The State's larger water purveyors felt that DEPE adoption of design flows greater than the seven day 10 year low flow would compromise the quality of water provided to the public for consumption and subject the purveyors to enforcement actions for violations of the Safe Drinking Water Act. This concern is based on the fact that waterways with reservoirs are required to maintain the MA7CD10 flow during droughts, but dischargers would have effluent limitations based on larger flows. In theory, insufficient dilution may result. The purveyors also cited the conflict with the spirit of the water allocation statutes (N.J.S.A. 58:1A-1 et seq. and N.J.S.A. 58:2-1 et seq.). The water purveyors would prefer retention of design flows equal to or less than the MA7CD10 flow. In contrast, dischargers want less restrictive design flows to reduce the costs associated with additional treatment. They are also concerned about higher risks of incurring violations of more stringent limitations resulting from lower design flows. Because the proposed criteria will protect water supplies better than the existing Surface Water Quality Standards which do not contain most of the chemical specific criteria being adopted, and because a decision not to adopt these design flows would leave USEPA's equivalent design flows in place without regulatory flexibility for the NJPDES permitting program, the DEPE is adopting the design flows as proposed. DEPE commits to analyzing the impact of the various design flows on purveyors and dischargers over the next several years. If serious concerns are identified for any of the design flows, the DEPE would consider a proposal to change the design flows.

2. DEPE did not use the best available scientific information in developing the proposed criteria: There is a considerable lag time (six to eight months) between preparation of a proposal and the issuance of that proposal. The concern that the DEPE did not use up-to-date toxicological data as the best available scientific information reflects this lag time. Other concerns related to this issue involve: appropriate form of metals to regulate (for example, dissolved or total recoverable); appropriate exposure periods specified for the numerical criteria (for example, one hour average, four day average); use of design flows "requiring" use of steady state models; and site-specific concerns impacting toxicity of certain pollutants.

These concerns were voiced by dischargers, potable water purveyors, and an environmental group. The DEPE responds as follows:

(a) Aquatic protection-based criteria proposed for metals are not being adopted. A new proposal will be developed for the regulation of metals focusing on the bioavailable form of the metals along with methods to allow for correction to reflect site-specific conditions. This part of the proposal was a major concern of the dischargers.

(b) An exposure period is the time period an organism may be subjected to a given level of a chemical without exhibiting toxic effects. Each type of criterion is associated with an exposure period. The exposure periods previously in effect were for an instantaneous time period, which was overly stringent and required change. The exposure periods being adopted are a significant step toward what commenters wanted and the DEPE will evaluate the need for additional changes to the exposure periods as new information becomes available.

(c) Design flows are being adopted which more closely reflect the exposure periods of concern. Adoption of the design flows **does not** preclude the use of dynamic or statistical modeling which in some cases more closely represent real world considerations, but this was not clearly understood by the commenters because it was not explicitly stated. However, the DEPE will propose a provision to the Surface Water Quality Standards within the next two years that **explicitly** allows for use of dynamic or statistical modeling, as requested by the commenters.

(d) The existing regulations do not preclude site-specific criteria, but the commenters were very concerned that what is not specifically allowed is not favored. The DEPE will propose a provision to the Surface Water Quality Standards within the next two years that explicitly allows for site-specific criteria, as requested by the commenters.

3. Economics should be considered in developing criteria: Commenters expressed concern that permit limitations based on the proposed criteria will result in treatment costs that will bankrupt communities and businesses. Therefore, the commenters felt that the DEPE should be considering the ability of dischargers to treat to certain levels or the ability of analytical techniques to measure to certain levels when developing the surface water quality criteria. However, Federal regulations at 40 CFR 131.11 explicitly state that criteria must be based on sound scientific rationale and must protect the designated use(s). Establishment of criteria should be based either on USEPA 304(a) guidance or on 304(a) guidance modified to reflect site-specific conditions. USEPA does not state that criteria should be developed with regard to cost. The DEPE is in the process of addressing the economic concerns through increased flexibility in the NJPDES regulations, use of dynamic or statistical modeling, and revised variance provisions in the Surface Water Quality Standards. It should also be noted that changes to the form of the criteria for metals may result in decreased economic impact to New Jersey Pollutant Discharge Elimination System (NJPDES) Discharge to Surface Water (DSW) permittees with metals limitations.

4. Certain criteria are below reliably measurable levels: This issue was raised by dischargers, water purveyors, and an environmental group. Many of the criteria are below concentrations that can be reliably measured using standard laboratory procedures. However, in some cases the point is irrelevant to discharge control because regulatory limitations based on the criteria are above reliably measurable levels even when the ambient criteria are not. In other cases, regulatory limitations in either the effluent or in the ambient waterbody may be below measurable levels. Specifically for this reason, the Surface Water Quality Standards proposal and an Interested Party Review (IPR) on PQLs were issued concurrently. PQLs are developed to reflect reliably measurable levels. This IPR document is part of a separate effort to develop and integrate PQLs into the Surface Water Quality Standards and implementing programs. The DEPE has already incorporated the PQL concept into the drinking water and ground water quality standards. A formal PQL proposal for surface waters will be published in 1994.

5. Point of regulation: Many dischargers felt that the DEPE should regulate pollutants to ensure that freshwater human health criteria reflecting potable use of the water are met at the water purveyors' intake pipes and not throughout the fresh waters of the State. Commenters suggested that DEPE abandon its decades-old policy of protecting all fresh waters for possible use as potable water supplies; that DEPE should modify the human health criteria to reflect reductions in pollutant levels provided by both routine and advanced treatment at potable water supplies; and that dischargers and water purveyors should both bear the cost of removing pollutants.

In general, many of these commenters did not recognize that the freshwater human health criteria are designed to protect people from drinking contaminated water and from consuming contaminated fish flesh. The DEPE's policy for decades has been that all fresh waters in the State are designated for potable use after such treatment as required by law or regulation. Treatment currently required by law is defined as conventional filtration treatment (screening, combinations of coagulation/flocculation, sand filtration, and disinfection). It has also been the DEPE's policy that point sources of pollutants should discharge so as to support the designated uses without credit for treatment at the point of use. The New Jersey Water Pollution Control Act (N.J.S.A. 58:10A-1 et seq.) provides clear guidance to justify current policies. The costs of protecting water quality should be borne by more than just point source dischargers—nonpoint source and stormwater dischargers should also be held responsible. However, the DEPE's consistent policy has been that dischargers bear the cost of water quality protection, not water users.

6. Deficiencies in the Surface Water Quality Standards Proposal: Some commenters felt the proposal was deficient because alternatives for each proposed change were not provided or discussed. DEPE recognizes that the proposal did not explain the alternatives that DEPE had considered or the reasons that alternatives were rejected. However, DEPE discussed alternatives with interested parties during the extensive process of public participation following the proposal. In addition, this adoption document describes all alternatives suggested by interested parties who commented on the proposal. DEPE agrees that it would be helpful to describe the analysis of alternatives to proposed regulations at the time the regulations are proposed, and will make every effort to do so in the future.

Many dischargers felt that the implementation provisions in the NJPDES and other programs were not discussed in detail. DEPE anticipates that the implementation provisions will be addressed through NJPDES reform. Some commenters felt that the proposal was deficient because not all forms of treatment and costs associated with the implementation of the criteria were discussed in the Social or Economic Impact statements. In regard to specific costs, various factors must be considered for each facility, making it impossible to project costs statewide. These include a facility's location on a waterbody, the pollutants discharged, waterbody classification and antidegradation category, existing treatment, projected growth in flows, and applicability of variance and site-specific procedures. Finally, some commenters objected to cross-referencing other regulations such as the Delaware River Basin Commission regulations, because they felt that this deprived interested parties of the opportunity to comment. The proposal indicates, however, that the DEPE will work with the Delaware River Basin Commission to ensure that there will be adequate public notice in New Jersey and at least one public hearing will be held in the State when changes to the Delaware River Basin Commission regulations are proposed.

Upon review and consideration of the written comments received and the issues raised at the various public meetings held to discuss the proposal, the DEPE has decided that the following course of action is appropriate.

1. Aquatic Life Protection Criteria: The DEPE is adopting aquatic criteria for 27 chemicals, including 42 freshwater criteria and 35 saline criteria. The DEPE originally proposed criteria for 10 metals, expressed as total recoverable metal. These criteria are not being adopted. The DEPE will reevalute criteria for these metals in conjunction with mechanisms to address waterbody-specific conditions and the portion of the metal that is biologically available in the waterbody. Upon completion of this evaluation, the DEPE will undertake formal rulemaking. See the Summary of Changes on Adoption below for the specific provisions being adopted herein.

2. Human Health Criteria: The DEPE is adopting the proposed human health criteria, with certain exceptions. The DEPE is not adopting criteria for six chemicals for which DEPE used USEPA proposed criteria, which USEPA did not adopt. This adoption strategy was described in

the Basis and Background document (page 19). The DEPE is not adopting criteria for three chemicals which the USEPA did not adopt because they are no longer scientifically defensible. Inclusion of these criteria for the three chemicals in the Surface Water Quality Standards proposal was based on this same science. The DEPE is not adopting criteria for seven other chemicals that USEPA proposed at 10^{-6} carcinogenicity risk levels but adopted at 10^{-5} risk levels. These will be the subject of a new proposal to incorporate the less stringent criteria in conjunction with scientific updating, as applicable. See the Summary of Changes on Adoption below for specific provisions being adopted herein.

3. Recodification of the Surface Water Quality Standards: Adopting as proposed without change.

4. Definitions: Adopting as proposed without change from the proposal with the exception of the exclusion of the term "vadose waters" from the definition of wetlands. See the Summary of Changes on Adoption below.

5. Severability Clause: Adopting as proposed without change.

6. Carcinogen Policy: Adopting as proposed without change.

7. Compliance Schedules: Adopting as proposed without change.

8. Water Quality Management Planning Changes: Adopting as proposed without change.

9. Expression of Metals Criteria as Total Recoverable: Adopting as proposed without change.

10. Delaware River and Delaware Bay: Adopting as proposed without change.

11. Surface Water Classification Changes: Adopting as proposed without change.

12. Ground Water Quality Standards Definitions: Adopting without change from the proposal with the exception of the exclusion of the definition of "vadose waters." See the Summary of Changes on Adoption below for specific changes.

13. NJPDES Regulations: Adopting without change from the proposal with the exception of the exclusion of the definition of "vadose waters" and exclusion of the term "vadose waters" from the definition of "wetlands." See the Summary of Changes on Adoption below.

As a result of the public hearings, the hearing officers recommended that the DEPE adopt the rules with the changes described in the Summary of Changes on Adoption, for the reasons described in the Summary of Public Comments and Agency Responses. The DEPE agrees with the recommendations. Interested persons may inspect the public hearing record, or obtain a copy upon payment of the DEPE's usual copying charge, by contacting:

Janis E. Hoagland, Esq.
Administrative Practice Officer
Office of Legal Affairs
Department of Environmental Protection and Energy
CN 402
Trenton, New Jersey 08625-0402

Summary of Changes on Adoption:

The DEPE has determined to adopt the proposed recodification and amendments with the following changes:

1. The DEPE made several grammatical and technical changes to either correct printing errors or clarify minor technical points.

2. At N.J.A.C. 7:9B-1.4, the DEPE is not adopting the phrase "vadose zone" proposed for the definition of "unsaturated zone."

3. At N.J.A.C. 7:9B-1.4, the DEPE is not adopting the definition of the term "vadose waters" because of a conflict with the definition of "surface water."

4. At N.J.A.C. 7:9B-1.4, the DEPE is not adopting the phrase "or vadose water" proposed for the definition of "wetlands."

5. At N.J.A.C. 7:9B-1.14(c)13, the DEPE is not adopting the sentence, "'H' represents hardness, in mg/l as calcium carbonate, in water quality criteria formulas for metals," because no aquatic life protection criteria for metals are being adopted. Redundant language is also deleted from the Note.

6. At N.J.A.C. 7:9B-1.14(c)13i, the DEPE is not adopting the freshwater (0.0028(hc)) and salt water (0.031(hc)) human health criteria for "Acenaphthylene" because the DEPE used the USEPA proposed criteria, which the USEPA did not adopt and there is not sufficient scientific justification or basis to defend these criteria. The DEPE added the word "Reserved" in place of the criteria not being adopted to indicate that the DEPE intends to repropose criteria at a later date.

7. At N.J.A.C. 7:9B-1.14(c)13v, the DEPE is not adopting the freshwater (750(a); 87(c)) aquatic life protection criteria for "Aluminum" because all of the aquatic life protection criteria for metals are being reexamined. The DEPE has added the word "Reserved" in place of the criteria not being adopted to indicate that the DEPE intends to repropose criteria at a later date.

8. At N.J.A.C. 7:9B-1.14(c)13viii, the DEPE added the phrase "(Total Recoverable)" after the toxic substance "Antimony" because it had inadvertently omitted it in the proposal.

9. At N.J.A.C. 7:9B-1.14(c)13ix, the DEPE is not adopting the freshwater (360(a); 190(c)) and saltwater (69(a); 36(c)) aquatic life protection criteria for "Arsenic" because all of the aquatic life protection criteria for metals are being reexamined.

10. At N.J.A.C. 7:9B-1.14(c)13xi, the DEPE added the phrase "(Total Recoverable)" after the toxic substance "Barium" because it had inadvertently omitted it in the proposal.

11. At N.J.A.C. 7:9B-1.14(c)13xvii, the DEPE is not adopting the freshwater (0.0028(hc)) and saltwater (0.031(hc)) human health criteria for "Benzo(ghi)perylene" because the DEPE used the USEPA proposed criteria which the USEPA did not adopt and there is not sufficient scientific justification or basis to defend these criteria. The DEPE added the word "Reserved" in place of the criteria not being adopted to indicate that the DEPE intends to repropose criteria at a later date.

12. At N.J.A.C. 7:9B-1.14(c)13xix, the DEPE added the phrase "(Total Recoverable)" after the toxic substance "Beryllium" because it had inadvertently omitted it in the proposal. In addition, the DEPE is not adopting the freshwater (0.00767(hc)) and saltwater (0.132(hc)) human health criteria because they are no longer scientifically defensible. The DEPE added the word "Reserved" in place of the criteria not being adopted to indicate that the DEPE intends to repropose criteria at a later date.

13. At N.J.A.C. 7:9B-1.14(c)13xxii, the DEPE is not adopting the freshwater (0.0186(hc)) and saltwater (0.0625(hc)) human health criteria for "gamma-BHC" because the USEPA proposed these criteria at 10^{-6} risk levels and adopted them at 10^{-5} risk levels, which DEPE believes to be more appropriate.

14. At N.J.A.C. 7:9B-1.14(c)13xxix, the DEPE is not adopting the freshwater (e(1.128(ln(H))-3.828)(a); e(0.7852(ln(H))-3.490)(c)) and saltwater (43(a); 9.3(c)) aquatic life protection criteria for "Cadmium" because all the aquatic life protection criteria for metals are being reexamined. In addition, the DEPE is not adopting the freshwater (15.9(h)) and saltwater (169(h)) human health criteria because they are no longer scientifically defensible. The DEPE is retaining the freshwater human health criterion (10(h)) which had previously been promulgated.

15. At N.J.A.C. 7:9B-1.14(c)13xxxviii, the DEPE is not adopting the freshwater (16(a); 11(c)) and saltwater (1,100(a); 50(c)) aquatic life protection criteria for "Chromium" because all the aquatic life protection criteria for metals are being reexamined.

16. At N.J.A.C. 7:9B-1.14(c)13xl, the DEPE is not adopting the freshwater (e(0.9422(ln(H))-1.464)(a); e(0.8545(ln(H))-1.465)(c)) and saltwater (2.9(a); 2.9(c)) aquatic life protection criteria for "Copper" because all the aquatic life protection criteria for metals are being reexamined. The DEPE added the word "Reserved" in place of the criteria not being adopted to indicate that the DEPE intends to repropose criteria at a later date.

17. At N.J.A.C. 7:9B-1.14(c)13xlvii, the DEPE is not adopting the saltwater (34(hc)) human health criterion for "Dibromochloromethane" because USEPA proposed it at a 10^{-6} risk level and adopted it at a 10^{-5} risk level, which DEPE believes is more appropriate.

18. At N.J.A.C. 7:9B-1.14(c)13liv, the DEPE is not adopting the saltwater (3.2(hc)) human health criterion for "1,1-Dichloroethylene" because USEPA proposed it at a 10^{-6} risk level and adopted it at a 10^{-5} risk level, which DEPE believes is more appropriate.

19. At N.J.A.C. 7:9B-1.14(c)13lxxi, the DEPE is not adopting the saltwater human health criterion (51,100(h)) for "Fluorene" because the criterion as published in the New Jersey Register was incorrect. The actual criterion developed by the DEPE and discussed in the Basis and Background document is 15,100(h).

20. At N.J.A.C. 7:9B-1.14(c)13lxxvi, the DEPE is not adopting the saltwater (50(hc)) human health criterion for "Hexachlorobutadiene" because USEPA proposed it at a 10^{-6} risk level and adopted it at a 10^{-5} risk level, which DEPE believes is more appropriate.

21. At N.J.A.C. 7:9B-1.14(c)13lxxx, the DEPE is not adopting the freshwater (1,000(hc)) aquatic life protection criteria for "Iron" because all the aquatic life protection criteria for metals are being reexamined. However, the DEPE added the phrase "(Total Recoverable)" after the toxic substance "Iron" because it had inadvertently omitted it in the

proposal and added the word "Reserved" in place of the criterion not being adopted to indicate that the DEPE intends to repropose criteria at a later date.

22. At N.J.A.C. 7:9B-1.14(c)13lxxxi, the DEPE is not adopting the saltwater (600(hc)) human health criterion for "Isophorone" because USEPA proposed it at a 10^{-6} risk level and adopted it at a 10^{-5} risk level, which DEPE believes is more appropriate.

23. At N.J.A.C. 7:9B-1.14(c)13lxxxii, the DEPE is not adopting the freshwater (e(1.273(In(H))-1.460)(a); e(1.273(In(H))-4.705)(c)) and saltwater (220(a); 8.5(c)) aquatic life protection criteria for "Lead" because all the aquatic life protection criteria for metals are being reexamined.

24 At N.J.A.C. 7:9B-1.14(c)13lxxxiv, the DEPE added the phrase "(Total Recoverable)" after the toxic substance "Manganese" because it had inadvertently omitted it in the proposal.

25. At N.J.A.C. 7:9B-1.14(c)13lxxxv, the DEPE is not adopting the freshwater (2.4(a); 0.012(c)) and saltwater (2.1(a); 0.025(c)) aquatic life protection criteria for "Mercury" because all the aquatic life protection criteria for metals are being reexamined.

26. At N.J.A.C. 7:9B-1.14(c)13lxxxviii, the DEPE is not adopting the freshwater (5.7(hc)) and saltwater (470(hc)) human health criteria for "Methyl chloride" because the DEPE used USEPA proposed criteria which USEPA did not adopt and there is not sufficient scientific justification or basis to defend these criteria. The DEPE added the word "Reserved" in place of the criteria not being adopted to indicate that the DEPE intends to repropose criteria at a later date.

27. At N.J.A.C. 7:9B-1.14(c)13xci, the DEPE is not adopting the freshwater (e(0.8460(In(H))+3.3612)(a); e(0.8460(In(H))+1.1645)(c)) and saltwater (75(a); 8.3(c)) aquatic life protection criteria for "Nickel" because all the aquatic life protection criteria for metals are being reexamined.

28. At N.J.A.C. 7:9B-1.14(c)13cii, the DEPE is not adopting the freshwater (0.0028(hc)) and saltwater (0.031(hc)) human health protection criteria for "Phenanthrene" because the DEPE used USEPA proposed criteria which USEPA did not adopt and there is not sufficient scientific justification or basis to defend these criteria. The DEPE added the word "Reserved" in place of the criteria not being adopted to indicate that the DEPE intends to repropose criteria at a later date.

29. At N.J.A.C. 7:9B-1.14(c)13cvii, the DEPE is not adopting the freshwater (20(a); 5.0(c)) and saltwater (300(a); 71(c)) aquatic life protection criteria for "Selenium" because all the aquatic life protection criteria for metals are being reexamined. The DEPE is not adopting the freshwater (179(h)) human health criterion because it is no longer scientifically defensible. In addition, the DEPE is not adopting the saltwater (6,800(h)) human health criterion because the DEPE used USEPA proposed criteria which USEPA did not adopt and there is not sufficient scientific justification or basis to defend it. The DEPE is retaining the freshwater human health criterion (10(h)) which had previously been promulgated.

30. At N.J.A.C. 7:9B-1.14(c)13cviii, the DEPE is not adopting the freshwater (e(1.72(In(H)-6.52)(a)) and saltwater (2.3(a)) aquatic life protection criteria for "Silver" because all the aquatic life protection criteria for metals are being reexamined. In addition the DEPE is not adopting the saltwater human health criterion (65,000(h)) because the DEPE used USEPA proposed criteria which USEPA did not adopt and there is not sufficient scientific justification or basis to defend it.

31 At N.J.A.C. 7:9B-1.14(c)13cxii, the DEPE is not adopting the saltwater (11(hc)) human health criterion for "1,1,2,2-Tetrachloroethane" because USEPA proposed it at a 10^{-6} risk level and adopted it at a 10^{-5} risk level, which DEPE believes is more appropriate.

32. At N.J.A.C. 7:9B-1.14(c)13cxiv, the DEPE has added the phrase "(Total Recoverable)" after the toxic substance "Thallium" because it had inadvertently omitted it in the proposal.

33. At N.J.A.C. 7:9B-1.14(c)13cxix, the DEPE is not adopting the saltwater (42(hc)) human health criterion for "1,1,2-Trichloroethane" because USEPA proposed it at a 10^{-6} risk level and adopted it at a 10^{-5} risk level, which DEPE believes is more appropriate.

34. At N.J.A.C. 7:9B-1.14(c)13cxxiv, the DEPE is not adopting the freshwater (e(0.8473(In(H))+0.8604)(a); (e(0.8473(In(H))+0.7614)(c)) and saltwater (95(a); 86(c)) aquatic life protection criteria for "Zinc" because all the aquatic life protection criteria for metals are being reexamined. The DEPE added the word "Reserved" in place of the criteria not being adopted to indicate that the DEPE intends to repropose criteria at a later date.

35. At N.J.A.C. 7:9-6.3, the DEPE is not adopting the definition of the term "vadose waters" because of a conflict with the definition of "surface water."

36. At N.J.A.C. 7:14A-1.9, the DEPE is not adopting the definition of the term "vadose waters" because of a conflict with the definition of "surface water."

37. At N.J.A.C. 7:14A-1.9, the DEPE is not adopting the phrase "or vadose" proposed for the definition of "wetlands" because of a conflict with the definition of "surface water."

Summary of Public Comments and Agency Responses:

The following persons submitted either oral or written comments during the comment period with respect to amendments proposed on November 2, 1992:

1. Diane Alexander-McCabe, Maraziti, Falcon & Gregory
2. Charles Burns, Caldwell Township
3. Leo Coakley
4. Stephen DeTommaso, Hoffman-LaRoche
5. Thomas Detweiler, Chemical Industry Council of New Jersey
6. Scott Du Boff, Winston & Stawn
7. Eric Evenson, U.S. Department of the Interior
8. Ella Filippone, Passaic River Coalition
9. Virginia Finley, Princeton University
10. John Gaston, Association of Environmental Authorities
11. Ellen Gulbinsky, Association of Environmental Authorities
12. John Hall, Association of Environmental Authorities
13. William Hall, Environmental Resources Management, Inc.
14. Gerald Hansler, Delaware River Basin Commission
15. Charles Harp, Archer & Greiner
16. Mark Harris, Chemical Land Holdings, Inc.
17. William Harrison, Pinelands Commission
18. Michael Hart, Carpenter Technology Corporation
19. Gerard Hartig, Rollins Environmental Services (NJ), Inc.
20. Michael Haydinger, Utility & Transportation Contractors Association of America
21. Jeffrey Horn, Association for Commercial Real Estate
22. R.M. Ivory-Moore, Mobil Oil Corporation
23. Robert Karen, New Jersey Builders Association
24. M.G. Kaul, New York Department of Environmental Conservation
25. Robert Kirkbright, U.S. Department of the Navy
26. Harvey Klein, Garden State Labs
27. Marvin Lewis
28. Michael Lyons, Northeast Monmouth County Regional Sewerage Authority
29. Frank Mangravite, CFM Environmental Services
30. Richard Manney, Secaucus Municipal Utilities Authority
31. Anthony Matarazzo, Elizabethtown Water Company
32. Edward Mullen, Elizabethtown Water Company
33. Russell Nerlick, Western Monmouth County Utilities Authority
34. Dean Noll, North Jersey District Water Supply Commission
35. Patrick O'Keefe, New Jersey Builders' Association
36. Alfred Pagano, Du Pont Chambers Works
37. Marwan Sadat, Sadat Associates, Inc.
38. James Schmid, Schmid & Company, Inc.—Consulting Ecologists
39. Thomas Sergi
40. John Serkies, Department of Commerce & Economic Development
41. Judith Thornton, New Jersey Manufactured Housing Association
42. Edward Wagner, New York City Department of Environmental Protection
43. William Wisseman, Newport Associates
44. Howard Woods, New Jersey—American Water Company
45. Paul Wyszkowski, AT&T Bell Laboratories

The following individuals submitted comments postmarked after the close of the comment period on March 18, 1993. Their comments are not addressed in the response to comments. However, most of these comments were reflected in the comments of other persons:

46. D.B. Bordvick, Tosco Corporation
47. Clifford Day, U.S. Department of the Interior
48. Diane Dona, Merck & Co., Inc.
49. D.D. Esch, Exxon Company, U.S.A.
50. Sandra Grenci, Rahway Valley Sewerage Authority
51. Daniel McIntyre, Ciba-Geigy
52. James Shissias, Public Service Electric & Gas Company
53. William Voeltz, New Jersey Society of Professional Engineers

A summary of the comments timely received and the DEPE's responses follow. The number(s) in parentheses after each comment identifies the respective commenter(s) listed above.

Procedural

1. COMMENT: The proposed water quality standards and the Statement of Basis are deficient because they contain an incomplete and cursory description of the policy decisions underlying the proposal. AEA recommends that the DEPE publish the full array of policy options prior to issuing final regulations so that the public can voice an opinion as to how conservative the State's water quality procedures should be. The most notable of these deficiencies are as follows:

- The DEPE does not notify the public of reasonable alternatives to the water quality standards, and implementing policies that USEPA and other states recognize will fully protect the environment;
- The DEPE does not notify the public that these alternative policies will protect the environment at less cost to the citizens of New Jersey;
- The DEPE does not provide a meaningful analysis of the social and economic costs to be visited upon the citizens of New Jersey; and
- The DEPE does not notify the public as to how it will implement several general policies thereby stifling public comment. (11, 12)

RESPONSE: The DEPE extended the public comment period on this proposal by 90 days for a total comment period of 158 days. During the extended comment period the DEPE held a series of public meetings, including roundtable discussions, with interested parties (for example, environmental groups, industrial groups, water purveyors, dischargers) where the policy decisions reflected in the proposal were discussed. One of the purposes of the public comment period is to provide an opportunity for other alternatives to be identified and discussed. Various alternatives, including the Federal water quality criteria, were considered by the DEPE in developing its proposal. As evidenced by the comments received, a number of alternatives were identified and discussed as part of the public comment on the proposal.

The fact that alternate water quality standards, policies and implementation approaches were not included with the published proposal does not preclude the DEPE from proceeding with promulgation of those portions of the proposal that are considered appropriate after consideration of all of the comments raised during the extended public participation process. As a result of comments received on the proposal the DEPE has decided not to promulgate some of the proposed criteria, including the aquatic protection based criteria for metals.

The DEPE clearly provided an adequate analysis of social and economic impacts that presented an estimate of the range of costs that could be expected to be incurred as a result of the proposed revisions to the regulations. A number of commenters provided input on the social and economic impacts of the proposal during the comment period. The DEPE intends to continue to seek input from the regulated community on the social and economic impacts of revisions to the Surface Water Quality Standards for use in preparation of the Basis and Background documents to be issued in support of future proposals. There will still be areas of disagreement on these analyses, but the DEPE is required under the Administrative Procedure Act to estimate the social and economic impact of its proposals. An example is the DEPE's position that the incremental costs resulting from the proposed criteria would be minimal because the same criteria were required to be used in discharge permits under N.J.A.C. 7:9-4.6(c)4iii (now recodified to N.J.A.C. 7:9B-1.6(c)4iii) which authorized the use of Best Available Scientific Information-based Criteria. Commenters evaluations were based only on the change between criteria which were already explicitly included in the surface water quality criteria and those being proposed. The DEPE evaluation incorporated the fact that the Surface Water Quality Standards required the use, at a minimum, of the USEPA 304(a) criteria as best available scientific information based criteria. The DEPE position was strengthened when the USEPA adopted (40 CFR Part 131; 57 Fed. Reg. 246; Pages 60848-60923; December 22, 1992) the criteria it had previously proposed. Preparation of an economic analysis based on the DEPE best available scientific information based criteria provides an estimate that is based on better assumptions than economic analyses based on only the criteria contained in the 1989 Surface Water Quality Standards. A more detailed discussion of the social and economic analysis is provided in the responses to Comments 4 to 22, which deal specifically with the impact analyses that accompanied the proposal.

Finally, the commenter did not identify the general policies being implemented about which the public has not been notified. The DEPE is currently working on major revisions to the NJPDES regulations and program. Those revisions are expected to include written implementation procedures. Such regulatory reform should address the commenter's concern about not knowing how the DEPE will implement general policies.

2. COMMENT: The proposal would modify N.J.A.C. 7:9B-1.14(d) to incorporate by reference the DRBC criteria in Article 3 of Part III of the DRBC Administrative Manual, "including all amendments and future supplements thereto." Although the State may use such criteria when appropriate, they cannot become State water quality standards without undergoing New Jersey rulemaking procedures. See N.J.S.A. 52:14B-4. Thus incorporation of DRBC standards into State regulations must be preceded by an explanation of their "terms or substance" in the New Jersey Register. N.J.S.A. 52:14B-4(a)(1). The notice must be accompanied by a statement setting forth, among other things, "a summary of the proposed rule [and] a clear and concise explanation of the purpose and effect of the rule." (N.J.S.A. 52:14B-4(a)(3)) The State cannot now give proper notice or solicit meaningful comment on unknown, future DRBC standards. (19)

RESPONSE: Both the Interstate Sanitation Commission (ISC) and the Delaware River Basin Commission (DRBC) are independent interstate regulatory agencies with jurisdiction over certain waters in New Jersey. Once these agencies adopt uses or criteria applicable to New Jersey waters the DEPE must apply the more stringent of the State or ISC/DRBC regulations. In the past, as the DEPE, ISC and the DRBC modified their respective regulations, it was not immediately obvious which regulations were applicable for waters under the jurisdiction of the ISC or DRBC. By incorporating the ISC and DRBC regulations by reference it should be easier to identify the applicable regulations.

Both the ISC and the DRBC publish notice and accept comments on rules that they propose. Where those rules apply to New Jersey waters, notice and the opportunity for comment are provided to interested parties in New Jersey. Incorporation of regulations by reference is an accepted practice which is allowed under the rules which implement the Administrative Procedure Act.

3. COMMENT: DEPE is proposing to adopt criteria for all of the toxic substances for which USEPA has published Clean Water Act §304(a) water quality criteria. This approach is unnecessary to protect waters of the State, is not legally required, and will result in the adoption of criteria that the State has identified as not being scientifically supported. (4)

RESPONSE: Because New Jersey has a very diverse community of public, industrial and commercial facilities, the DEPE concluded that surface water criteria were needed for all the chemicals listed in the proposal. Accordingly, the DEPE approach is necessary to protect the State's waters and is required by the Federal Clean Water Act. These criteria, after adoption, will be used in permitting or regulatory actions (for example, Superfund actions, enforcement actions, ground water remediations, administrative consent orders) taken by the DEPE when such actions were needed. The determination of the need for their use will rest with the individual regulatory programs. It should be noted that the criteria proposed for some of these toxic substances (for example, aquatic protection-based criteria for metals) are not being adopted at this time.

The decision to adopt criteria for all of the toxic substances for which USEPA §304(a) criteria have been published does not result in the adoption of scientifically unsupported criteria. Some of the criteria for specific toxic pollutants (for example, phenols, polynuclear aromatic hydrocarbons and bromodichloromethane) could theoretically be modified to satisfy DEPE concerns about how they were developed. The human health-based criterion for phenols in saline waters, for example, is based on exposure through consumption of organisms. Exposure through skin contact is probably more significant and would result in a more stringent criterion, if this route of exposure could be incorporated into the development of the criteria. Currently, methods are not available to incorporate dermal exposure into criteria development and the criteria proposed were based, when they were developed, on the best available scientific information. Similarly, human health-based criteria for several, individual polynuclear aromatic hydrocarbons are based on the characteristics of benzo-(a)-pyrene. Development of criteria based on the characteristics of each toxic pollutant might yield more appropriate criteria. Information on the toxicological characteristics of these individual polynuclear aromatic hydrocarbons was not available and the criteria proposed were based, when they were developed, on the best available scientific information. Finally, the available toxicity information in the USEPA Integrated Risk Information System database has changed for several toxic pollutants (for example, bromodichloromethane).

Changing the criteria to reflect the newest information would result in more up-to-date criteria. Once again, however, the criteria proposed were based, when they were developed, on the best available scientific information. In each of these cases the DEPE would prefer to use better, more up-to-date information to develop the criteria. However, this is a moving target and if proposals were withdrawn for modification each time there was a change to the underlying scientific information or if criteria were withheld because there were considerations which could not be factored in given the current state of scientific information and methods, it would be difficult to adopt enough criteria to regain primacy. Accordingly, while the DEPE would prefer to see the criteria developed with additional considerations incorporated, the criteria being adopted are scientifically defensible based on the information available when the criteria were developed.

Social/Economic/Environmental Impact Statements

4. COMMENT: In the Social Impact section, the DEPE states, "The segment of the population that will be most directly affected by the proposal will be those responsible for discharges as defined in the New Jersey Water Pollution Control Act." However, it is not those responsible for the discharges but those who must pay the user charges—the people of New Jersey—who will be most directly affected. The DEPE may say that the residents will be better protected; however, if they are adequately protected now, there is no reason to better protect them. (33)

RESPONSE: The DEPE recognizes that for publicly owned treatment works it is ultimately the users of the system who pay the costs of compliance. However, the DEPE's statement that the segment of the population most affected will be those responsible for the discharges is correct. New Jersey is the most densely populated state in the nation. Accompanying that population density is a large and varied community of industrial, commercial and municipal discharges containing a large variety of pollutants. It is hard to understand how the public can be adequately protected now, given the large number of pollutants potentially being discharged for which New Jersey does not have surface water quality criteria. The November 2, 1992 proposal was intended to begin to deal with this by proposing chemical specific criteria for over 100 pollutants that were not previously regulated through the Surface Water Quality Standards. The DEPE believes that it is adopting criteria that are in fact needed to adequately protect the public.

5. COMMENT: The proposed regulations do not contain an adequate cost analysis. The apparent reason for this major oversight is the bald statement of DEPE that "There would be no actual increase in compliance costs resulting from these more stringent criteria because the proposed criteria represent best available scientific information-based criteria which must be used under the existing Surface Water Quality Standards, N.J.A.C. 7:9-4.6(c)4iii" (now codified at N.J.A.C. 7:9B-1.6(c)4iii).

As shown below, even a simplistic cost analysis reveals the far-ranging cost implications of the proposed rulemaking and indicates DEPE's assertions lack any realistic basis. The public was never previously informed how DEPE would apply USEPA criteria or what in fact, constituted "best science." Most importantly, the proposed rulemaking fails to provide notice to the public of the alternative application protocols and their relative cost impacts. The development and application of water quality standards in a manner consistent with the most recent science will dramatically reduce the cost of compliance for AEA members in comparison to the current proposal.

The following is a preliminary cost analysis comparing the anticipated costs of the historical application (which is no longer scientifically defensible) and the anticipated costs of the scientifically defensible applications. The cost analysis yields one conclusion: the costs associated with the historical approach are extreme, unnecessary, will adversely affect public welfare and the environment, and will impose dire impacts on smaller communities and businesses. DEPE should explicitly apply the current scientifically defensible approach to avoid such large and needless expenditures.

AEA relies on several sources of data to estimate the cost impacts of the historical application of the criteria documents. The sources include Section 304(l) lists, Section 305(b) reports, the "Technical Support Document for Water Quality-based Toxics Control" (USEPA, EPA/2-90-001, March 1991) (TSD), and USEPA pretreatment documents. Data analyzed reflect municipal discharges of metals originating from drinking water sources and the distribution system. Dilution factors are calculated to provide an estimate of the number of affected dischargers. The analysis addresses the costs of removal to assess incremental treatment costs. (We believe that this analysis provides a conservative estimate of the cost impacts for the following industries: textiles, metal finishers, foundries, and electroplaters as well as other industries who add metals to their process water through manufacturing.)

Finally, we have excluded from the analysis evaluation of the large compliance costs that would be incurred should DEPE use the historical application protocols to establish controls for combined sewer overflows, stormwater discharges or cooling water discharges. Several of the CWA Section 304(l) listed discharges are included in the foregoing categories. 33 U.S.C. §1314(l). Unfortunately, the use of the invalidated application protocols for these types of situations has already taken place for many discharges.

The compliance costs of the proposed rulemaking are expected to be manifested in one of the following ways:

- alteration of water supplies;
- more stringent pretreatment programs;
- end-of-pipe treatment;
- site-specific WQS development;
- closure of facilities; and
- lawsuits over compliance.

The majority of AEA members are likely to adopt a compliance strategy that includes several of the above options. The analysis focuses on items three and four. For this reason, we believe that the cost analysis is conservative and underestimates actual impacts.

The Statewide cost of the proposed application of the criteria may vary from $1 billion, provided that site-specific standards were liberally granted (which they are not), to a range of $2 to 3 billion where additional treatment facilities are constructed for most dischargers. This estimate excludes the cost impacts on State agency resource needs, stormwater and CSO corrective actions, and lower municipal tax bases if industries must close.

The two most obvious factors affecting proper application of the criteria are evaluation of bioavailability and recognition of the numeric criteria as dissolved metals. Tests for assessing both of these issues will not significantly increase operational costs because bioassays are presently required of all dischargers on streams having low dilution, and the costs of testing for dissolved metals are equivalent to the costs for testing total recoverable metals. At most, AEA members must incur a relatively modest sum to perform additional testing for a dissolved:total recoverable ratio for the discharge permit.

USEPA studies indicate that 50-55 percent of the metals discharged are dissolved—the figure is partially dependent on the suspended solids levels in the effluent. Assuming that most discharge requirements will increase by a factor of three and that most background metals levels represent particular metals from runoff, about 50 percent of permittees identified above would **not** require further treatment facilities to comply with water quality standards expressed as dissolved metals.

The fraction of a metals discharge that is bioavailable depends upon industrial category, type of treatment process employed and source of the metals. Site-specific studies discussed in the literature indicate that the range of bioavailable metals in a **dissolved** test is from five to 50 percent. The more complexing agents available in effluent or receiving stream, for example, as indicated by TOC, BOD or COD, the lower the bioavailability of the metals. Copper, lead, zinc, and cadmium are particularly susceptible to complexing.

Assuming that a bioavailability analysis would typically yield a criteria scaleup factor of five (for example, 20 percent bioavailable), the overall effect of the dissolved and bioavailability factors would be the equivalent of 15:1 dilution. This effect avoids substantial costs for metals removal for most dischargers of metals in New Jersey. These two factors would likely eliminate metals requirements for 85 to 90 percent of the dischargers identified by DEPE.

In addition to costs associated with DEPE's proposed regulatory approach to metals, other areas where unnecessary costs are likely to be incurred due to application of outdated science include:

- misapplication of Enterococcus limitations;
- winter nitrification due to application of outdated criteria; and
- unnecessarily conservative application of standards with steady-state models, remote return flows and stringent mixing zone provisions.

Each of these areas is responsible for the establishment of limitations causing unnecessary expenditure of energy, chemical and monetary resources. These approaches do not comport with the "best scientific" application of USEPA criteria and should be amended.

Proper application of the criteria should reduce compliance costs by 85 to 90 percent. The negative environmental impacts associated with

achieving extremely low metals limits are also reduced. Because there are no environmental benefits and the economic costs are staggering, DEPE has a duty to rectify the effects of its unnecessarily stringent regulatory approach.

The failure to disclose the dramatic variation in costs associated with alternative application methodologies warrants withdrawal of the proposed rulemaking. DEPE must fully notify the public of all recent scientific information regarding the proper development and implementation of criteria, and the costs associated with meeting such criteria. (11, 12)

6. COMMENT: The ability to achieve consistent compliance with NJPDES permit limitations for metals in the low parts per billion range has not been demonstrated on a full-scale basis. In fact, the **only** treatment technology capable of reliably achieving the low metals levels proposed by DEPE—chemical precipitation followed by reverse osmosis—was not even considered by DEPE in assessing costs of the proposed rulemaking. This deficiency renders the administrative record incomplete and AEA objects, accordingly.

There are limited treatment technologies available to AEA members that can reliably meet the proposed standards, expressed as total recoverable metals. The following assesses two levels of technology: Option 1—polymer addition with filtration; and Option 2—polymer addition with filtration plus reverse osmosis. The capital cost per million gallons per day for these types of improvements is at least $500,000 for Option 1 and $2.0 million for Option 2. The operation and maintenance costs of each alternative are substantial because of the amount of sludge and other toxic waste streams generated. The relative annual cost per gallon treated (annualized capital, operation and maintenance levels) is estimated at $0.50 per gallon for Option 1 and $1.50 per gallon for Option 2. A reasonable assumption is that **any** discharger on low flow streams (1:1 dilution or less) will need to utilize Option 2 because the limitations will be in the low parts per billion range. Option 1 is, at most, available for dischargers into receiving streams with more dilution. Assuming each direct discharger represents an average of 1 million gallons per day under design flow conditions (a very low estimate), the following cost estimate would apply:

60 dischargers severely affected	=	$90 million per year
Life cycle cost (15 years)	=	$1.35 billion
60 dischargers moderately affected	=	$30-50 million per year
Life cycle cost (15 years)	=	$450-750 million
Total cost (annual)	=	$120-140 million
Life cycle cost (15 years)	=	$1.8-2.1 billion (11, 12)

7. COMMENT: The DEPE has grossly underestimated the cost impacts of the proposed regulations. DEPE must take a much more thorough and critical approach to determining the economic impacts of the proposed regulations. It is anticipated that the regulations would make it necessary for treatment facilities to increase their usage of chemicals and electricity and result in the generation of more sludge and toxic brine. (20)

8. COMMENT: The impact of any regulatory program on society and the economy, as well as the environmental impacts (both positive and negative), must be carefully evaluated before adoption and implementation of environmental programs. Reconsideration of the social and economic impact of the proposed Surface Water Quality Standards is necessary. The benefits to the environment and costs to society of implementing the proposed Surface Water Quality Standards must be included in the rule adoption. (41)

9. COMMENT: It is recognized that DEPE is under Federal mandate to adopt a program acceptable to the USEPA. It is requested that New Jersey review the experience in other states and apply that experience to its benefit. It is further requested that a meaningful cost analysis be undertaken and publicly noticed. (41)

10. COMMENT: The DEPE has neither adequately addressed the economic implications of capital, operating, and monitoring costs and the time-frame over which such costs will be realized by the regulated community, nor have the benefits, which will be realized by the user community, been addressed over a comparable time-frame. The cost data provided in Table 1 (24 N.J.R. 3986) is an interesting illustration of the relative costs among different water treatment processes at different flow rates, but does not serve as a substitute for estimating the quantitative costs which are likely to be borne by the regulated community, or the likely costs that will be incurred by the DEPE in administering the regulations. Also, the statement that "the additional costs associated with adoption of the proposed criteria would range from zero for some dischargers to millions of dollars for other dischargers" does not meet the due process intent of an economic impact evaluation. (16)

11. COMMENT: The DEPE must include a meaningful cost analysis in any proposed regulatory program, including the proposed Surface Water Quality Standards. A meaningful cost analysis should therefore be prepared for the proposed Surface Water Quality Standards. If the DEPE requests assistance from the public in this regard, there are many interested groups which would, most likely, be pleased to provide assistance. (23)

12. COMMENT: Throughout the 1970s and 1980s, the DEPE followed an approach of regionalized sewage treatment. To that end, regional publicly owned treatment works (POTW) were constructed and communities connected to those regional plants. In addition, pursuant to the State planning process, a procedure which required the expenditure of considerable resources, areas of the State were designated as being inappropriate for sewers and, therefore, were designated to rely either on nonregional surface water discharges or discharges to ground water for the disposal of wastewater. The cost for the implementation of this process has been paid for by the citizens of New Jersey and, insofar as capital improvements were the result of bond issues, will continue to be paid for by those citizens for many years. If adopted as proposed, the Surface Water Quality Standards would negate this costly planning process. For instance, adoption of the proposed Surface Water Quality Standards would virtually eliminate use of package treatment plants in developments which, pursuant to the State Plan, are not scheduled to be sewered by a regional authority.

The real effects of the proposed Surface Water Quality Standards cannot be ignored. At a minimum, the user rates paid by many State residents will quadruple. For those new developments, either planned or in process, the cost to connect to a regional sewage authority will substantially increase. Housing costs include these connection fees and therefore will also increase. Moreover, residents must be able to pay quadrupled sewer rates which, in general, currently run between $400.00 and $800.00 per year. Thus, not only will the initial cost of housing be increased, but also the market to which the houses can be sold will be decreased as housing costs spiral. (23)

13. COMMENT: Today, it is a well-known fact that many businesses have relocated out of New Jersey, or selected other states into which to relocate, due to the high costs of operation and employee relocation in New Jersey. One of the main factors in employee relocation costs is housing costs. To the extent that these relocation and related living costs are substantially higher in New Jersey than in other states, New Jersey cannot compete with other states in attracting business. Thus, New Jersey loses a market to which it could otherwise provide housing.

NJBA requests that the DEPE re-evaluate its position regarding the proposed Surface Water Quality Standards. A number of other states have adopted alternatives which appear to be more technically feasible and economically reasonable. These alternatives also appear to have been accepted by the respective USEPA regions. To the extent that other states have expended resources reviewing and evaluating various alternatives, the State of New Jersey should conserve its limited resources and use these experiences. (23)

14. COMMENT: Adoption of the Surface Water Quality Standards as proposed will have a negative impact on development without the establishment of a relationship to enviromental protection or improved water quality. New developments in sewered areas will be diminished insofar as quadrupled user fees and connection costs will increase the cost and affordability of housing. Development in areas of the State not serviced by a regional sewage treatment plant will be virtually curtailed since package plants may not include the technology or provide the levels of treatment required to achieve the proposed Surface Water Quality Standards. Again all of this without showing a relationship to the environment. Nor could a package plant be maintained by a limited number of users on an ongoing basis due to the increased operating and maintenance costs which will result if the proposed standards are adopted. (23)

15. COMMENT: A summary of control technology efficiency has been prepared by USEPA (EPA-600/2-82-001c; 1983). Numerous technologies were evaluated including filtration and chemical oxidation, to determine treatment efficiencies for specific metal and organic contaminants. These are summarized below for filtration and chemical oxidation.

USEPA reported removal ranges and median removal efficiencies based on data summarized for pilot and full scale operations for filtration using slow sand, rapid sand, and high rate dual media filters. The median

removal efficiency for most metals is well below 50 percent. However, the proposed water quality standards are typically orders of magnitude below the categorical effluent limits most facilities are permitted under. Therefore, alternative technologies are likely also required in an effort to achieve effluent concentrations at the proposed water quality standards.

Data summarized for pilot scale operations of chemical oxidation systems using ozone are limited but indicate mixed median removal efficiencies. This technology may be suitable for treating some organic parameters but does not appear suitable for all organics. Therefore, alternative technologies would also be required in an effort to achieve effluent concentrations at the proposed water quality standards.

Combinations of treatment will be required to meet water quality-based effluent limitations for effluents that must achieve concentrations at or near the proposed water quality standards. These treatment combinations may include activated carbon, ion exchange, and reverse osmosis.

As noted in DEPE's initial summary, actual cost estimates cannot be made due to the large number of uncertainties involved in the costing assumptions. However, an example of the potential costs associated with metals removal to achieve water quality-based limitations was calculated for the Sacramento Regional Wastewater Treatment Plant. Twenty year amortized capital, operation and maintenance costs to provide reverse osmosis for this 240 million gallons per day facility are estimated to exceed one billion dollars. Similar costs should be expected for facilities in New Jersey.

The economic impact suggested in the proposed Surface Water Quality Standards appears optimistic. Alternative cost estimates should also be provided and the influence of these potential costs on the economy of the State should be determined. (13)

16. COMMENT: DEPE should withdraw the proposed water quality standards because AEA believes that adoption of the regulations as proposed cannot survive judicial scrutiny due to procedural and substantive defects in the administrative record. These defects include:

> The failure to publish an adequate social and economic cost analysis comparing the likely cost of several approaches that fully protect the environment. The social and economic costs analyses contained in the Statement of Basis do not meet the minimum requirements of N.J.S.A. 52:14B-4(a)(2). The DEPE's analyses fail to advise the public of the fact that there are a broad array of approaches for interpreting and implementing water quality standards. The different approaches will yield different costs to the regulated community. Without any explanation or comment from DEPE AEA cannot address the full range of costs associated with the proposed regulations.
>
> DEPE does not advise the public that its proposed approach "when used for ambient waters ... may result in overstimating the toxicity." The "overestimating of toxicity" in New Jersey waters will impose social and economic costs on the AEA membership; costs that DEPE does not consider relevant to this rulemaking. DEPE cannot claim that the proposed regulations adopt the "best available scientific information" or that the proposed regulations predict conditions in the waters of New Jersey until the DEPE considers the appropriateness to New Jersey waters of the latest scientific information.
>
> Second, the proposed regulations do not compare the relative social and economic costs of each available approach for developing water quality standards for metals considered acceptable to USEPA. The public cannot submit meaningful public comment until the DEPE provides notice of the different approaches and provides a framework and discussion of the anticipated social and economic costs of each approach.
>
> DEPE compares USEPA's "most conservative" criteria to its conservative BASIC protocol which is why DEPE states that
>
> > the criteria proposed **are identical** to the best available scientific information-based criteria.
>
> This leads to the incorrect conclusion that
>
> > because the criteria are identical, there will be no increased costs associated with adoption of these criteria when compared to costs resulting from application of the existing Surface Water Quality Standards N.J.A.C. 7:9-4 (now recodified to N.J.A.C. 7:9B-1) in general and N.J.A.C. 7:9-4.6(c)4iii (now recodified to N.J.A.C. 7:9B-1.6(c)4iii) in particular).
>
> The notice of proposed rulemaking does not explain why DEPE proposes total recoverable measurements and rejects other more reasonable and appropriate approaches for measuring toxicity in the ambient waters of New Jersey. Because USEPA will accept at least three approaches for measuring metals, DEPE must compare the social and economic costs of each approach. This comparison provides meaningful information to the public about the consequences of the proposed regulations. (11, 12)

17. COMMENT: The environment should be protected, based on the best scientific information currently available, without imposing undue or unnecessary financial burdens on the citizens of the State. (45)

18. COMMENT: One of the issues raised by the Roundtable Summary is the role of cost/benefit analysis in developing water quality criteria. Commenters strongly support the use of such cost/benefit analysis. As recognized by USEPA, environmental regulations must integrate science and social values to ensure that society's limited resources are focused on the most pressing environmental issues. Remarks by Henry Habicht, USEPA Deputy Administrator, Resources for the Future Conference (November 15-17, 1992). A cost/benefit analysis is essential to achieving that important objective. In addition, a cost/benefit analysis recognizes the fallacy that science-based environmental goals can be pursued in a vacuum devoid of societal impacts. For example, without a cost/benefit analysis the adoption of a particular water quality standard potentially could result in environmental harm (for example, increased use of treatment chemicals that generate hazardous waste by-products) greater than the benefit achieved by complying with the criteria. An upfront cost/benefit analysis of proposed water quality criteria would also reduce the burden on the DEPE's permit writers to estimate costs on a permit specific basis.

A prime example of the need for careful cost/benefit analysis relates to older generating stations that are subject to only limited and infrequent use. As applied to such older power generation units, cost/benefit concerns arise in several contexts. First, an older generating unit may be scheduled for retirement in a relatively brief period. Significant pollution control upgrades for such a power generation unit would not be justified. Second, even where an older generating unit is expected to remain operational for an indefinite period as a peaking unit (that is, for relatively brief periods of time during the course of the year), the substantial cost of pollution control upgrades would not be justified by the minimal environmental benefit gained.

Adoption of water quality criteria on the basis of a cost/benefit analysis is legally permissible. The New Jersey Water Pollution Control Act authorizes the Commissioner of the DEPE to adopt "**reasonable** codes, rules and regulations" to carry out the purposes of the Act. N.J.S.A. § 58:10A-4 (emphasis added). As recognized in court decisions interpreting the Federal Water Pollution Control Act, at some point extremely costly pollution control requirements that have de minimis effects on receiving waters become unreasonable. For example, *American Petroleum Institute v. EPA,* 787 *F.2d* 965, 972-73(5th Cir. 1986). That principle applies in the analogous context of the New Jersey Water Pollution Control Act. In short, the DEPE is authorized to compare the cost of achieving the criteria with the level of ecological benefits to be derived therefrom. (6)

19. COMMENT: In New Jersey the protection of water quality has become an administrative quagmire. The Passaic River Coalition is interested in restoring, maintaining and enhancing the quality of waters of the State. The coalition is concerned that the progress gained in cleaning up the waters of the State might be allowed to backslide because of the promulgation of inappropriate regulations. We are apprehensive that these proposed regulations if implemented would be so onerous that the regulated community would revolt, and that the whole program might be scrapped, or that the regulated community would seek relief in the courts. Such action could set back the program so far that irreversible damage to the water resources of the state might be done.

There is abundant evidence that the NJPDES program is not functioning as well as it might be. As of the end of 1992, 90 percent of the applications to the DEPE for changes in NJPDES permits were backlogged applications ("1992-1993 Annual Fee Report and Assessment of Fees", page 86). The DEPE's cost of running the NJPDES Surface Water Program in FY92 rose to 19 percent over that in FY91 (Ibid, pages 81-82). It could go up another 40 percent in FY93. These costs come from fees and fines paid by permittees. The inflation rate for other costs borne by permittees is not reported by the DEPE, but it should be taken into account in evaluating the cost effectiveness of the NJPDES program. (8)

RESPONSE: Most of the comments seem to deal with the costs associated with adoption of the proposed criteria for metals. The DEPE has decided, based on consideration of the comments received and changes in national guidance, not to adopt the proposed aquatic protection-based criteria for the metals, at this time. Instead, the DEPE will propose aquatic protection-based criteria for the metals which will be expressed as "concentration times Water Effects Ratio" in 1994. As stated by one commenter "The two most obvious factors affecting the proper application of the criteria are evaluation of bioavailability and recognition of the numeric criteria as dissolved metals." The DEPE believes that its decision to reconsider and repropose the aquatic protection-based criteria, incorporating the Water Effects Ratio, should mitigate many of the concerns raised about the costs of compliance.

A common theme in the comments received on the economic impact analysis which accompanied the proposal is that the DEPE did not provide an adequate cost analysis or underestimated the economic impact of the proposed standards. The act of promulgating numeric surface water quality criteria does not immediately or automatically result in more stringent NJPDES/Discharge to Surface Water (DSW) effluent limitations. The Clean Water Act requires water quality-based effluent limitations only where, after compliance with technology based effluent limitations, there is still a reasonable expectation that the discharge of pollutants will not achieve and/or maintain the designated/existing uses of the receiving waterbody. Where water quality criteria have been promulgated for a particular pollutant, compliance with the criteria is considered to accomplish the goal of attaining and/or maintaining water quality which supports the designated/existing uses. Also, USEPA regulations allow consideration of receiving waterbody dilution, natural stream water quality and controls on point and nonpoint sources of pollution in determining the need for water quality-based controls. The DEPE will be addressing water quality-based toxics controls on a watershed basis by developing total maximum daily loads (TMDLs) and wasteload allocations (WLAs) for dischargers. Until the process of developing watershed-based TMDLs/WLAs is completed, including public participation and promulgation of TMDLs/WLAs, most chemical-specific toxic effluent limitations will be based on technically achievable levels which will not entail the types of costs described in the comments. Also, until the watershed-based TMDLs/WLAs are developed, except where special watershed type studies are being completed (for example, NY-NJ Harbor Estuary), the DEPE cannot determine which dischargers will need more stringent water quality-based effluent limitations and could not provide better cost estimates.

The commenters seem to assume that every permittee will have to treat their discharge to the levels of the water quality criteria. The DEPE agrees that with respect to many pollutants the cost to achieve this would be considerable even if the technology existed. However, as stated above, the process of determining a water quality based effluent limit in a permit provides an adjustment to the appropriate level necessary to comply with the Surface Water Quality Standards. In addition, at this time the DEPE does not know which dischargers will have to reduce levels of toxic pollutants nor the magnitude of the reductions. Any permittee that receives a water quality-based effluent limitation will have several avenues through which to obtain relief. Cost and achievability can be raised at an adjudicatory hearing to contest the water quality-based effluent limit and/or as part of variance proceedings to demonstrate that compliance with water quality-based effluent limit would "result in substantial and widespread adverse social and economic impact." Additionally, the permittee could seek reclassification of the waterbody for less restrictive uses or approval of site-specific criteria.

The economic impact analysis included in the proposal included a table of costs associated with several commonly used treatment technologies. This list of technologies was not meant to represent all available treatment technologies. The table was provided to allow parties reviewing the proposal to begin to estimate possible costs of complying with water quality-based effluent limitations. Only the permittees have the required site specific information, such as sources/uses of pollutants and existing treatment facilities, to calculate compliance costs. Also, the economic impact analysis stated that additional treatment is only one of several alternatives to reduce pollutant levels (for example, pollution prevention for industrial dischargers and pretreatment programs for POTWs). One commenter stated that the DEPE did not include Reverse Osmosis in its impact analysis. As stated above, the list of treatment technologies was not meant to be exhaustive. In addition, although reverse osmosis is effective as a water supply treatment technology it is not a proven nor commonly used wastewater treatment technology.

Some commenters suggested that the DEPE should have considered the costs of compliance with the benefits resulting from compliance with the criteria in determining what the criteria should be. One commenter equated the Water Pollution Control Act language authorizing the commissioner to adopt "reasonable codes, rules and regulations" with authorizing cost/benefit analyses. The Clean Water Act Amendments of 1987 and the Federal Water Quality Standards Regulation indicate that water quality criteria are to be set at the level necessary to protect the designated/existing uses. When USEPA adopted its rules regarding criteria development, it specifically rejected the use of a cost/benefit analysis in the development of the criteria. Former Commissioner Weiner indicated, at the Roundtable held on the proposal, that the criteria represent the goals that DEPE is striving to achieve. As such they should be set at the level necessary to protect the uses and not at modified levels which reflect costs of compliance, availability of existing treatment technologies or analytical considerations. These considerations are more appropriately addressed as part of the implementation process (for example, permit development, variances, compliance schedules, analytically based limitations).

Adoption of criteria at levels necessary to protect the uses does not negate the planning process conducted through the 1970s and 1980s, as indicated by one commenter. It might raise the costs of local treatment facilities and it will probably require improved management of local treatment facilities. However, this does not preclude nonregional surface water discharges or discharges to ground water for areas of the State designated as being inappropriate for sewers.

20. COMMENT: The following statement from the Economic Impact statement is incorrect.

> "because the criteria are identical, there will be no increased costs associated with the adoption of the criteria."

There will be significant costs associated with the adoption of the criteria. In fact the DEPE may require the effluent permit holders to monitor down to even PQLs of the most sensitive method available. Analytical costs may easily double or triple or quadruple. (22)

RESPONSE: Utilization of best available scientific information based criteria for regulatory purposes would result in the same monitoring requirements as could be expected if the proposed New Jersey criteria had been adopted in their entirety. Additionally, monitoring to characterize dischargers' effluents to assess whether "reasonable potential" exists for contravening the Surface Water Quality Standards would also result in monitoring down to the levels cited by the commenter. Finally, at the time of the November 2, 1992 DEPE Surface Water Quality Standards proposal, the USEPA had proposed ambient water quality criteria for New Jersey waters which covered most of the pollutants included in the DEPE proposal, at levels that would require the same monitoring that the State's proposal would. The USEPA, on December 22, 1992, adopted most of its proposed criteria, which means that the analytical costs the commenter cites will eventually be incurred by the dischargers regardless of whether or not the DEPE adopts its proposed criteria. Accordingly, the statement cited by the commenter was, and is, accurate.

21. COMMENT: The DEPE must review in detail, and concurrently provide with toxic criteria, practical, cost-effective methodologies and schedules for POTWs to achieve compliance. The benefits anticipated to be gained by application of the proposed criteria must be shown by the DEPE, and are in question. Substantial funding sources must be made available. Such efforts are far beyond the resources of municipalities. (30)

RESPONSE: As discussed in the response to Comments 14 to 19, consideration of costs and benefits is not appropriate when setting ambient water quality criteria. Consideration of practical, cost-effective methodologies and schedules for POTWs to achieve compliance is more appropriately dealt with during the implementation of the Surface Water Quality Standards through regulatory and enforcement actions (for example, issuance of NJPDES permits). There are a number of funding sources currently available to communities to meet effluent limitations that may be imposed on them. Some communities have obtained financing from the FHA. Additionally, the State has a Municipal Wastewater Assistance Trust to help finance improvements needed to provide necessary treatment.

22. COMMENT: The costs involved for the treatment processes necessary to remove the trace levels of inorganic substances which are found in safe drinking water are unjustifiable. The removal of these substances before the ultimate discharge back to a receiving stream, which in most cases already has ambient natural levels of the same

substances at equal or greater concentrations, does not make environmental or economic sense. The Surface Water Quality Standards should be set at levels that recognize naturally ocurring conditions, attainable goals and the needs for safe drinking water. (44)

RESPONSE: Surface water quality criteria are established at the levels necessary to protect the uses of the State's waters. Adjustments for treatment costs are either made through a variance or through the implementation process. Concentrations in the State's waters which are not in compliance with the surface water criteria are dealt with at N.J.A.C. 7:9B-1.5(c)1, which provides that in such cases the natural water quality becomes the criteria.

General

23. COMMENT: The United States Environmental Protection Agency (USEPA) has issued water quality standards for New Jersey. The issuance of Federal water quality standards should not delay the adoption of more reasonable policies. USEPA encourages states to promulgate water quality standards to supersede the Federally-imposed requirements. DEPE should adopt water quality standards allowing the same flexibility as Federally promulgated water quality standards. The DEPE should review and modify the proposed regulations accordingly. (11, 12)

RESPONSE: DEPE does not intend to delay its promulgation of water quality standards. The selected water quality criteria being adopted are intended to replace the corresponding USEPA promulgated criteria (40 CFR Part 131; 57 Fed. Reg. 246; Pages 60848-60923). Through the adoption of these selected criteria the DEPE will regain flexibility in the regulation of discharges by being able to issue compliance schedules, approve site specific criteria and grant variances. The DEPE will propose additional criteria to replace USEPA promulgated criteria (for example, metals) as soon as they are developed. To build into this rule the flexibility to adjust the numerical criteria that is contained within the Federally promulgated water quality criteria would be too significant a change to make on adoption. The DEPE agrees with the comment and will consider incorporating additional flexibility (for example, regulating metals as "dissolved" instead of "total recoverable") during preparation of a proposal of criteria for metals expected to be published in 1994.

24. COMMENT: Rainwater pH may exceed the proposed water quality criterion (pH = 6.5-8.5). In this situation, discharge samples submitted for analysis may exceed the water quality criterion in certain geographic areas. The DEPE should provide a procedure for modifyng this criterion for these areas, as well as quality of rainwater before it enters the surface water. (21)

25. COMMENT: The proposed regulations should recognize naturally occurring background levels in native soils and should not set standards that cannot be attained because of these background levels, for example, for viruses, bacteria, iron and aluminum. (32)

26. COMMENT: The proposed Surface Water Quality Standards do not recognize naturally occurring background levels and so the standards are not attainable or justifiable. (34)

RESPONSE: The Surface Water Quality Standards, at N.J.A.C. 79B-1.5(c)1, provide that where natural water quality does not meet the water quality criteria as a result of natural conditions, the natural water quality becomes the water quality criteria. Otherwise, the surface water quality criteria apply.

27. COMMENT: The regulations should expressly provide that until water quality criteria for wetlands are incorporated into the surface water quality standards, these standard will not apply to wetlands. (21)

RESPONSE: Such a provision cannot be inserted into the regulations on adoption. The criteria at N.J.A.C. 7:9B-1.14(c) do not directly apply to wetlands and clarifying language will be proposed for inclusion in the Surface Water Quality Standards.

28. COMMENT: Unless the DEPE incorporates internal policies and standards, it will not be in compliance with the following statement in N.J.A.C. 7:9B-1.1.

> Unless otherwise provided by rule or statute, this subchapter shall constitute the rules of the Department of Enviromental Protection and Energy governing the matters of policy with respect to the protection and enhancement of surface water resources.... (18)

RESPONSE: The DEPE intends to incorporate policies and standards that have general applicability into these regulations, as soon as practicable after development.

29. COMMENT: With respect to N.J.A.C. 7:9B-1.5(d)6ii(2), the DEPE should define what is meant by the phrase "not creating any water quality problems." The use of this phrase makes it unclear what standards should be followed at sites with NJPDES permits, thus adding an unnecessary layer of uncertainty and confusion. (21)

RESPONSE: The phrase is intended to indicate contraventions of the Surface Water Quality Standards and conditions which impair the use of the waters. This phrase has been part of the Surface Water Quality Standards for over a decade and no implementation problems have been brought to the attention of the DEPE.

30. COMMENT: With respect to N.J.A.C. 7:9B-1.6(c)3v(2), the DEPE should clarify the term "all existing discharges." Does this mean all discharges from the applicant's site? (21)

RESPONSE: "All existing discharges" refers to the discharges which could influence the establishment of the water quality based permit limitations for a facility. This is, of necessity, a case-by-case determination. Where discharges from sites other than the applicant's site are in such proximity that they must be taken into consideration in developing the water quality based effluent limitations for the applicant's site, they are part of "all existing discharges." Applicants should submit and discuss proposed sampling programs with the DEPE prior to actually undertaking such programs to address such questions.

31. COMMENT: New Jersey must keep its competitiveness, both in terms of government and industry, in perspective. It should not achieve environmental goals at the expense of losing manufacturing jobs in industries that use water. The DEPE should adopt a multiuse formula for its water courses with the acceptance that some water courses will not improve beyond a preestablished level of quality, thereby allowing those chosen water courses to be a resource for industrial development. (29)

RESPONSE: The goal of both the Federal and State programs is to restore and enhance water quality. In New Jersey, all waters have been assigned designated uses that reflect their existing or projected uses. Where certain uses have been determined to be unattainable for certain waters, through a use attainability analysis, those uses have not been assigned to those waters. In order to implement the commenter's suggestion it would be necessary to designate waters for less restrictive uses. This is accomplished by making demonstrations, as specified at N.J.A.C. 7:9B-1.10, that the reclassification meets the legal requirements for such an action. The DEPE is working through its ongoing efforts to revise the NJPDES regulations to provide additional flexibility in regulating discharges to help maintain New Jersey's competitiveness while improving the quality of its waters to ensure that the Surface Water Quality Standards will be attained.

32. COMMENT: The commenter emphasizes the need for and endorses a watershed, basin-wide approach for the derivation of effluent limitations that achieve point source effluent limits which are technically and economically feasible. The watershed approach should include allocation for nonpoint pollution sources. Specifically for Section 304(l) waterbodies, effluent limitations resulting from the proposed water quality criteria for toxic pollutants are not attainable because of irretrievable man-induced conditions. Adoption of these criteria will require that each discharger apply separately for a modification of a water quality based effluent limitation. This approach is impractical since it would be extremely time consuming, burdensome, and costly. (30)

RESPONSE: The DEPE appreciates the support expressed for the watershed, basinwide approach to managing water quality. Where it can be shown that the water quality stanards are not attainable because of irretrievable man-induced conditions, the DEPE will actively pursue USEPA approval of alternate water quality criteria for waters so impaired, instead of pursuing USEPA approval on a discharger specific basis. However, the DEPE is not currently aware of waters in New Jersey where the criteria are not attainable because of irretrievable man-induced conditions.

33. COMMENT: The proposed Surface Water Quality Standards would require that all fresh waters of the State be maintained as if they were potable water supplies. It would be much more cost-effecive to upgrade the surface water treatment plants than to upgrade all the sewage treatment plants to meet potable water standards. We are required to make our water fishable and swimmable, not potable. It would not be cost-effective to try to make all fresh water potable. (33)

RESPONSE: The proposed Surface Water Quality Standards do not include any change in the designated uses of the fresh waters to add use as potable water supplies. The policy decision to protect all of New Jersey's fresh waters for use as potable water supplies is reflected in "Rules And Regulations Establishing Surface Water Quality Criteria," New Jersey Department of Environmental Protection, June 30, 1971, and subsequent Surface Water Quality Standards (now codified at N.J.A.C.

7:9B). The DEPE has concluded that a state as densely populated as New Jersey is must protect all its fresh waters for possible use as potable water supplies in the future.

34. COMMENT: DEPE should formulate and propose a set of water quality standards that are more reasonable, insofar as they are both feasible and attainable using conventional monitoring and treatment methods. (34)

RESPONSE: The DEPE believes that the Surface Water Quality Standards as adopted are both feasible and attainable. In response to comments received on the proposed standards and in light of USEPA's adoption of metals criteria that can be adjusted for bioavailability, the DEPE has decided not to adopt aquatic protection-based criteria for the metals at this time. The DEPE will repropose criteria that will include a water effects ratio, as requested by commenters. This will ensure that only the toxic or bioavailable metals are regulated.

35. COMMENT: Many of the proposed requirements are far more stringent than drinking water standards. The standards for metals and other pollutants are based on test methods that even USEPA readily acknowledges will over-regulate dischargers. DEPE should reconsider its position on this matter. (40)

RESPONSE: The DEPE has decided not to adopt the proposed aquatic protection criteria for metals at this time. The DEPE will propose aquatic protection criteria in the near future, with a modifier (water effects ratio) built in to avoid over-regulating dischargers. There are three situations in which the Surface Water Quality Standards are most likely to be more stringent than the drinking water standards. The first is where the aquatic protection criteria are more stringent. The second is where the drinking water standard is based on analytical or financial considerations instead of human health protection. Since the Surface Water Quality Standards establish criteria at the level necessary to protect the use, neither analytical nor financial considerations are factored into the development of the water quality criteria. Finally, there can be situations where the Surface Water Quality Standards are based on more recent information than the information on which the drinking water standards are based. In each of these cases, the Surface Water Quality Standards are appropriately stringent in order to achieve their intended purpose of protecting and enhancing surface water quality.

36. COMMENT: Discharges to surface water in some portions of the Pinelands are regulated and controlled by the Pinelands Commission. Duplicative regulations by the DEPE would be inefficient and costly. These antidegradation policies should be adopted and enforced by the Pinelands Commission. (21)

RESPONSE: The DEPE is required by law to develop and promulgate Surface Water Quality Standards including antidegradation provisions, for all waters of the State. The Pinelands Commission has already incorporated compliance with the State's Surface Water Quality Standards into its comprehensive management plan. Projects involving both agencies are fairly common and the agencies discuss and coordinate their efforts.

37. COMMENT: A screening test to show whether mercury in water is at safe levels would be most useful. (27)

RESPONSE: There are two concerns with mercury in water. The first is consumption through drinking water and the second is the build-up of mercury in the tissues of aquatic organisms. Measurement of mercury in the tissue of aquatic organisms which are consumed is the best way to determine if the build-up of mercury in tissues is a problem. An alternative is to establish an ambient criterion that is low enough to prevent bioaccumulation. The only way to deal with levels of mercury in water which is consumed is through actual measurement of mercury concentrations in the water.

38. COMMENT: The DEPE should incorporate into the criteria the safety factors utilized in the determination of the criteria. This would allow a determination to be made of what is unacceptable quality as well as what is acceptable quality. The DEPE proposed that the criterion for copper should not exceed 11.8 ppb. If this number was utilized for permit limitations, there must be some factor of safety used to determine that a level of 11.8 was satisfactory or acceptable. There must be some other higher number at which the DEPE would say this water is unacceptable. (33)

RESPONSE: The DEPE identified the methodology used to develop the criteria being adopted in the Basis and Background document that was prepared in support of the proposal, mailed free of charge to everyone that was on the Surface Water Quality Standards mailing list and that was available for review by requesting a copy from the Office of Administrative Law or the Surface Water Quality Standards program within the Office of Land and Water Planning, DEPE. Once the criteria are adopted, any concentration that is higher than a specific criterion for the specified duration is considered to be unacceptable. This does not mean that adverse impacts will be seen each time a concentration exceeds the criterion. The criteria are established at levels which are intended to prevent adverse impacts from occurring. Further, the criteria are not used directly as effluent limitations, but rather are one factor in the development of effluent limitations.

39. COMMENT: The consideration of bioconcentration estimates for each compound in criteria development is not biochemically sound. It does not make ecological or biochemical sense to consider the bioconcentration potential of volatile organic compounds in aquatic systems. Typically, these compounds are toxic under acute, high concentration exposures. Low concentrations that would be associated with chronic exposures in a typical receiving stream would be further reduced via biodegradation, and volatilization. In addition, there are no accepted methods for the analysis of volatile organic compounds in fish tissue. Verification of bioconcentration of volatile organics is, therefore, not possible. (16)

RESPONSE: Studies done in the Delaware River Estuary have revealed unexpected levels of volatile organics. As stated by the commenter, it had previously been assumed that volatile organics would essentially disappear from surface waters. The findings in the Delaware Estuary studies demonstrate that such assumptions do not always hold true. Absence of "accepted" methods is different from an absence of any methods for determining levels of volatile organics in fish tissues. The DEPE must sometimes use methods that have not been formally adopted. In such instances the DEPE will define the methods to be used. However, there are widely accepted methods for estimating the bioconcentration potential of compounds. Where actual measurements of bioconcentration and/or bioaccumulation have not been done, accepted methods of estimating bioconcentration factors are used.

The "inability" to verify the bioconcentration of volatile organics using "accepted" methods does not mean that such bioconcentration is not occurring nor does it eliminate the need to regulate dischargers to prevent such bioconcentration.

40. COMMENT: It would be useful for the DEPE to identify the number of chemicals for which the DEPE adopted the USEPA criteria and the total number of proposed New Jersey criteria which are more stringent than the USEPA criteria (rather than simply identifying those that vary from the USEPA criteria by +10 percent). It is apparent from the discussion provided that the proposed New Jersey criteria are more stringent than those proposed by the USEPA. The reasons for this increased stringency should be discussed. We do not believe that evidence exists to suggest that the environment in New Jersey is especially sensitive to chemicals nor that the USEPA's approaches are flawed; therefore, it may be assumed that the DEPE's approach is simply more conservative. A justification for this increased conservatism, which is greater than what the USEPA deems necessary to protect public health and the environment, should be provided. (16)

RESPONSE: The DEPE provided the numbers of chemicals that were different from the USEPA proposed criteria by more than 10 percent in an effort to help quantify the differences between the proposals. Using this approach, if the USEPA criterion was 0.021 ug/L, the DEPE's proposed number would have to be between 0.019 and 0.023 to meet the 10 percent differential. In terms of providing treatment of determining regulatory actions, there is very little difference between these numbers. Using the commenter's suggested approach would mean that if the USEPA's proposed criterion was 0.0000019 and the DEPE proposed criterion was 0.0000018, the DEPE's criterion would be listed as more stringent. In reality there would be little real-world difference between the numbers or the regulatory implications of the two numbers. Anyone wishing to determine the number of criteria that the DEPE proposed which were more stringent than the USEPA's criteria, without regard for the magnitude of the difference, can simply compare the two proposals. Where the differences were greater than 10 percent the DEPE explained the cause of the differences in the Basis and Background document. The explanations contained in the Basis and Background document indicate the differences of more than 10 percent between the USEPA and DEPE numbers were due to the DEPE's use of more recent data, different rounding approaches, and similar reasons, rather than mere conservatism.

41. COMMENT: The proposal would change N.J.A.C. 7:14-3.14(c) to require that NJPDES permit conditions for metals be expressed as "total recoverable metal." The purpose of this modification is to allow direct

calculation of limits in the form required by 40 CFR 122.45(c). That USEPA regulation itself, however, provides for these exceptions: (a) when a standard or limit issued under the Clean Water Act specifies another form; (b) for limits developed on a case-by-case basis, when necessary to implement the Clean Water Act; and (c) when all approved analytical methods for the metal measure only its dissolved form (for example, hexavalent chromium). These exceptions are sensible, and DEPE should adopt them as part of its own rule. (19)

RESPONSE: The proposed amendment would not have changed the requirements for how metals limits are expressed in permits. It would have established the criteria in a form that would allow the direct calculation of permit limits. However, because the DEPE has decided not to adopt the aquatic protection metals criteria as proposed, the DEPE will be giving additional consideration to the form of the metal to be covered by the criteria and incorporation of provisions for site-specific criteria development into the Surface Water Quality Standards. Consideration of the need for a provision allowing metals limitations to be in a form other than total recoverable metal because of analytical limitations is being evaluated by the program in the DEPE that is revising the NJPDES regulations, and the commenter's concern has been communicated to that program. It should be noted that the form of metals limitations in discharge permits is governed by Federal regulations at 40 CFR 122.45(c). Pursuant to that regulation, metals limitations in permits are expressed as "total recoverable," except in specific, limited circumstances.

42. COMMENT: The DEPE has offered no justification for setting generic Surface Water Quality Standards for all surface waters in the State of New Jersey for the same water uses (that is, drinking and fish consumption for freshwater and fish consumption for saltwater). (16)

RESPONSE: New Jersey's surface waters are designated for a variety of uses including: potable water supply, primary contact recreation, secondary contact recreation, protection and propagation of aquatic biota, migration of fish, agricultural water supply and other reasonable uses. The language cited above (drinking and fish consumption for freshwater and fish consumption for saltwater) is taken from the USEPA toxics criteria proposal. New Jersey establishes its criteria to protect the designated uses of its waters.

43. COMMENT: Reference to the relevant scientific literature by the DEPE is nearly absent in the proposed criteria document. The scientific bases for the assumptions made in developing the proposed criteria are, therefore, difficult for the reader and affected regulated community to ascertain and understand. (16)

RESPONSE: While the proposal does not contain references to the relevant scientific literature, the Basis and Background document supporting the proposal does contain them. The proposal directed those interested in reviewing the Basis and Background document to request a copy from the Office of Administrative Law or from the DEPE.

44. COMMENT: The DEPE has an obligation to establish that the standards which it has proposed for surface water quality are related to environmental protection. The DEPE cannot hypothesize that the adoption of a lower number is the equivalent of increased water protection. Nor can the DEPE merely assume that the adoption of a lower number mandates and justifies the substantial capital expenditures which will be needed. The relationship between a proposed surface water quality standard and the environment, based on the most representative scientific data is necessary. (23)

RESPONSE: The DEPE believes that the criteria it is adopting are directly related to protecting the environment and the citizens of New Jersey who use its waters. Because the commenter did not provide an example or explanation of the type of criteria for which the DEPE allegedly established a lower number that is not related to environmental protection, the DEPE is unable to more specifically address the commenter's concern.

45. COMMENT: The DEPE should proceed to modernize its water quality standards and NJPDES permitting procedures, by utilizing the most up-to-date scientific information to: adjust USEPA's criteria; translate them into water quality standards; and, derive reasonable permit effluent limitations that will protect our environment. (45)

RESPONSE: The DEPE is engaged in a significant effort to revise the NJPDES regulations to do exactly what the commenter is suggesting. New Jersey's Surface Water Quality Standards also are continuously being modernized. For example, the DEPE has decided to postpone adoption of aquatic protection criteria for the metals so that it can incorporate water effects ratios into the criteria. As several commenters have pointed out, this recent change in the approach to regulating metals is the most up-to-date way to translate the USEPA 304(a) criteria into water quality standards and is based on the best available scientific information.

46. COMMENT: Although the DEPE has attempted to provide an explanation or written documentation (that is, "Basis for Best-Available Scientific Information Based Criteria") to support the proposed revisions or amendments of the Surface Water Quality Standards and the New Jersey Pollutant Discharge Elimination System, the commenter believes that the underlying record is neither comprehensive nor current. (45)

RESPONSE: The commenter is correct in concluding that the "Basis for Best-Available Scientific Information Based Criteria" does not provide a comprehensive or current explanation for the proposed revisions and amendments to the Surface Water Quality Standards. The cited document was not developed for that purpose, but instead to support the use of criteria not yet proposed or adopted by the DEPE. The Basis and Background document developed in support of the November 2, 1993 proposal contains the information the commenter was seeking and was available to interested parties during the comment period.

47. COMMENT: If a standard is not attainable by either ordinary or extraordinary means, then the activity that such a standard regulates become illegal, and the person undertaking such activity becomes subject to fines and imprisonment. With regard to these proposed regulations, if a surface water quality standard could not be attained, then the discharger would be forced to choose continuing an illegal activity or stopping the discharge. For example, shutting down even one major sewage treatment plant in this state would put thousands of people in non-compliance with the regulations. (8)

48. COMMENT: Criteria may not be attainable because water containing regulated parameters may not be treatable to the required levels. For most of the regulated parameters treatment to levels of less than 50 ppb would not be practicable, and in many cases would not be feasible. (8)

49. COMMENT: There are ways by which substances proposed for regulation can get into either wastewater or surface water which are not controllable by a NJPDES permittee. The atmosphere is one source which is rarely recognized. Others are generally included in what are called non-point sources. These sources can lead to non-attainability. For instance, regulated substances, especially volatile organics, evaporate in the air and then dissolve in water at a point removed from their source. Observations have shown that concentrations of less than five ppb of volatile organics found in water, especially in warm weather, frequently can only be explained by hypothesizing an airborne source. Such a source is usually uncontrollable by a wastewater discharger. Thus, a criterion for a volatile organic compound that is less than five ppb may not be attainable because of airborne pollution.

Exceedances of sodium, total suspended solids, and total dissolved solids caused by storm water runoff are common now. These proposed surface water quality standards would add many more parameters to permits whose concentrations in effluent would be uncontrollable by the permittee. (8)

RESPONSE: The Surface Water Quality Standards contain a provision providing relief from water quality-based effluent limitations when substantial and widespread adverse social and economic impacts would result from imposition of those limitations. It is hard to conceive of a situation that would better qualify for relief under this provision than the one described by the commenter. Additionally, the DEPE is working to build provisions into its NJPDES regulations to deal with this type of situation. The DEPE believes that the Surface Water Quality Standards must establish the proper target (concentration) for protecting the State's waters. The implementing regulations (for example, the NJPDES regulations) must establish the mechanisms to ensure that the Standards are applied in a consistent and reasonable manner. One issue under consideration as the NJPDES regulations are revised, is how to deal with the issue of contamination that comes into a facility with the water that is used in the facility. Providing some allowance in these situations is commonly referred to as "netting" and can be used when calculating technology-based limitations for industrial discharges. The NJPDES revisions may propose a mechanism to provide similar flexibility for water quality-based effluent limitations. Relief from contributions resulting from air deposition might also be something that would be appropriately dealt with through a similar process. This comment has been forwarded for consideration by the program working on the revisions to the NJPDES regulations.

50. COMMENT: The intent of the proposed regulations, as well as the laws on which they are based, is to bring the waters of the State back into conformity with naturally occurring quality. In fact, one of the statements of policy is: "The natural water quality shall be used in place of the promulgated Water Quality Criteria ... for all water quality characteristics that do not meet the promulgated Water Quality Criteria as a result of natural causes." (N.J.A.C. 7:9B-1.5(c)1.) However, the burden of proving that a criterion cannot be met "due to natural conditions" would be upon the permittee. (8)

RESPONSE: The burden of demonstrating that a water quality criterion could not be met due to naturally occurring levels of that substance would be on the permittee (discharger) whenever the DEPE had not already made that determination. However, as the DEPE implements its watershed approach to water quality management, the DEPE may determine whether nonconformance with the water quality criteria is a result of natural causes in a particular watershed.

51. COMMENT: None of the proposed changes in the regulations from N.J.A.C. 7:9B-1.4 through 7:9B-1.14 should be promulgated, and the existing surface water quality standards should continue in force for the time being. (8)

RESPONSE: The DEPE has decided not to adopt certain proposed criteria in response to comments submitted. However, the DEPE has concluded that it should proceed with the adoption of the rest of the proposed amendments. The criteria being adopted are intended to replace criteria already adopted for New Jersey waters by the USEPA. New Jersey's adoption of criteria will allow the State to issue variances and approve site-specific criteria, providing increased flexibility in the application of the Surface Water Quality Standards.

52. COMMENT: The proposed changes to the surface water classifications (N.J.A.C. 7:9B-1.15) contain numerous inconsistencies. (8)

RESPONSE: The DEPE is unable to determine what inconsistencies the commenter was referring to and cannot respond directly to the comment. When inconsistencies in the classification listings are specifically identified, the DEPE eliminates the inconsistencies through appropriate revisions to the listings.

53. COMMENT: All PCB congener mixtures have been evaluated as total PCBs based on toxicity data for two common mixtures, even though the environmental fate and transport characteristics and toxicity of the more than 200 congeners vary considerably based on the amount of chlorination on the biphenyl rings. These two common mixtures are not particularly representative of the range of fates related to the spectrum of PCB congeners. It would be more appropriate for the DEPE to include toxicity data for not only common mixtures, but also congeners with low and high propensities for biodegradation in aqueous media in establishing a limited number of criteria to address the entire category of PCBs. (16)

REPSONSE: The DEPE believes that it is more appropriate to base the aquatic protection criteria for PCBs on "common mixtures" of congeners rather than on uncommon mixtures. Acute toxicity is generally considered to be additive and developing individual criteria for all congener mixtures would be unworkable. Even if criteria were developed for all of the congeners, a method would have to be developed to take into account the additivity of the toxicity of the congeners. Failing to do this would result in underprotective criteria. Establishing a single set of criteria applicable to all PCBs is appropriately protective. The environmental fate and transport characteristics of PCBs are considered when permit limitations (total maximum daily loads, wasteload allocations and water quality-based permit limitations) are developed.

54. COMMENT: DEPE should reexamine its proposed Surface Water Quality Standards revisions, the underlying criteria, and justifications to assure that they are not overprotective. (45)

RESPONSE: The DEPE has reexamined the underlying USEPA 304(a) criteria and justifications in light of the comments received on the proposal. Selected portions of the proposal have not been adopted because of this reexamination. The remainder are considered to be appropriate.

55. COMMENT: Simplified or ultra-conservative procedures should not be employed in developing reasonable and appropriate water quality standards, and implementing them through the NJPDES process. (45)

RESPONSE: The DEPE believes the adopted criteria are appropriate and well founded. Other modifications of these rules that will improve the Surface Water Quality Standards have been identified and will be proposed as soon as they have been fully thought out and developed. Additionally, the DEPE is currently revising the NJPDES regulations to improve the implementation process.

56. COMMENT: The technical problems with the proposed Surface Water Quality Standards, such as non-measurability, non-attainability, and non-conformity with natural conditions, are the result of risk evaluations. In spite of the claim that these criteria are based on the "best available scientific information," they are not based on reproducible science. The only genuine scientific information that went into these criteria is the result of many toxicological studies of the effects of various doses of each substance on test animals. What has not been done scientifically, or reasonably, is the assignment of values to the many factors, other than toxicological data, that are calculated into a criterion.

There has been much discussion about the costliness of environmental regulations such as these proposed standards. An editorial in Science entitled "Regulatory Costs" (8 January 1993) implies that risk assessments done by USEPA are a root cause of the problem. John Ahearne, executive director of Sigma Xi, wrote in an article on "Integrating Risk Analysis into Public Policymaking" in Environment (March 1993, page 38): "The amount of money being allocated on the basis of misperception and poor risk analysis and the amount of pain and suffering that is being caused are quite significant." The proposed surface water quality criteria are unreasonable because the process by which they were determined was unreasonable. (8)

RESPONSE: The process by which the surface water quality were developed is an open and reasonable process. Methodologies and databases utilized by the DEPE in developing these criteria have been and continue to be readily available for review by interested persons. When comments are submitted in response to a proposal, the DEPE considers them in deciding whether or not to proceed to adoption. In the case of these amendments, the proposed aquatic protection criteria for metals are not being adopted because commenters raised valid issues which need to be dealt with in a subsequent proposal.

The DEPE is addressing the technical problems with the proposed Surface Water Quality Standards that the commenter cites in a number of ways. Non-measurability is being addressed in three ways: through the development of Practical Quantitation Levels (PQLs), by modification of the policy dealing with effluent limitations that are below the level of detection, and by revisions to the NJPDES regulations. Non-attainability is primarily a permitting issue, but it is partially dealt with in the Surface Water Quality Standards by the allowance of modifications of water quality-based effluent limitations when their imposition would result in significant and widespread adverse social and economic impacts. Risk assessments are built into the USEPA methodologies for developing criteria. The DEPE does not perform an independent risk assessment when developing aquatic protection based criteria. (New Jersey specific aquatic protection criteria are developed when sufficient data exist.) When the DEPE develops human health based criteria it reviews the risk assessments already performed by the USEPA and uses them when they are found to be valid. Otherwise, the DEPE performs its own risk assessments in developing the human health-based criteria. Finally, the Surface Water Quality Standards already address situations where the criteria are exceeded due to natural conditions. N.J.A.C. 7:9B-1.5(c) provides that where criteria are exceeded due to natural conditions, the natural water quality becomes the criteria.

57. COMMENT: Many of the inorganic substances are proposed at ug/L levels which community water systems (CWS) do not or cannot possibly meet, and hence will pass through the wastewater treatment process, are at a level which will compromise human health and welfare by interfering with the CWS disinfection process intended to produce safe drinking water, or are at a level which will generate tastes and odors during the CWS production of safe drinking water. Some inorganic Surface Water Quality Standards levels are proposed below the maximum contaminant levels of the Safe Drinking Water Act (SDWA), and others below the ambient New Jersey surface and ground water background levels, for example, beryllium and aluminum. (32)

58. COMMENT: Consideration should be given to the ambient concentrations of minerals when establishing acceptable water quality limits. Some inorganic Surface Water Quality Standards levels have been proposed below the maximum contaminant levels of the Safe Drinking Water Act, while others are below the ambient New Jersey surface and ground water background levels, for example, iron, manganese and aluminum. (44)

RESPONSE: The Surface Water Quality Standards already address situations where the criteria are exceeded due to natural conditions. N.J.A.C. 7:9B-1.5(c) provides that where criteria are exceeded due to natural conditions, the natural water quality becomes the criteria. If

criteria for specific substances are identified which do not adequately protect human health and welfare, the DEPE will act to modify the surface water quality criteria to ensure that they do so.

Some criteria are being adopted herein are below the maximum contaminant levels established pursuant to the Safe Drinking Water Act. This is appropriate because the maximum contaminant levels reflect analytical limitations and financial considerations. The surface water quality criteria, on the other hand, are established at levels which are protective of human health through consumption of water and aquatic organisms. A better comparison would be the criteria and the State "maximum contaminant level goals," which do not factor in financial or analytical considerations.

59. COMMENT: The criteria to protect aquatic animals and human health are based on their respective tolerance limits, which are much lower than the detection limits. It may be desirable to be overly conservative from a strictly environmental viewpoint, but it does no good to set a standard that is not achievable or that is tremendously costly to society to try to achieve. (3)

60. COMMENT: The standards more or less attempt to regulate at levels that are below the level of measurability or approaching the level of measurability, and we anticipate the compliance costs to be enormous. The environmental improvement that is likely to occur is viewed as being marginal, and in some cases, just not there. In the rulemaking process the USEPA has provided ample opportunity for states to strike out on their own and to do things that comply with the general purpose of the rule. New Jersey can do the things that are necessary for the State to have a fair and equitable program. (10)

RESPONSE: In some cases the criteria are lower that the detection levels of commonly used analytical methods. However, it must be kept in mind that these criteria are used as the basis for calculating regulatory limits which take into consideration the environmental fate of the substance, as well as the dilution available in the waters into which the substance is discharged. In many instances the regulatory limits developed from these criteria are above the detection level and the practical quantitation level. The DEPE is proceeding to develop PQLs and associated implementation policies to make sure that the regulations are applied appropriately. Finally, the criteria represent the goals that the DEPE is striving to achieve. These goals should be set at the levels which are necessary to protect the uses of the waterbodies, and not modified by considerations of analytical limitations, costs of compliance, or availability of treatment technologies, which are more appropriately dealt with at the implementation stage.

While the USEPA may have "provided ample opportunity for states to strike out on their own," the USEPA also adopted ambient criteria applicable to New Jersey waters on December 22, 1992, many of which are below the level of measurability and which limit the State's flexibility. Proposed criteria which are less stringent than those adopted by the USEPA must undergo two public participation processes, one at the state level and the other at the Federal level, to ensure that any less stringent criteria submitted by the states will protect the uses of that state's waters. Where criteria are not proposed by a state for a particular pollutant, the Federal criteria would remain in effect.

61. COMMENT: We support the use of appropriate acute bioassay testing to accurately assess the potential for acute impacts to the receiving stream. DEPE should withdraw the numerical acute criteria from the proposed water quality standards and instead adopt acute standards derived solely on the basis of a properly determined whole effluent toxicity, which is the most accurate assessment of aquatic toxicity.

The fundamental oversight in translating the numerical acute criteria into water quality objectives and permit conditions is the failure to regulate only bioavailable pollutants. For example, the laboratory conditions of the USEPA experiments accurately reflect the maximum toxic impacts to highly sensitive species when exposed to a highly toxic dissolved, ionic form of the metal in pure water. In the environment, such conditions rarely, if ever, exist. Depending upon varied site conditions, a preponderance of the metals in a discharge may be in an insoluble, and therefore, non-bioavailable state or be present as compounds with significantly reduced toxicity. Use of activated sludge processes by most municipalities has been demonstrated to convert and complex bioavailable metals into less toxic or non-toxic forms because the metals are exposed to very high organic carbon levels. USEPA's laboratory procedures have little relevance to regulating such effluents. Moreover, because of basic pH levels and natural complexing agents typically found in receiving waters and effluents, the highly toxic ionic metals are often only a small fraction of the actual dissolved pollutant level. This is particularly true for low dilution receiving waters where proper application of the acute criteria is most critical.

Through adoption of acute whole effluent biomonitoring, DEPE would account for these fundamental differences and properly translate the criteria into water quality standards and permit effluent limitations. USEPA has approved regulatory programs in Georgia, North Carolina and elsewhere that assess acute toxicity using acute whole effluent toxicity (WET) measurements. There is no reason that approved acute WET protocols should not be applicable in New Jersey.

DEPE, by allowance of scientifically defensible biomonitoring/bioassay methods as an alternative method of developing acute permit limits, would assure the appropriate expression of acute effluent toxicity limits as the toxic or bioavailable pollutant form. Unlike acute criteria expressed as numerical values, standards based on the bioavailable fraction of a pollutant are rationally related to the actual potential for aquatic life impacts. The commenter strongly supports this approach which would avoid costly and unnecessary pollution measures where, to quote USEPA, "in reality, problems do not exist."

Recent scientific information from USEPA indicates that instream toxicity standards may be developed on the basis of acute LC1 that are fully protective of aquatic life uses:

> [T]he study determined that the LC1 compared closely with the instream effluent dilution at the first downstream sampling site where no signficant instream effects were observed. This supports the use of the LC1 or 0.3 TUa for setting protective effluent permit limits.

USEPA recognizes the influence of mortality of control organisms on acute bioassay testing: to be valid, control organism survival must equal or exceed 90 percent. Control mortality, however, is attributed to many causes and often exceeds 10 percent. Because of unpredictable control organism mortality that often exceeds the USEPA recommended cutoff of 10 percent, the commenter believes that the use of an acute LC10 (90 percent survival) would provide the best indication of no acute instream toxicity. (11, 12)

RESPONSE: The DEPE utilizes whole effluent toxicity testing in its regulation of toxic substances. As discussed in the preceding comment, the use of whole effluent toxicity testing provides a better indication of the toxicity resulting from combinations of chemicals and changes in toxicity due to the chemistry of the water. New Jersey uses this approach to supplement, not replace, the use of chemical specific numerical criteria. Numerical criteria for toxic pollutants are used as the basis for many of the DEPE's regulatory programs, not just for the NJPDES program. Withdrawing the proposed numerical criteria and replacing them with whole effluent toxicity testing requirements would not satisfy the need for criteria in these other programs (for instance, Superfund, Hazardous Site Remediation, Pollution Prevention, Stormwater) for use in establishing requirements or to evaluate progress. Additionally, the Clean Water Act Amendments of 1987 specifically require the states to adopt chemical specific numerical criteria for toxic pollutants. The commenter's suggestion seems to be more appropriate for designing an implementation program than for determining what should be contained in the Surface Water Quality Standards.

The commenter's suggestion to regulate dischargers by the use of the LC10 in setting effluent limits is unnecessarily protective. New Jersey uses a formula for developing toxicity test based limits that reflect the dilution available in the receiving waters and result in limits that are only as stringent as necessary to protect the aquatic organisms. In situations where the calculated toxicity test based limit would require organism survival in excess of 90 percent, the DEPE imposes a limit of "no measurable acute toxicity" which is equivalent to 90 percent survival in undiluted effluent.

62. COMMENT: How do these proposed regulations impact existing legal agreements (administrative consent orders, consent decrees, etc.) between one or more parties and the State and/or USEPA, where site-of project-specific water quality limitations have previously been stipulated and those limitations may be higher or lower than the proposed Surface Water Quality Standards and/or the proposed PQLs. For instance, there are many sites that are undergoing remedial investigation or are in the process of being cleaned up to specific limitations set forth in an existing agreement. In some cases, these agreements have called for the setting or project-specific PQLs, as part of treatability

studies, to address complex matrices which are not conducive to the achievement of routine PQLs that have been determined for individual compounds in a distilled water matrix.

It would be counterproductive and disruptive to impose new criteria on these projects, and would likely result in substantial delays in project implementation, increased costs to the regulated entity, and increased administrative efforts by the DEPE, and could lead to seemingly needless litigation to determine the legal authority for superseding the existing agreements. The DEPE should address this concern carefully and clearly with regard to the impact on the regulated community before reissuing the proposed Surface Water Quality Standards. (16)

RESPONSE: Permit requirements are reviewed whenever a particular permit comes up for renewal. It would be expected that the newly adopted criteria would be considered in developing water quality-based limitations for a renewal. Because the DEPE is switching to a watershed permitting approach it is most likely that changing permit limitations to reflect the newly adopted criteria would be done for most permits when permits were developed for a watershed.

Conditions established in administrative consent orders, consent decrees, etc. are governed by the specific terms in the particular documents. In general, where these documents allow for changes in regulatory limits, the DEPE is required to develop requirements that provide for compliance with the Surface Water Quality Standards. Changes to criteria will not necessarily lead to changes in requirements that rely on general or site-specific PQLs, as such PQLs appropriately reflect analytical limitations that must be considered in the implementation process.

63. COMMENT: The footnote symbols #, ??? and + listed for Table 6 in the Basis and Background Document are not used in the table; this should be corrected. (16)

RESPONSE: In Table 6 of the final "Basis And Background Document For The 1992 Proposed Revisions To The Surface Water Quality Standards" (DEPE, October 1992) the "#" symbol appeared next to Aluminum, the "+" appeared in the criteria equation and the "???" did not appear anywhere on the Table, including the footnotes.

64. COMMENT: The DEPE indicated in the Basis and Background document that "Application factors have been used to provide the degree of protection required." What are the application factors and how was the "degree of protection required" determined by the DEPE? (16)

RESPONSE: The Basis and Background document supporting the proposal indicates (page 60) that, where the USEPA "Red Book" criteria were based on toxicity data of less than 96 hours duration, the USEPA utilized application factors to provide the "degree of protection required." As indicated in the Basis and Background document, the DEPE decided to adopt the USEPA 304(a) criteria where there was not enough information to update or develop New Jersey specific criteria. The DEPE did not select the "degree of protection required" nor the application factors needed to provide this "degree of protection." Instead, the DEPE decided that it would use the USEPA 304(a) criteria. The commenter should refer to the USEPA "Red Book" for information on the application factors and "degree of protection required," as referred to by the DEPE in its discussion of the USEPA "Red Book" criteria.

65. COMMENT: The proposed standards describe FW2 waters with uses as ". . . Public potable water supply after such treatment as required by law or regulation . . .". This description is extremely vague and invites difficulty. A reasonable level of treatment should be described for the definition so as to limit the acceptable quality of FW2 waters, otherwise exotic treatments such as reverse osmosis and granular activated carbon could be required as routine treatment. (34)

RESPONSE: The "treatment as required by law or regulation" refers to the minimum level of treatment required under the State Safe Drinking Water Act at N.J.A.C. 7:10-11.1(e)3 and 4, and Federal regulations at 40 CFR Part 141, Subpart H, which is "conventional filtration treatment." "Conventional filtration treatment" means a series of processes including coagulation, flocculation, sedimentation, and filtration resulting in substantial particulate removal. Therefore, expected FW2 water quality, as a result of permitted discharges, would be that which could be effectively treated via conventional filtration treatment and disinfection.

66. COMMENT: The State seems to rely on petitions from the public to upgrade a water body classification. We suggest that a headwaters policy be established and applied so that all headwater areas are classified consistently. (8)

RESPONSE: The DEPE is willing to explore the development of a headwaters policy, and invites the commenter to provide more information so that the DEPE can discuss and consider the subject more specifically.

67. COMMENT: It is overly restrictive to set surface water criteria which are protective of drinking water consumption for all freshwater bodies in the State, considering that (1) only a fraction are used as drinking water sources and (2) virtually all surface water used as drinking water in New Jersey is treated to reduce the chemical constituents and bacteria to acceptable levels. The DEPE's partial explanation for using this approach for surface water criteria derivation is that it is being conservative; however, as the DEPE is aware, conservatism can be carried to extremes in terms of the benefits derived versus the costs incurred. (16)

RESPONSE: New Jersey has a long standing policy, reflected in "Rules And Regulations Establishing Surface Water Quality Criteria," New Jersey Department of Environmental Protection, June 30, 1971, and subsequent Surface Water Quality Standards (now codified at N.J.A.C. 7:9B), of protecting all freshwaters for use as potable water supplies. The percentage of the surface waters currently used for drinking water is not really the relevant issue. What is really relevant is what percentage of these waters will ultimately be needed for drinking water. Recently, a water supply withdrawal was established on the Metedeconk River and the Manasquan Reservoir went into operation. In both cases, waters which had previously not been used for drinking water are now being used for that purpose. Other waters in the Sttae which are not currently being used for drinking water have been identified as the next waters to be used for drinking water supply. Ultimately, it is expected that most freshwaters will be needed to meet the potable water supply needs of New Jersey. For these reasons, the DEPE does not believe that it is overly restrictive to protect these waters for use as potable water supplies.

Treatment routinely provided to drinking water in New Jersey currently consists of filtration and disinfection. Neither consistently removes chemical constituents. Additionally, the "safe" concentrations of some toxic pollutants are below the concentration levels routinely measurable when using standard analytical procedures. Obviously, if a water purveyor does not "find" a chemical present at a level of concern, treatment will not be provided. Therefore, DEPE's policy continues to be that toxic pollutants should be regulated at the point of discharge and not at the point of use.

68. COMMENT: The proposed water quality standards list "cyanide" as a water quality criterion but does not specify the form of cyanide. In USEPA's Quality Criteria for Water—1986, data on acute and chronic testing are based on free cyanide. Also the State of Delaware's Water Quality Standards are based on "free cyanide" and the Delaware River Basin Commission Water Quality Advisory Committee recommended "free cyanide" in its report titled "Recommended Water Quality Criteria for Toxic Pollutants for the Delaware River Estuary."

There is no approved analytical procedure specifically identified for "cyanide" or for "free cyanide," USEPA methods under 40 CFR Part 136 only set forth methods for "cyanide, total" and "Cyanide amenable to chlorination" ("CN,t" and "CN,a" respectively). The compliance monitoring method for cyanide should focus on the toxic forms of cyanide. "CN,t" does not delineate the toxic forms, but includes a number of complexed species, such as iron cyanides, which are relatively harmless. The "CN,a" method was specifically developed to exclude such non-toxic forms. However, analytical chemists recommend that a third method, "Cyanide, weak acid dissociable" ("WAD") is analytically more rigorous than "CN,a." This method is described in Standard Methods for the Examination of Water and Wastewater, Section 4500-CN1 and in ASTM Standard D2036-C.

It should be noted that the "WAD" procedure will include "free cyanide" and dissociable cyanide salts. The test method for evaluating compliance with the water quality criteria should be "WAD". However if only a 40 CFR 136 method is to be used, then "Cyanide, amenable to chlorination" should be specified. (5, 36)

RESPONSE: Adoption of alternate methods for analysis of cyanide would exceed the scope of the November 2, 1992 proposal. Additionally, the methods proposed by the commenter are currently outside the approved methods listed in 40 CFR Part 136 required to be used in the NPDES program (NJPDES program per the USEPA-DEPE delegation agreement) pursuant to USEPA NPDES regulations. This limited the analytical methods that were considered by the DEPE to "Cyanide, total" and "Cyanide, amenable to chlorination."

Cyanide, as regulated under these adopted rules, is "Cyanide, total." Regulation of cyanide as "Cyanide amenable to chlorination" is not considered to be protective of the uses and may be inaccurate because

of the presence of organic substances. The commenter suggests regulating cyanide as "Cyanide, weak acid dissociable" because it is analytically more rigorous than "Cyanide, amenable to chlorination." This would seem to indicate that the commenter agrees that "Cyanide, amenable to chlorination" is not adequately protective. The commenter then indicates that, if the choices are limited to "Cyanide, total" and "Cyanide, amenable to chlorination," "Cyanide, amenable to chlorination" should be used. This recommendation appears to ignore the requirement that criteria be established at the level necessary to protect the uses. Both the commenter and the DEPE agree that "Cyanide, amenable to chlorination" is not rigorous enough to protect the uses. DEPE reaches a difference conclusion than the commenter when deciding between "Cyanide total" and "Cyanide, amenable to chlorination." DEPE has determined that "Cyanide, total" is the more appropriate analytical form, of the forms under consideration, to ensure that the criteria are protective of the uses.

Finally, Mr. Thomas J. Fikslin, Director, Estuary Toxics Management Program, DRBC, was contacted by DEPE staff on October 21, 1993 and questioned about the DRBC Water Quality Advisory Committee recommendation of "free cyanide" in its report titled "Recommended Water Quality Criteria for Toxic Pollutants for the Delaware River Estuary." Mr. Fikslin indicated that he anticipates that recommendation being changed to "Cyanide, total" based on additional research done by DRBC staff.

N.J.A.C. 7:9B-1.4 Definitions

69. COMMENT: AEA concurs with the DEPE's determination that the proposed numeric water quality standards are not appropriate for wetlands. Wetlands require a separate set of numeric criteria. The proposed regulations define surface waters to include "wetlands" (which is a defined term). Arguably, the final surface water quality standards would apply to wetlands. This is not the intent of DEPE. The final regulations should make clear that the numeric criteria do not apply to wetlands and that the DEPE will promulgate a separate set of numeric criteria for wetlands. Therefore, AEA requests that DEPE explicitly state that the final numeric criteria for surface waters do not apply to wetlands. (11, 12)

RESPONSE: The DEPE agrees that the criteria in N.J.A.C. 7:9B-1.14 are not intended to directly apply to wetlands. Language will be included, when the DEPE proposes revised criteria for metals, to clarify the application of water quality criteria to wetlands.

70. COMMENT: The definition for "surface water" in N.J.A.C. 7:9B-1.4 should be amended to include a definition of "Waters of the State," which would be consistent with the USEPA definition of Waters of the United States. The present definition of "Waters of the State" could be construed to incorporate all waters conveyed through manmade water viaducts that reside on the surface. If this is the case, the DEPE may be regulating the environment of municipal sewer systems. (18)

71. COMMENT: The proposed definition of surface waters is expanded beyond the scope and authority of the DEPE under the existing statutory framework binding the DEPE, by including within the definition of surface waters "artificial water bodies." The DEPE should define "artificial water bodies" in order to prevent arbitrary regulation of waterbodies never intended to be covered by the enabling legislation. This comment also applies to the proposed amendments to N.J.A.C. 7:9-6.3 and N.J.A.C. 7:14A-1.9. (21)

RESPONSE: NJDEPE has jurisdiction over artifical waterbodies (for example, dammed ponds, reservoirs, man-made channels). This authority comes from the Water Pollution Control Act (N.J.S.A. 58:10A-3.t) and Water Quality Planning Act (N.J.S.A. 58:11A-3.g) definitions of "Waters of the State." As defined in the Water Pollution Control Act," "Waters of the State" means,

> the ocean and its estuaries, all springs, streams and bodies of surface or ground water, whether natural or artificial, within the boundaries of this State or subject to its jurisdiction.

The definition of "surface water" is based on the definitions of "Waters of the State" contained in the laws cited above. Whether the Surface Water Quality Standards apply to lagoons, tanks, and ponds that are constructed as part of a wastewater treatment facility is determined by the DEPE on a case-by-case basis as part of Departmental deliberations on permits and other regulatory actions. Revisions to deal with such artificial waterbodies (for example, wastewater treatment works lagoons and ponds) will be considered for inclusion in the Surface Water Quality Standards as part of future revisions.

72. COMMENT: The definition of wetlands includes vadose water, which is inconsistent with the definitions of wetlands set forth in the enabling legislation at both the State and Federal level. The definition of wetlands is inconsistent with the DEPE's definition of surface waters because the definition of surface waters does not include ground water contained within the unsaturated zone, which is vadose water, while the definition of wetlands does include vadose water. Consequently, by including wetlands within the definition of surface waters, the DEPE has proposed a set of regulations which have internally inconsistent definitions. These comments also apply to the proposed amendments to N.J.A.C. 7:14A-1.9. (21)

RESPONSE: The definition of wetlands is not inconsistent with the enabling legislation at either the State or Federal level. Wetlands are areas which are inundated by either surface water or ground water at a frequency which supports the wetlands ecosystem. Waters within the vadose zone can be surface waters passing through the vadose zone as subsurface runoff. Accordingly, a definition of wetlands that includes vadose waters is consistent with the Federal and State definitions. However, the DEPE agrees that the proposed definition of wetlands is inconsistent with the proposed definition of surface waters. The DEPE is deleting vadose waters from the definition of wetlands, which will resolve the definitional inconsistency without changing the regulatory meaning of this section. Vadose waters, by definition, cannot be associated with saturated areas. Instead, subsurface runoff can pass through the vadose zone to inundate wetlands.

73. COMMENT: The definition of wetlands that is proposed at N.J.A.C. 7:9B-1.4 must be modified to indicate that "Within the Pinelands Protection Area (as defined by N.J.S.A. 13:18A-1 et seq.) wetlands are defined by N.J.A.C. 7:50-6.3. The Pinelands commission shall determine the presence and extent of wetlands based upon this definition." This definition language is necessary to provide consistency between the definitions contained in the Surface Water Quality Standards and the Pinelands Comprehensive Management Plan. The definition of PL waters should include the entire Pinelands National Reserve as defined in the National Parks and Recreation Act of 1978 (PL 95-625, Section 502). This modification is necessary to protect the resources of the entire Pinelands as required by the Federal Act. (17)

RESPONSE: DEPE proposed the addition of the definition of wetlands as a first step toward incorporation of wetlands into the Surface Water Quality Standards. Pinelands Commission staff will be included in discussions on the development of revisions to the Surface Water Quality Standards dealing with wetlands. The Legislature, in enacting the Freshwater Wetlands Protection Act, provided a specific section exempting activities within the Pinelands from needing a Freshwater Wetlands Permit. They also indicated that permits required under Section 404 of the Clean Water Act would still be required. Nothing was found in the Freshwater Wetlands Protection Act that indicated that the definition in N.J.A.C. 7:50-6.3 would govern within the Pinelands. Where there are overlapping authorities and regulations, absent specific language to the contrary, the more stringent provisions/definitions would govern. This is consistent with the historical operation of the Surface Water Quality Standards in relation to the Pinelands Commissions regulations.

No change is being made to the definition of PL waters. The definition contained within the Surface Water Quality Standards reflects the Pinelands Area as delineated by the New Jersey Legislature in the law establishing the Pinelands Protection and Preservation areas.

74. COMMENT: The definition of ground water is too restrictive. The DEPE should use a definition consistent with hydrological principles, which are also the principles generally employed by the regulated community. Failure to follow these principles will result in confusion within the regulated community concerning which program has jurisdiction over the regulated activity. This comment also applies to the proposed amendments to N.J.A.C. 7:14A-1.9. (21)

RESPONSE: The definition of "ground water" is not too restrictive and is consistent with hydrological principles and the Ground Water Quality Standards recently adopted by the DEPE (N.J.A.C. 7:9-6). It is not clear from the comment what portion(s) of the definition the commenter objects to, or what modifications would have improved the definition.

75. COMMENT: The definitions of MA1CD10, MA7CD10 and MA30CD5 should provide the method used to correlate analytical results of site specific field sampling to the concentration for the designated flow events as opposed to the generic stream data currently used. (21)

RESPONSE: The DEPE will accept calculations of the referenced flows by recognized and generally accepted methods in permitting or other DEPE actions when these flows are used. Incorporating methods

for calculating these flows into the definitions would make the definitions unnecessarily restrictive. Additionally, in New Jersey, determinations of these flows generally are made by the United States Geological Survey (USGS). The methods that the USGS uses are published and available for review by contacting the USGS, New Jersey District Office, Water Resources Division, 810 Bear Tavern Road, Suite 206, West Trenton, New Jersey 08628.

76. COMMENT: The definition of toxic substances and toxic pollutants is too expansive, since it includes "disease causing agents," without defining what is meant by the term "disease causing agents," and without setting forth any standard for determining what constitutes a "disease causing agent." (21)

RESPONSE: The definition is not too expansive because the phrase "disease causing agents" was included in the definitions in State and Federal Laws that the definition of "toxic substances" or "toxic pollutants" is based on. "Toxic pollutant" is defined at N.J.S.A. 58:10A-3 as "any pollutant identified pursuant to the Federal Act, or any pollutant or combination of pollutants, including disease causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly or indirectly by ingestion through food chains will, on the basis of information available to the commissioner, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions, including malfunctions in reproduction, or physical deformation, in such organisms or their offspring."

77. COMMENT: The Basis and Background document for the 1992 proposed revisions to the Surface Water Quality Standards states that NJDEPE is proposing a definition for "Waters of the State." The proposed N.J.A.C. 7:9B-1.4 contains no such definition. (38)

RESPONSE: The commenter is correct and the DEPE will correct this oversight through a subsequent proposal.

N.J.A.C. 7:9B-1.5 Policies

78. COMMENT: The inclusion of compliance schedules is appropriate when it is demonstrated by the discharger that new or revised water quality-based effluent limitations cannot be consistently met with the facility's existing treatment system. This will allow a facility sufficient time and flexibility to address new or revised NPDES permit limitations through waste minimization, raw material substitution, and/or additional wastewater treatment. (5, 36)

RESPONSE: The DEPE appreciates the commenter's support for this change to the Surface Water Quality Standards.

79. COMMENT: Section 301(b)(1)(C) of the Clean Water Act does not prohibit the states from establishing compliance schedules. The proposal explains that N.J.A.C. 7:9-4.5(c) is being amended to reflect DEPE's existing authority to grant compliance schedules. It concludes that Section 301(b)(1)(C) of the Clean Water Act prohibits compliance schedules to achieve limits based on water quality standards adopted before July 1, 1977.

This conclusion is mistaken: Section 301(b)(1)(C) itself incorporates compliance schedules. It applies the 1977 deadlines to "any more stringent limitation ... necessary to meet [a] schedule of compliance." Thus the purpose of section 301(b)(1)(C) is to require compliance with State water quality laws by July 1, 1977, not to prohibit schedules of compliance which themselves are properly adopted under State law.

In any event, Delaware River Basin Commission (DRBC) guidelines are not water quality standards, and they were not officially adopted as such on July 1, 1977. Therefore compliance schedules are allowed for effluent limits based on those guidelines. Even if its interpretation is correct, DEPE should clarify that DRBC guideline-based permit limits should be subject to a compliance schedule if such a schedule is otherwise appropriate. (19)

RESPONSE: The USEPA, as a result of court proceedings involving Star-Kist Caribe, Inc., notified the states that a provision should be put into their respective Surface Water Quality Standards that explicitly allows for compliance schedules for water quality-based effluent limitations. USEPA's interpretation was that inclusion of such a provision would eliminate any question about the authority of a state to issue a compliance schedule if challenged in a court proceeding.

However, it is also USEPA's position that compliance schedules are not allowed for compliance with requirements based on criteria adopted prior to July 1, 1977. The rationale is that the Clean Water Act required compliance with water quality laws (criteria) by July 1, 1977. Anyone trying to meet a requirement based on water quality criteria adopted prior to July 1, 1977 should already be in compliance with such requirements. Further, because the July 1, 1977 compliance date is statutory, the states lack discretion to provide compliance schedules.

The "guidelines" referred to are part of the water quality standards adopted by the DRBC, and are enforceable. Where water quality guideline-based limits are imposed, compliance schedules are available under the same provisions and conditions applicable to any other provision of the DRBC's water quality standards.

80. COMMENT: There was no mention in the proposed regulations of how the DEPE intends to handle the transfer in coverage from the DEPE surface water quality criteria to those outlined by DRBC in cases where the DRBC criteria are more stringent, such as for total suspended solids. In addition, the DEPE has not addressed whether the reference criteria incorporated in N.J.A.C. 7:9B-1.14(d) will be consistent with those incorporated by reference in Pennsylvania and Delaware.

A schedule for compliance with DRBC regulations, when these are more stringent than those currently required under the DEPE Surface Water Quality Standards, should be incorporated. In addition, an approach consistent with that used in Pennsylvania and Delaware, and with that expected to be adopted in the next DRBC modification, should be adopted to ensure that overly stringent requirements are not established for New Jersey facilities which discharge into the mainstem Delaware River and Delaware Bay. (22)

RESPONSE: The regulations of the DRBC and the DEPE require the application of the more stringent of the adopted regulations, which obviates the need for any transition mechanism. If a situation arises in which there is a transition from less stringent to more stringent criteria, the provisions of N.J.A.C. 7:9B-1.5(e)8, concerning compliance schedules, may apply.

New Jersey, Delaware, Pennsylvania and the USEPA are working with DRBC staff in developing the upcoming proposal to modify the DRBC Regulations to incorporate chemical specific toxics criteria and implementation procedures. The proposal is being developed in concert with other activities under the Delaware River Estuary Program and is intended to ensure that discharge requirements are developed in a consistent manner by all of the participating states.

81. COMMENT: The proposed regulations, at N.J.A.C. 7:9B-1.14(d)3, state "For all water under the jurisdiction of the DRBC where criteria are not established in DRBC's Administrative Manual—Part III, Water Quality Regulations, DEPE shall use criteria based upon the best available scientific information, in accordance with N.J.A.C. 7:9B-1.6(b)4iii and 7:9B-1.14(d)1ii to establish water quality-based effluent limitations."

This statement causes concerns because, as stated in this proposal, DRBC is currently working on a toxics criteria proposal that is expected to be out this spring for comment. The regulated community should not have to be subjected to two different set of standards that two regulatory agencies intend to promulgate. In comparing the final report of the Water Quality Advisory Committee of DRBC titled "Recommended Water Quality Criteria for Toxic Pollutants for The Delaware River Estuary" and the New Jersey proposed Surface Water Quality Standards there are some major differences in implementation of these criteria. (36)

82. COMMENT: The DEPE should coordinate with the DRBC in order to promulgate the Water Quality Standards within the same general time frame in order that a permittee will not be subjected to the conflicting requirements of the criteria. If this is infeasible, it is recommended that the DEPE stipulate in its regulations that if DRBC does not promulgate its standards within one year of New Jersey's promulgation, the DEPE will undertake consideration of the DRBC standards for NPDES permits. (5, 36)

RESPONSE: To further complicate this discussion of overlapping regulatory jurisdiction, the USEPA, on December 22, 1992, adopted criteria for toxic substances which are applicable to the mainstem of the Delaware River. The imposition of criteria by the USEPA is temporary, as stated in the USEPA proposal and adoption notices. Because of this, the DEPE did not build USEPA adopted criteria into the proposed changes to the Surface Water Quality Standards. However ongoing multistate efforts to develop and adopt criteria for toxic substances which would be applicable to the mainstem Delaware River are dealing with the same toxic substances contained in the Surface Water Quality Standards.

New Jersey is coordinating its criteria adoptions/proposals by working with Pennsylvania, Delaware, USEPA—Region II, and DRBC staff to develop uniform implementation procedures for the criteria. As part of these implementation procedures, a mathematical water quality model is being developed which would be used to derive wasteload allocations and, ultimately, permit limitations. The goal of this effort is uniform criteria and uniform implementation of those criteria by the states and

by the DRBC. This should ensure that, except in very limited instances during the proposal/adoption process, permittees discharging to the mainstem of the Delaware River are not subjected to conflicting requirements.

83. COMMENT: The proposed removal of the listed designated uses for the mainstem Delaware River and the Delaware Bay and incorporation by reference of the designated uses in Article 3 of the DRBC regulations is appropriate.

The proposed change in the surface water quality criteria for the mainstem of the Delaware River and Delaware Bay, that replaces the table containing DRBC criteria and instead incorporates by reference the criteria contained in the "Delaware River Basin Commission, Administrative Manual, Water Quality Regulations" is also appropriate. (5, 36)

RESPONSE: The DEPE appreciates the commenter's support for these changes to the Surface Water Quality Standards.

N.J.A.C. 7:9B-1.5(c)2 Design Flows

84. COMMENT: DEPE states in the Basis and Background document, "No frequency of exceedance at flows at or above the applicable design flows is allowed." Are the criteria proposing discharge limits? What is the relevance of this sentence to surface water criteria derivation? (16)

RESPONSE: The allowable frequency of exceedance is the frequency of occurrence of flows below the design flows. No additional frequency of exceedance is allowed. Because of concerns that the DEPE, through the adoption of design flows, has mandated steady state modeling, the DEPE intends to propose revisions to the Surface Water Quality Standards which will explicitly authorize the use of dynamic and/or statistical models. At the same time, the DEPE will specify the allowable frequency of exceedance to be used when running these more complex models.

The relevance of the questioned sentence to the criteria is to define how the criteria are to be implemented. In order to implement the criteria it is necessary to know the allowable duration of exposure and the allowable frequency of exceedance. The criteria, specified design flows and associated frequency of exceedance are not intended to serve as discharge limits. They are intended to be used to develop permit limits taking into consideration existing loadings from other sources, available dilution and, where possible, the environmental fate of pollutants.

85. COMMENT: Under proposed N.J.A.C. 7:9B-1.5(c)2, the design flow for acute aquatic protection criteria would be changed from the "MA7CD10" standard—minimum average seven consecutive day flow with a statistical recurrence interval of 10 years—to the "MA1CD10" standard—minimum average one consecutive day flow with a statistical recurrence interval of 10 years. The proposed regulation states that this change is intended to reflect the different exposure times associated with the criteria. Commenters fail to see the logical connection between short-term—acute—exposure standards and selecting the lowest average single day flow over a 10-year period. How many conservative assumptions need to be built into New Jersey's Surface Water Quality Standards? Many safety factors are already incorporated into the acute toxicity criteria and the MA1CD10 simply adds one more redundant layer of conservatism. (6)

86. COMMENT: The CWA Section 304(a) criteria and USEPA's "Technical Support Document For Water Quality-based Toxics Control," EPA/505/2-90-001, March 1991 (TSD) establish USEPA's position on proper criteria application. The criteria application procedures and exposure assumptions made by DEPE are not supported by the best available scientific information. Moreover, the continued incorporation of outdated stream flow assumptions (for example, MA7CD10) in the application of the criteria-only to simplify calculation procedures—dramatically increases the stringency of the criteria. The DEPE should modify these approaches to ensure criteria application is based upon the best available science. (11, 12)

87. COMMENT: The proposed Surface Water Quality Standards incorporate extremely conservative stream flow assumptions in acute criteria derivation, apparently only to simplify calculation procedures. An extreme "worst case" drought flow assumption is proposed by DEPE for acute criteria derivation:

> Acute aquatic protection criteria are designed to protect against short duration exposures and the design flow proposed for use with these criteria is the minimum average one consecutive day flow with a statistical recurrence interval of 10 years (MA1CD10)

Because the probability of occurrence of extreme "worst case" flow is remote, USEPA recommends the use of a dynamic modeling approach to establish appropriate effluent limitations. The TSD recognizes that the more representative dynamic modeling methodologies routinely produce less stringent effluent limits.

The TSD indicates that steady-state models produce results that are typically two to three times more stringent than the more accurate dynamic models. Research conducted by HydroQual has independently confirmed that steady-state (for example, MA7CD10) modeling typically produces results two to five times more stringent than dynamic models. In light of the admitted shortcomings with the historically used steady-state approaches proposed by DEPE, and USEPA's acknowledgment that the criteria are conservatively established, the DEPE should authorize statistical modeling approaches to acute criteria implementation. (11, 12)

RESPONSE: It is not clear, from some of the comments, whether the commenters were aware that the DEPE had proposed multiple design flows, intended to better reflect the exposure times of the different types (for example, acute aquatic protection, non-carcinogenic human health protection) of criteria, as recommended by the USEPA. The DEPE intends to publish another proposal that will explicitly authorize the use of dynamic and/or statistical modeling. This is seen as the most appropriate way to allow for "less conservative and more realistic" approaches to the regulation of toxic substances. Where a dynamic and/or statistical model is not available, the DEPE will continue to use the design flows being adopted herein.

88. COMMENT: There are several technical issues regarding the use of the MA1CD10 and the long term harmonic mean flow to bring to the DEPE's attention before these statistics are adopted into final regulations. Short-term stream flow events such as ice jams upstream of the gauging stations that can cut off flow for a period, mill operations and pumping from stream for fire fighting can affect the one day minimum flow, but may not significantly affect the seven-day minimum flow. The MA1CD10 for gauging stations can be computed and probably transferred to ungauged sites. However, for some gauges the flow may be artificially low due to events that perhaps are not a concern of the Surface Water Quality Standards. A standard procedure will have to be developed to deal with zero flows to have a technically defensible statistic. Additionally, the long term harmonic mean can change by several percent depending on the way data are rounded. A standard procedure will have to be developed so that consistent results are obtained from the use of gauging station information. DEPE may want to consider an alternate statistic to the long term harmonic mean which would be the 75 percent flow duration in selecting its design flow criteria. The 75 percent flow duration is presently computed for all gauging stations and transfer of this statistic to ungauged sites could probably use existing procedures. (7)

RESPONSE: The DEPE is currently working with the United States Geological Survey (USGS) on solutions to the concerns raised by the commenter. USGS will be examining flow records to determine if there is a statistical recurrence flow that approximates the mean harmonic flows on waterways in New Jersey that are similar in hydrology to the streams used in the USEPA evaluation of the mean harmonic flow. Once currently planned studies and analyses are completed, the DEPE will decide what modifications of the Surface Water Quality Standards are necessary and will propose them for adoption.

89. COMMENT: NJDEPE should consider the effective date for using low-flow statistics like the MA1CD10, MA30CD5, and the long term harmonic mean flow because these statistics are not currently available and documentation of the methods to develop these statistics at unmeasured sites is also not available. To adequately defend statistically generated flows such as these, full documentation should be developed. (7)

RESPONSE: These design flows have already been adopted for use in New Jersey by the USEPA. Consequently, no purpose is served by delaying adoption of the design flows while they are refined. As discussed in the preceding response, the DEPE anticipates revisiting this issue as additional information is generated. Until full documentation is developed, the DEPE will use flows provided by the USGS and will review comments on individual flows with the USGS. It is anticipated that in most cases the USGS estimated flows will be acceptable.

90. COMMENT: The DEPE has included the hydrological design flow-based method and has not included the biologically-based method, which provides a more precise calculation. The DEPE should include the option for a permittee to use either method. Also, because of the highly stringent criterion of MA1CD10, the DEPE should allow for adjustment of effluent flow during extended dry periods. (18)

RESPONSE: Biologically based design flows build upon the one in three year frequency of exceedance developed by the USEPA. Commenters have questioned the appropriateness of this frequency of exceedance and the DEPE believes that inclusion of explicit authorization of dynamic and/or statistical modeling is a better solution to this concern, and will be proposing a modification to the Surface Water Quality Standards which explicitly authorizes dynamic and/or statistical modeling. The question of allowing adjustment of effluent flow during extended dry periods to be factored into the development of permit limits will be considered by the DEPE in its current efforts to revise the NJPDES regulations.

91. COMMENT: The use of harmonic flow values will seriously affect the ability of surface water treatment plants to achieve safe drinking water standards. The commenter continues to endorse the use of the minimum average seven consecutive day flow as the design flow for all criteria to assure the safe yield of potable surface waters in the state of New Jersey. (31)

92. COMMENT: The proposed switch in design flows does not protect certain uses, for example, community water suppliers (CWS). CWS would have to install water treatment for the worst case when the discharge occurs at less than harmonic mean flow. (32)

93. COMMENT: The use of the unfamiliar harmonic mean flow and the MA30CD5 rather than the MA7CD10 flow, will result in increased concentrations and increased total amounts of contaminants in water supply sources. The MA7CD10 has provided acceptable flow conditions in the past. This is evident in the fact that many of the streams in New Jersey have continued to improve with its use. The need for the more restrictive MA1CD10 for biota protection is recognized. (34)

94. COMMENT: The area of the regulation that presents the greatest concern deals with the change in the flow calculations. If actual wasteload allocations and permit limitations are not available and the actual impact of utilizing the proposed new design flows cannot be estimated, it would seem prudent to retain the existing design flow of MA7CD10 for the time being. Once actual wasteload allocations and permit limitations are available they could be examined and could provide the necessary justification for a change in design flows, if warranted. (44)

RESPONSE: The apparent conflict between the design flows being adopted and the issuance of water allocations down to the MA7CD10 flow is recognized by the DEPE. This apparent conflict will be examined more closely to determine how best to resolve it. The DEPE is adopting the design flows it proposed because they more closely reflect exposures of concern and because adoption of the design flows will allow DEPE to regain permitting flexibility through consideration of variance and site-specific criteria requests. The DEPE has taken into consideration that the vast majority of existing dischargers are expected to maintain or reduce their existing levels of discharges of toxic substances as a result of the adoption of chemical-specific numerical criteria and the design flows. The only situations where the discharge of toxic substances would be expected to increase would be where a discharger seeks an expansion or a new discharge is proposed. In those limited situations where an expansion or new discharge is proposed, the antidegradation provisions of the Surface Water Quality Standards would apply and limit the change in discharge levels that could occur without a socioeconomic analysis and opportunity for public comment. Because there are few of these expansion/new discharge requests occurring, and the discharge level changes are limited by the antidegradation provisions, the DEPE believes it can adopt the design flows, even while additional evaluations are underway, without exposing water purveyors to potential penalties for exceedances of drinking water standards, and without increased health risk to the public.

95. COMMENT: The commenter supports revising the design flows for water quality criteria to better represent the averaging periods associated with the specific categories of water quality criteria. (4)

RESPONSE: The commenter's support is appreciated.

96. COMMENT: The NJDEPE should develop an implementation policy for determining receiving water design flows for assessing water quality effects of stormwater discharges. The use of critical low flows in rivers and streams is inappropriate for evaluating water quality effects of stormwater discharges, since when these discharges occur there will also be increased flow in the receiving waters. In the proposed rule, NJDEPE should add to N.J.A.C. 7:9B-1.5(c) a general technical policy dealing with stormwater and nonpoint source discharges. This policy should state that the assessment of water quality impacts of stormwater discharges will be based on site-specific analysis and not on the design flows in N.J.A.C. 7:9-1.5B(c)2. (4)

RESPONSE: Adding a general policy, as suggested by the commenter, would be too substantive a change to make on adoption of these amendments. The DEPE will consider the suggestion. However, it should be noted that stormwater and nonpoint discharges have only recently come under the scrutiny of regulatory agencies. There is little guidance or information available to use in developing the policy the commenter seeks.

97. COMMENT: The design flows in the existing and proposed regulations are not measurable in most cases. Measurement requires continuous or at least daily stream flow data for a period of about 20 years. Such data has been collected at USGS gauging stations, but they are few and far between. A NJPDES permittee cannot be reasonably expected to measure design flows at a particular discharge point, and yet these proposed regulations require that, "The following information shall be submitted by the applicant for a water quality based effluent limitation . . .: Stream analyses, which shall include a flow analysis to determine the appropriate long term harmonic mean, MA30CD5, MA1CD10, or MA7CD10 flow; . . ." (N.J.A.C. 7:9B-1.6(c)2v(1)). (8)

RESPONSE: In most situations, this requirement has been traditionally satisfied by use of flow data/estimates/analyses obtained from the United States Geological Survey. Occasionally a discharger obtains raw flow data and performs its own analysis of flows. The DEPE would accept the discharger's flow analysis, if adequate, or the United States Geological Survey's flow analysis as acceptable "stream analyses." The DEPE will clarify this section in future amendments to the Surface Water Quality Standards.

N.J.A.C. 7:9B-1.14(c)13 Averaging Periods

98. COMMENT: DEPE proposes to assess acute aquatic life protection criteria on the basis of one hour averages. This is inappropriate since the acute aquatic life criteria were determined on the basis of much longer exposures (at least 24 hours). It is axiomatic that criteria must be applied in the same manner in which they were developed. The 1985 USEPA "Guidelines for Deriving Numerical National Water Quality Criteria for The Protection of Aquatic Organisms and Their Uses" prohibit application of the criteria in a manner not contemplated by them:

> Criteria must be used in a manner that is consistent with the way in which they were derived if the intended level of protection is to be provided in the real world. Regardless of the model that is used, the durations of averaging periods and frequencies of allowed exceedances must be applied correctly if the intended level of protection is to be provided.

USEPA acute criteria are generally developed based on 48 to 96 hour exposures. In establishing its Clean Water Act Section 304(a) criteria, USEPA arbitrarily reduced "acute" exposures to one hour. DEPE has apparently adopted USEPA's one hour exposure verbatim. USEPA initially determined the 96 hour no effect concentration, then reduced allowable exposure period from 96 hours to one hour without a corresponding adjustment in the numeric criteria. Neither DEPE nor USEPA has offered any scientific basis for the reduction in exposure.

In response to comments on its "Technical Support Document for Water Quality-based Toxics Control" (USEPA, EPA/2-90-001, March 1991) (TSD) regarding the basis for the criteria averaging periods, USEPA acknowledged that

> The one hour acute averaging period was derived primarily from the data on response time for toxicity to ammonia, a "fast acting toxicant."

Even if high levels of ammonia (near 100 mg/L) exhibit certain toxicological characteristics, a scientifically defensible basis is not established to assume all pollutants are "fast acting" and establish a one hour averaging period for all pollutants. Laboratory data are available from USEPA which indicate which toxicants are "fast acting" and which are not. Research has been performed which disproves USEPA's assumption that all pollutants are fast acting. A five-fold increase in acute zinc concentrations reduces the organism acute response time by 30 percent. The acute response to zinc can hardly be termed "fast acting."

The one hour acute averaging period has incorporated unnecessary safety factors. Converting a 96 hour LC_1 (essentially a "no effect" level) into a one hour limitation effectively provides an order of magnitude safety factor to an exposure level that was considered safe originally.

Recognizing that the one hour averaging period may have incorporated an unnecessary margin of safety, the TSD suggests that permittees recalculate the criteria averaging periods and investigate the chemical-specific characteristics of a pollutant. DEPE should adopt this guidance,

and allow calculation of acute criteria on the basis of the actual exposure periods used for criteria development (for example, 24 hour acute exposure). (11, 12)

99. COMMENT: USEPA states that both acute and chronic criteria may be exceeded, at most, once in three years. DEPE, at N.J.A.C. 7:9B-1.14(c)13, on the other hand, makes no allowance for criteria exceedance at any time:

> No exceedance of aquatic life criteria shall be permitted at or above the design flows specified in section N.J.A.C. 7:9B-1.5(c)2.

USEPA developed the three year exceedance frequency policy on the basis of overly conservative estimates, and "worst case" scenarios. By proposing a "zero tolerance" exceedance frequency, the DEPE has surpassed USEPA's conservative estimates and would incorporate safety factors that are orders of magnitude greater than necessary for the adequate protection of aquatic life uses.

USEPA selected the three year return frequency to avoid major excursions above the criteria that might permanently damage the stream biota and to keep the receiving waters from being in a "continual state of recovery." The literature cited by USEPA to support establishment of a three year return interval and, consequently, use of a 7/Q/10 (MA7CD10) flow does not relate to proper application of the criteria.

The cited literature supporting a three year return frequency represented the average time necessary for a stream to recover from a severe acute event (for example, large scale fish kill from a chemical release). USEPA chronic and acute criteria, however, are intended to avoid even slight stresses. Therefore, the conclusion that a chronic exceedance may only occur once in three years has no scientific basis. USEPA estimated that, given the manner in which chronic criteria are applied, a severe acute event would occur less frequently than once in a billion years. (Delos, C., *Metals Criteria Excursions in Unspoiled Watersheds;* DRAFT (1990)) Because stream flows cannot occur much lower than a MA7CD10 flow, and permit limits equate to 95 to 99 percentile performance, the only way for an extreme acute event to occur is when a spill or accident occurs at the facility. Neither USEPA criteria nor the water quality-based program has any control or relevance to such upset events. Thus, it is apparent that the scientific basis for even a once in three year exceedance level is inconsistent with the manner in which criteria are generally applied.

In sum, the USEPA-recommended once in three year exceedance requirement does not have any technical basis when applied to chronic criteria and has, at best, questionable validity when applied to acute criteria. The proposed zero exceedance frequency is likewise devoid of any scientific basis. DEPE should allow a toxicity exceedance frequency based on a one to three year return interval. (11, 12, 13)

100. COMMENT: The one-hour averaging period for the acute criteria is overly conservative and does not consider results of 48 to 96 hour toxicity tests. Both concentration and exposure time are important, since for many toxicants the 96-hour LC50 is dramatically lower than the one-hour LC50. The one-hour averaging period is technically unsupported by the limited information presented.

The rationale for the four-day averaging period is inappropriate. Chronic toxicity tests for most species require much longer than four days. Longer term exposures are typically needed to produce ecological effects. A 30-day averaging period should be acceptable, particularly in cases where concentrations do not change rapidly. (16)

101. COMMENT: Chronic criteria are generally developed based upon long-term exposure studies (30 to 360 days). Acute criteria are generally developed based on 48 to 96 hour exposures. In establishing its criteria, USEPA arbitrarily reduced chronic periods to four days and "acute" exposures to one hour. Actually, acute criteria underwent two transformations. USEPA initially determined the 96 hour no effect concentration; it then reduced the allowable exposure period from 96 hours to one hour without a corresponding adjustment to the numeric criteria.

DEPE is apparently considering adoption of the USEPA's averaging periods for acute and chronic toxicity, as indicated by the statement on page 60 of the Basis and Background document:

> The DEPE is proposing to replace existing single number, maximum at any time, aquatic life protection criteria (identified in N.J.A.C. 7:9-4.14(c)) with acute and chronic aquatic life protection criteria as one-hour and four-day average criteria, respectively.

DEPE should avoid the verbatim adoption of improperly derived restrictive averaging periods for all pollutants. In response to comments its TSD, USEPA admitted:

> The one hour acute averaging period was derived primarily from the data on response time for toxicity to ammonia, a "fast acting toxicant."

There is no scientific basis to assume all pollutants are "fast acting" and establish a one hour averaging period for all pollutants. USEPA's assumption that all toxicants are fast acting is scientifically flawed; DEPE should not adopt this erroneous position. Research performed by Mancini (1983), cited in the TSD, verifies USEPA's assumption is incorrect. (See Mancini, J., *A Method for Calculating Effects on Aquatic Organisms of Time Varying Concentrations,* 17 Water Res. 1355-1362 (1983)) Application of a single scientific observation for one chemical is not a basis to require more stringent regulation of all other chemicals. Contrary to the TSD, which suggests that permittees recalculate the criteria and investigate the chemical-specific characteristics of a pollutant, USEPA is mandated by the Federal Clean Water Act to incorporate this type of information into the criteria.

The use of a blanket one hour averaging period for all acute standards is arbitrary and capricious. DEPE should not adopt the one hour acute averaging period without first obtaining from USEPA the specific scientific information about characteristics of each pollutant and their proper averaging period. Pending identification of such data, further action by the DEPE on the acute criteria should be stayed. Acute averaging periods should be established on the basis of 24 hour exposure.

Similarly, the restrictive four day averaging period was established:

> based upon the shortest period that chronic effects may be observed for certain chemicals. (USEPA Response to Comments, 40 CFR Part 131; 57 FR 246; Page 60880; December 22, 1992)

This regulatory approach, like the others discussed above, arbitrarily classifies all chemicals as "fast acting" even though, for many pollutants, this assumption is false.

The selection of a four day versus thirty day chronic averaging period has a major impact on the acceptable effluent limits to achieve compliance. Statistical analyses demonstrate that acceptable effluent limitations increase by a factor of two to three through modification of the averaging period. This difference would save millions of dollars in treatment costs unnecessary for the protection of aquatic life uses. Chronic averaging periods should be established on the basis of 30 day exposure.

In summary, the USEPA selection of criteria averaging periods for both acute and chronic criteria is arbitrary and capricious. DEPE should not adopt USEPA's averaging periods verbatim, where the assumptions made by USEPA are devoid of a scientific basis. (11, 12, 13)

102. COMMENT: The commenter supports the DEPE's proposal to replace the present instantaneous exposure standard with a one-hour average exposure standard for acute criteria and a four-day average for chronic criteria. This proposed amendment has ample justification, and recognizes that neither acute nor chronic impacts occur as a result of instantaneous contact with a given pollutant. (6)

103. COMMENT: The averaging periods for the aquatic life criteria that are specified by USEPA in its criteria documents and used by DEPE in the proposed rule are not specifically supported. DEPE should assign a one-day average for the acute criteria and a seven-day average for the chronic criteria. These averaging periods are consistent with the design flows used to establish permit limits. (4)

104. COMMENT: Recent sophisticated toxicological studies have shown that the critical frequency and duration of exposure (averaging periods) established by USEPA for acute and chronic toxicity could not be substantiated under ambient conditions. The DEPE should consider these studies when establishing criteria. (45)

RESPONSE: The USEPA answered questions on the averaging periods being adopted in the responses to comments contained in "Establishment of Numeric Criteria for Priority Toxic Pollutants; States' Compliance; Final Rule." (40 CFR Part 131; Federal Register; Vol. 57, No. 246; December 22, 1992; Page 60880) In its response concerning averaging periods, the USEPA indicated that the averaging periods were intended to be conservative to account for the variability in effluent quality, stream flow and other factors which result in organisms being exposed to fluctuating pollutant concentrations. New approaches, such as Mancini's, are described as promising but still under evaluation. Among the issues yet to be resolved with these new approaches are how to deal with delayed mortality and limitations on observation times. The DEPE agrees with the USEPA approach given the currently available information, but will consider this issue further as it prepares its proposal of aquatic protection-based criteria for the metals. The proposed averaging periods, which are the same as those adopted by the USEPA, are

being adopted because they represent protective averaging periods that are closer to correct than the "instantaneous maximum" averaging period contained in the 1989 Surface Water Quality Standards.

The DEPE has not reduced the frequency of exceedance to zero, as some commenters have stated, but has recognized that frequencies of exceedance are incorporated into the Surface Water Quality Standards via the selected design flows. Inherent in each design flow being adopted is a frequency of exceedance which is the frequency of occurrence of flows below the specified design flow. Specification of design flows reflects the historical reliance on steady state models in New Jersey and the expectation that steady state models will continue to be widely used for the foreseeable future. When the DEPE proposes revisions that explicitly authorize dynamic and/or statistical modeling, it will also propose the frequency of exceedance to be used in those models. This will provide the necessary frequencies of exceedance for use in both steady state and statistical or dynamic models, both of which will be used in different waters of the State when developing total maximum daily loads and wasteload allocations. In response to questions about the once in three year frequency of exceedance (which was not proposed by the DEPE), the USEPA indicated it was adopting it because it provided approximately the same level of protection as had been provided historically and because it reflected the agency's policy of taking conservative approaches to ensure adequate protection. Commenters have questioned the appropriateness of this conservative approach, but have not suggested an alternative approach, with supporting documentation, for the DEPE's consideration in the preparation of future proposed revisions to the Surface Water Quality Standards. The DEPE invites commenters to submit any studies or papers setting forth an alternative frequency of exceedance for consideration in the DEPE's ongoing efforts to improve the Surface Water Quality Standards.

105. COMMENT: DEPE has proposed USEPA's recommended averaging periods for acute and chronic aquatic life toxicity. USEPA is reexamining the frequency and duration data to determine whether the averaging periods specified in the criteria documents should be adjusted to more accurately reflect the true nature of each toxicant's effects on aquatic life. USEPA's initial thinking that all toxicants are fast-acting was incorrect. DEPE should review this information prior to adoption of design conditions, and make any adjustments that are necessary to ensure that they are not overprotective. (45)

RESPONSE: The DEPE will consider any guidance available from the USEPA concerning frequencies of exceedance and averaging periods during development of proposed aquatic protection-based criteria for metals. At the present time, the USEPA has adopted the same averaging periods that the DEPE is promulgating.

N.J.A.C. 7:9B-1.14(c)13 Criteria

Metals

106. COMMENT: New information has led USEPA to conclude that the only scientifically defensible assessment of metals toxicity to aquatic life must be made on the basis of the biologically available metals fraction. (11, 12, 13)

107. COMMENT: It is estimated that most dischargers located in New Jersey discharge into receiving waters that have less than 1:1 dilution under low flow conditions. A preliminary analysis of Section 304(l) indicates that hundreds of New Jersey dischargers will be required to achieve extremely stringent metals limitations expressed as total recoverable metals. Over 96 percent (30 out of 31 facilities) of the Section 304(l) listings in New Jersey are for metals. We believe that this represents only a fraction of the total affected population because data were not available for many other discharges. If total recoverable metals data were available, more facilities would have been placed on the Section 304(l) lists. (11, 12)

108. COMMENT: The "latest" and "best" available scientific knowledge for developing water quality standards is to rely on water effects ratios. Chemical-specific test measurements, like total metals or total recoverable metals, do not accurately predict toxicity in the natural occurring conditions of waters in the State of New Jersey. Measured in waters downstream of an outfall, the water-effect ratio is affected not only by speciation among the various dissolved and particulate forms, but also by any synergistic or antagonistic effects of other materials in the effluent and receiving water. An approach like that proposed by Maryland to incorporate a bioavailability adjustment factor into the criteria should be incorporated into the DEPE regulations so that a permit writer can develop a scale-up ratio to produce scientifically defensible permit conditions without the need to propose site-specific water quality standards. (11, 12, 13)

109. COMMENT: The DEPE should incorporate explicitly or by reference the ability to utilize the USEPA interim guidance approaches for the development of appropriate water quality-based metal limitations. The water quality metals criteria should be based on the USEPA's filterable (soluble) method. These alternatives for determining bioavailable or soluble metal methods are given by the USEPA in the reference as preferable to the total recoverable metals measurement for providing an improved determination of bioavailable metal concentrations. (5)

110. COMMENT: Measurement of metals in the total recoverable form is preferable to accepting dissolved levels with a built-in adjustment or measurement of total metal. It is unclear how acceptable levels for specific metals can be established to be protective of instream aquatic life since most data have been generated on the basis of total metal analysis and little is known about the behavior of specific metals under varying water quality conditions.

It was the consensus at the USEPA Workshop on Aquatic Life Criteria for Metals (Jan. 25-29, 1993, Annapolis, MD) that the use of total recoverable metal with adjustment based on the water effects ratio would be the most effective short-term strategy.

Since there is a lot of activity on this issue, for the short-term, water effects ratio data should be used when applying total recoverable metal criteria. Where these data are not available, or have not been determined on a site-specific basis, a 1:1 assumption should be used as the correlation between total recoverable and bioavailable forms of each metal. (22)

111. COMMENT: USEPA Interim Guidance reccognizes more flexible approaches, such as dissolved metals and biological testing, are acceptable and more appropriately protective of aquatic life than regulating the metals as "total recoverable." However, the guidance continues to support the total recoverable metals as a "reasonable approach" for applying metals criteria. Recent information from USEPA indicates the "reasonableness" of this approach should be re-evaluated. In response to a Freedom of Information Act request seeking the technical basis for correlating actual instream impacts to total recoverable metals measurements, USEPA indicated there is no scientific support for the assumption that total recoverable metals are an indicator of potential aquatic life impacts when it stated:

> [W]e have **no data**, other than anecdotes, relating toxicity in naturally occuring waters to total metal concentration ... As you are probably already aware, the most recent USEPA research does not indicate significant bioavailability for the particulate metal. The Metals Guidance thus recommends the use of dissolved metals.

This statement, alone, supports withdrawal of the proposed metals criteria expressed as total recoverable metals. Instead, the preferred methodology to protect is water effects ratios. We fully support the use of water effects ratios. (11, 12, 13)

112. COMMENT: No single issue in the proposed water quality standards is of greater importance than the accurate assessment of the aquatic toxicity of metals. The proposed regulations illustrate the DEPE's adherence to outdated science. The proposed metals criteria are expressed as total recoverable metals which USEPA recognizes overestimate toxicity in ambient waters. The ambient water conditions, under which total recoverable measurements overestimate toxicity, are prevalent in New Jersey. Application of the metals criteria as proposed will increase the costs of compliance, increase the risk of fines and penalties for non-compliance and will not improve water quality.

USEPA's latest statements of policy make clear that **all metals species** in a discharge do not contribute to aquatic toxicity, and do not require regulation. This scientific conclusion is why expressing metals criteria as total recoverable metals overestimates toxicity in ambient waters. Toxicological impacts in the aquatic environment are attributable to **only** those metal species that are in biologically available forms ("bioavailable metals"). USEPA as well as several states focus the expression of metals criteria in terms of bioavailable metals to avoid unnecessary and costly regulations of non-toxic metal forms. These developments reflect best available scientific information which refutes the hypothesis that total recoverable metals correlate to aquatic life impacts. (11, 12, 13)

113. COMMENT: The total recoverable metals approach sets limits on metals in water even if they are not bioavailable to aquatic organisms. In typical surface water conditions much of the metal is precipitated, complexed, or rendered non-bioavailable. Therefore, the proposed metals criteria as total recoverable metals for aquatic life are overly

restrictive. Since the USEPA admits that there is little scientific data to support the total recoverable metals method it is not clear why the DEPE continues to support the concept by placing total recoverable metals in the proposed criteria without any flexibility to address this issue. (5)

114. COMMENT: DEPE should withdraw the proposed Surface Water Quality Standards because adoption of the regulations as proposed cannot survive judicial scrutiny due to procedural and substantive defects in the administrative record. Defects include:

- The failure to establish water quality standards reflecting the "best available scientific information" as represented in this and prior rulemaking actions. The proposed water quality standards are not based on the current and applicable "USEPA methodology for development of section 304(a) criteria." The DEPE has failed to consider critical new information pertaining to the interpretation and implementation of the CWA Section 304(a) criteria for metals that USEPA headquarters issued on May 28, 1992. The recommendation of the Interim Guidance is that the water effects ratios method, and not ambient water measurements of total recoverable metals, is the best predictor of toxicity in ambient waters. In order for DEPE to claim to the public that the proposed regulations are based on or identical to the "best available scientific information," the final regulations must include a procedure for establishing water quality standards based on water effects ratios and the administrative record must contain the latest scientific information.
- The failure to establish water quality standards and implementing policies that are supported by substantial evidence in the administrative record. A careful survey of USEPA guidance and DEPE policies concerning interpretation of CWA Section 304(a) criteria for metals demonstrates that there is not substantial evidence in the administrative record supporting adoption of standards expressed as total recoverable metals. DEPE should withdraw the proposed water quality standards expressed as total recoverable metals and propose regulations based on USEPA's recommended methodologies (either dissolved measurements or water effects ratios). The Interim Guidance recognizes that the water effects ratio method will provide the most accurate measure of toxicity in the ambient water. The Interim Guidance provides that:

> [t]he water-effect ratio is affected not only by speciation among the various dissolved and particulate forms, but also by additive, synergistic, and antagonistic effects of other materials in the affected site waters. As such, the water-effect ratio is a much more comprehensive measure than a ratio of total recoverable metal to dissolved metal. (11, 12)

115. COMMENT: The DEPE approach for implementing criteria for metals and for measuring attainment is to measure total recoverable metals in ambient waters, and to compare such measurements to criteria. This approach does not account for differences in toxicity due to metals' bioavailability as a function of metal binding particulate matter and dissolved organic complexes and therefore it is likely that total recoverable measurements may result in overestimating the toxicity. (30)

116. COMMENT: DEPE's current approach of requiring compliance to criteria based on measuring total recoverable metals is over restrictive. This would result in a treatment design which would be in excess of that needed to protect the receiving water and would result in an inappropriate and cost prohibitive treatment design process. (30)

117. COMMENT: NYDEP is opposed to New Jersey using the total recoverable method to establish and measure levels of metals, especially copper in estuarine surface waters. The use of the total recoverable form overestimates the bioavailability of the metal, and thus the proposed standards are unnecessarily stringent. New York and New Jersey share certain waterways, therefore, it is possible that New York City will be forced to meet criteria promulgated by New Jersey with which we fundamentally disagree. We urge New Jersey to adopt the more accurate dissolved metal form already in place for certain metals in New York.

Total recoverable concentrations fluctuate with suspended solids, dissolved concentrations remain relatively constant, and thus appear to more accurately reflect actual ambient conditions. Additionally, there is no evidence of any use impairment attributable to copper in the New York and New Jersey Harbor shared by both the states. The most sensitive species on which the copper criterion was based is the blue mussel *(Mytilus edulis)*. A lack of bioavailability and impairment is indicated by the fact that the blue mussel is numerous throughout the Harbor, including within the discharge zones of the largest point sources of copper.

In light of the evidence of the Harbor unaffected by copper, the growing scientific consensus indicating that the total recoverable form for copper is overly protective, and the huge potential regional costs of compliance, promulgation of this standard for our shared waters seems unwarranted. We urge New Jersey to promulgate copper criteria based on the dissolved metal. (42)

118. COMMENT: USEPA's water quality criteria for metals, on which New Jersey's limits are based, were ordinarily derived by measuring the effects on aquatic species of the dissolved metal. Accordingly, when water quality-based metals limits are expressed as "total recoverable" metal, the limits should be adjusted to reflect the portion of the "total recoverable" metal likely to be present in the stream in dissolved form. We are aware of several states that make such an adjustment and none that do not. The adjustment is necessary to make the limits correspond to the aquatic toxicity tests on which they are based. (19)

119. COMMENT: How metals should be measured (N.J.A.C. 7:14A-3.14(c)), is a topic that should be discussed further. (8)

120. COMMENT: The bioavailable fraction of a given metal in an effluent discharge should be the focus of water quality impact considerations. That is because it is bioavailable metals (generally speaking, dissolved metals) that have potential for injury to the aquatic environment and human health. The very conservative measurement methodologies that the USEPA and the DEPE relied on in the past, however, focused on "total metals" (or "total recoverable" metals), of which the bioavailable fraction is only a subset. Nevertheless, permit writers generally assume a direct one-to-one (1:1) ratio between total recoverable metals and bioavailable metals even though the total recoverable measurement will typically include various combinations (or species) of the metals that are not bioavailable or have minimal toxicity. The consequence has been to impose unduly stringent water quality standards. Athough mixing zone policies, N.J.A.C. 7:9-4.5(c)4, can mitigate these impacts to a limited extent, an unduly stringent acute toxicity standard would generally continue to apply within the mixing zone (acute criteria may not apply within that portion of the overall mixing zone that immediately surrounds the outfall—the "zone of initial dilution").

USEPA has recently recognized the deficiencies in the measurement methodologies that have previously governed water quality standards. An example of this is USEPA's May, 1992 Interim Guidance on Interpretation and Implementation of Aquatic Life Criteria for Metals ("Interim Guidance"). While the Interim Guidance reflects USEPA's preference for measurement methodologies that focus on the bioavailable portion of toxic metals, the Interim Guidance nevertheless retained the total recoverable method as a principal (albeit not exclusive) measurement tool. A few months later, however, in September, 1992, USEPA acknowledged (in response to a request under the Freedom of Information Act) that there is little, if any, scientific basis for using total recoverable metals as an indicator of toxicity. USEPA conceded that it had nothing more than anecdotal evidence to support a correlation between total recoverable metals levels and toxicity to aquatic life. (6)

121. COMMENT: Under the DEPE's November, 1992 proposal, compliance with ambient criteria for metals would be based on "total recoverable metals." In the DEPE's February 18, 1993 document entitled "New Jersey's Surface Water Quality Standards: Issues for Discussion" (Roundtable Summary), the DEPE notes that use of the total recoverable method, although an improvement in comparison to the "total" method, is nevertheless overly stringent. The Roundtable Summary appears to endorse the "water-effects ratio" method for determining compliance with ambient criteria for metals. Commenters urge the DEPE to incorporate into New Jersey's Surface Water Quality Standards regulations the flexibility that alternative methodologies like the water-effects ratio offer. Alternative approaches adopted in other states (Georgia, North Carolina and Pennsylvania) recognize the need for flexible application of water quality criteria on a site-specific basis and flexibility in the development of water quality based effluent limits and should be evaluated by the DEPE for inclusion into New Jersey's Surface Water Quality Standards. (6)

122. COMMENT: In a March 1991 response to a Petition for Rulemaking from several industrial and municipal dischargers. USEPA stated that permit writers should "account for biologically available metals" when calculating effluent limitations for discharges of metals. Similarly, in a 1991 letter to Los Angeles County, USEPA advised the public that only the bioavailable fraction of a pollutant should be regulated and that "the most accurate approach" for applying metals criteria is to develop site-specific criteria using a water-effects ratio as described in the Water Quality Standards Handbook. The USEPA states that, compared to reinterpreting the existing numeric criterion as a

dissolved or acid-soluble standard, the water-effect ratio is a more complete and accurate site-specific adjustment of the criteria.

The water-effect ratio is the ratio of species LC_{50}s using site water for toxicity test dilution water, compared with species LC_{50}s listed in the criteria documents. This is the best science for developing water quality standards. USEPA has stated the benefit of this approach is that "the water-effect ratio is affected not only by speciation among the various dissolved and particulate forms, but also by any synergistic or antagonistic effects of other materials in the effluent and receiving water." USEPA's embrace of the water-effect ratio approach in unpublished documents is also reflected in USEPA's approval of state water quality standards incorporating this method and in published USEPA documents.

DEPE should abandon the total recoverable method and establish water quality standards based on dissolved measurements. Because using dissolved metals will more accurately replicate the laboratory experiments to develop the USEPA criteria and because water effects ratios are the "best" predictors of ambient water toxicity, water quality standards should be expressed as dissolved metals and contain an adjustment factor based on water effects ratios. (13)

123. COMMENT: The standards as proposed fail to regulate only bioavailable metals, and, as a result, fail to conform to the latest and best scientific information regarding the proper application of metals criteria. USEPA's criteria are based on laboratory experiments designed to reflect the maximum toxic impacts to highly sensitive species when exposed to a highly toxic dissolved ionic form of the metal in pure water. This combination of conditions does not exist in natural settings in New Jersey. The bulk of metals in most discharges are not bioavailable and do not threaten aquatic life uses of the ambient waters. Use of activated sludge processes by most municipalities expose most metals to high levels of organic carbon resulting in complexed non-toxic, non-bioavailable compounds. The natural conditions of receiving waters also typically contain high levels of complexing agents which minimize metals toxicity, including low dilution receiving waters where proper application of the criteria is especially important.

DEPE can account for these factors affecting metals toxicity through adoption of whole effluent biomonitoring assessments. In Virginia, Tennessee, and Texas, USEPA has approved the use of more simplified translator mechanisms using a dissolved standard as the basis and applying a scale-up to a total recoverable permit, based upon effluent and instream characteristics. This procedure is still conservative because a significant portion of the dissolved metal will likely be complexed and less toxic than reflected in the measurements. Maryland, Pennsylvania, and Georgia are proposing to adopt a translator mechanism employing the "most accurate measure" of pollutant toxicity. According to the proposals, a water effects ratio would be incorporated directly into their standards. As USEPA stated, "through operation of the procedure, State criteria could take on different values at different sites. These different values, however, would all be toxicologically equivalent, providing the same degree of protection."

The following modifications to the proposed regulations are submitted:

- Express water quality standards as dissolved metals.
- Incorporate approved translation protocols as part of the final rule, such as the one promulgated in the federal water quality standards. The translation mechanism, such as the water effects ratio approach, should set forth the manner in which to account for factors justifying an adjustment to the numeric criteria and should be applied on a stream-by-stream basis.
- Support bioassay methodologies and explicitly set forth water quality standards expressed as water effects ratios ("the most accurate approach for applying metals criteria" according to USEPA) to ensure simplified application during the permit process.
- Where water effects ratio data are not available, specify alternate procedures, preferably the dissolved approach. Where dissolved data are not available, total recoverable metals methodology should be used only as a last resort. (13)

124. COMMENT: Water quality standards should limit only bioavailable metals. The toxic form of most metals, including those metals subject to limits under the proposed standards, is usually the free metal ion, and this metals form must be bioavailable for there to be a toxicological impact. Only a very low fraction of a metal in the natural environment is in the free metal form, however, because metals naturally adhere to particulates and dissolved organics or inorganics in the water. In almost all surface waters of New Jersey, as in almost any water except pristine laboratory testing water, the toxic form of most metals comprise a small fraction of the metal in the ambient water because metals in ambient water are complexed by particulates or dissolved organic and inorganic materials.

USEPA's published guidelines endorse the use of dissolved metals measurements and regulation of bioavailable metals. The USEPA in its 1983 Water Quality Standards Handbook (Handbook) recognizes that some forms of a metal are more toxic than others and that the toxic form is most often the soluble dissolved fraction. As early as 1983, USEPA recognized that the national criteria may be "unnecessarily stringent" if applied to total metal measurements in waters where total metal concentrations include a preponderance of metal forms which are highly insoluble or strongly complexed. Instead of only applying a total metals measurement, the Handbook recommends an analysis of the total and dissolved metal concentrations when the dissolved metal is added to site water in order to determine if the metal is rapidly converted to insoluble forms or other metals forms with low bioavailability. Where complexing is found, the Handbook states that a site-specific criterion is appropriate and will probably result in less stringent criteria values.

In the Handbook, USEPA also encourages use of indicator species or resident species for derivation of site-specific criteria for metals whose bioavailability or toxicity is significantly affected by variations in physical or chemical characteristics of water. For those metals, the USEPA recommends measurement of both total recoverable and dissolved metal concentrations during toxicity testing. The conclusions of the Handbook continue to reflect current science. (13)

125. COMMENT: Criteria for metals should regulate the dissolved form of the metal. Laboratory studies which served as the basis for the USEPA 304(a) criteria for metals looked almost exclusively at the toxicity of the ionic dissolved form of the metals. Regulation of metals as total recoverable is overly protective. (45)

126. COMMENT: The DEPE should consider the guidance provided by the USEPA in its Interim Guidance on Interpretation and Implementation of Aquatic Life Criteria for Metals (May 28, 1992) in developing water quality standards. (45)

127. Metals criteria as total recoverable metals for aquatic life is overly restrictive. In laboratory testing soluble metal salts were used to develop dose/response toxicity data so that nearly 100 percent of the metal was soluble and bioavailable. In typical surface water conditions much of the metal is precipitated, complexed, or in some way rendered non-bioavailable. The total recoverable metals approach sets limits on metals in water even if they are not bioavailable to aquatic organisms.

The October 2, 1992 issue of "Inside EPA" states that USEPA admits that there is little scientific data to support its most stringent recommended method for setting metals limits in water. Since USEPA admits that there is little scientific data to support the total recoverable metals method it is not clear why DEPE will continue to support the concept by placing total recoverable metals in the proposed criteria without any flexibility to address this issue.

USEPA has recognized the need to allow alternatives methods to be utilized to derive appropriate water quality-based limitations for metals. DuPont recommends that DEPE incorporate explicitly or by reference the ability to utilize the interim guidance approaches for the development of appropriate water quality based metal limitations and the water quality metals criteria be based on USEPA's filterable (soluble) method. These alternatives for determining bioavailable or soluble metal methods are given by USEPA as preferable to the total recoverable metals measurement for providing an improved determination of bioavailable metal concentrations. (36)

128. COMMENT: The proposed surface water quality criteria are based upon toxicity data that primarily represent the dissolved form of metals. DEPE should adopt criteria that are based on the dissolved or free ion concentration of metals in the water column, with a translator mechanism to set permit limits for total metals or total recoverable metals. (4)

RESPONSE: The DEPE agrees with many of the comments and has decided not to adopt the aquatic protection-based criteria, as proposed, for the metals. This decision reflects the comments received on the proposed criteria and discussions which occurred at the USEPA meeting on criteria for metals held in Annapolis, Maryland in January 1993. Specifically, the conferees at the Annapolis meeting were of the opinion that total recoverable metals criteria, without built in modifiers, would not accurately reflect the toxic fraction of the metals in ambient waters. Additionally, when the USEPA adopted criteria applicable to New Jersey waters for the metals (40 CFR Part 131; 57 Federal Register 246; Pages 60848-60923; December 22, 1992), the proposed criteria were changed

from a total recoverable metal concentration to a total recoverable metal concentration multiplied by the water effects ratio for that metal/waterway.

The water effects ratio measures the difference in toxicity that can be assigned to the water quality characteristics of a given waterbody. Where a water effects ratio has not been developed a value of one is assigned to the water effects ratio. By leaving the USEPA criteria for metals in place until the DEPE can repropose and adopt its own criteria for metals, the DEPE is providing flexibility in the establishment of total maximum daily loads, wasteload allocations and permit limitations.

As part of the development of its new criteria proposal for the metals, the DEPE will be examining the form of the metal to be specified in the criteria. Commenters have suggested adopting the criteria for the metals as dissolved and as total recoverable. In addition, areas within New Jersey, such as the Pinelands and surrounding areas, are characterized by low pH and hardness which can make more of the total recoverable metal bioavailable. Recognizing the significance of this issue the DEPE intends to carefully consider the available approaches. The DEPE has already decided that its new criteria for aquatic protection-based metals criteria will be expressed as "concentration multiplied by water effects ratio." This will allow dischargers to have effluent limitations developed that reflect the effects of metal binding by particulate matter and dissolved organic material.

Finally, the DEPE strives to base all of its rule proposals on the best available scientific information it has at the time of the proposal. However, it must be recognized that a rule proposal is drafted six to eight months before it appears in the New Jersey Register. During this period between proposal and adoption changes can occur in the information available. Unless the changes in the information are deemed to be extremely significant the rule would proceed. To do otherwise would mean that the DEPE would not be able to propose and promulgate rules. In the case of the metals, the changes which occurred were so significant and basic that the DEPE decided to reconsider its proposed criteria. As indicated in the comments and this response, the changes were recent (the new USEPA interim guidance was issued only five months before the DEPE proposal was published, and the Annapolis conference occurred two months after the proposal was published) and significant (USEPA changed their criteria for the metals to incorporate the water effects ratio almost a month and a half after the DEPE proposal was published).

129. COMMENT: The States of Maryland, Pennsylvania and Georgia are proposing to adopt translator mechanisms employing the "most accurate measure" of pollutant toxicity. The proposals plan to incorporate water-effect ratio protocols directly into their standards. The USEPA's approval noted that "we do not see it as a marked departure from currently accepted administrative procedures." USEPA reasoned that "through operation of the procedure, State criteria could take on different values at different sites. These different values, however, would all be toxicologically equivalent, providing the same degree of protection." Accordingly, because USEPA recognizes that this approach is the best application of the criteria as intended, the AEA strongly recommends DEPE's incorporation of this concept and a similar implementation procedure into the proposed water quality standards, which would greatly reduce the administrative burdens of site-specific objectives development and avoid over regulation of metals discharges. (11, 12)

130. COMMENT: DEPE should promulgate translation mechanisms, such as the water effects ratio approach, in the final rule. The protocol(s) would apply on a receving-stream-by-receiving stream basis. By making the translator protocol a part of the water quality standards, DEPE would provide clarity and uniformity as to their application. Permittees and the public would become informed about the methods by which numeric standards are developed. Moreover, these protocols guarantee equivalent levels of protection for all receiving waters. (11, 12)

131. COMMENT: USEPA admits that "the most accurate approach for applying metals criteria is to develop site-specific criteria, using a water effects ratio, as described by the Water Quality Standards Handbook." USEPA defines these ratios as "the ratio of species LC_{50}s using site water for toxicity test dilution water, compared with species LC_{50}s listed in the criteria document." DEPE should support these bioassay methodologies and explicitly set forth water quality standards expressed as water effects ratios to ensure simplified application of the water effects ratio information during the permit process.

The development of water effects ratios is not necessary in all cases. The dissolved approach is recognized by USEPA as more conservative and protective of aquatic life uses than the more accurate approach using water effects ratios. The total recoverable approach, while not scientifically defensible is the absolute worst case assumption regarding bioavailable metals. Thus, it would be appropriate for the rule to specify that where water effects ratio data are not available, dissolved data will be used to calculate the permit translator. Where no such dissolved data are available, a 1:1 assumption will be used that total recoverable metals measurements correlate to bioavailable metals. (11, 12)

132. COMMENT: The DEPE should explicitly set forth water quality standards expressed in terms of water effects ratios and/or bioassay results to ensure simplified application during the permitting process. (13)

RESPONSE: The USEPA is in the process of finalizing a guidance document on the water effects ratio methodology. This document was supposed to be released during the summer of 1993. Current estimates by the USEPA are that it should be released by the end of October 1993. Once the USEPA publishes this formalized guidance on water effects ratios and the DEPE decides how best to incorporate the approach into the Surface Water Quality Standards, a new proposal will be issued which will propose criteria for the metals with a water effects ratio incorporated as part of the criteria.

133. COMMENT: Due to concerns that the USEPA copper criteria was unreasonably stringent because it did not address only the bioavailability of the toxic fraction, North Carolina rejected the USEPA criteria and instead adopted action levels for copper (and zinc), including whole effluent bioassay testing and chemical-specific monitoring for action level parameters. In its 1989 Triennial Review of Water Quality Standards, North Carolina reviewed the technical basis for the USEPA criteria for several metals and found that total recoverable measurements are overly protective and stated: "The continued recommendation by USEPA to utilize total recoverable metal concentrations in order to implement metals criteria that have been developed on the basis of dissolved metal concentrations is neither technically sound nor scientifically justifiable." North Carolina's proposed standards provide for an action level for copper of seven ug/L, and the state NPDES permits are based on the measurements of that portion of the dissolved instream concentration of the action level parameter attributable to the specific permitted discharger.

The data North Carolina compiled supporting its action level approach demonstrate that the action level concept is appropriate for both copper and zinc. The data reveal that aquatic life protection is being achieved in instances where ambient levels of copper and zinc exceed or are calculated to exceed USEPA water quality criteria. North Carolina examined compliance monitoring data for 12 months and found that numerous facilities were in compliance with their chronic toxicity limit while at the same time discharging levels of copper or zinc that were calculated to exceed water quality criteria instream. Additional data showed that ambient stations whose water quality was rated from good to fair to excellent based on benthic macroinvertebrate indicators have also experienced ambient levels of copper or zinc exceeding water quality criteria. (11, 12)

RESPONSE: In light of recent changes in the USEPA's position on how metals should be regulated, as reflected in the adoption of criteria for metals as "concentration multiplied by water effects ratio," the DEPE has decided not to adopt the metals as proposed. The USEPA's new approach to regulating metals incorporates the water effects ratio to allow for differences in toxicity resulting from either differences in water chemistry or sensitivity of organisms. DEPE will be able to use the USEPA "concentration multiplied by water effects ratio" metals criteria, with its built in correction factor, until new criteria can be proposed for the metals by DEPE. The DEPE will evaluate the approach that was taken by North Carolina as it reconsiders criteria for the metals.

134. COMMENT: The quantity and quality of the data for lead to not support adoption of the USEPA numeric criteria expressed as total recoverable metals. DEPE had made an effort to update or develop aquatic criteria for lead, but as the DEPE explains:

> "discussions with the USEPA (USEPA, 1990d) on the quality of the available toxicity test data and examination of the original literature containing the lowest acute toxicity values for chlordane and lead (Rao et al., 1975), indicated that the data is questionable ... The DEPE agrees with the USEPA's recommendation (USEPA, 1990d) not to use these values in the derivation of water quality criteria because of the questionable quality of the Rao data."

Because of these concerns with the quality of available data, DEPE proposed the CWA Section 304(a) freshwater criteria and a recalculated

CWA Section 304(a) saltwater criterion. Just as the DEPE and USEPA found that current data on lead toxicity is "of questionable validity," so too is the data on which USEPA relied in developing its 1984 criteria. (11, 12)

RESPONSE: The "current data" on lead toxicity that were of questionable validity were the Rao, et al data. Other data used by the USEPA to calculate the 304(a) criteria were not of questionable validity. However, the DEPE is not adopting aquatic protection criteria for the metals, at this time, as discussed in the preceding response.

135. COMMENT: USEPA first published the CWA Section 304(a) criteria for lead in 1980 and republished it in 1984. Both contain a limited database. USEPA only assessed 10 freshwater species. The lowest chronic test result was 12 ppb for Daphnia magna at a hardness of 50 mg/L. Because of the small database and statistical assumptions built into the criteria calculation methodology, USEPA calculated a chronic water quality criterion of 1.3 ug/L at 50 mg/L hardness (10 times lower).

This database has not been updated in seven years and cannot reasonably be called "the latest scientific information." It is highly probable that use of an updated and expanded database will result in a significant increase in the lead chronic aquatic life criteria. There is no reasonable basis to conclude that a lead value 10 times lower than the lowest chronic result ever measured is needed to protect aquatic life from lead impacts. (11, 12)

136. COMMENT: North Carolina, in response to USEPA's technical shortcomings in developing the lead criterion, adopted a lead criterion of 25 ug/L (as total recoverable) because:

> We believe that a standard based on an acid-soluble equivalent value of 1.3 ug/L Pb is extremely and unnecessarily overly protective, especially when considering the vast differences in Pb concentration that can be measured from the same sample, as shown by USEPA's data. Since these values can vary as much as 50-75 fold for Pb according to USEPA's data, implementing a standard of 25 ug/L measured as total recoverable metal (which is less than 20 times higher than the acid-soluble criterion of 1.3 ug/L) is sufficiently conservative and technically sound, based upon the arguments already presented.

Similar reasoning is applicable to New Jersey. Given the prevalence of lead in virtually all municipal effluents due to water distribution system corrosion (typical municipal effluent lead levels range from 15 to 50 ppb), a minor increase in the lead criteria will significantly affect treatment requirements. Until USEPA updates the species database, and recalculates an appropriate lead criteria based upon a more comprehensive species list, DEPE should follow the scientifically defensible establishment of lead criteria as was done in North Carolina. (11, 12)

RESPONSE: Inclusion of additional toxicity data can change the criteria in a number of ways. First, the additional data can identify more sensitive organisms, which would result in a more stringent criterion. Secondly, the increased number of types of organisms available for calculation will increase the value "n" in the formula, resulting in criteria which (everything else being equal) are less stringent. Third, new toxicity data on organisms previously tested may indicate that lead is more or less toxic than previously thought, due to improvements in toxicity testing procedures. Depending on what the data showed, the criteria could change to either more or less stringent, or stay the same. The DEPE is not adopting criteria for lead, at this time, and will be reevaluating the criteria for lead, using whatever appropriate toxicity data is available, before proposing new criteria.

137. COMMENT: Adoption of the numeric criteria for cadmium expressed as total recoverable metals is not supportable. This expedient approach fails to account for the fact that different forms of cadmium exert toxicity and that certain species are more sensitive to cadmium than others. USEPA noted that, in both fresh and salt waters, particulate matter and dissolved organic material "may bind a substantial portion" of the cadmium. The presence of these materials makes a direct transfer of the USEPA "Gold Book" criteria for cadmium expressed as total recoverable metal scientifically indefensible. USEPA further noted that "different species exhibit different sensitivities to cadmium, and many other factors might affect the results of tests of the toxicity of cadmium to aquatic organisms." The calculated national criteria were reduced by a factor of 2.5 specifically to protect rainbow trout. Additionally, the two most sensitive species tested are trout and salmon (cold water species). All other warmwater species are five to 10 times less sensitive. Recalculation of the cadmium criteria for non-trout waters would result in a criterion of 12.0 ug/L at 50 mg/L hardness. The final water quality criteria should account for these factors. (11, 12)

138. COMMENT: Recognizing the importance of considering resident species exposure, Arizona and North Carolina have deleted cold water species from the calculation of cadmium criteria, establishing separate warmwater criteria five to 10 times higher than USEPA's cold water based criteria. Consistent with other states' approaches, New Jersey should establish a warmwater cadmium criterion because a less restrictive criterion is acceptable and protective for warmwater fisheries. Recalculation of the criterion would yield a ten-fold increase for warmwater fisheries. (11, 12)

RESPONSE: The DEPE has examined the feasibility of developing warmwater criteria for cadmium. Based on a literature search performed during the summer of 1993 there does not appear to be enough toxicity data on enough species to allow calculation of warmwater criteria following the 1985 methodology. In addition, the USEPA considered this comment as part of their adoption of criteria for selected states, including New Jersey. The USEPA concluded that it "had no scientific basis to develop separate cadmium criteria based on the division of aquatic species into coldwater or warmwater types." Among the considerations supporting this conclusion was the finding that "a review of toxicity data in USEPA's criteria document does not indicate that the sensitivities of so-called coldwater or warmwater species differ significantly." (Federal Register; Vol. 57, No. 246; December 22, 1992; Page 60882) the DEPE will reexamine this matter in preparing its new proposal of criteria for the metals, which is expected to be published in 1994.

139. COMMENT: USEPA notes that zinc is one of the most mobile and widely used of the metals and is also an essential micronutrient for all living organisms. The natural weathering of bedrock "gives rise to zinc in surface water." Concentrations of zinc in uncontaminated fresh water are typically in the range of 0.5 to 10 ug/L. Complexes of zinc with the common ligands of surface waters are soluble in neutral and acidic solutions, so that "zinc is readily transported in most natural waters." The toxicity of zinc is influenced by a number of chemical factors "including calcium, magnesium, hardness, pH, and ionic strength." The criteria document states "these factors appear to affect the toxicity of zinc either by influencing the availability of zinc or by inhibiting the sorption or binding of available zinc by biological tissues." Accordingly, DEPE should propose adjustment of zinc numerical criteria given the level of organic material present in New Jersey waters. Alternatively, zinc criteria should be specified in terms of bioavailable metal because of the significant ameliorative influences of pH and TOC on detoxification of the dissolved metal species.

The zinc ion (+2) is the primary source of aquatic toxicity due to zinc. Other forms of zinc are not toxic or have little toxic impact. Measuring zinc as total recoverable regulates the non-toxic as well as toxic forms of the metal. DEPE should amend the proposed zinc standards. The zinc criteria should be pH dependent. Moreover, the USEPA zinc criteria document states "in the presence of dissolved organic materials, particularly humic substances, the major fraction of dissolved zinc is in the form of zinc-organic complexes." DEPE should eliminate non-resident species data for zinc toxicity and recalculate criteria based on the effect of the bioavailable toxic fraction on resident species. (11, 12)

RESPONSE: The DEPE will be proposing aquatic protection-based criteria for the metals, including zinc, in 1994 with the water effects ratio built into the criteria. This will ensure that the criteria accurately reflect the toxicity of the metals in specific discharge and receiving water situations. Whether pH dependent criteria for zinc will be proposed depends on whether the available data are sufficient to define the relationship between pH and zinc toxicity. The USEPA concluded that "there is inadequate data on enough species and conditions to adjust for all important factors." The DEPE will examine the literature to see if additional studies are available that might define the relationship between pH and zinc toxicity. However, by incorporating the water effects ratio into the criteria the effects of pH will be accounted for.

140. COMMENT: The criteria for mercury should be established within the Surface Water Quality Standards as trigger levels which will indicate when testing of edible fish tissue is necessary to detect methyl mercury and not "total recoverable mercury." This approach will then be consistent with the USEPA's mercury water quality criteria for New Jersey which basically states (in footnote (i) of table found at 40 CFR 131.36(b)(1)) that if a chronic criterion for mercury is exceeded, the state should analyze edible aquatic life tissue to determine if the FDA methyl mercury standard of 1.0 mg/kg is exceeded. If the FDA standard is exceeded, then the State must take further action to reduce mercury concentrations in edible fish tissue. (5)

RESPONSE: The commenter has misinterpreted the USEPA mercury criteria as being only trigger levels. USEPA's mercury criteria are enforceable ambient water quality criteria. The difference is that if the mercury criteria are exceeded more than once in three years there are additional actions required to safeguard the public. The first of these additional actions is fish tissue sampling to determine if mercury contamination of aquatic organisms exceeds the FDA standard. If the FDA tissue level standard is not exceeded, the State must only take steps to ensure that the criteria are not exceeded more frequently than once every three years. If the FDA tissue level standard is exceeded the State must: 1) notify the appropriate USEPA Regional Administrator; 2) initiate revision of the mercury criteria to prevent such tissue contamination; and (3) take appropriate actions to protect human health (for example, issue fish contamination advisories for affected areas). The DEPE is not adopting aquatic protection-based criteria, at this time, and will consider the need to incorporate a mandatory aquatic organism tissue testing provision into the Surface Water Quality Standards when developing its new criteria proposal for mercury.

141. COMMENT: The final water quality standards should ensure that the criteria-based water quality standards are expressed in the same pollutant form assessed in the documents (for example, cupric ion for copper, Arsenic III or simply "bioavailable metals"). Thus, the standards will become dissolved, ionic, and readily bioavailable standards, as appropriate. Such a rule assures regulation of the correct pollutant form (11, 12)

RESPONSE: The DEPE will be proposing metals criteria expressed as "concentration multiplied by water effects ratio." This ensures that the criteria relate to "bioavailable metals."

142. COMMENT: The proposed water quality standards for arsenic are identical to the national criteria for arsenic (III). Because there is no national criteria for arsenic (V), the DEPE "decided to propose the criteria for the more toxic form, arsenic (III), as criteria for arsenic (total recoverable), in N.J.A.C. 7:9-1.14(c) in order to be protective." Apparently the DEPE decided to propose overreaching criteria for expediency rather than apply the best available scientific information and without regard for the cost implications of its proposal. Regulating all forms of arsenic under the stringent requirements of the most toxic form when DEPE knows that the different forms have varying toxicities is arbitrary and capricious. (11, 12)

RESPONSE: The DEPE decided to propose criteria for arsenic expressed as total recoverable because the USEPA metals guidance described the total recoverable approach as reasonable and protective and to simplify the development of permit limitations. This decision resulted in a single "arsenic, total recoverable" listing in the criteria table instead of separate listings for "arsenic (III)" and "arsenic (V)." The total recoverable method of analysis does not allow determination of the concentrations of arsenic (III) and arsenic (V) separately. The DEPE proposed criteria concentrations for arsenic using the concentration value for arsenic (III) because there was no other concentration value available. The DEPE will reexamine this matter in preparing its new proposal of criteria for the metals, which is expected to be published in 1994. If the DEPE proposes criteria for arsenic in a form other than total recoverable it will reevaluate how to select the apropriate criteria concentration.

143. COMMENT: DEPE cannot scientifically justify the blanket adoption of numerical criteria for metals as water quality standards expressed as total recoverable metals, without consideration of site-specific factors such as resident species (particularly for cadmium and zinc) or instream complexing effects (particularly for copper). DEPE should consider all factors USEPA has identified in the criteria as relevant to the toxic impact of the metals when deriving numerical water quality standards. Because DEPE has not engaged in this exercise, the proposed numerical water quality standards should be withdrawn and adjusted accordingly. (11, 12)

RESPONSE: In response to the many comments submitted regarding the proper form for metals criteria, the DEPE has decided not to adopt the proposed aquatic protection-based criteria for the metals. The water effects ratio has become an important and accepted modifier of criteria because it measures the net effect of all of the various site-specific factors on the toxicity of a pollutant in a specific waterbody. Where clear relationships have been developed for particular factors (for example, water hardness on the toxicity of certain metals), the criteria will reflect that relationship. Otherwise, the DEPE will rely on the water effects ratio approach to account for these factors. The DEPE intends to propose, in 1994, aquatic protection-based criteria for the metals which will be expressed as "concentration multiplied by water effects ratio."

144. COMMENT: The establishment of the new terminology "total recoverable metal" is likely to be confusing to the regulated community from an analytical perspective, even though there does not appear to be any difference in the analytical testing procedures intended to be used for determining "total metal." (16)

RESPONSE: The term "total recoverable metal" has been widely used for many years. It is included in the USEPA regulations, at 40 CFR 122.45(c), that require National Pollutant Discharge Elimination System permit limitations for metals to be expressed as "total recoverable metal", with a few exceptions. The difference between the "total metal" and the "total recoverable metal" methods is that the "total metal" method provides for more rigorous digestion of the sample prior to the analytical determination.

145. COMMENT: N.J.A.C. 7:9B-1.14 does not explain what *"e"* represents in the metal formulas. (9)

RESPONSE: The mathematical symbol *"e"* is the mathematical constant used as the base of natural logarithms and has a value of approximately 2.7182818.

146. COMMENT: DEPE criteria are being written and based upon the total recoverable form of metals. Limits derived for toxicants in the soluble form or biologically available form should be considered. DEPE should address this issue and give guidance on developing limits only for bioavailable forms of pollutants. (16)

RESPONSE: The DEPE has decided not to adopt aquatic protection-based criteria for the metals at this time. When new criteria are proposed they will be expressed as "concentration multiplied by water effects ratio." This ensures that the use of the best available method for regulating the metals can be used without further administrative proceedings.

Aquatic Criteria—General

147. COMMENT: In the ambient waters of New Jersey, the actual toxicity of a pollutant varies significantly from the laboratory results on which the criteria are based. The variable factors controlled in the experiments (hardness, pH, TOC, temperature, presence of organic and inorganic complexing materials) exert significant influences on the toxicity of the pollutant. The presence of these factors in a receiving water warrants site-specific adjustments to the toxicological relationships identified in the USEPA Gold Book and CWA Section 304(a) criteria. (11, 12, 13)

148. COMMENT: In addition to performing the experiments in a pristine environment, the toxicological tests assumed that the receiving water is or can reasonably be populated by species that are known to be pollutant sensitive and that the exposure to the pollutants will occur during the critical life stage of that organism. Site-specific adjustments to criteria are appropriate (and in fact called for by USEPA) in circumstances where either assumption about resident species is not correct. (11, 12, 13)

RESPONSE: USEPA has conducted a series of field applicability studies to determine the correlation between chemical specific criteria and receiving water impacts ("Technical Support document for Water Quality-based Toxics Control," USEPA, EPA/2-90-001, March 1991, page 2). These test results indicate a good correlation between the laboratory concentrations and expected field results. The criteria values developed from the laboratory testing provide an acceptable level of accuracy and represents a technically acceptable approach.

The DEPE agrees with the commenter that the variable factors cited can affect the toxicity of a pollutant. DEPE proposed water quality dependent acute and chronic aquatic criteria where sufficient and applicable relationships were found between the variable factors and the toxicity of the pollutants (for example, the criteria for pentachlorophenol were developed taking pH into consideration). The development of site-specific criteria may be appropriate for certain waterbodies and pollutants. Although the current Surface Water Quality Standards do not prohibit the development of site-specific criteria, the rules do not explicitly authorize them and do not contain guidance for the development of such criteria. In the February 1, 1993, notice in the New Jersey Register of the Interested Party Review of anticipated changes to the NJPDES and Surface Water Quality Standards regulations, the DEPE stated that it was working on amendments to the Surface Water Quality Standards that would specifically allow for the development of site-specific criteria. DEPE is, however, waiting for issuance of the final USEPA guidance

regarding the development of water-effect ratios for metals before proposing the provison specifically allowing the development of site-specific criteria and providing guidance for the development of such criteria.

149. COMMENT: Data requirements of state-specific criteria for the protection of aquatic life should reflect state-specific diversity. Requiring data on no less than eight families of organisms common to New Jersey for each chemical eliminates nearly all chemicals from criteria development, and is not scientifically valid for use in the development of individual state standards. (Harris)

150. COMMENT: The USEPA methodology for calculating numerical water quality criteria for protection of aquatic organisms is developed to account for nationwide variability in species diversity and number. New Jersey specific criteria should be developed based on an appropriate data set that adequately adresses the variability in species diversity and number of organisms in the State of New Jersey, **not the entire nation**. (16)

RESPONSE: USEPA has considered alternate methods for calculating aquatic life protection criteria. The present methodology was developed by a USEPA guidelines committee, was subject to outside public and peer review, and is a reasonable technique. The criteria are developed with as large a data set as available. The guidelines generally require eight separate families that represent a wide variety of taxonomic and functional groups of organisms for derivation of acute criteria. This is done in order to protect the variety of aquatic organisms and the organisms' uses of the waterbody. The commenters should note that as the data set grows it provides additional confidence that the more sensitive organisms have been tested and that the criteria are protective. As the database becomes more robust, multipliers used to account for statistical uncertainties are reduced, and the stringency of the criteria are more directly related to the available toxicity data. Criteria developed using this method may also be lowered to protect specific recreationally or commercially sensitive species.

Ideally, New Jersey's surface water quality criteria would be developed using resident species. However, adequate data are not available at this time. It should be noted that the family distributions utilized by USEPA in the 304(a) criteria are expected to generally represent the family distribution present in the State. The guidelines are presently under review and until USEPA alters them, the DEPE has decided it is appropriate to use the same family distribution.

151. COMMENT: Recent sophisticated toxicological studies have shown that environmental conditions more often than not diminish rather than magnify the toxicity of many pollutants, particularly metals. The DEPE should consider these studies when establishing criteria. (45)

RESPONSE: While the commenter's statement accurately reflects some studies, it is generally accepted that the acute effects of multiple toxics in a waterbody are additive. In addition, certain environmental conditions found in New Jersey waters, such as the low pH of waters in the Pinelands and surrounding areas, magnify the toxicity of certain pollutants (for example, the metals). When site-specific information is available, the DEPE can take these effects into consideration as it establishes criteria. Most of the time, these effects will be addressed when site-specific criteria are developed for particular regulatory cases or watersheds.

152. COMMENT: In the Basis and Background document the DEPE states, "Because of the lack of acceptable toxicity test data on a distribution of species meeting the updated method, the DEPE is also proposing the USEPA 304(a) criteria for the other sixteen toxic substances reviewed in detail." This statement is entirely vague. The DEPE must clearly state what "acceptable" toxicity test data means. Does "updated method" refer to USEPA methodology? (16)

RESPONSE: The intended meaning of the quoted statement is that DEPE did not have available to it enough acceptable toxicity data to calculate New Jersey-specific aquatic life protection criteria for 16 of the 18 chemicals listed in Table 7 of the Basis and Background Document using the method described in the 1985 USEPA guidelines, entitled Guidelines for Deriving Numerical National Water Quality Criteria for The Protection of Aquatic Organisms and Their Uses (1985 National Guidelines). The 16 chemicals are benzene, carbon tetrachloride, chlorobenzene, 1,2-dichlorobenzene, 1,3-dichlorobenzene, 1,4-dichlorobenzene, 1,2-dichloroethane, 1,1-dichloroethylene, trans-1,2 dichloroethylene, methylene chloride, PCBs, tetrachloroethylene, 1,2,4-trichlorobenzene, 1,1,1-trichloroethane, trichloroethylene, and vinyl chloride. The DEPE therefore chose to propose for adoption the USEPA 304(a) criteria for these parameters.

The acceptability of data is based on the quality of the data and ecological relevance of the test methods. The 1985 National Guidelines discuss the minimum standards that toxicity tests must meet in order for the data to be considered acceptable. These include such things as acclimation time, feeding loading limitations, temperature measurements, length of the test, specific end points, etc. The DEPE generally judges the acceptability of data by these guidelines.

153. COMMENT: In reference to Table 6, in the Basis and Background document, the DEPE must specify why some criteria are developed by the 1976 Red Book, while others are taken from the USEPA 1985 method or the USEPA 1991 proposed rule. (16)

154. COMMENT: The methodologies for the determination of acute and chronic criteria must be presented. In addition, the number and type of studies used to develop each criterion should be presented. This information is required for comment on the appropriateness of the "acute" and "chronic" criterion determination. (16)

RESPONSE: The methodology used for the determination of aquatic criteria was presented in the Basis and Background document for the proposal in the discussion beginning on page 60. DEPE stated that it followed the method developed by USEPA and described in detail in the 1985 National Guidelines. The DEPE utilized this method in an attempt to develop New Jersey specific aquatic life protection criteria for the chemicals listed in Table 7 of the Basis and Background document. Since adequate data were not available to develop New Jersey-specific aquatic life protection criteria using the 1985 National Guidelines, the DEPE attempted to update the national criteria using the 1985 National Guidelines for those parameters. There were not adequate data for updated national criteria either, so DEPE decided to propose for adoption the national aquatic criteria that the USEPA published in 1980. The aquatic life protection criteria published using the "Guidelines for Deriving Water Quality Criteria for Protection of Aquatic Life and Its Uses," (1980 National Guidelines) Federal Register, November 28, 1980, volume 45, no. 231 Appendix B, include values for aldrin, gamma-BHC, chlordane, 4,4'-DDT, dieldrin, endosulfans, endrin, heptachlor, and silver. These criteria were developed by USEPA using methods published in the 1980 National Guidelines. Complete listings of the studies utilized by USEPA in calculating all of the aquatic life protection criteria may be found by referring to the individual 304(a) criteria documents, or the 1976 USEPA "Red Book." These documents are on file at the DEPE offices in Trenton and may be examined by contacting the Surface Water Quality Standards Program at (609) 633-1179. It should be noted that the DEPE proposed the most recently developed USEPA aquatic life protection criteria, whether they came from the 1976 "Red Book," or the more recent individual 304(a) criteria documents.

155. COMMENT: The acute aquatic life criteria for pesticides are those which were presented as "Final Acute Values" in the USEPA's 1980 water quality criteria documents. It is believed that these values should be divided by two to make these criteria consistent with criteria for other parameters. (14)

156. COMMENT: The DEPE proposed surface water criteria for aldrin, gamma-BHC, chlordane, 4,4'-DDT, dieldrin, endosulfans, endrin, heptachlor, and silver that are based on the 1980 USEPA 304(a) criteria. These criteria are two times higher than the criteria that would result from application of the more recent 1985 National Guidelines for developing numerical aquatic protection based criteria. (The proposed criteria are equivalent to Final Acute Values which the 1985 National Guidelines indicates should be divided by two to arrive at the ambient criteria.) What is the scientific justification for this decision? If DEPE is simply waiting for USEPA to dictate its approach, why is it proposing these criteria? (16)

RESPONSE: As the commenters have noted, some of the aquatic life protection criteria are based on the 1980 National Guidelines. These guidelines produce final criteria which are instantaneous values, as contrasted with a continuous maximum concentration (CMC), produced using the 1985 methodology which represent one hour averages. The 1985 method requires a broader taxonomic distribution when compared to the 1980 method and the 1980 method does not call for dividing the final acute value by two. USEPA has suggested that states **may** divide the 1980 final acute values by two to **approximate** the CMCs calculated using the 1985 method. However, the DEPE decided not to divide the 1980 criteria by two because of the age of the underlying database and differences in species composition requirements between the two criteria calculation methodologies. These criteria are protective of aquatic life and scientifically sound. Nevertheless, the DEPE notes that the

methodology for development of criteria is evolving, and as new studies and methodologies become available, the DEPE will update these criteria accordingly.

157. COMMENT: The DEPE provides no basis for the proposed freshwater or the saline water acute aquatic protection criteria, which are one half of the currently promulgated USEPA criteria. The DEPE must justify the rationale as to the proposed criteria being more conservative than those of the USEPA. (16)

RESPONSE: The freshwater and saltwater acute aquatic protection criteria concentrations that DEPE proposed are not more conservative than those the USEPA promulgated. In fact the freshwater and saltwater acute aquatic protection criteria concentrations are the exact criteria concentrations adopted by USEPA.

158. COMMENT: The DEPE should adopt only the criteria which are proven to be scientifically sound and needed to protect the designated uses of the State's waters. (5)

RESPONSE: The DEPE believes that all of the criteria adopted herein are scientifically defensible and are needed to protect the designated uses of the waters of New Jersey. Those criteria proposed but which the DEPE believes were not scientifically defensible are not being adopted at this time and are being reexamined for subsequent reproposal.

159. COMMENT: It is unreasonable to require certain surface water quality criteria to be lower than the ambient level that occurs naturally because of the geology of the surface water drainage basin or ground water aquifer. (32)

160. COMMENT: Several of the proposed criteria, such as those based on chronic aquatic toxicity for aluminum, copper and zinc, may be lower than naturally occurring levels in some waters of the State. We know that the criteria for arsenic and mercury in sea water (SC) are less than the normal concentrations of these elements in sea water. (8)

RESPONSE: The DEPE is aware that, in certain waterbodies of the State, naturally occurring levels of toxic parameters may exceed the surface water quality criteria. However, most exceedances of the surface water quality criteria are due to man-induced conditions and are not naturally occurring. The Surface Water Quality Standards already contain a provision (N.J.A.C. 7:9B-1.5(c)1) applicable to situations where exceedances of the criteria are the result of natural causes. It states "The natural water quality shall be used in place of the promulgated water quality criteria of N.J.A.C. 7:9B-1.14 for all water quality characteristics that do not meet the promulgated water quality criteria as a result of natural causes."

161. COMMENT: It appears that the proposed Surface Water Quality Standards are geared to protecting aquatic life rather than improving surface water quality for the production of drinking water for people and the recreational use of our rivers by our citizens. (32)

162. COMMENT: The Surface Water Quality Standards should not be set at levels below those required by the Safe Drinking Water Act. The Surface Water Quality Standards should be set at levels that recognize the needs for safe drinking water is a greater need than the needs of fish. (32)

RESPONSE: The commenter apparently misunderstands the purpose of the criteria contained in the Surface Water Quality Standards. The criteria are designed to protect the designated uses of waterbodies. Examples of designated uses include drinking water supply, primary contact recreation, shellfish harvesting, and maintenance, migration and propagation of the natural and established biota. A complete listing of the designated uses may be found at N.J.A.C. 7:9B-1.12.

Aquatic life protection criteria may be more stringent than human health protection criteria for certain pollutants when the aquatic organisms have proven to be more sensitive than humans to those pollutants. Conversely, human health protection criteria for certain pollutants may be more stringent than aquatic life protection criteria when humans have proven to be more sensitive than aquatic life. The DEPE's goal is to protect both human health and aquatic life through proper implementation of the surface water quality criteria.

Human health protection criteria contained in the Surface Water Quality Standards may also be set below (are more stringent) the criteria in the SDWA because the surface water quality criteria take into consideration protection of human health through consumption of water, as done pursuant to the SDWA, and aquatic organisms (fish, shellfish, etc.) by specific factors (for example, bioconcentration factors) for each chemical. Criteria established pursuant to the SDWA use a generic factor to account for exposure from all sources other than drinking water. When the bioconcentration factor for a chemical is high the Surface Water Quality Standards human health criterion for that chemical is likely to be more stringent than the corresponding SDWA criterion.

163. COMMENT: In 1988, USEPA identified three options the states could follow to satisfy the requirements of the Clean Water Act (CWA) ("Guidance for State Implementation of Water Quality Standards for CWA Section 303(c)2(B)," Office of Water Regulations and Standards, Washington, D.C., December 1988). Option one is for the states to adopt the §307(a) toxics criteria in toto. Option two is for the state to adopt specific criteria as needed to prevent interference with designated uses. Option three is for the states to adopt narrative water quality standards, with a translator mechanism to derive numeric criteria. In the proposed rule, DEPE has elected to establish surface water quality criteria using USEPA's Option one.

Of the three options, Option two, which allows a state to adopt criteria only for those pollutants that reasonably could interfere with designated uses, most closely meets the intent of Congress to address problem areas or "toxic hot spots." Both Option one and Option three go beyond the intent of Congress and should not be used by DEPE to adopt water quality standards.

The basic premise of Option two, that a state be allowed to set toxic pollutant criteria individually by water segment where pollutants are known to be present or are discharged and could reasonably be expected to interfere with designated uses, is supportable.

DEPE's selection of Option one, which requires a state to adopt criteria for all toxic pollutants for which USEPA has recommended criteria, is not supportable because 303(c)(2)(B) requires criteria to be adopted only where "the discharge or presence ... could reasonably be expected to interfere with those designated uses." Option one, which requires adoption of criteria for all §307(a) pollutants regardless of need, is an erroneous interpretation of §303(c)(2)(B) and should not be used. New Jersey has not made a finding that criteria for all §307(a) pollutants are required to meet the goals of the CWA. (4)

164. COMMENT: DEPE is knowingly adopting certain numeric criteria pursuant to Option one that it believes are not scientifically supported. (4)

165. COMMENT: Although USEPA recommends that states using Option one provide for water quality standard variances and site-specific criteria methodology to allow some flexibility, and DEPE has proposed such procedures, variances and site-specific criteria are difficult to obtain "after-the-fact" because of the presumptive applicability of the Option one criteria. (4)

RESPONSE: New Jersey did not elect to follow Option one. New Jersey has a large number of publicly owned treatment works and industrial and commercial dischargers producing, using or handling a wide variety of chemicals or chemical by-products that are discharged to waters of the State. As a result, the DEPE felt it necessary to propose and adopt criteria for as many pollutants as there existed scientifically sound USEPA §304(a) criteria. This was done to assist the NJPDES permitting program and the various other DEPE programs (for example, Publicly Funded Site Remediation) involved with remediation projects which regularly use surface water quality criteria in developing regulatory limits. Additionally, New Jersey has the greatest number of contaminated sites listed under the Federal Superfund program of any of the states. Finally, New Jersey requires facilities being sold to clean up contamination at the site. These considerations led the DEPE to conclude that it needed to adopt criteria for all of the chemicals for which Section 304(a) criteria were available. While this approach may seem to be in line with Option one, it is really more in line with Option two, since the decision was based on the potential for discharges of pollutants at levels which could impair the designated uses of the waters. The only other approach considered by the DEPE was to promulgate criteria on a waterbody basis, as they were needed. This option was rejected because of the long lead time required to promulgate criteria and because it does not allow affected parties to estimate the limitations to be applied to them because the criteria will not be developed until they are needed for a regulatory action. Adoption of the criteria makes the regulatory process more predictable, consistent and efficient.

Even though the DEPE has adopted criteria for over 110 pollutants premised on the potential need for criteria for each of these pollutants in order to carry out its administrative and enforcement responsibilities, DEPE must find a reasonable potential for discharge of specific pollutants to cause or contribute to violation of the Surface Water Quality Standards before it can incorporate limitations for the specific pollutants in discharge permits.

166. COMMENT: DEPE criteria are being written and based upon the total recoverable form of metals. Limits derived for toxicants in the soluble form or biologically available form should be considered. DEPE should address this issue and give guidance on developing limits only for bioavailable forms of pollutants. (16)

RESPONSE: The DEPE has decided not to adopt aquatic protection-based criteria for the metals at this time. When new criteria are proposed they will be expressed as "concentration multipled by water effects ratio." This ensures that the best currently available method for regulating the metals will be used without further administrative proceedings (for example, to promulgate site-specific criteria).

167. COMMENT: Historical application of the Surface Water Quality Standards has, except where appropriate translation protocols are utilized, over-regulated the discharge of pollutants. The DEPE should authorize the use of alternative biological test methods designed to assess the fraction of the pollutant which may cause aquatic toxicity; this would guarantee regulation of pollutants that are bioavailable and actually pose a threat to the aquatic environment. This approach conforms to USEPA's recent acknowledgment of the deficiencies with its historical approaches. (11, 12)

RESPONSE: The criteria proposed are scientifically sound because they are based on a technically and scientifically acceptable methodology. The criteria should provide a reasonable amount of protection with only a small possibility of substantial overprotection or underprotection. The DEPE gives credence to constantly evolving science since additional research is always being done and more precise analytical test methods become available.

One of the new developments in aquatic life protection criteria development is the water effects ratio (WER), which compares the toxicity of site water with the laboratory test water. USEPA is currently focusing its use of WERs on metals criteria because of the complexity of metals speciation, and the consequent varying degrees of bioavailability and toxicity of the many forms and complexes. Additionally, use of the water effects ratio method takes into account the additive, synergistic, and antagonistic influences of other materials in the water.

Based on the recent changes in metals criteria development, the DEPE has decided not to adopt the aquatic protection-based criteria for metals. Instead, new criteria will be proposed which express the criteria as "concentration multiplied by water effects ratio."

168. COMMENT: It is inappropriate to use "discussion with Ken Potts" as a reference for rulemaking. Who is Ken Potts and what is his authority? His "discussion" is not an appropriate reference unless it has been published in scientific or regulatory literature. (16)

RESPONSE: Ken Potts is an Environmental Scientist with the Office of Science and Technology, USEPA Headquarters in Washington, D.C. He is responsible for developing aquatic life protection water quality criteria. Part of his job is to provide states with information and guidance with regard to the development and interpretation of the USEPA 304(a) criteria. It is entirely appropriate for the DEPE to confer with and refer to discussions with USEPA for interpretation of USEPA criteria. However, the DEPE should have provided a more detailed description of who Mr. Potts is and his job with respect to aquatic life protection criteria.

169. COMMENT: When the DEPE discusses that "no plant values" or "plant toxicity data" were available, does the DEPE actually mean "aquatic" plant toxicity data was unavailable? What is the scientific relevance of terrestrial plant toxicity for surface water standards? Does the plant category include algae? (16)

170. COMMENT: References to "plant toxicity" or data availability for "plants" should be changed in the Basis and Background document to indicate that it is "aquatic plant toxicity" data that is being referred to. (16)

RESPONSE: Plant toxicity, as referred to in the Basis and Background document, is in fact aquatic plant toxicity. The commenter is correct in stating that terrestrial plant toxicity has no relevance in aquatic criteria development. The DEPE apologizes for any confusion this oversight may have caused. It should be noted that "aquatic plant toxicity" does include algae, and a 96-hour test conducted with an alga following the proper methodology can be as important as aquatic animal toxicity data.

171. COMMENT: References to "animal families" in the Basis and Background document should be clarified to indicate that they refer to invertebrate and fish families. (16)

RESPONSE: When the DEPE refers to "animal families" in the Basis and Background document supporting the Surface Water Quality Standards proposal, it is not referring only to invertebrate and fish families. The 1985 National Guidelines require as one of the eight family distributions "a third family in the phylum Chordata." This could include a fish, an aquatic amphibian, or an aquatic reptile family. However, the DEPE did not find acceptable aquatic amphibian or aquatic reptilian data to fulfill this requirement, and where available, used a fish family to fulfill this requirement.

172. COMMENT: It must be noted that 65 out of 115 DEPE proposed aquatic life-based criteria are less than their practical quantitation level (PQL) and, therefore, are untenable. DEPE should not be setting water quality-based limits below detection levels, especially since variability of a test method is greater the closer the results are to the detection level. In addition, six chemicals have criteria developed for them with no methodologies proposed by DEPE for quantification. For example, Demeton, although not indicated in the DEPE document, has an acceptable method for quantification (8140-SW846) and a quantification range of 11.9 to 314 mg/L which also exceeds the criterion proposed of 0.1 ug/L. This outcome is a result of the DEPE's overly stringent interpretation of aquatic toxicity data. Many of the proposed standards will require serious re-evaluation before they attain any credibility in the scientific community. (16)

173. COMMENT: The proposed saltwater chronic criteria for lead is less than the PQL. (16)

174. COMMENT: Freshwater and saltwater aquatic protection based criteria proposed for PCBs are less than the PQLs for PCBs and the criteria are untenable. (16)

175. COMMENT: Three of the four criteria proposed for chlordane are less than the PQL. The PQL for three of the four criteria proposed for heptachlor epoxide exceeds the aquatic criterion. The criterion is, therefore, untenable. (16)

RESPONSE: In consideration of the statutory requirements of the New Jersey Water Pollution Control Act that surface water quality criteria are to be protective of the designated uses of a waterbody, the DEPE has determined that analytical detectability is not an appropriate factor to consider when calculating water quality criteria. Although the sensitivity of analytical methods is not an appropriate consideration for setting surface water quality criteria, they are appropriate considerations in implementing the surface water quality criteria. It should also be noted that by the time the criteria are converted into permit limitations after calculating total maximum daily loads (TMDL) and wasteload allocations (WLA), an actual permit limit may be in the range of the analytical detection level. While DEPE did not propose PQLs in these amendments, it did publish an Interested Party Review of draft PQLs at the same time as the proposal and intends to publish a separate proposal of PQLs in 1994. In the interim the DEPE is using recommended quantiation levels when developing permits.

176. COMMENT: Information regarding the aquatic fate and transport of the chemicals addressed in the proposed Surface Water Quality Standards was not considered in the criteria development. Elimination of these compounds from surface water via volatilization, adsorption, hydrolysis, photolysis, biodegradation, etc. is common. Increased volatilization of many organic compounds with water turbulence eliminates them from the water column. Bioavailable metals are typically removed from the water column via adsorption to suspended organics. The hydrophobicity and high molecular weight of PCBs typically removes them from the water column to the sediments. Chronic exposures and associated criteria of these chemicals should incorporate biodegradation potential and half-lives of these chemicals. Chronic exposures to organic contaminants in an aquatic system will change over time as a result of of chemical, physical, and biological forces acting on the compound. Physicochemical parameters of each compound and their associated fate and transport properties in aquatic systems should be considered in the development of surface water criteria. (16)

RESPONSE: Fate and transport considerations are not appropriate to development of criteria because they do not relate to the pollutant concentrations which are protective of the uses. Instead, these processes (for example, biodegradation, volatilization, absorption, photolysis) are appropriate implementation considerations and should be looked at when developing total maximum daily loads, wasteload allocations, and water quality based-permit limitations. First-order rate modeling, partition modeling and various types of complex modeling can account for such processes as sorption, volatilization, biological uptake, hydrolysis, settling, deposition, resuspension and complexing in developing the total maximum daily loads, wasteload allocations, and water quality-based permit limits.

Aquatic Criteria--Chemical Specific

Generic Criteria for Chemical Groups

177. COMMENT: The DEPE has proposed generic surface water criteria for certain groups of chemicals without adequate justification, especially considering that the USEPA has adopted chemical-specific criteria. The chemicals chromium (III) and chromium (VI) have been categorized together as "Total Recoverable Chromium" based on toxicity data for chromium (VI); likewise, the chemicals arsenic (III) and arsenic (V) have been categorized together as total arsenic based on toxicity data for arsenic (III). Additionally, all lead forms are considered together as inorganic lead.

Because the toxicity of these chemicals has been studied separately, they are measurable using current standard laboratory methods, and the USEPA has set separate ambient water quality criteria for these chemicals, the DEPE should consider setting separate surface water criteria for each of these chemicals. The DEPE's partial explanation for using this approach is that it is being conservative; however, as the DEPE is aware, conservatism is not an appropriate basis for rule-making.

Ambient Water Quality Criteria (AWQC) for arsenic have been developed for both arsenic (III) and arsenic (V). Acute freshwater AWQC are 360 and 850 mg/L arsenic (III) and arsenic (V), respectively. Chronic freshwater AWQC is 190 mg/L for both forms of arsenic. Acute saltwater (marine) AWQC are 69 and 2319 mg/L for arsenic (III) and arsenic (V), respectively. Chronic saltwater AWQC is 36 mg/L for both forms of arsenic.

Arsenic in water can undergo a complex series of transformations. Factors most strongly influencing fate processes of As in water include pH, metal sulfide and sulfide ion concentrations, iron concentrations, temperature, solidity, and distribution and composition of the biota (Callahan, et al., 1979; Wakao, et al., 1988 as cited in ATSDR, 1992). The predominant form of arsenic in surface water is usually the less toxic arsenic (V) (Newman and McIntosh, 1991). Speciation of metals with variable toxicity should be considered in the development of surface water criteria. (16)

178. COMMENT: The aquatic life water quality criteria for arsenic should be based on the trivalent form of arsenic, not on total recoverable arsenic. (4)

RESPONSE: The USEPA proposed and adopted criteria for the metals as "total recoverable metal." Utilizing the total recoverable method it is not possible to differentiate between forms of arsenic, chromium and lead. The DEPE proposed criteria based on the more toxic form of each of the referenced metals, to ensure that the criteria would be protective in situations in which all of the measured total recoverable metal was actually the more toxic ionic form of the metal (For example, all of the measured total recoverable arsenic was arsenic (III)). The DEPE did not propose the criteria simply to be conservative, but to reflect limitations inherent in the "total recoverable" analytical method.

The DEPE has decided not to adopt aquatic protection criteria for metals at this time, but expects to repropose them, expressed as "concentration multiplied by water effects ratio," in 1994.

Questionable Data

179. COMMENT: The DEPE must state what exactly is "questionable" about the data in the Rao et al. (1975) studies on lead and chlordane. (16)

RESPONSE: The data available on lead and chlordane from Rao et al. (1975) is questionable because unacceptable methodologies were used. Review of the Rao et al. (1975) tests revealed that the method of acclimation, feeding, loading limits, temperature used and chemical composition of the dilution water were all unacceptable when compared to the generally acceptable practices of the American Society for Testing and Materials. It is not common to feed fish "oil cake mixed with rice flour" or to acclimate fish in "cement lined earthen ware vats" as was done in the Rao et al. (1975) studies. Addtionally, the tests were conducted in tap water and the temperature used during the tests was 27.5 degrees Celsius, which is higher than normally used for *Cyprinus carpio*.

For these reasons, the DEPE decided not to use these data in the derivation of criteria for chlordane and lead. This is consistent with the USEPA position on the use of these data in the derivation of §304(a) criteria.

Species Availability for Lead and Chlordane

180. COMMENT: In the Basis and Background document the DEPE indicates that acute toxicity information for chlordane was available for species in six freshwater invertebrate families (Daphnidae, Gammaridae, Chironomidae, Palaemonidae, Pteronarcidae and Planorbidae) and five fish families (Salmonidae, Cyprinidae, Centrarchidae, Percichthyidae and Poeciliidae). The DEPE must state whether the six invertebrate and five fish families are endemic in New Jersey. If so, why does DEPE default to USEPA proposed criteria, the one time it has State specific data to meet the eight family criteria?

Toxicity data for 13 families of invertebrates was available for lead and should be adequate for the development of criterion for a compound not likely to be even remotely soluble in a natural surface water system. Invertebrates and other sediment dwelling organisms would have the greatest exposure to lead in an aquatic system. (16)

RESPONSE: The Basis and Background document for the proposal on page 65, Section 3.a., discuss why the DEPE is neither proposing State-specific criteria nor updating the national criteria for chlordane and lead. The information available on New Jersey species was not sufficient, according to the 1985 National Guidelines, to develop a freshwater criterion for either chemical.

Even though the required eight families appear to be available to update the national freshwater acute criterion for chlordane and lead, the DEPE could not do so because of the unacceptable Rao et al. (1975) data. Toxicity tests conducted on Cyprinus carpio, by Rao et al. (1975) showed this organism to be one of the four most sensitive species for which toxicity data was available for both these chemicals. Due to unacceptable methodology used by Rao et al. (1975) the data was rejected by both the USEPA and the DEPE. Therefore, the required eight-family distribution was not met for deriving freshwater acute criteria for chlordane and lead. Accordingly, the DEPE decided to propose the USEPA's §304(a) criteria for chlordane and lead.

DEPE is adopting the criteria for chlordane. However, the aquatic protection-based criteria for lead, which is a metal, is not being adopted at this time. The DEPE has decided to reconsider the criteria for all the metals.

Aluminum N.J.A.C. 7:9B-1.14(c)13v

181. COMMENT: The drinking water standard should be adopted as the wastewater standard for aluminum with 200 ug/L or even a higher value than this. Toxicity of aquatic organisms due to asphyxiation of the fish due to irreversible absorption on the gills should be dropped as available toxicity for determining water quality standards in general. The standards should be based on toxicity caused by acute or chronic disease and not asphyxiation without a clear demonstration that such a phenomenon occurs in real life. The antidegradation, antibacksliding restrictions should be dropped. (29)

RESPONSE: The DEPE has not proposed the drinking water standard as the surface water quality criteria because it is not protective of aquatic life. The aquatic criteria are developed based on the toxic effects caused by the pollutant to the aquatic organisms. The drinking water standard has no relationship to aquatic life protection.

Asphyxiation can be explained as a local or systemic deficiency of oxygen and excess of carbon dioxide in living tissue. It causes death by making the body incapable of utilizing an adequate supply of oxygen. Asphyxiation is considered an acute toxic effect. Acute toxicity is defined at N.J.A.C. 7:9B-1.4 as "a lethal or severe adverse sublethal effect (for example, immobilization of daphnids) to an organism exposed to a toxic substance for a relatively short period of time." When aquatic animals are exposed to unacceptable levels of chemical substances such as carbon monoxide, hydrogen, nitrogen, helium, hydrogen sulfide, or cyanide asphyxiation can kill aquatic animals within a short period of time.

The USEPA Water Quality Standards Regulation (40 CFR 131.12) sets forth the requirement that the states must include antidegradation policies in their Surface Water Quality Standards, to conserve, maintain and protect existing uses and water quality. Antibacksliding is a National Pollutant Discharge Elimination System requirement and is outside the scope of the Surface Water Quality Standards.

Arsenic N.J.A.C. 7:9B-1.14(c)13ix

182. COMMENT: The Basis and Background document lists those chemicals for which the DEPE used an umbrella listing instead of individual valence states like the USEPA did; As(III) and As(VI) should also be included in this list of chemicals for which the USEPA proposes specific criteria, and the DEPE proposes non-speciated criteria based on the worst case (assuming all arsenic is As(III)). (16)

RESPONSE: The DEPE agrees that arsenic should have been listed among "umbrella" chemicals. However, aquatic protection criteria

proposed for arsenic were not adopted by the DEPE. If the aquatic protection-based criteria for arsenic are reproposed as "total recoverable metal" the DEPE will make sure that arsenic is included as having an umbrella criterion.

Benzene N.J.A.C. 7:9B-1.14(c)13xiii

183. COMMENT: Data was available on seven families of organisms for benzene and that should be more than sufficient for the development of New Jersey specific standards. (16)

RESPONSE: A minimum of four invertebrate species (a planktonic crustacean, a benthic crustacean, an insect and an annelid or a mollusk), and four vertebrate species (a salmonid, a recreationally or commercially important warmwater species, an amphibian or a bony fish from a family not already represented and a species from any phylum not already represented), are required by the 1985 National Guidelines.

The acute toxicity data available for benzene was not sufficient, under the USEPA 1985 guidelines, to derive a criterion because data for only two invertebrate species are available. Developing criteria with only the information available could result in underprotective criteria, either because of the lack of toxicity data from important animal families or because of the reduction in the number of genus mean acute values used to calculate criteria.

Chromium N.J.A.C. 7:9B-1.14(c)13xxxviii

184. COMMENT: We strongly recommend that DEPE adopt the USEPA aquatic life criteria for chromium. These criteria incorporate the following separate standards for trivalent and hexavalent chromium:

Chromium III: CMC of 1700 ug/L and a CCC of 210 ug/L, based on water hardness of 100 mg/L and a water effects ratio of one.

Chromium VI: CMC of 16 ug/L and a CCC of 11 ug/L.

We believe that these standards would fully protect New Jersey surface waters. The USEPA criteria include a mechanism for establishing site-specific criteria. USEPA derived the following formula based on an analysis of the influence of water conditions on trivalent chromium toxicity:

$$CMC = WER \exp\{m_A[\ln(\text{hardness})] + b_A\}$$
$$CCC = WER \exp\{m_C[\ln(\text{hardness})] + b_C\}$$

where $m_A = 0.8190$, $b_A = 3.688$, $m_C = 0.8190$, $b_C = 1.561$. WER is defined by USEPA (1992b) as "the acute (or chronic) value in site water divided by the acute (or chronic) value in standard laboratory water." Therefore, using water hardness values and identifying a water effects ratio for a specific surface water, the trivalent chromium criteria can be adjusted. Similarly, USEPA indicates that with application of a site-specific water effects ratio hexavalent chromium criteria also can be adjusted for a specific surface water. (15)

185. COMMENT: We strongly recommend that the DEPE propose surface water FW2 standards for chromium (III) and chromium (VI) for protection of aquatic life.

While the DEPE provides the argument that chromium (III) is less toxic than chromium (VI) to aquatic organisms under almost all conditions, it neglects to build a defensible position as to why it feels it is appropriate to regulate total chromium as chromium (VI). Using chromium (VI) toxicity to set standards for total chromium is inconsistent with the USEPA ambient water quality criteria which provides standards for chromium (VI) and chromium (III) and contrary to good science. Finally, the proposed total recoverable chromium criteria are not enforceable since the proposed standards of 11 and 16 ug/L for freshwater chronic and acute exposures are less than background concentrations of total chromium in natural surface waters.

The DEPE stated in the Basis and Background document, "Although the USEPA has developed freshwater criteria for chromium (III) (USEPA, 1986a), the DEPE has determined that it is not appropriate to distinguish between the two forms in this proposals. This determination was based on the consideration that currently available field collection and preservation methods do not allow the separate determination of chromium (III) and chromium (VI) concentrations that accurately represent their respective true concentrations in the environment." Recent advances in the analysis of environmental media for chromium (VI) have demonstrated that chromium (VI) can be measured with high precision and accuracy in soils and water. The USEPA method for analysis of chromium (VI) in water is 7196 and can be found in SW-846. The DEPE must prove, in light of the evidence to the contrary, that chromium (VI) cannot be measured in water or promulgate standards for chromium (III) and chromium (VI) separately as done by the USEPA. (16)

186. COMMENT: The proposed aquatic life criteria for total recoverable chromium are not scientifically-supported, since they are based upon the USEPA criteria for hexavalent chromium, the most toxic and soluble form of this metal. (4)

RESPONSE: The DEPE chose to propose criteria for metals, in general, as total recoverable which should measure most chemical forms of the metals. As discussed in the Basis and Background document on page 62, the current field collection and preservation methods do not allow the separate determination of the two forms when dealing with the total recoverable form of the metals. Because of this, the DEPE based its total recoverable criteria on chromium (VI) criteria, which is the more toxic form as between chromium (III) and chromium (VI). In addition, ion-specific toxicity testing results on the various forms of chromium are questionable because of the potential for interconversion of the forms during the test and in vivo.

The criteria proposed are not the threshold levels for enforcement. Once criteria are derived they are used in mathematical models to derive total maximum daily loads (TMDLs) and wasteload allocations (WLAs). These TMDLs and WLAs are used in the permit process to develop permit limits that reflect available dilution and fate of the metal.

Soon after DEPE proposed the Surface Water Quality Standards, the USEPA promulgated criteria for 14 states including New Jersey on December 22, 1992. These Federal criteria, which include the metals criteria, are in effect. The DEPE has decided to repropose the metals criteria expressed as "concentration multiplied by water effects ratio." The water effects ratio approach directly accounts for water characteristics such as total organic carbon, pH, metals speciation and hardness. The availability of the water effects ratio methodology, which measures the difference in toxicity caused by the water quality characteristics of a given waterbody, influenced the DEPE's decision to reconsider the aquatic protection-based metals criteria.

187. COMMENT: In the Basis and Background document the DEPE indicated that it had compared the protection provided by criteria based on chromium (VI) and chromium (III). This comparison concluded that it was only at hardness below 2.7 mg/L (as $CaCO_3$) that a criterion based on chromium (VI) would not be protective of the aquatic biota. The DEPE must state the scientific justification of the use of 2.7 mg/L (as $CaCO_3$) in the derivation when USEPA uses 100 mg/L $CaCO_3$ in ambient water quality criteria derivation and less than 60 mg/L $CaCO_3$ is considered soft water.

The DEPE must state the reference for the equation used to determine chromium (III) standards relative to hardness. It is not the same equation as that used by the USEPA (1980). At a hardness of 2.7 mg/L, is the equation still valid as these equations are generally designed to describe bioavailability as a function of hardness ranging from 60 mg/L (which is acceptable as tap water) to 400 mg/L? Further, the DEPE is comparing the toxicity of chromium (III) dependent on hardness to an unknown criterion for chromium (VI) which has not been normalized for hardness. (16)

RESPONSE: The DEPE did not derive criteria for chromium (VI) based on a hardness of 2.7 mg/L of $CaCO_3$. As discussed in the Basis and Background document, the DEPE only did an analysis to compare the degree of protection provided by the two forms of chromium (III and VI) in fresh waters. As a results, it was found that only at water hardnesses below 2.7 mg/L of $CaCO_3$ would the criteria for chromium (III) be more stringent than the criteria for chromium (VI).

The vast majority of the surface waters in New Jersey have hardnesses in excess of 2.7 mg/L of $CaCO_3$. Therefore, the DEPE concluded that aquatic life is protected by the proposed chromium (VI) criteria, from exposure to either form of chromium (III or VI).

The USEPA (1980) criteria for chromium were updated by the USEPA in 1984. The acute and chronic equations for chromium (III), as listed in the Basis and Background document on page 62, are the same as the chromium (III) criteria promulgated by the USEPA in its final rule adoption, 40 CFR: Part 131, Fed. Reg. Vol. 57, No. 246, on December 22, 1992, and as contained in the updated 304(a) criteria document (1984). Due to the lack of sufficient information on the relationship between the toxicity of chromium (VI) and water hardness, the 304(a) criteria for chromium (VI) were not based on hardness effect.

It should be noted that the DEPE is not adopting aquatic protection-based criteria for the metals at this time. They will be the subject of a new proposal.

Endosulfan N.J.A.C. 7:9B-1.14(c)13lxv

188. COMMENT: USEPA AWQC criteria for endosulfan, endosulfan-alpha, and endosulfan-beta are chemical specific. Each chemica

has an allowable criterion of 0.22 mg/L and 0.056 mg/L (acute and chronic freshwater) and 0.034 mg/L and 0.0087 mg/L (acute and chronic saltwater). DEPE proposes one criterion to address all three chemicals. The criterion is the same as the USEPA AWQC. What is the scientific justification for this conservative approach? (16)

RESPONSE: The DEPE proposed aquatic protection criteria for endosulfan for mixtures of alpha and beta endosulfan because, as mentioned in the Basis and Background document on page 62, these substances generally occur as mixtures and not as individual chemicals.

Heptachlor Epoxide N.J.A.C. 7:9B-1.14(c)13lxxiv

189. COMMENT: DEPE indicated in the Basis and Background document that it would not adopt the criteria being proposed if USEPA did not adopt its proposed criterion for heptachlor epoxide. If DEPE is allowing USEPA criteria adoption to dictate its own, why is it proposing these New Jersey specific criteria? (16)

RESPONSE: The DEPE indicated in the Basis and Background document on page 62, that it proposed criteria for heptachlor epoxide so that the DEPE would have authority to grant variances and site-specific criteria when warranted. However, the DEPE did not propose New Jersey specific criteria due to insufficient toxicity data on New Jersey species. The criteria proposed are therefore those that the USEPA proposed.

Lead N.J.A.C. 7:9B-1.14(c)13lxxxii

190. COMMENT: The DEPE states that the freshwater aquatic protection lead criteria were developed based on the assumed water hardness of 100. There are no units associated with this value. Assuming this value is in mg/L of $CaCO_3$, this would be inconsistent with Section B of the DEPE's Basis and Background document which bases hardness calculations on 2.7 mg/L of $CaCO_3$. (16)

RESPONSE: The criteria proposed for lead are consistent with Section C of the Basis and Background document because the DEPE did an analysis to compare the protection provided by the two forms of chromium (III and VI) based on different levels of water hardness. This analysis had no relationship to the development of the criteria proposed for lead. The freshwater and saltwater criteria concentrations proposed for lead are the same as the USEPA, 304(a) criteria, as listed in the USEPA final rule adoption, 40 CFR: Part 131, Fed. Reg. Vol. 57, No. 246, December 22, 1992. The freshwater acute and chronic criteria presented are equations based on a water hardness of 100 mg/L $CaCO_3$, and the saltwater criteria are the USEPA recalculated values. However, the DEPE is not adopting aquatic protection-based criteria for any of the metals at this time. The DEPE will reevaluate the metals criteria and expects to publish proposed metals criteria in 1994.

191. COMMENT: The DEPE is unclear how the proposed freshwater acute aquatic protection criterion for lead is developed. The proposed value is different from that currently promulgated by the USEPA. The DEPE needs to explain the selection of this freshwater criteria. Additionally, the DEPE discusses that the basis for the development of the lead freshwater acute aquatic protection criteria is based on an equation yet this equation is not presented nor discussed. (16)

RESPONSE: On pages 64, 65, and 68 of the Basis and Background document, DEPE discussed why the freshwater acute criteria for lead were not derived. With insufficient information to develop State-specific criteria and unable to use the Rao et al. (1975) data (see the response to Comment 179 above) to update the national criteria, the DEPE chose to propose USEPA 304(a) criteria.

The proposed aquatic protection-based criteria concentration levels for lead are the same as the criteria adopted by the USEPA. The USEPA freshwater acute and chronic criteria for lead were developed taking hardness into account and are presented as equations. In the Basis and Background document, DEPE also explained the saltwater aquatic protection-based criteria presented in the USEPA 304(a) Ambient Water Quality Criteria (AWQC) document for Lead, 1984, were erroneous and that DEPE was proposing the USEPA recalculated criteria. The equations were presented in the proposed amendments at N.J.A.C. 7:9B-1.14(c)13lxxxii. Finally, the DEPE is not adopting the criteria for lead. Instead, it will repropose aquatic protection-based criteria for lead expressed as "concentration multiplied by water effects ratio."

Polychlorinated Biphenyls (PCBs) N.J.A.C. 7:9B-1.14(c)13cv

192. COMMENT: Although there is information available on more than eight families, the DEPE did not propose criteria for PCBs that was based on the available information. This failure to use available information means that the DEPE is not utilizing or even recognizing the need for using the best available data. (16)

RESPONSE: The 1985 National Guidelines require eight species in eight different families to have a satisfactory database to develop freshwater acute criteria, basically four invertebrates and four fish. For PCBs only three invertebrate families were available and the minimum required distribution of families was not met to develop fresh water acute criterion as was already explained in the Basis and Background document. The lack of information on the required families is the reason not to develop criteria and not that the DEPE is not recognizing the best available data.

Silver N.J.A.C. 7:9B-1.14(c)13cviii

193. COMMENT: The DEPE states that the criteria for silver is based on water hardness of 100. There are no units presented for this value. The DEPE needs to list the units for all numeric criteria. (16)

RESPONSE: All the metals criteria including the silver criteria, presented in the proposal, as discreet concentrations, were based on a hardness of 100 mg/L of $CaCO_3$.

It should be noted that the DEPE is not adopting aquatic protection-based criteria for the metals at this time. They will be the subject of a new proposal.

Human Health Criteria—General

194. COMMENT: The DEPE should not base criteria for all fresh water bodies on drinking water and fish consumption since most freshwater bodies are not used for drinking water and many do not contain fish. (16)

195. COMMENT: The DEPE's policy is to set ambient criteria for human carcinogens under exposure assumptions appropriate for the designated uses of the waterbody (proposed N.J.A.C. 7:9B-1.5(a)4). The DEPE has proposed, however, to use the same exposure assumptions when applying water quality criteria based on human carcinogenicity to all FW2 waters. FW2 is a general freshwater classification that includes streams with varying uses. The ambient criteria for human health, to the extent they are based on exposure to drinking water, should only be applied to those FW2 streams that are designated for such uses. The DEPE should clarify that such is the case. (19)

RESPONSE: New Jersey has a long standing policy of protecting all freshwaters for use as potable water supplies, dating back to June 30, 1971, when the Department of Environmental Protection published "Rules and Regulations Establishing Surface Water Quality Criteria." The DEPE has concluded that a state that is as densely populated as New Jersey must protect all its fresh waters as potable water supplies for possible future use. It should be noted that the Manasquan Reservoir recently went into operation and waters which had previously not be used for drinking water are now being used for that purpose. Ultimately, it is expected that most freshwaters will be needed to meet the potable water needs of New Jersey. Therefore, human health protection criteria have been developed for all FW2 waters to protect the existing or future possible use of the waterbody as a potable water supply.

196. COMMENT: The equations used to calculate the human health-based standards ignore less-than-lifetime exposures, daily water consumption from other sources, and the fraction of total fish consumption traceable to fish from New Jersey waters. (16)

RESPONSE: The goal of the criteria is to protect the water for the designated uses. For potable waters, the water should be suitable for use as a drinking water source and therefore assumptions appropriate for lifetime exposure via drinking water are used. Regarding fish ingestion, an individual may potentially obtain all of the fish he or she consumes from New Jersey waters, and the goal of the criteria is to protect such individuals.

197. COMMENT: The equation used to derive human health-based criteria does not account for any degradation processes. (16)

RESPONSE: The human health-based critera consider potential health effects only, and do not consider fate and transport processes. These factors may be taken into account by the DEPE through the modeling process associated with the development of NJPDES permits.

198. COMMENT: The drinking water consumption rate of two liters per day is an overestimate for most people, especially for long-term average exposure, and a consumption rate of 1.4 liters per day is suggested. (16)

RESPONSE: The water ingestion rate of two liters per day is used to develop drinking water standards by both USEPA and DEPE, to develop human health-based surface water quality criteria by USEPA,

and ground quality water criteria by DEPE. Surface water quality developed to protect for use as potable water should logically utilize the same assumption for the amount of drinking water ingested as the drinking water criteria. In addition to ingestion, the assumption of two liters per day is intended to account for non-ingestion exposures to water contaminants through routes such as inhalation and dermal exposure which can not be exactly quantitated.

199. COMMENT: The DEPE proposed standards without consideration of pollutant removal by water treatment processes, although the Basis and Background document states that the exposure scenario is based on ingestion of treated surface water and presents treatment data on removal of a number of chemicals. (12)

200. COMMENT: The DEPE should consider the reduction of a chemical contamination achieved during potable water treatment in developing criteria. (13, 16)

201. COMMENT: Many studies have demonstrated that treatment techniques for drinking water typically remove greater than 90 percent of inorganic contaminants. (16)

202. COMMENT: The point of application of human health criteria should be at the point of ingestion, not at the point of discharge. (12)

RESPONSE: The commenters recognize that the human exposure scenarios used by the DEPE are based on exposure to water which has undergone treatment by the purveyor, but do not consider best available technologies (BAT) in the potable water treatment plant in developing the Surface Water Quality Standards. To develop criteria which will encompass all State waters, the DEPE is charged with considering all of the variables involved with acceptable levels of contamination. Lead in surface water illustrates the variables the DEPE must use to develop standards. USEPA (53 FR, 31529, Aug. 18, 1988) specifies the BAT for lead and copper as coagulation/filtration, ion exchange, lime softening, and reverse osmosis. These technologies are capable of reducing contaminant levels from the maximum levels of occurrence in source water down to 0.005 mg/L for lead. Although this may seem to indicate that the DEPE should raise the proposed criteria for surface water, none of these BATs are consistently applied across the State. These treatment technology efficiencies for lead removal have been described in detail (Hem, J.D. and Durum, W.H., 1973. Solubility and Occurrence of Lead in Surface Water, Journal of the AWWA, 562; Sorg, T.J., Csanady, M., and Logsdon, G.S., 1978, Treatment Technology to Meet the Interim Primary Drinking Water Regulations for Inorganics: Part 3, Journal of the AWWA, 680). A variety of different water quality parameters, such as sulfate, carbonate, hydroxide concentration, and pH will determine the soluble form of lead in a surface water system, with pH being the parameter with the greatest influence. No single unit operation can effectively remove all of the possible species of lead that can potentially exist in freely dissolved or bound form.

If the surface water was the only determinant of the total concentration of lead in drinking water, then implementing a less stringent criterion could theoretically occur. However, research has identified other sources of lead such as that from distribution systems and plumbing fixtures. It would be impossible to apply an all encompassing exposure level at the point of ingestion due to the diverse types of distribution systems throughout the State.

Treatment routinely provided to drinking water in New Jersey currently consists of filtration and disinfection. Neither of these treatments provides consistent removal of chemical constituents. Additionally, the "safe" concentrations of some toxic pollutants are below the levels available when using standard analytical procedures. Obviously, if a water purveyor does not find a chemical present at a level of concern, treatment will not be provided. Because of this, the point of application of human health criteria should be at the point of discharge and not at the point of ingestion.

203. COMMENT: The DEPE, in the Basis and Background document for the proposed Surface Water Quality Standards regulations, develops criteria for human health protection, including removal of toxic pollutants during the treatment of surface water by water utilities. The DEPE stated:

> If a substantial percentage of a chemical is consistently removed by conventional drinking water treatment, the criteria could theoretically be increased accordingly.

While this statement is accurate, the DEPE should define "conventional treatment" and allow a permittee to develop site-specific human health exposure criteria that account for any additional treatment, other than conventional drinking water treatment, that a facility effluent receives during the drinking water treatment process. This provision in the Surface Water Quality Standards would eliminate the economic impact of imposing unnecessary, redundant treatment without adversely affecting human health or the environment. (18)

RESPONSE: While the DEPE discussed removal during treatment in the Basis and Background document (pages 16 and 18), the DEPE did not develop, as the commenter phrases it, "criteria for human health considerations, including removal of toxic pollutants during the treatment of surface water." The commenter has taken the DEPE statement out of context. It was clearly discussed in the text that treatment removal was not to be factored into criteria development at this time as indicated by the results of a study conducted by the DEPE (NJDEP. 1988. New Jersey Special Water Treatment Study, Phase II. Final Report. Division of Water Resources). It was further stated that the development of ambient surface water quality criteria following the USEPA guidance does not include such consideration.

By conventional drinking water treatment, the DEPE means the treatment as required by law or regulation. See the Federal regulations at 40 CFR Part 141, Subpart H, as well as N.J.S.A. 58:12A-1, which is implemented by N.J.A.C. 7:10-11.1(e)3 and 4. The minimum level of treatment required by these laws and regulations consists of "conventional filtration treatment" and disinfection. "Conventional filtration treatment" means a series of processes including filtration, flocculation, coagulation, and sedimentation, resulting in substantial particulate removal but not consistent removal of chemical constituents.

As to the commenter's request to allow a permittee to develop site-specific criteria to account for any additional treatment that a facility's effluent receives during the drinking water treatment process, the DEPE understands the concern. However, criteria are promulgated to ensure that the level of ambient water quality would not adversely affect human health and the environment, regardless of whatever treatment that the ambient water may receive subsequently. The DEPE is interested in whole water resources. Adverse effects could occur to human health or the ecosystem before the water reaches the water treatment plant. It is the DEPE's policy to regulate surface water at point of source rather than at point of use. Therefore, the DEPE does not agree that the permittee should be allowed to develop site-specific criteria to account for subsequent treatment. The same DEPE policy is already in effect for ground water.

204. COMMENT: The volatile organics proposed for regulation are not likely to be a drinking water treatment issue because fate and transport processes would eliminate them from surface waters at the majority of drinking water intake locations. (16)

RESPONSE: The DEPE generally agrees with the assertion that fate processes for volatile organic chemicals (VOCs) present at low concentrations will generally eliminate them before they reach surface drinking water intakes. However, in cases where drinking water intakes are located close to permitted or accidental releases, and in cases where spills of large amounts of solvents occur, fate processes such as volatilization will not be sufficient to entirely remove the chemical. For this reason the DEPE believes that fate and transport are most appropriately considered when implementing the Surface Water Quality Standards (for example, issuing permits). Furthermore, some VOCs, especially the carcinogens, need to be regulated at levels possibly beyond the removal capability of fate and transport processes. Finally, studies by the DRBC have found unexpectedly high levels of VOCs in the Delaware River. This indicates that our understanding of fate and transport is not sufficient enough to always predict instream levels of VOCs.

205. COMMENT: USEPA risk assessment guidance states that the fish consumption rate of 6.5 g/day should only be used in conjunction with an exposure frequency parameter. (16)

RESPONSE: It is not clear to which USEPA risk assessment guidance the commenter is referring. However, the fish consumption assumption of 6.5 g/day is an estimate of average daily per capita ingestion of fish by the population including both fish eaters and non-fish eaters, including days on which fish is ingested and days on which none is eaten. The average amount eaten only on days on which fish is eaten would be much higher. Since the exposure frequency parameter is already incorporated into this value, it is not appropriate to include an exposure frequency parameter with this assumption, and USEPA does not use such an exposure frequency parameter in deriving its ambient water quality criteria.

206. COMMENT: The ingestion of fish caught in the same waterbody every day of an individual's life is an unrealistic assumption, and it is not imaginable that there are individuals who follow this pattern of fish

ingestion in New Jersey. Reasonable long-term average values of fish ingestion should be obtained and applied in the development of the standards. (13)

RESPONSE: The assumption of an ingestion rate of 6.5 grams of fish per day does not necessarily mean that a person is eating fish from the same waterbody every day. The value of 6.5 grams represents an average amount of fish ingested per day including days on which fish is eaten and days on which no fish is eaten. Furthermore, it is possible that the same contaminant is present in fish from more than one water body. The assumption of 6.5 grams per day is a national value obtained from USEPA. The DEPE has begun to conduct research to determine the fish consumption patterns of New Jersey residents, and the results of these studies will indicate whether the current assumption should be modified.

207. COMMENT: New Jersey-specific, species-specific consumption rates should be used for waters used for recreational fishing, and separate standards based on consumption should be set for fish from fresh waters and salt waters. (16)

208. COMMENT: Site-specific fish consumption rates for New Jersey should be used to develop the standards, and consumption rates should be evaluated separately for marine and freshwater fish. (16)

209. COMMENT: The consumption rates of shellfish should be considered separately from those of saltwater fish generally, since contaminants in shellfish are derived primarily from sediment contamination. (16)

210. COMMENT: It is important to know the fraction of fish consumption from salt water and fresh water, since water hardness affects bioavailability and concentration of contaminants in fish tissues. (16)

RESPONSE: The DEPE agrees with the commenter that criteria for fresh and salt water that reflect site- and species-specific consumption rates of fish need to be developed. At this time, the DEPE lacks sufficient information to develop such criteria and so has set the default value of 6.5 g/day for the daily consumption rate for all waters.

The DEPE recently initiated a survey to determine the fish consumption patterns of New Jersey consumers and anglers. From this project, the DEPE expects to obtain species-specific data on the rate of consumption of freshwater fish, rate of consumption of saltwater fish and rate of consumption of shellfish by New Jersey consumers and anglers. Information on the frequency and the size of edible portions is to be included. Site-specific information will be gathered to the extent that is possible. New Jersey anglers are a high risk group whose consumption patterns are of special interest to the DEPE, since their consumption rates probably represent the high end of consumption. The DEPE plans to use the survey information to develop criteria for fresh waters and saline waters, or recreational waters, based on the New Jersey-specific, species-specific consumption rates of aquatic organisms residing in the respective waters.

211. COMMENT: Any changes in the assumed fish consumption rate must be promulgated through formal rulemaking, and should include evaluation of public- and peer-reviewed information. (16)

RESPONSE: The DEPE would promulgate any change in the fish consumption rate through formal rulemaking, and would evaluate all available information when doing so.

212. COMMENT: DEPE should revise the percent lipid content of aquatic organisms consumed in New Jersey to reflect species reasonably consumed on a regular basis by the average person in the State. The human health criteria are skewed because the calculation of mean lipid content includes American eel and carp, which have the two highest lipid contents but are seldom consumed. Also, the freshwater and saltwater percentage lipid numbers should be considered separately rather than using the overall mean in order to be consistent with the way the DEPE has derived its human health criteria. (12)

213. COMMENT: The percent lipid content used to develop the standards should be weighted for the fraction of each fish species ingested. (16)

214. COMMENT: Separate lipid contents should be used for saltwater and freshwater standards. (16)

RESPONSE: The DEPE agrees with the commenters that the percent lipid content of aquatic organisms consumed in New Jersey should reflect the species consumed in the State. The data presented in Table 5 on page 97 of the Basis and Background document were analyzed to determine the mean percent lipid content of representative edible New Jersey species. The DEPE also agrees that the percent lipid content should be weighted for the fraction of each fish species ingested. The overall mean was considered for risk assessment because the DEPE found that weighting by the pounds of commercial harvest for the included species did not significantly alter the overall mean. The inclusion of American eel and carp did not affect the mean value.

As mentioned in response to Comments 207 to 210 above, the DEPE has initiated a survey of fish consumption by New Jersey consumers and anglers. After the completion of this survey, the DEPE expects to have current species-specific information on the basis of which the weighted mean lipid content can be reexamined and recalculated for developing human health-based criteria. The DEPE will use freshwater and saltwater percent lipid contents separately for criteria development for fresh water and salt water, respectively, should there be substantial differences in lipid contents of fish species residing in these waters.

215. COMMENT: For calculating the average percent lipid in New Jersey aquatic species, the hepatopancreas should not be counted as muscle tissue for blue claw crab since it is rarely, if ever, ingested. (16)

RESPONSE: Hepatopancreas was included because the data available on crab samples did not make the distinction between muscle and hepatopancreas. The DEPE specially noted this fact in the Basis and Background document because it shares the commenter's concern. However, the inclusion of hepatopancreas, most likely, would not have affected criteria developed by the DEPE. Blue crab provided only 13 percent of the data for the analysis and hepatopancreas is ingested occasionally, though not always. Furthermore, the overall mean lipid content for New Jersey freshwater and saline species was calculated to be 3.12 percent. The fact that a lower value, the USEPA default value of three percent, was used for criteria derivation provides downward adjustment to discount the contribution from hepatopancreas of the blue claw crab.

216. COMMENT: DEPE should set standards for fish consumption based on species-specific bioconcentration factors (BCFs) for waterbodies frequented by recreational fishermen. The DEPE should not use a single BCF for each chemical for all surface water systems, since BCFs calculated from laboratory studies may not be representative of dynamic systems such as a moving river. (16)

RESPONSE: The DEPE agrees that BCFs developed using nonmigratory and recreational species or measured in specific water systems would more appropriately reflect local conditions. However, such data would require extensive experimentation, data collection, analysis and validation. As yet, no site-specific, or species-specific BCFs are available to the DEPE for developing criteria for fish consumption. The BCFs DEPE used in developing its proposed criteria were those used by the USEPA to develop its ambient water quality criteria or those stated in the various USEPA ambient water quality criteria documents.

217. COMMENT: The proposed water quality standards are based on theoretical BCF values, which can overtake risk and result in overly restrictive water quality criteria. DEPE's water quality criteria should allow for site-specific BCF testing to modify NJPDES permit limits and provision should be made in the rule accordingly. (13)

RESPONSE: As stated in response to Comment 216, the BCFs used by the DEPE were those used by USEPA. However, it is the DEPE's understanding that the USEPA uses measured values from field testing rather than theoretical values from calculation, to the extent that data are available. As to the commenter's request concerning site-specific BCF testing to modify NJPDES permit limits, such provision is not provided in the NJPDES regulations as such a modification to criteria would be within the purview of the Surface Water Quality Standards. Currently, there is no citation in the Surface Water Quality Standards explicitly allowing site-specific BCF testing to modify NJPDES permit limits. However, DEPE may entertain requests for site-specific BCFs to be used in developing NJPDES permit limits. Such requests would have to be considered on a case-by-case basis by the DEPE.

218. COMMENT: Standards based on ingestion of aquatic organisms are not meaningful for contaminants with BCFs of less than 100 L/kg because these chemicals do not accumulate in fish tissue. (16)

219. COMMENT: Recreational exposures, such as dermal absorption, should be used as the basis for surface water criteria where appropriate, particularly for contaminants which do not have high BCFs and for waters which are not drinking water sources. The information needed to quantitate dermal exposure during swimming and inhalation of volatiles during bathing is available in USEPA guidance, and uptake during other recreational activities is not significant. (16)

RESPONSE: The DEPE agrees that recreational exposures should be the basis for the criteria for contaminants with low BCFs in non-potable waters. The DEPE does not believe that it is preferable to develop criteria based on aquatic organism consumption alone for contaminants

with extremely low BCFs (15 L/kg or less), since ingestion of aquatic organisms is not a significant route of exposure to these contaminants. The DEPE intends to revise criteria for these contaminants for saline waters based on recreational exposures, and to repropose these in the future.

220. COMMENT: Many of the numerical values selected by the DEPE as surface water quality criteria make no practical sense. For example, the surface water criterion for phenol in saltwater is listed as 4,600,000 ug/L, which would be the equivalent of a strong wastewater from a steel manufacturing process. (16)

RESPONSE: The DEPE agrees with the commenter that the saline criterion for phenol appears to make no practical sense. The criteria for phenol and other chemicals with BCFs below 15 L/kg listed in the DEPE proposal were developed by the USEPA following USEPA standard methodology which considers fish consumption as the only exposure scenario. As stated in the above response to Comment 219, the DEPE does not believe that it is preferable to develop saline criteria in this manner for those chemicals. However, in the absence of more suitable criteria, the USEPA criteria represent the best scientific information available to the DEPE at the time. Therefore, the DEPE included the criteria proposed by the USEPA for New Jersey in its proposal so as to provide for regulatory flexibility (for example, in issuing variances). Most of these criteria have been subsequently adopted by the USEPA for New Jersey waters.

To gain regulatory flexibility, the DEPE intends to adopt these USEPA criteria as proposed except criteria for selenium and silver which have been deleted by the USEPA. The DEPE will also not adopt the saline criteria for the following six Group C chemicals with BCFs below 15 L/kg: dibromochloromethane, 1,1-dichloroethylene, hexachlorobutadiene, isophorone, 1,1,2,2-tetrachloroethane, and 1,1,2-trichloroethane. For these chemicals, criteria were proposed by the USEPA at 10^{-6} risk levels. In accordance with the New Jersey stated policy for Group C chemicals, the USEPA has adopted the proposed criteria at 10^{-5} risk levels for New Jersey. The DEPE has decided to delete the proposed saline criteria. A new proposal for criteria at 10^{-5} risk level will follow in the immediate future. As more flexibility in terms of compliance is provided for dischargers by the less stringent USEPA criteria, the DEPE expects less potential need for variances for the short term period before the new proposal is adopted.

When a methodology for developing saline criteria for chemicals with extremely low BCFs is available to incorporate other exposure scenarios, the DEPE intends to review and evaluate the methodology and apply it to derive saline criteria, if appropriate.

221. COMMENT: Criteria for surface waters classified as saline estuaries (SE) and saline coastal waters (SC) presented in the criteria table differ from those in the text for benzene, chlorobenzene, 1,2-dichloroethane, and 1,1-dichloroethylene. (16)

RESPONSE: The four chemicals the commenter mentions belong to the group of chemicals with BCFs below 15 L/kg. The SE and SC criteria derived for these chemicals on the basis of standard USEPA methodology and toxicity factors developed pursuant to the A-280 amendments to the New Jersey Safe Drinking Water Act (N.J.S.A. 58:12A), are included in the text alone with the FW2 criteria (Basis and Background document, pages 29, 35, 43 and 44). However, the DEPE did not consider it preferable to propose criteria based on ingestion along for chemicals with BCFs below 15 L/kg and so did not propose these criteria. In order to maintain regulatory flexibility for variances to water quality based effluent imitations developed using these criteria, the DEPE proposed, instead, the USEPA criteria for these chemicals as shown in the criteria table (Basis and Background document, pages 83 to 87). A detailed account of the issues involved is presented in the Basis and Background document. The numerical values for the two sets of criteria are different because the criteria were developed based on different toxicity factors.

222. COMMENT: Because the criteria are based on consumption of aquatic organisms, compliance with the criteria should be established by fish tissue testing. The FDA action levels are the principal factors governing derivation of the human health criteria and the conversion of FDA levels into criteria assumed various bioaccumulation/bioconcentration (BC) factors. Because the BC factors are affected by the bioavailability issues as well as other factors, unnecessary regulation occurs when the assumed BC factors are too high. Direct fish tissue measurement would suffice to monitor compliance with criteria governed by fish consumption without complication by BC factors. (12)

RESPONSE: The DEPE does not believe that compliance with criteria can be established by fish tissue testing. Criteria are promulgated by the DEPE as an integral part of the Surface Water Quality Standards to protect designated uses and are utilized to develop discharge permit limitations so as to achieve and maintain those uses. The DEPE is required, pursuant to the Clean Water Act, New Jersey Water Pollution Control Act (N.J.S.A. 58:10A-1 et seq.), and New Jersey Water Quality Planning Act (N.J.S.A. 58:11A-1 et seq.) to regulate discharges which have a reasonable potential to contribute to exceedances of applicable criteria. To establish compliance by fish tissue testing would be to measure an after-effect of pollution rather than to ensure that the designated uses are adequately protected from pollution.

The FDA action levels represent the limit at or above which the Federal Food and Drug Administration (FDA) will take legal action against the product to remove it from the market. The FDA action levels are not the principal factors governing the derivation of the proposed human health criteria as stated by the commenter. The standard methodology used by the USEPA and the states for deriving human health criteria is based on toxicity factors and does not involve FDA action levels (Basis and Background document, page 22). At any rate, it is the DEPE's understanding that the FDA has established action levels for only 14 chemicals, and these levels were derived on the basis of economic and resource considerations in addition to assessment of health risks. Since the FDA action levels are not derived on the same basis as the DEPE's criteria, it is unclear how fish tissue levels would be translated into ambient water criteria and ultimately into permit limitations that would ensure that fish tissue levels would not exceed the FDA action levels.

The DEPE recognizes that BCFs are affected by various issues, such as bioavailability. The DEPE used the best available scientific information to derive the proposed criteria, in this case, the BCFs used by the USEPA to develop its proposed criteria or the BCFs from the 304(a) USEPA ambient water quality criteria documents.

223. COMMENT: USEPA in the Superfund program uses a 30 year frequency for average duration of time in a residence, and DEPE's use of an assumption of a 70 year length of exposure for the criteria results in standards which are too low by a factor of 2.5. (13)

RESPONSE: The exposure duration of 70 years affects the development of criteria based on carcinogenic effects, but not those based on non-carcinogenic effects. The surface water criteria for carcinogens are intended to protect at a risk level of 1×10^{-6} for lifetime exposure to the contaminant, while the cleanup levels used by the Superfund program may have different goals. The average duration of an individual living in a residence is not the issue in deriving surface water criteria to protect for potable use as the water supply may be the same in more than one of the residences in which the individual lives, or may be contaminated with the same chemical in more than one residence even if the water supply has changed. The same exposure scenario is used for drinking and ground water quality criteria.

224. COMMENT: The human health-based criteria were designed to protect against chronic health effects not acute effects; hence the surface water standards should be average concentrations, or at the very best, a procedure for allowing for some exceedances should be promulgated with these surface water standards. (16)

225. COMMENT: In-stream standards should reflect long-term average concentrations for human health-based carcinogens and numeric criteria exceedance frequencies should be allowed for these parameters. (13)

RESPONSE: The noncarcinogenic effect-based human health criteria represent 30-day averages, with no exceedance at or above the design flows specified for the noncarcinogenic criteria, while the carcinogenic effect-based human health criteria represent 70-year averages, with no exceedance at or above the design flows specified for carcinogenic criteria. By specifying a design flow associated with a criterion, the DEPE has provided for some allowable exceedances, whenever the actual stream flow drops below the specified design flow. Furthermore, by using representative averages of 30 days or 70 years, the DEPE is, in fact, allowing exceedances, provided the averaged values can meet the criteria at the specified design flow. Within the next two years the DEPE will propose a provision to the Surface Water Quality Standards that explicitly allows for use of dynamic or statistical modeling, as requested by the commenters. Incorporation of dynamic modeling in the future will enable the DEPE to specify more precisely the exceedance allowed, for example, not to exceed the criteria more often than one percent of the time.

226. COMMENT: The proposed criteria for the 18 chemicals should be withdrawn and new criteria should be proposed based on USEPA guidance, since the DEPE reviewed 18 chemicals in depth and developed stringent criteria using data not clearly supportive of the increased standards nor reflecting the best scientific knowledge. (12)

RESPONSE: The DEPE recognizes the need to use recent and scientifically valid information for the toxicity factors which form the basis for the Surface Water Quality Standards. New Jersey has developed toxicity factors for the A-280 drinking water contaminants which are discussed in detail in the Basis and Background document independently of USEPA and updates these on a triennial basis. In some cases, DEPE scientists have made professional judgments which differ from those made by USEPA scientists, resulting in the two agencies' establishing differing toxicity factors. These differences do not result from one agency utilizing more up-to-date information than the other. The DEPE's policy in the development of Surface Water Quality Standards is to utilize New Jersey toxicity factors for those chemicals for which toxicity factors have been developed and adopted as the basis for drinking water standards. This provides consistency among the criteria developed by different programs within the DEPE.

227. COMMENT: The DEPE does not have the resources or the expertise to develop toxicity criteria differing from those developed by USEPA, and the review process used by the DEPE and by USEPA are not comparable. Only USEPA criteria, where they exist, should be used. (16)

228. COMMENT: The DEPE must rely entirely on carcinogenic classifications promulgated by the USEPA, since the DEPE has not demonstrated that it has the resources to develop its own carcinogenic classifications. The USEPA's internal and external review processes are more rigorous than DEPE's. (16)

RESPONSE: The DEPE does not agree that it must rely entirely on carcinogenic classifications promulgated by the USEPA. Expertise within the DEPE includes toxicologists who are Diplomats of the American Board of Toxicology, epidemiologists, and statisticians. The risk assessments for carcinogens were developed with the assistance of a nationally recognized consultant, KS Crump Associates, and with external peer review by Clement Associates. Additionally, the New Jersey Drinking Water Quality Institute (NJDWQI), an advisory group established by the 1984 A-280 amendments to the New Jersey Safe Drinking Water Act, recommended these classifications to the DEPE. The risk assessments underwent formal rulemaking including a public comment period, and went promulgated as final regulations under the A-280 Amendments to the New Jersey Safe Drinking Water Act.

229. COMMENT: Why is a separate New Jersey carcinogenicity classification system necessary, since it does not significantly differ from the USEPA "Group" system? (16)

RESPONSE: The New Jersey carcinogenicity system is similar to the USEPA system, with New Jersey Category I comparable to USEPA Group A and B, New Jersey Category II comparable to USEPA Group C, and New Jersey Category III comparable to USEPA Group D and E. It was developed in the process of deriving toxicity factors for drinking water contaminants pursuant to the A-280 Amendments to the New Jersey Safe Water Drinking Act, and is used by DEPE for those contaminants for which it develops its own toxicity factors.

230. COMMENT: Were the DEPE's drinking water criteria peer-reviewed by the national scientific community when they were issued in 1987, and have they been reviewed or updated since 1987? (16)

RESPONSE: The toxicity factors developed by the NJDWQI were peer-reviewed prior to proposal by Clement Associates and were proposed for public comment in the New Jersey Register on December 7, 1987. Responses to oral and written public comments were published with the final rule on January 3, 1989 (21 N.J.R. 46). The basis for these toxicity factors has been reviewed within the last year by the NJDWQI as part of the triennial review process, and revisions have been recommended by the NJDWQI to the DEPE. If appropriate, the DEPE intends to propose the revisions to its Surface Water Quality Standards in the near future.

231. COMMENT: The proposed New Jersey standards for toxics are generally consistent with USEPA guidance, except for those chemicals covered by the State Safe Drinking Water regulations. (14)

RESPONSE: The DEPE is aware that its criteria for contaminants for chemicals covered by the State Safe Drinking Water Act differ from those developed by USEPA in some cases, because these criteria are based on the toxicity factors which form the basis for the New Jersey health-based MCLs for those contaminants. DEPE's policy is to use these toxicity factors as the basis for human health-based surface water criteria to promote consistency between DEPE programs.

232. COMMENT: The IRIS database should not be used to establish water quality standards for the following reasons. The IRIS data are not subject to public review and comment. The IRIS database was developed for site-specific risk assessment/risk management purposes and should not be utilized for establishing water quality standards unless it is subjected to the full review and comment period required by the Administrative Procedure Act. The New Jersey Administrative Procedure Act mandates that the DEPE subject all scientific data used to develop water quality criteria to public review and comment. The toxicity factors in IRIS are consensus estimates made by USEPA work groups, and are not subject to public review and comment. The IRIS data can be changed by USEPA whenever the work groups feel it is necessary without input from scientists outside of USEPA. The IRIS database only provides a summary of studies used as the basis for the criteria, and does not give in detail the toxicology and methods used as the basis for the standards, unlike the criteria documents recently published by USEPA for the existing 304(a) criteria. The public comment period provided by the DEPE is grossly inadequate for review of the IRIS database and associated studies. (4, 5)

233. COMMENT: It is a concern that the DEPE relied on the USEPA's IRIS database as the current source of information on human health data. IRIS is not always up to date on the latest carcinogenicity data, and the lack of peer-review raises concern about its accuracy. It is recommended that the DEPE incorporate other relevant toxicity information in addition to review of information from primary sources such as IRIS. (22)

RESPONSE: The DEPE provided an extended comment period for the public to review and comment on the proposal and the associated background and reference materials. The comment period, which began with the newspaper notice on October 12, 1992, was scheduled to end on December 18, 1992. The Commissioner of DEPE extended the comment period for an additional three months, to March 18, 1992. During this extended period which lasted over five months, several members of the public did visit the DEPE specifically to review the IRIS data used by the DEPE in support of the proposed criteria. The DEPE is in full compliance with the requirements of the New Jersey Administrative Procedure Act. Additionally, IRIS is accessible by the public. It has provided the basis for standard development for the USEPA and many states for the various programs such as those for drinking water, surface water, ground water, and Superfund. In fact, IRIS data have been subjected to an ongoing review process by the public, as the standards based on IRIS are publicly noticed and proposed. The DEPE is aware that the toxicity factors on the IRIS database do not undergo public comment as a proposed regulation. IRIS was developed to promote consistency between risk assessments done by different groups within USEPA. In order to be entered into IRIS, a risk assessment is reviewed and approved by a work group which consists of scientists from throughout USEPA. The toxicity factors on IRIS represent the consensus of USEPA scientists and are the most comprehensive source of risk assessment information on environmental contaminants currently available. The DEPE is aware that the information in the IRIS database changes over time, and intends to update its criteria as part of the triennial review process. Any change in criteria necessitated by IRIS updates will be formally proposed and subjected to public review and comment.

234. COMMENT: The toxicity data on which the standards are based are already between six months old, if the data camr from IRIS, and five years old, if the standards were based on NJDWQI's 1987 risk assessments. Since the standards will be reproposed in another three years, it can be assumed that some standards will be another three years out of date prior to reproposal. IRIS data tables change each month, and there should be flexibility to develop wasteloads based on the most current view of the toxicity information. (13)

RESPONSE: The DEPE needs promulgated criteria for use in the development of total maximum daily loads and wasteload allocation (40 CFR 130.7(c)). Although the DEPE is fully aware of the availability of constantly improved scientific information, the DEPE has to at a given time use the existing data to derive criteria and promulgate them after public comment so that they can be used for regulatory purposes. The DEPE is familiar with monthly IRIS updates and intends to utilize the most current IRIS data to make appropriate changes to the criteria adopted herein in the near future.

235. COMMENT: DEPE has not used the current IRIS database for human health criteria development. The outdated 1987 IRIS is cited throughout the Basis and Background document. Because IRIS is on-line and updated on a regular basis, use of the 1987 IRIS is inappropriate and demonstrates that the DEPE has not reviewed or revised its 1987 toxicity criteria since they were proposed in an earlier proposal. (16)

RESPONSE: The commenter has mistaken the year cited in the reference (USEPA, 1987c) for the date of IRIS search by the DEPE. As shown on page 114 of the Basis and Background document in the References Section, the reference year refers to the year of publication of the specific USEPA publication on the IRIS (EPA 600/8-86/032a and 600/8-86/032b), in this case, a two-volume support document providing the basic introduction to the system. Also included in this reference on IRIS is the wording "and periodic data updates." The specific data of the first batch of IRIS retrievals was September 17, 1990. The IRIS information was updated in part in December 1991, for chemicals for which the DEPE's draft criteria and the USEPA's proposed criteria (56 FR 58420, November 19, 1991) differed by more than 10 percent. These dates are clearly stated in the text of the Basis and Background document, for example, on page 5 in the section on Toxic Substances Criteria, and on page 95 with the accessed IRIS information.

The DEPE agrees with the commenter on the importance of using current data and is aware of the IRIS monthly updates. The scientific community is constantly striving to improve information. However, there is an unavoidable time lag between the availability of the most current data and the promulgation of rules based on such information. The nature of the rulemaking process, which includes drafting reviewing and finalizing the proposal, public comment period, comment, review and response, requires time. The DEPE acts on the best scientific information available to it at the time a proposal is being developed. The triennial review process for the Surface Water Quality Standards and interim amendments can address changes necessitated by new data.

The DEPE reviewed IRIS printouts through July 1, 1993, for revisions which may significantly affect the criteria originally included in the proposal. The chemicals for which changes are noted in toxicity factors are the following: benzo(a)pyrene, bromodichloromethane, endosulfan, isophorone, hexachlorobutadiene.

The DEPE considered the withdrawal of the proposed criteria, and publishing a new proposal to reflect changes in IRIS for the above chemicals and for the other chemicals in the proposal whose criteria were based on toxicity factors of the above chemicals. However, because the USEPA promulgated toxic criteria for New Jersey on December 22, 1992 (57 FR 60918), for these chemicals, the DEPE has decided to adopt the proposed criteria so that the DEPE can gain regulatory flexibility to issue variances on a discharger- or stream-specific basis. It is anticipated that these criteria will be repealed in the near future and new criteria proposed that incorporate up-to-date IRIS data.

236. COMMENT: DEPE should explain the difference between the evaluation of the 18 chemicals in Table 4 in the Basis and Background document for which criteria derivations are included and that of the other chemicals listed in the table which lack derivations. (16)

RESPONSE: For the 18 chemicals with derivations, the DEPE conducted extensive reviews of the available toxicity information. Because of special considerations regarding the health effects of lead, the DEPE evaluated existing data and developed a criterion for fresh water for lead. The remaining 17 chemicals were reviewed in depth by the DEPE in order to develop MCLs at the request of the NJDWQI as mandated by the amendments to the New Jersey Safe Drinking Water Act (N.J.S.A. 58:12A-1 et seq., P.L.1977, c.224, as amended and supplemented by P.L.1983, c.443). The toxicity factors which provided the health basis for the MCLs were utilized as the basis for the human health criteria for surface water. For these chemicals, the DEPE prepared, in the Basis and Background document, detailed discussions on chemical-specific criteria development based on information available from prior work with developing drinking water standards.

For chemicals of concern which were not addressed by the NJDWQI, but which the USEPA incorporated into IRIS, DEPE used the oral toxicity factors in IRIS, if appropriate, in deriving the criteria. These chemicals are listed in Table 4 of the Basis and Background document together with the 18 chemicals with derivations. The table contains sufficient information from which to develop criteria following the methodology adopted for the 18 chemicals. Therefore, chemical-specific discussions for these chemicals were not provided in the Basis and Background document. Detailed accounts of the relevant toxicity studies and references can be obtained from the IRIS.

237. COMMENT: The DEPE provides no justification or rationale for proposing changes to the currently existing criteria. Additionally, the DEPE provides no methodology for the derivation of the proposed criteria. The DEPE needs to provide the equations and rationale for the proposed criteria as done in section B under Criteria Development for Toxic Substances in the Basis and Background document, so that more specific comments may be developed. As it is, the criteria are proposed with no explanation as to how they were derived, the methodology (for example, the equations for calculating the proposed criteria), or upon what study the relevant Reference Doses or cancer potency factors were based. Additionally, many of the proposed criteria appear to be the same as those values currently promulgated by the USEPA. If the DEPE is basing its proposed criteria on those currently promulgated by the USEPA, the DEPE needs to state this and reference the USEPA criteria. (16)

RESPONSE: The rationale for the proposed changes to the existing toxic substances criteria was provided in the Summary to the Proposal and the Basis and Background document. The existing criteria consist of aquatic life criteria for 11 chemicals and human health criteria for nine chemicals, all of which required review and updating. The changes were proposed to meet Federal requirements, and to provide updated criteria for the protection of aquatic organisms and human health according to the best science to date.

The States are required to conduct triennial reviews of the Surface Water Quality Standards (33 U.S.C.A. 1313(c)(1)), and to modify the Surface Water Quality Standards as necessary. Additionally, Section 303(c)(2)(B) of the Clean Water Act, as amended by the Water Quality Act of 1987, requires the States to adopt numeric criteria to protect the uses of their waters. New Jersey has a large number of publicly owned treatment works and industrial and commercial dischargers producing, using, or handling a wide variety of chemicals or chemical by-products that are discharged to waters of the State. As a result, the DEPE considers it necessary to propose and adopt criteria for chemicals as long as there are scientifically sound data available to develop criteria. Furthermore, New Jersey has the greatest number of contaminated sites listed under the Federal Superfund program of any of the states. Also, New Jersey requires facilities being sold to clean up contamination at the site. In addition to the NJPDES permitting program, publicly or privately funded remediation projects for cleaning up contaminated sites need surface water quality criteria to provide the basis for regulating surface water. The DEPE thus concluded that it needed to make the proposed changes to the currently existing criteria.

Furthermore, USEPA proposed chemical-specific numerical criteria for the priority toxic pollutants for New Jersey on November 19, 1991 (56 FR 58445) and adopted them on December 22, 1992 (57 FR 60860). The State will not be able to gain regulatory flexibility (such as issuing variances) unless it adopts its own criteria for these chemicals.

The DEPE provided instructions on page 27 of the Basis and Background document regarding how the criteria were developed using the methodology discussed on page 23 and the information presented in Table 4. The general equations for criteria derivation were also provided. It is not necessary to follow the same format as presented in Section B, where the derivations of chemical-specific toxicity factors are discussed (Basis and Background document, pages 27-60) for a very large number of chemicals whose toxicity factors were obtained from IRIS. The toxicity studies and other related information for these IRIS-based chemicals can all be accessed directly from the IRIS, if needed.

Some of the proposed criteria are the currently promulgated USEPA criteria as shown in the Basis and Background document in Table 2, entitled "Existing USEPA 304(a)(1) and Maximum Contaminant Level Goal-Based Human Health Criteria," and in Table 3, "Human Health-Based Criteria from USEPA Proposed Rule". The Tables are so titled to acknowledge explicitly the USEPA sources. Table 2 lists the USEPA criteria for chemicals for which the DEPE had no IRIS information to update the 304(a)(1) criteria or no available BCFs, while Table 3 lists the USEPA proposed criteria which the DEPE would have preferred not to include in the proposal because of difference in scientific opinion between the DEPE and the USEPA. Prompted by the concern for losing its regulatory flexibility, the DEPE decided to include these USEPA proposed criteria in its proposal. Tables 2 and 3, together with Table 4, contain the information used to prepare Table 1, which includes all of the proposed human health criteria.

Some of the proposed criteria listed in Table 4 appear to be the same as those currently promulgated by the USEPA, but these criteria were not based on USEPA's. The brief chronology of the DEPE's efforts in

criteria development in the Basis and Background document explains the evolution of the criteria in Table 4. In late 1990, after the DEPE developed criteria for the 17 chemicals covered by the A-280 amendments to the New Jersey Safe Drinking Water Act at N.J.S.A. 58:12A and completed the update of the USEPA 304(a)(1) criteria, the DEPE prepared a draft proposal of the Surface Water Quality Standards, including criteria, for internal review. On November 19, 1991, while that proposal was being finalized, the USEPA proposed criteria for New Jersey. Where the DEPE's 304(a)(1)-based criteria differed from the USEPA's proposed criteria by more than 10 percent, the DEPE reviewed and updated the criteria, if needed. Because the DEPE updated the 304(a)(1) criteria using USEPA IRIS data and standard USEPA methodology, the DEPE's proposed criteria, originated in 1990, and the USEPA criteria, promulgated in 1992, appear the same, though these were developed independently.

238. COMMENT: Because the DEPE has applied its own rounding policy to USEPA toxicity criteria, the DEPE recommends criteria with more significant figures than those promulgated by the USEPA. The number of significant figures reflects the level of confidence associated with a particular value. For example, if an uncertainty factor of 30,000 is applied to toxicity data to arrive at a Reference Dose, use of more than one significant figure reflects a level of precision not applicable to the Reference Dose. The USEPA rounding procedure is appropriate and no additional significant figures should be incorporated into the Reference Doses and cancer slope factors. (16)

RESPONSE: The rounding policy and the policy on number of significant figures are two separate issues. The DEPE does not have its own rounding policy. As stated on page 27 of the Basis and Background document, the DEPE, in fact, follows the general USEPA practice for rounding. Values ending with five or more are consistently rounded up. As to the number of significant figures used for the proposed criteria, all proposed criteria have been rounded to three digits to be consistent with the existing USEPA criterion with the largest number of significant figures, the criterion of 313 mg/L of dimethyl phthalate.

Regarding the number of significant figures used for the Reference Doses and cancer slope factors, it is stated in the DEPE drinking water document which provided the basis to derive the toxicity factors for the so-called A-280 chemicals for this proposal that two significant figures were provided for the health-based levels (NJDWQI. 1987. New Jersey Drinking Water Quality Institute. Maximum Contaminant Level Recommendations for Hazardous Contaminants in Drinking Water, page 38). The toxicity factors used to derive these levels as shown in Appendix B of the drinking water document cited above are mostly in two or three significant figures.

The DEPE agrees with the commenter's statement that the number of significant figures should not reflect a level of precision not applicable to the value. However, risk assessment is not a precise science and, as the commenter stated, uncertainty factors are applied. Currently in IRIS, Reference Doses are listed mostly in one significant figure and cancer slope factors in two significant figures. Often, toxicity data are reported in IRIS. Therefore, the DEPE recalculated the Reference Doses from these data to two significant figures for use in criteria development so that the derived criteria value could be more meaningful.

239. COMMENT: The dose extrapolation from rodents to humans based on body surface area needs explanation. USEPA, FDA, and the Consumer Product Safety Commission (CPSC) have agreed to scale dose by body weight to the 3/4 power for chemicals in which a metabolite is the toxic moiety. (16)

RESPONSE: The DEPE is aware that this scaling approach was proposed as a 1992 USEPA draft report (57 FR 24152). This policy has not been adopted as final. USEPA currently utilizes the same scaling approach used by DEPE.

240. COMMENT: Different studies should not be used to classify carcinogenicity and to set standards. (16)

RESPONSE: Carcinogenicity classification is based on the total set of data available for the compound of interest including chronic studies, mutagenicity and other short term tests, and structure activity relationships. The toxicity factor is based on the most sensitive endpoint which is relevant to potential human toxicity.

241. COMMENT: The use of a one-in-one-million cancer risk level is arbitrary and overly stringent. This risk level has been used historically only for very large exposed populations, and that a higher risk level is appropriate for surface water bodies which support small or moderately sized populations. The CERCLA National Contingency Plan specifies 1×10^{-6} as a point of departure, and recommends risks in the range of 10^{-4} to 10^{-6}. Many USEPA MCLs are not based on 10^{-6} risk. (16)

242. COMMENT: New Jersey should not restrict itself by regulation to a one-in-one million cancer risk level because the underlying scientific method is too uncertain. An article entitled "Rodent Carcinogens: Setting Priorities" published in Science, Oct. 9, 1992, by Bruce Ames and Lois Gold, criticizes the widely applied methodology of extrapolating from high chemical doses in rats to low tolerance levels in humans. According to the Gold and Ames article, all natural chemicals are toxic at some dose, defenses to natural chemicals will protect humans against synthetic chemicals, the high doses of chemicals given to rats frequently kill cells, and the resulting cell replacement increases the risk of cancer, most fruits and vegetables probably contain natural pesticides which are rodent carcinogens, and normal daily doses of natural carcinogens from common fruits and vegetables are more potent than those from many synthetic chemicals. (19)

243. COMMENT: The DEPE should justify its use of the lifetime cancer risks of 1×10^{-6} and 1×10^{-5}. A paper presented by K. Kelly challenges the use of 1×10^{-6} as a definition of acceptable risk. (21)

244. COMMENT: The rigid application of the 10^{-6} target cancer risk level is not consistent with USEPA current policy. In the 1990 National Contingency Plan on Superfund remedial action (55 FR 86666, 8716). USEPA rejected the strict application of 10^{-6} risk level in favor of a range of 10^{-6} to 10^{-4}. Congress also did not adopt this risk level in the Clean Air Act Amendments of 1990. (22)

RESPONSE: The 10^{-6} cancer risk level has been used by DEPE as the basis for a number of different contaminant specific human health based regulations. It is the risk level specified in the A-280 amendment to the New Jersey Safe Drinking Water Act as the basis for human health-based drinking water standards for carcinogenic contaminants and in the New Jersey ground water quality criteria. USEPA also used 10^{-6} as the risk level on which it based the Surface Water Quality Criteria proposed on November 19, 1991. In its final rule (FR 57, 60848, December 22, 1992), USEPA relaxed this requirement, and allowed states to depart from the 10^{-6} risk based on "each State's policy or practice regarding what risk level is, or should be, used in regulating carcinogens in surface waters." The DEPE believes that, for New Jersey, the designation of a 10^{-6} risk level is appropriate based on the policies of DEPE for other human health-based water standards and on USEPA's policies for surface water criteria.

In regard to the risk range cited for the National Contingency Plan (NCP), the 1×10^{-6} risk for ambient water quality criteria used by New Jersey is not comparable to the 10^{-4} to 10^{-6} range utilized by USEPA in the NCP. The USEPA risk range refers to the risk from the contaminants at an entire contaminated site, combining risks from the total number of environmental contaminants through all media and exposure routes. The water quality criteria are based only on exposures to individual contaminants in surface water.

Furthermore, the NCP speaks of 10^{-6} as a "starting point" for development of cleanup levels, which may be modified by such practical considerations as analytical limitations and background levels. Ambient water quality criteria are utilized to determine allowable discharges into the environment, rather than to determine cleanup levels for contamination which is already present. The intent is to not permit an undesirable level of contamination to be intentionally discharged.

Similarly, the intent and considerations for choosing a risk level as the basis for regulation of discharge of toxic air pollutants under the Clean Air Act are not directly comparable to the Surface Water Quality Standards.

Regarding the comment on water bodies which support small or medium sized populations, the DEPE's policy is to protect all individuals equally. DEPE therefore calculates risk based on individual lifetime risk, not in units of person-years.

Regarding the USEPA MCLs, the maximum contaminant level goal, or target level, is zero for carcinogens. The actual MCL is determined by factors such as analytical limitations and treatability. As stated above, the risk level specified by the A-280 amendments to the New Jersey Safe Drinking Act for the MCLs developed for New Jersey is 10^{-6}, after which analytical limitations and treatability are also considered in determining the final MCLs.

245. COMMENT: The 10^{-6} risk level is consistent with the USEPA approach. Carcinogens should be regulated as are other toxic substances,

with acceptable in-stream concentrations calculated on the basis and type and duration of exposure (limited for non-potable waters), amount of exposure and volume. (5)

RESPONSE: The DEPE agrees with the commenter. The surface water quality criteria are based on designated uses of the water bodies, with non-potable (saline) waters having more limited uses than fresh waters.

246. COMMENT: The risk level of 1×10^{-6} appears unnecessarily stringent for receiving waters not routinely used as potable water sources. Consideration of receiving water classification and use should be incorporated when establishing acceptable risk levels. A flexible approach should be considered that would allow for adjustments to the 1×10^{-6} level based on site-specific conditions and other risk management factors. The actual expected ingestion of specific receiving waters should be considered, rather than assuming two liters per day for 70 years. (22)

RESPONSE: All FW2 waters of New Jersey are designated for potable use, and are considered potential drinking water supply sources. Therefore, the human health-based FW2 criteria for these waters are based on exposure assumptions appropriate for potable use. The DEPE has decided to base its criteria on the 10^{-6} risk level for Group A and B carcinogens, using appropriate exposure assumptions for designated uses. The New Jersey legislature has mandated a 10^{-6} risk level for drinking water contaminants, and this risk level is also used for the human health based surface water quality criteria.

247. COMMENT: The commenter would like an opportunity to review and comment on how the DEPE intends to regulate discharges to meet the target risk levels. (22)

RESPONSE: The DEPE is working on revisions to the NJPDES regulations which will include the methodology that will be used to meet target risk levels. These changes will be proposed for public review and comment. In addition, implementation procedures for the Mainstem of the Delaware River are being drafted by DRBC staff with input from representatives of New Jersey, Pennsylvania, Delaware and the USEPA-Region II and III. These implementation procedures will also be released for public review and comment.

248. COMMENT: USEPA has intentionally not developed potency factors for Group C carcinogens because the databases are typically inadequate, and standards for Group C carcinogens should be based on non-carcinogenic effects only. (16)

RESPONSE: This comment is factually incorrect. USEPA often sets potency factors for Group C carcinogens and uses these slope factors to develop criteria based on carcinogenic effects for Group C carcinogens. For example, perusal of the first several pages of Table 3 (Carcinogenicity) in the FY92 Health Effects Assessment Summary Table (HEAST) reveals that atrazine, bis (2-chloroisopropyl) ether, captafol, chloranil, and chloromethane are all listed as Group C carcinogens, and all have potency factors given.

249. COMMENT: Group C chemicals are not likely to pose a significant cancer risk to humans based on available evidence, and the commenters were concerned about the 1×10^{-5} risk level for Group C chemicals. If the DEPE has a particular concern about the carcinogenic potential of a particular Group C chemical, DEPE should assess the evidence for that chemical and make any resulting "safety factor" adjustment on a chemical-specific basis. (22)

250. COMMENT: A scientific basis should be provided for the use of an additional uncertainty factor of 10 for Group C carcinogens with uncertain carcinogenicity status. Neoplastic liver nodules likely occur at doses of chlorobenzene above the Reference Dose, so no extra factor needs to be applied. The use of this factor should be considered on a chemical-specific basis, and a factor of less than 10 would be appropriate for some chemicals. (16)

RESPONSE: These comments question the appropriateness of applying an additional uncertainty factor of 10 to the Reference Dose for Group C carcinogens.

Different regulatory agencies utilize various approaches for risk assessment for Group C carcinogens (possible human carcinogens). These are contaminants for which some evidence of carcinogenicity exists, but the evidence is insufficient to warrant classification as Group A (known human carcinogens) or Group B (probable human carcinogens). Group C carcinogens may have sufficient toxicity data to develop a Reference Dose based on non-carcinogenic effects, a potency factor based on carcinogenic effects, or both. The approach used for risk assessment of Group C contaminants is, in part, a policy decision. It is appropriate to treat Group C contaminants more stringently than Group D or E contaminants, and less stringently than Group A or B contaminants. The proposed approach for Group C carcinogens which have a Reference Dose is the same as the one utilized by DEPE in developing health-based MCLs for drinking water (NJDWQI, 1987; Maximum Contaminant Levels Recommendations for Hazardous Contaminants in Drinking Water, submitted to DEPE) and in the Ground Water Quality Standards, and by USEPA in its development of maximum contaminant level goals for drinking water (USEPA, 1985, FR 50: 46902). DEPE has chosen to utilize this approach so that all Group C contaminants for which DEPE is developing criteria will be addressed consistently. This approach involves utilizing the Reference Dose, when available, and incorporating an additional safety factor of 10 to account for potential carcinogenicity. If no Reference Dose exists for the contaminant, the risk assessment is based on the potency factor. The DEPE believes that Group C chemicals should be regulated less stringently than Group A or Group B chemicals. Therefore, a risk level of 1×10^{-5} rather than 1×10^{-6} is utilized for them.

251. COMMENT: The reference for the odor thresholds given in the Basis and Background document for the chemicals which the DEPE reviewed in depth needs to be cited. Was the odor threshold given in mg/L or did the DEPE convert the odor threshold from ppm to mg/L? (16)

RESPONSE: The reference for the odor thresholds is Verschueren, K. Handbook of Environmental Data on Organic Chemicals. Van Nostrand Reinhold, New York, 1983. The odor thesholds are presented as given in the reference.

252. COMMENT: The use of the phrase "carcinogenic, mutagenic or teratogenic substances" is inconsistent with the DEPE's regulation of "disease causing agents". The DEPE should not, within the definition of toxic substances and toxic pollutants, attempt to regulate "disease causing agents" if its policy is to regulate carcinogenic, mutagenic, and teratogenic substances. (21)

RESPONSE: All contaminants which may result in adverse effects in humans may be regulated as toxic substances. The fact that mutagenic, teratogenic, or carcinogenic substances are of particular concern to the DEPE does not mean that substances which result in other adverse effects are not of concern.

Human Health Criteria—Chemical Specific

Arsenic N.J.A.C. 7:9B-1.14(c)13ix

253. COMMENT: The DEPE proposes to replace the human health protection criterion of 50 ug/L for arsenic applicable to FW2 waters with a human carcinogen protection criterion for FW2 waters of 0.0170 ug/L. The USEPA human health criteria for arsenic(III) for a lifetime risk of 10^{-6} is 2.2 ng/L for freshwater and 17.5 mg/L for saltwater criteria. Because USEPA and DEPE criteria agree within 10 percent, the DEPE does not provide a detailed explanation of how it derived its arsenic human health criteria. However, it clearly attempts to apply the criteria for one form of arsenic(III) to total arsenic. The standards should include an "equivalency" protocol, similar to the one the USEPA has developed for dioxin, to account for the varying toxicity of different forms of the toxicant. Regulating all forms of arsenic under the stringent requirements of the most toxic form when DEPE knows that the different forms have varying toxicities is arbitrary and capricious. No data have been reported that anyone has been adversely affected by the current 50 ug/L standard for arsenic which would be about a one in five cancer risk, if the USEPA criterion for arsenic(III) (2.2 ng/L) is correct at 10^{-6} risk. (12)

RESPONSE: The criteria for arsenic were developed following USEPA's standard methodology, on the basis of toxicity studies of several forms of arsenic, not only of trivalent arsenic. As stated in the Basis and Background document (for example, pages 4 and 20), the DEPE developed human health criteria for many toxic substances by updating the 1986 USEPA 304(a)(1) criteria with toxicity information contained in the USEPA Integrated Risk Information System (IRIS). These 1986 criteria were published by the USEPA pursuant to section 304(a)(1) of the Clean Water Act. The criteria were derived based on the IRIS weight-of-evidence classification and quantitative estimate of carcinogenic risk from oral exposure. Arsenic is classified by IRIS as "Category A, human carcinogen" with a unit risk of 5E-5/ug/L based on the studies in Taiwan as discussed in IRIS. The chemical form of arsenic in the Taiwanese water was not clearly determined; people in that region of Taiwan could have been exposed to both trivalent and pentavalent arsenic compounds (USEPA, 1980. Ambient Water Quality Criteria for Arsenic. EPA 440/580-021).

With the IRIS information cited above, the DEPE developed the proposed criteria for arsenic: a criterion of 0.0170 ug/L for FW2 water

and 0.136 ug/L for SE and SC waters at a lifetime excess cancer risk level of 10^{-6}. The DEPE criteria are within 10 percent of the criteria of 0.018 ug/L and 0.14 ug/L, respectively, which USEPA promulgated for New Jersey on December 22, 1992. The DEPE has decided to adopt the arsenic criteria as proposed. In adopting its proposed arsenic criteria, the USEPA explained in a footnote that the criteria refer to the inorganic form of arsenic only. The DEPE plans to draft a new proposal to amend the arsenic criteria to refer to the inorganic form only in the immediate future. The commenter used outdated information in citing the USEPA human health criteria being 2.2 ng/L for fresh water and 17.5 ng/L for salt water which are the USEPA 1986 Gold Book criteria.

The DEPE is aware of the equivalency protocol that the USEPA is developing for dioxin. However, in the case of arsenic, the problem of differential toxicity of the various members of the chemical family is compounded by the interconversion of members having different oxidation states and various degrees of methylation. If enough information becomes available in the future which indicates that criteria for arsenic should be based on the equivalency protocol, the DEPE will review the data and revise the criteria for arsenic, if appropriate.

The DEPE disagrees with the commenter's estimate of the cancer risk. Based on a linear relationship, using the figures cited (50 ug/L and 2.2 ng/L at 10^{-6} risk), the risk at 50 ug/L should be one in 44, and not one in five as the commenter states. For cancer risk assessment, the criteria were calculated from an upper bound estimate of risk from lifetime exposure. While the unit risk for arsenic was based on skin cancer data, significant associations of dose-related cases of bladder, liver, and lung cancer with arsenic ingestion have also been found. The actual risk is not possible to determine.

254. COMMENT: The target organ for carcinogenesis of ingested arsenic is the skin. Epidemiological studies of arsenic-promoted skin carcinogenesis suggest that ultraviolet light is normally the initiating carcinogen. There is evidence that arsenic oral carcinogenicity is nonlinear at low doses due to detoxification by methylation and excretion. There is no health basis for a water quality standard that is less than the 50 ug/L MCL value. (13)

RESPONSE: The concern about cancer resulting from ingested arsenic is not limited to skin cancer. Associations between arsenic ingestion and cancer of various internal organs, such as bladder, liver, lung, kidney, and colon, have also been reported (IRIS, September 29, 1993). The commenter's statement on arsenic's serving only as a promoter in carcinogenesis and the nonlinearity of arsenic oral carcinogenicity at low doses needs full verification. In view of the health concerns, the DEPE does not consider that setting the criterion for arsenic at 50 ug/L MCL value as a noncarcinogen is adequately protective. Furthermore, ambient water quality criteria and MCLs can not be compared to each other because they are derived from different bases. While both are based on health concerns, considerations for treatability, cost, and analytical detectability often lead to a much higher value for MCLs, especially for the carcinogens.

Benzene N.J.A.C. 7:9B-1.14(c)13xiii

255. COMMENT: Why did the DEPE develop its own slope factor for benzene, which differs from USEPA's? Improvements in low dose extrapolation have been made since 1987. USEPA guidance should be used, especially since the New Jersey factor is six years old. (16)

RESPONSE: New Jersey developed its own slope factor for benzene pursuant to the requirements of the 1984 amendments to the New Jersey Safe Drinking Water Act (known as the A-280 Amendments). Although the slope factor was developed in 1987, the basis for the slope factor was reviewed within the past year, and no new information was discovered which would necessitate revision of the slope factor.

256. COMMENT: The derivation of the potency factor for benzene was misleading. The text of the Basis and Background document indicates that the factor was derived from human dose-response data, but in the equations given, it appears to be derived from a risk-based drinking water standard. (16)

RESPONSE: The potency factor was derived in this manner because of the way in which the health-based drinking water level was derived. The drinking water level was derived from the concentration of benzene in air in occupation studies that was found to result in a 10^{-6} cancer risk. This was then converted to the equivalent drinking water concentration as follows (NJDWQI, 1987, Maximum Contaminant Level Recommendations for Hazardous Contaminants in Drinking Water, Appendix B—Health-based Maximum Contaminant Level Support documents):

Drinking Water Concentration (ug/L) =
$(2.64 \times 10^{-5}$ ppm) (319 mg/m^3/ppm) (1000 ug/mg) $\times$ (10 m^3) $\times$ (260 days/360 days) (0.5)/2 liters = 0.15 ug/L

where, 2.64×10^{-5} ppm is the air concentration calculated to result in 10^{-6} additional cancer risk via occupational exposure; 3.19 mg/m^3/ppm is the conversion factor from mg/m^3 to ppm for benzene; m^3 is the volume of air assumed to be inhaled by an individual during a working day; 260 days/360 days is the number of working days per year; and 0.5 is the fraction of inhaled benzene assumed to be absorbed.

257. COMMENT: The DEPE does not have the expertise to develop its own slope factor for benzene, and must explain why its approach is more credible than USEPA's. (16)

RESPONSE: The DEPE does not agree that it does not have the expertise to develop its own slope factor for benzene. Within DEPE, professionals in the fields of toxicology, statistics, and epidemiology were involved in developing the benzene risk assessment as well as an outside consultant, KS Crump Associates. External peer review was provided by the New Jersey Drinking Water Quality Institute and by Clement Associates. After a public comment period, the drinking water standard which was based on the benzene risk assessment was promulgated under the A-280 amendments to the New Jersey Safe Drinking Water Act.

Benzene is classified by the USEPA and DEPE as a Group A human carcinogen. The USEPA and DEPE benzene cancer potency factors are 0.029 and 0.23 (mg/kg/day)$^{-1}$, respectively. The dose response relationship between benzene and human leukemia was derived from three human epidemiological studies. The eight-fold more stringent DEPE benzene potency factor arises from three risk assessment assumptions. First, the DEPE determined that the best model of the epidemiological studies was the relative risk (multiplicative) model of cumulative benzene dose, while the USEPA calculated the geometric mean of estimates from four different models. The relative risk (multiplicative) model assumes that the increased age-specific leukemia mortality from a specific benzene dose is proportional to background leukemia mortality. The relative risk model predicts that the effect of benzene should be larger as the background occurrences of leukemia increase. The relative risk model has been used to describe the causal relationship between cigarette smoking, asbestos, and human lung cancer. Second, DEPE used the 95 percent upper confidence interval on risk, while the USEPA applied the maximum likelihood estimate of average risk. The 95 percent upper confidence level on risk or 95 percent lower confidence level on dose is meant to protect 95 percent of the general population from one in one million excess cancer risk. Third, the DEPE assumed that workers absorb 50 percent of the benzene inhaled, while the USEPA assumed 100 percent absorption of inhaled benzene. Approximately 50 percent of inhaled benzene was retained in studies of human volunteers (Docter and Zielhuis (1967), Ann. Occup. Hyg. 317; Nomiyama, K. and Nomiyama, H. (1974), Int. Arch Arbeitsmed. 32, 75).

258. COMMENT: The DEPE needs to provide more justification for use of a 50 percent bioavailability factor for benzene. The studies cited by DEPE in the Basis and Background document, as the basis for this factor are over 20 years old. (16)

RESPONSE: The DEPE is not aware of any data which indicate that the study used as the basis for the 50 percent bioavailability factor is no longer valid. The fact that the work was published over 20 years ago is not a legitimate reason not to use the information.

259. COMMENT: The DEPE does not justify why the relative risk (multiplicative) model of cumulative benzene dose was the best model for calculating criteria and why the 95 percent upper confidence interval on risk was used instead of the maximum likelihood estimate. (12)

RESPONSE: The DEPE felt that the relative risk model was the most appropriate for derivation of the benzene slope factor. The relative risk model assumes that the increased age-specific mortality from benzene is proportional to the background mortality. The modeling is based on cumulative dose from exposure histories of individual cohort members. This model is linear at low doses.

260. COMMENT: The DEPE used the 95 percent upper confidence interval, rather than the "best" estimate used by USEPA in deriving the benzene slope factor. (16)

RESPONSE: The DEPE's policy for carcinogens is to use the 95 percent upper confidence interval in derivation of the slope factor. This approach was used in developing the health-based MCL for benzene under the A-280 amendments to the New Jersey Safe Drinking Water Act. The benzene risk assessment underwent public comment, and the benzene MCL upon which it was based, was adopted as part of the final drinking water rule (21 N.J.R. 46).

Beryllium N.J.A.C. 7:9B-1.14(c)13xix

261. COMMENT: Standards for beryllium should be based on non-carcinogenic effects, because the DEPE's criteria based on carcinogenic effects were not developed using state-of-the-art science. For example, the DEPE used USEPA's classification of beryllium as an oral carcinogen with an oral carcinogenic potency half of that of the inhalation potency. (13)

RESPONSE: As stated in the response to Comment 339 regarding the DEPE's deliberations on the 12 chemicals deleted by the USEPA in its adoption, the DEPE is not adopting the proposed criteria for beryllium at this time. In the interim, criteria based on the best available scientific information will be utilized by the DEPE in the development of chemical-specific water quality based effluent limitations for point source discharges, when needed, as provided at N.J.A.C. 7:9B-1.6(c)4iii.

Carbon Tetrachloride N.J.A.C. 7:9B-1.13(c)13xxx

262. COMMENT: The DEPE must give the justification for the use of the Weibull model in place of the Linearized Multistage Model for carbon tetrachloride. (16)

RESPONSE: The Weibull adjustment to the linearized multistage model was used for low dose extrapolation for carbon tetrachloride because of the need to adjust for early deaths of the animals due to tumors. This model is linear at low doses, and the 95 percent upper confidence limit on risk was used. The model is used to provide the adjustment from the less than lifetime exposures of the rodents in the study to estimate risks in humans with a full lifetime of exposure.

263. COMMENT: The DEPE selected species to find the most stringent data possible, not necessarily the best or the most representative scientific data possible, when developing criteria for carbon tetrachloride. (12)

264. COMMENT: The DEPE should better substantiate and reference the difference in sensitivity to carbon tetrachloride between mice and rats. The choice of the mouse study instead of the rat study as the basis of the risk assessment shows poor judgment, since rats have been reported to be similar to humans in their response to hepatotoxic chemicals. Mice have a high background incidence of hepatocellular tumors which may exaggerate their response to carbon tetrachloride. (16)

RESPONSE: The policy of the DEPE is to use the most sensitive endpoint as the basis for risk assessment, unless it has been shown that the most sensitive endpoint is not relevant to humans. The DEPE is not aware of information indicating that hepatotoxic effects in rats are more relevant to humans than hepatotoxic effects in mice. The commenter did not provide references to support the statements about the relative sensitivities of rats and mice.

Chlordane N.J.A.C. 7:9B-1.14(c)13xxxi

265. COMMENT: The RIAST study used as the basis for the chlordane risk assessment identifies only benign tumors (hepatocellular adenomas) as its carcinogenic endpoint. It is accepted practice to combine benign and malignant tumors, but the use of benign tumors is questionable. (16)

266. COMMENT: The DEPE should comment on the relevance of hepatocellular adenomas in mice, since controls have a high background incidence of these tumors. (16)

267. COMMENT: Explain the decision by the DEPE not to use the two chronic mouse studies which USEPA used as the basis for the chlordane risk assessment particularly the elimination of one of the studies because the dose was changed during the study and because the control group had a small number of animals. (16)

268. COMMENT: The DEPE fails to explain why it did not use the USEPA carcinogenic potency factor and other available data to develop criteria for chlordane, nor does it explain its selection of the incidence of hepatocellular adenoma in male mice as the appropriate endpoint for criteria development. (12)

RESPONSE: The DEPE has reviewed the data on chlordane and has concluded that the RIAST study is the most appropriate basis for the risk assessment. The DEPE agrees that the derivation of the slope factor for chlordane from the RIAST (1983) study cited in the Basis and Background document should be reevaluated, particularly regarding the modeling of benign tumors only, and is currently conducting this re-evaluation. If it is determined that the potency factor should be modified to one based on the combined incidence of benign and malignant tumors, DEPE does not anticipate that the change in actual values will be large.

269. COMMENT: The bioconcentration factor of 14,000 L/kg indicates that chlordane bioconcentrates in fish. The DEPE properly developed human health-based criteria for uptake of this chemical by fish ingestion. (16)

RESPONSE: The DEPE appreciates the commenter's support for this change to the Surface Water Quality Standards.

Chlorobenzene N.J.A.C. 7:9B-1.14(c)13xxxiv

270. COMMENT: The DEPE should explain the derivation of its Reference Dose for chlorobenzene. The incorporation of an "additional safety factor of 10" into the USEPA Reference Doses does not result in the Reference Dose presented. The DEPE must provide the basis for all of the uncertainty factors used to derive Reference Doses. (16)

271. COMMENT: In regard to chlorobenzene, it is inconsistent to use toxicity studies in one species for carcinogenicity classification (neoplastic liver nodules in male rats) and to base the risk assessment on results from a different species (histological changes in dogs). (16)

272. COMMENT: The DEPE needs a much stronger justification for the classification of chlorobenzene as a possible human carcinogen. (16)

273. COMMENT: There appears to be a calculation error in the DEPE's derivation of the standard for chlorobenzene. (16)

274. COMMENT: There is a 30-fold difference between the Reference Dose of the USEPA and that of the DEPE used in calculating chlorobenzene criteria, even though the Reference Doses were based on the same toxicological study. (12)

RESPONSE: The New Jersey Reference Dose differs from that of USEPA by 30-fold, due to the incorporation of two uncertainty factors.

An additional uncertainty factor of three was used because of the small number of experimental animals. In a subchronic study involving dogs, it is desirable that six to eight animals be used per sex per dose group (Hayes, A.W., 1989, Principles and Methods of Toxicology, 2nd Edition, Raven Press, NY) while in the Monsanto study which is the basis for the DEPE risk assessment, four dogs were used. Additionally, not more than 10 percent of high dose animals should die during a subchronic study (Hayes, A.W., 1989, Principles and Methods of Toxicology, 2nd Edition, Raven Press, NY), while in the Monsanto study 50 percent of the high dose animals died.

Regarding the carcinogenicity classification of chlorobenzene, the New Jersey Drinking Water Quality Institute has considered the data from the National Toxicology Program study (see below), as well as general USEPA recommendations for risk assessment based on rat liver lesions (USEPA, 1986, Proliferative hepatocellular lesions of the rat: review and future use in risk assessement. Risk Assessment Forum, USEPA, Washington, DC). Classification of chlorobenzene as a Group C carcinogen was based on the increased incidence of neoplastic nodules in male rats in the NTP study (National Toxicology Program. 1985. Toxicology and carcinogenicity studies of chlorobenzene (CAS No. 108-90-7) in F344/N rats and B6C3F1 mice (gavage study). NTP Technical Report Series No. 261). (An increased occurrence of neoplastic liver nodules or malignant liver tumors did not occur in female rats, male mice, or female mice.) The general USEPA guidance regarding rat liver lesions (1986) states that if the incidence of neoplastic liver nodules, but not the incidence of liver carcinomas, is increased significantly, the chemical should be classified as Group C.

The specific data on liver lesions in male rats from the NTP chlorobenzene study suggest a lack of biological significance of the observed increase in the incidence of neoplastic nodules, for several reasons. The incidence of neoplastic nodules was increased above the control group at the $p<0.05$ level only in the high dose group. Liver carcinomas occurred only in the control group; none occurred in either treated group. Finally, the combined incidence of neoplastic nodules and carcinomas was not statistically significant. This information was considered by the USEPA Science Advisory Board Halogenated Organics Subcommittee in making a recommendation that chlorobenzene be classified as Group D. The NJDWQI has therefore concluded that the data on liver lesions in male rats did not warrant classification in Group C, and recommended that the contaminant be reclassified as Group D. The Institute has recommended to the DEPE that the uncertainty factor of 10 used to account for possible carcinogenicity in the current health-based MCL be removed.

In order to gain regulatory flexibility that it lacks under the USEPA's adopted chlorobenzene criteria, the DEPE intends to adopt the chlorobenzene criteria as proposed. In the future, DEPE will propose the modified criteria to reflect the change in carcinogenicity classification from Group C to Group D. This will result in a 10-fold increase in the human health criteria.

Chromium N.J.A.C. 7:9B-1.14(c)13xxxviii

275. COMMENT: The DEPE proposed generic criteria for certain groups of chemicals as a conservative approach without adequate justification. For example, the DEPE has categorized Cr(III) and Cr(VI) together as "Total Recoverable Chromium" based on toxicity data for Cr(VI) which is more toxic than Cr(III). Because the toxicities of these chemicals have been studied separately, they are measurable using current standard laboratory methods. The USEPA has set separate criteria for these chemicals, and DEPE should consider setting criteria for each of these chemicals separately. (16)

RESPONSE: While USEPA has an approved analytical method for dissolved hexavalent chromium, this method will not detect chromium associated with particulates. The USEPA does not have an approved method for analyzing hexavalent chromium in solid matrices. Therefore, it is possible to differentiate Cr(III) from Cr(VI) when measuring dissolved chromium, but not when measuring total recoverable chromium. Since the criteria are based on total recoverable chromium, they are based on total chromium rather than separate forms of chromium. Toxicity data and the IRIS Reference Dose for Cr(VI) were reviewed by the USEPA Office of Water and formed the basis for the Federal MCL. This Federal MCL was reviewed by the NJDWQI, which recommended that it be used by the DEPE. Because of this agreement and the response stated for the Comment 276 below, both Cr(III) and CR(VI) will be regulated together as total recoverable Cr(VI). The response to Comment 276 below describes an additional rationale supporting DEPE's decision to regulate chromium as "total recoverable."

276. COMMENT: It is strongly recommended that standards for total chromium be based on Cr(III). The USEPA's drinking water MCL for chromium is for total chromium as Cr(III), since it is known that mammals, including humans, are capable of detoxifying Cr(VI) in the body by reducing Cr(VI) rapidly to Cr(III) in the gut, liver, red blood cells and some lung cells. In addition, Cr(VI) is reduced to Cr(III) in anaerobic surface water, and free chlorine ions added during water treatment rapidly reduce Cr(VI) to Cr(III). (16)

RESPONSE: The commenter suggests that drinking water standards for chromium should be based on Cr(III) because animals, including humans, reduce Cr(VI) to Cr(III). Such a reduction would be expected to occur to the same extent in the experimental animals dosed orally with Cr(VI) in toxicity studies, on which the Reference Dose for humans exposed to chromium in drinking water is based. This would suport the DEPE's decision to base the criteria on toxicity data for Cr(VI).

1,2-Dichlorobenzene N.J.A.C. 7:9B-1.14(c)13xlix

277. COMMENT: The DEPE did not include time-to-event analysis in the low-dose extrapolating modeling for 1,2-dichlorobenzene and proposed a more stringent requirement than did the USEPA without an explanation. (12)

RESPONSE: The commenter might have intended to comment on the risk assessment of 1,2-dicholorethane rather than that of 1,2-dichlorobenzene. A time-to-event analysis (Basis and Background document, page 43) was used by the USEPA to quantitate the cancer risk estimate for 1,2-dichloroethane. Because 1,2-dichlorobenzene is considered a noncarcinogen; a time-to-event analysis to quantitate cancer risk is not applicable. The issue of time-to-event analysis is discussed in the resposne to Comment 286 below.

278. COMMENT: The Lowest Observed Adverse Effect Level (LOAEL) for 1,2-dichlorobenzene is incorrect because the endpoint upon which it is based (increase in renal tubular regeneration) is not statisically significant. (16)

279. COMMENT: The term "appropriate uncertainty factors" in the 1,2-dichlorobenzene risk assessment is vague and the factors and their justification must be identified. (16)

RESPONSE: The New Jersey Reference Dose for 1,2-dichlorobenzene is based on a chronic oral study (National Toxicology Program, 1985, Technical report on the carcinogenesis studies of 1,2-dichlorobenzene in F344/N rats and B6C3F1 mice (gavage studies). NTP-82-062). The endpoint upon which the Reference Dose is based is increased incidence of tubular regeneration in the kidneys of male mice, which occurred in both the low dose (60 mg/kg/day) and high dose (120 mg/kg/day) groups. Any uncertainty factor of 500 was applied to arrive at a Reference Dose (ADI) of 0.085 mg/kg/day. The factor of 500 includes a factor of 100 to account for intraspecies and interspecies variation, and a factor of five for extrapolation from a LOAEL to a NOAEL.

280. COMMENT: Why the DEPE has set the policy of rounding Reference Dose to two significant figures, such as 0.085 mg/kg/day for o-dichlorobenzene? (16)

RESPONSE: This policy of expressing toxicity factors in more than one significant figure is consistent with the DEPE's prior work with deriving toxicity factors for drinking water standards. A more detailed discussion is included in the response to Comment 294 below.

1,3-Dichlorobenzene N.J.A.C. 7:9B-1.14(c)13l

281. COMMENT: The DEPE must cite a reference to support the statement regarding the similarity in toxicity between 1,2-dichlorobenzene and 1,3-dichlorobenzene. (16)

RESPONSE: Sufficient information on the toxicity of 1,3 dichlorobenzene is not available to develop an isomer-specific toxicity factor. USEPA (1980) in the Ambient Water Quality Criteria document for Dichlorobenzenes, notes the similarity in toxicity of 1,3-dichlorobenzene to the other dichlorobenzene isomers.

1,4-Dichlorobenzene N.J.A.C. 7:9B-1.14(c)13li

282. COMMENT: The DEPE must explain why the mechanism of action of 1,4-dichlorobenzene in causing kidney tumors in rats is not relevant to humans, especially considering that this study was used by USEPA to set its cancer slope factor. (16).

RESPONSE: The kidney tumors seen in male, but not female, rats treated with 1,4-dichlorobenzene, as well as a number of other chemicals, have been shown to arise through the accumulation in the kidney of a protein called alpha-2-microglobulin. The accumulation is believed to result from binding of the chemical to the protein, making it more difficult to hydrolyze than the free protein. The protein produces degeneration of the tubular epithelium, dilation and regeneration. Increased tubular proliferation is associated with the development of tumors in the kidney with prolonged exposures. The accumulation of alpha-2-microglobulin does not occur in the kidneys of humans. Therefore, the occurrence of tumors arising through this mechanism is not thought to be relevant to human carcinogenic potential (USEPA, 1991. Alpha 2u-globulin: Association with chemically induced renal toxicity and neoplasia in the male rat. Washington, DC). Because DEPE classified 1,4-dichlorobenzene in carcinogenicity Group III, the risk assessment is based on a Reference Dose, rather than a slope factor, so no cancer slope factor was developed.

283. COMMENT: The DEPE states in the Basis and Background document that a risk level of 10^{-5} will be used for Group C carcinogens when no Reference Dose is available. Why was this not the case for 1,4-dichlorobenzene? (16)

RESPONSE: There is a Reference Dose on which the DEPE based the criteria for 1,4-dichlorobenzene. As explained in the response to Comment 249 and 250, the DEPE utilized a Reference Dose with an additional uncertainty factor of 10 for Group C chemicals when a Reference Dose was available. Therefore, it was not necessary to use a 10^{-5} risk level for 1,4-dichlorobenzene.

284. COMMENT: The DEPE should state that 1,4-dichlorobenzene is classified for carcinogenicity as "Category II" rather than "Group C." (16)

RESPONSE: In the Basis and Background document (page 40), 1,2-dichlorobenzene is classified in Category II. In practice, New Jersey Category II is equivalent to USEPA Group C.

285. COMMENT: The DEPE does not explain why an additional safety factor of ten was necessary in calculating criteria for 1,4-dichlorobenzene. (12)

RESPONSE: As explained in the Basis and Background document, 1,4-dichlorobenzene is classified in Category II based on the tumors observed in rats and mice. Criteria for Category II chemicals are derived by applying an additional safety factor of 10 to the Reference Dose, if a Reference Dose has been developed.

1,2-Dichloroethane N.J.A.C. 7:9B-1.14(c)13liii

286. COMMENT: Why did DEPE omit a time-to-event analysis in the low dose extrapolation for 1,2-dichloroethane, while USEPA included this analysis? (16)

RESPONSE: USEPA used time-to-event analysis in the modeling bcause of a high mortality rate in high dose rats. Although DEPE did not use this analysis, the potency factors derived by USEPA and DEPE are in close agreement, with a less than 25 percent difference between the two factors.

1,1-Dichloroethylene N.J.A.C. 7:9B-1.14(c)13liv

287. COMMENT: The DEPE should reference its statement regarding causation of liver and kidney injury by 1,1-dichloroethylene, and it should define what is meant by "injury." (16)

RESPONSE: The Health-based MCL support document for Dichloroethylenes reviews the toxicity of 1,1-dichloroethylene and discusses a number of studies in which liver and kidney toxicity were seen (NJDWQI, 1987. Maximum Contaminant Level Recommendations for Hazardous Contaminants in Drinking Water. Appendix B—Health-based Maximum Contaminant Level Support Documents). Hepatic Toxicity was seen with chronic inhalation of 47 ppm of 1,1-dichloroethylene in several species of experimental animals (Prendergast et al., 1967, Toxico. Appl. Pharmacol. 10: 270). Hepatocellular fatty changes were seen in rats given 1,1-dichloroethylene in drinking water for two years (Rampy et al., 1977, Envir. Health Perspect. 21:33; Quast et al., 1983, Fund,. Appl. Toxicol. 3:55). Hepatocellular toxicity was observed in a subchronic gavage study in rats and mice conducted by the National Cancer Institute/National Toxicology Program (NCI/NTP) (1982). In a chronic gavage study conducted by NCI/NTP (1984), liver necrosis was seen in mice and chronic inflammation of the kidney was seen in rats.

288. COMMENT: The uncertainty factor of 16,667 for 1,1-dichloroethylene is unusually large. (16)

RESPONSE: The DEPE is uncertain how the commenter determined the value of 16,667 for the uncertainty factor. To clarify, the LOAEL of two mg/kg/day was adjusted for exposure on five days of seven days to give an effective LOAEL of 1.4 mg/kg/day. Appropriate uncertainty factors deriving a Reference Dose for a Category II carcinogen from a LOAEL from a chronic study were utilized. These were: 10 for interspecies variation, 10 for intraspecies variation, 10 for extrapolation of a LOAEL to a NOAEL, and 10 for possible carcinogenicity, for a total factor of 10,000.

289. COMMENT: The term ADI was formerly used for the toxicity factors for noncarcinogens adopted by New Jersey. These factors are now referred to by the term Reference Dose. The Reference Dose given for 1,1-dichloroethylene is not the same as the one derived in the reference given (NJDWQI, 1987). A "Reference Dose" is derived and used in a more strictly defined methodology than the "Acceptable Daily Intake." (16)

RESPONSE: There is an error in the final value for the ADI for 1,1-dichloroethylene given in the reference cited by the commenter (NJDWQI, 1987). The units for the ADI given in the NJDWQI report are mg/day rather than mg/kg/day. The ADI is derived from the information given in the NJDWQI report as follows, and was used correctly to derive the surface water criteria:

$$\frac{2\ \text{mg/kg/day} \times 1.0 \times 5/7}{100 \times 10 \times 10} = 1.4 \times 10^{-4}\ \text{mg/kg/day}$$

Where two mg/kg/day is the LOAEL; 1.0 is the proportion of administered dose absorbed; 5/7 is the days of exposure per week; 100 is the uncertainty factor for extrapolation from animals to humans, accounting for interspecies variation between humans and animals, and intraspecies variation between humans; 10 is the uncertainty factor for extrapolation from a LOAEL to a NOAEL; and 10 is the uncertainty factor for possible carcinogenicity for Category II carcinogens.

291. COMMENT: The DEPE should substantiate and reference its statement regarding the difference in sensitivity between rats and mice to 1,1-dichloroethylene, particularly since the USEPA Reference Dose is based on a study in rats and the DEPE Reference Dose is based on mouse data. (16)

RESPONSE: The DEPE Reference Dose is based on liver necrosis in a chronic oral study in mice (NCI/NTP, 1982, Carcinogenesis bioassay of vinylidene chloride in F344 rats and B6C3F1 mice) in which the Lowest Observed Adverse Effect Level was 2 mg/kg/day. The USEPA Reference Dose is based on hepatic lesions seen in a rat chronic oral study (Quast, 1983, Fund. Appl. Toxicol. 3: 55), in which the Lowest Observed Adverse Effect Level was nine mg/kg/day. Since the Lowest Observed Adverse Effect Level with chronic exposure was lower in mice than in rats, the mice were more sensitive than the rats. As a matter of policy, the DEPE uses the most sensitive endpoint as the basis for risk assessment in order to ensure protection of public health.

292. COMMENT: The DEPE selected the most stringent study available to develop criteria for 1,1-dichloroethylene without showing it to be the best available, the latest scientific data available or of any relevance to waters of New Jersey. The DEPE also used an uncertainty factor without explanation or support. (12)

RESPONSE: The Reference Dose for 1,1-dichloroethylene, including choice of study and application of uncertainty factors, was derived according to the usual procedures utilized by DEPE, as described in the Basis and Background document and in NJDWQI, 1987, Maximum Contaminant Level Recommendations for Hazardous Contaminants in Drinking Water.

trans-1,2-Dichloroethylene N.J.A.C. 7:9B-1.14(c)13lv

293. COMMENT: Why did the DEPE address only the trans-isomer and not the cis-isomer of 1,2-dichloroethylene, while the USEPA evaluated the cis- and the trans-isomers separately? (16)

RESPONSE: The DEPE is unable to identify the USEPA evaluation of both isomers to which the commenter refers. The toxics rule promulgated by the USEPA (57 FR 60848, December 22, 1992) addressed only toxic pollutants listed pursuant to section 307(a)(1) of the Clean Water Act, commonly known as priority pollutants. The cis-isomer, which is not a priority pollutant, was not included.

294. COMMENT: The DEPE did not make a general statement on rounding Integrated Risk Information System (IRIS) data to two significant figures or state the rationale or effects of this practice, which led to a Reference Dose of 0.17 mg/kg/day for trans-1,2-dichloroethylene instead of the Reference Dose of 0.02 mg/kg/day published by the USEPA for the same chemical. (12)

RESPONSE: The DEPE stated its policy on rounding IRIS data on page 22 of the Basis and Background document as follows: "Toxicity factors were recalculated from toxicity data, if provided in IRIS, in order to round to two significant figures for use in criteria derivation." Expressing the toxicity factors in more than one significant figure is consistent with the DEPE's prior work deriving toxicity factors for drinking water standards as shown in the drinking water document (NJDWQI, 1987. New Jersey Drinking Water Quality Institute. Maximum Contaminant Level Recommendations for Hazardous Contaminants in Drinking Water. Appendix B: Health-Based Maximum Contaminant Level Support Documents, submitted to New Jersey Department of Environmental Protection). Reference Dose is the toxicity factor used for criteria derivation for noncarcinogens (Basis and Background document, page 22). As stated on page 77 of the Basis and Background document, the effect of expressing Reference Dose in two significant figures resulted in the State's criteria being more stringent (for example, for antimony, nickel), if the Reference Dose used for criteria derivation was rounded upward to one significant figure by IRIS, or less stringent (for example, for di-n-butyl phthalate), if the Reference Dose was rounded downward by IRIS. In general, different rounding policies of DEPE and USEPA have not resulted in more than 10 percent difference in criteria.

As stated on page 45 of the Basis and Background document, rounding IRIS toxicity data to two significant figures resulted in a Reference Dose of 0.017 mg/kg/day for the DEPE instead of the 0.02 mg/kg/day listed in IRIS. Apparently, the commenter has misread the Reference Dose listed in the Basis and Background document (page 45). The value listed was 0.017 mg/kg/day, rather than 0.17 mg/kg/day.

295. COMMENT: Why is the format for the information on trans-1,2-dichloroethylene different from the format for the other chemicals? (16)

RESPONSE: The format for the information on trans-1,2-dichloroethylene is different from the format for the other chemicals because it describes a change from the original Reference Dose developed by NJDWQI and adopted by the DEPE.

296. COMMENT: Why is the Reference Dose previously used for trans-1,2-dichloroethylene given as 1.4×10^{-3} mg/kg/day when it is actually 1.4×10^{-4} mg/kg/day? (16)

RESPONSE: The Reference Dose previously used for trans-1,2-dichloroethylene is 1.4×10^{-3} mg/kg/day, not 1.4×10^{-4} mg/kg/day. Trans-1,2-dichloroethylene is classified as a Category III chemical, and the Reference Dose does not include an uncertainty factor for possible carcinogenicity.

297. COMMENT: Why are the human health-based criteria for trans-1,2-dichloroethylene not given in the Basis and Background document? (16)

RESPONSE: The derivation of the human health-based criteria for trans-1,2-dichloroethylene was not included in the Basis and Background document because these criteria are based on the USEPA Reference Dose given in IRIS. The criteria were derived using the same equations used for other Category III contaminants given in the Basis and Background document.

298. COMMENT: What is the toxic endpoint for the new Reference Dose of trans-1,2-dichloroethylene? It should be substantiated and referenced. (16)

RESPONSE: The Reference Dose given in IRIS for trans-1,2-dichloroethylene is based on increased serum alkaline phosphatase in male mice observed in a 90 day drinking water study (Barnes et al., 1985, Drug Chem. Toxicol. 8:373-392).

Heptachlor N.J.A.C. 7:9B-1.14(c)13lxxiii

299. COMMENT: The DEPE needs to clarify its derivation of the proposed freshwater human carcinogen criterion of 0.000208 ug/L for heptachlor, which is slightly different from that currently promulgated by the USEPA. (16)

RESPONSE: The development of criteria for toxic substances is clearly explained in the Basis and Background document which supported the proposal. The equation used to derive criteria is shown on page 23. The specific data used for criteria development are summarized in Table 4. It was on the basis of the data for heptachlor listed on page 93 in Table 4 that the proposed freshwater human carcinogen criterion of 0.000208 ug/L was derived for heptchlor. The proposed value is slightly different from the USEPA criterion of 0.00021 ug/L because of the number of significant figures used.

Lead N.J.A.C. 7:9B-1.14(c)13lxxxii

300. COMMENT: Thresholds for the toxic effects of organic forms of lead (lead alkyls) are given in IRIS database. The DEPE should not consider all lead forms together as inorganic lead. (16)

RESPONSE: The Reference Dose for alkyl lead given in IRIS is based on an endpoint other than neurotoxicity. No thresholds have been identified for the neurotoxic effects of lead. Alkyl lead compounds are much more neurotoxic on an equivalent equimolar basis than inorganic lead. Additionally, these forms of lead are extensively absorbed through the gastrointestinal tract (USEPA. Air Quality Criteria for Lead. 1986). Therefore, it is appropriate to treat these forms of lead at least as stringently as inorganic lead.

301. COMMENT: Why are surface water criteria promulgated for lead, if the primary source of lead in drinking water is not surface water? (16)

302. COMMENT: It is not necessary to require a discharger to the waters of New Jersey to meet more stringent requirements under the Surface Water Quality Standards than under the Safe Drinking Water Act, in regard to lead. Nonpoint sources of lead from runoff will continue to enter waters at higher concentrations than the criteria regardless of the surface water criteria. The costs of meeting the criteria are not justified in light of the runoff sources of lead and other inorganics. (32)

303. COMMENT: The lead standard is too stringent because wastewater treatment facilities will be required to treat water to potable standards and then discharge into a waterbody that is likely to be affected by non-point source pollution. Potable water facilities will treat the water before drinking, so this degree of stringency is unnecessary. (20)

RESPONSE: Although the primary source of lead in drinking water may not be point source discharges to surface water in the majority of cases, the DEPE's policy is to protect individuals from exposures to excessive levels of lead from all sources including surface waters. If the criteria for lead in surface waters are not sufficiently protective, excessive discharges of lead into surface waters could result in potentially harmful levels of lead entering drinking water via surface water. The circumstances noted by the commenters regarding nonpoint sources of lead are implementation issues that are addressed through the NJPDES program. Regarding lead from natural sources, the Surface Water Quality Standards, at N.J.A.C. 7:9B-1.5(c)1, provide that where natural water quality does not meet the water quality criteria as a result of natural conditions, the natural water quality becomes the water quality criteria. If criteria are identified which do not adequately protect human health and welfare, the DEPE will act to modify the surface water quality criteria to ensure that they do so.

304. COMMENT: Lead levels typically found in surface waters range from five to 30 ug/L. In order to comply with the proposed standards of five ug/L, surface water would need to be remediated to less than background levels and the standard becomes unenforceable. (16)

RESPONSE: According to the USEPA (56 FR 26463: MCLGs and National Primary Drinking Water Regulations for Lead and Copper—Final Rule, 1991), less than one percent of public water systems in the United States have ground or surface water entering the distribution system (source water) with lead levels greater than five ug/L. The drinking water action level in these USEPA regulations is 15 ug/L and is based on the leaching of lead from household plumbing. Based on these data, "background" surface water lead concentrations are considered to be equal to or less than five ug/L. DEPE's data on baseline lead levels in a New Jersey watershed show lead levels averaging one to four ug/L in the Upper Millstone River basin (Uchrin et al. 1989). During storm events, lead levels increase due to soil runoff. In the most urbanized and industrial section of the basin, lead levels during a storm event averaged three to 61 ug/L, while levels in forest, farm, and residential areas averaged from below detection to eight ug/L. All the lead found during storm events was associated with particulates.

Lead levels in rainwater have greatly decreased since 1970 since leaded gasoline use was controlled in the U.S. in 1978. Leaded gasoline was considered the major source of lead into the air before it was phased out. Today, airborne lead from gasoline is generally considered a minor source of lead exposure unless it is from a point source. Data from the New Jersey Air Toxics Program show that lead levels in air were reduced drastically from 1978 (1.3 ug/m^3 median) to 1987 (0.1 ug/m^3 median). (1987 Air Quality Report, July, 1988; DEPE, Division of Environmental Quality). Levels in rainwater have also been reduced over this time.

305. COMMENT: The DEPE proposed a lead criterion of five ug/L without scientific data to support the major change from the 50 ug/L recommended by the U.S. Public Health Service. (12)

306. COMMENT: It is recommended that the DEPE withdraw the criterion for lead which was not based on risk assessment methodology. (12)

RESPONSE: As discussed in the Basis and Background document (on page 26), it is generally agreed that the previous value of 50 ug/L is not protective of human health, since more recent data show that adverse effects occur at levels below those previously believed to cause toxicity. Public comments on the revisions to the Surface Water Quality Standards proposed in 1988 suggested that the lead criterion be reduced to reflect this newer toxicity data. As stated in the Basis and Background document, it is not possible to use the same risk assessment approaches for lead as for other contaminants because of considerations unique to lead. No threshold has been detected for some of the non-carcinogenic effects of lead, in particular those relating to neurotoxicity. These effects are of equal or greater concern than carcinogenic effects, since they cause permanent decrements in the mental functions of children. Additionally, lead has been classified as a probable human carcinogen (B2) by USEPA. No carcinogenic potency factor for lead has been derived because of difficulties in data interpretation. USEPA has finalized a health based drinking water Maximum Contaminant Level Goal for lead of zero.

Mercury N.J.A.C. 7:9B-1.14(c)13lxxxv

307. COMMENT: The proposed human health-based water quality standards for mercury should be based on the concentration of methyl mercury in tissues of aquatic organisms, and not be interpreted as criteria for total recoverable mercury. Both the USEPA and the DEPE's freshwater and saltwater criteria for protection of human health from mercury appear to be based on the FDA action level for this metal (USEPA, 1986, Gold Book). As proposed, the water quality criteria for mercury are a misinterpretation of the FDA action level. (4, 5)

RESPONSE: The DEPE does not believe that human health water quality criteria for mercury should be based on concentrations in tissues of aquatic organisms for the reasons stated above in response to Comment 222 regarding fish tissue testing. The commenters apparently have mistaken the USEPA and the DEPE's aquatic life Criteria Continuous Concentration (CCC) for human health criteria for mercury. The CCC were based on the Final Residue Values which, in turn, were derived from the FDA action level. Basing the aquatic criteria on the final residue value was explained in the USEPA publications (USEPA, 1985. Ambient Water Quality Criteria for Mercury—1984, EPA 440/5-84-026; USEPA, 1986. Quality Criteria for Water, 1986. EPA 440/5-86-001).

The human health criteria, on the other hand, were develped by the USEPA using the lowest observable effect level (LOEL) with neurologic effects as the endpoint (USEPA, 1980. Ambient Water Quality Criteria for Mercury. EPA 440/5-80-058) and not on the basis of FDA action level. These USEPA criteria expressed as total recoverable mercury were proposed for New Jersey on November 19, 1991, (56 FR 58446) and subsequently adopted for New Jersey on December 22, 1992, (57 FR 60918). The DEPE proposed to use and is adopting these USEPA criteria as its human health criteria for mercury. In the future, the DEPE may consider developmental effects of methyl mercury in its risk assessment to derive mercury criteria as part of an ongoing effort in evaluating health risks from exposure to mercury.

Methylene Chloride N.J.A.C. 7:9B-1.14(c)13lxxxix

308. COMMENT: Why is the DEPE's potency factor for methylene chloride different from the potency factor in IRIS, 1992, since the same study was used as the basis for both calculations. (16)

RESPONSE: As discussed in the Basis and Background document (on page 47), the DEPE potency factor is based on a chronic oral study in mice (National Coffee Association (NCA), 1983. 24-Month chronic toxicology and oncogenicity study of methylene chloride in rats. Final report. Project 2112-101), while the IRIS potency factor represents the arithmetic mean of the potency factors derived from the NCA, 1983 study and an inhalation study in mice (National Toxicology Program, 1986. Toxicology and carcinogenicity studies of dichloromethane (methylene chloride) in F344/N rats and B6C3F1 mice (inhalation studies), Technical report series No. 306).

309. COMMENT: The equation used for deriving the human health-based criteria for methylene chloride does not account for the time spent away from the contaminated source. A parameter for exposure frequency should be included in derivation of the criteria. (16)

RESPONSE: The human health-based criteria for all contaminants are derived based on the assumption of lifetime exposure, as discussed in the response to Comment 196. This approach is used both by DEPE and USEPA.

310. COMMENT: Regarding methylene chloride, setting a standard for a chemical with a bioconcentration factor of less than 100 L/kg, particularly one with a bioconcentration factor of 0.91 L/kg is inappropriate since such chemicals tend not to bioaccumulate. (16)

RESPONSE: DEPE agrees that it is not technically preferable to derive criteria based on bioaccumulation in aquatic organisms for chemicals with very low BCFs such as methylene chloride, since these do not bioaccumulate. The saline estuarine and saline coastal criterion for methylene chloride developed by the USEPA for New Jersey was based on the best scientific information at the time and was included in the proposal in order to maintain regulatory flexibility. Despite the difference in scientific opinion between the USEPA and the DEPE, the DEPE intends to adopt the criteria as proposed, in order to provide for regulatory flexibility.

311. COMMENT: Why is the cancer potency factor for methylene chloride higher than the one developed by USEPA, since USEPA considered both inhalation and oral intake and DEPE considered only oral intake? (16)

RESPONSE: The commenter apparently misunderstands how USEPA used the inhalation data. USEPA did not combine the potencies derived from the inhalation and oral routes to get a higher overall potency factor. USEPA averaged separate potency factors derived from an inhalation study and an oral study to obtain its final potency factor, while New Jersey used only the oral study. The potency factor from the oral study is higher than the one from the inhalation study, so the DEPE factor is higher. DEPE utilizes oral studies, if available, in preference to inhalation studies for criteria based on exposure via ingestion.

312. COMMENT: The DEPE must resolve the inconsistency between not including the inhalation study used by the USEPA to derive the potency factor for methylene chloride, yet developing criteria for many other chemicals based on inhalation studies. (12)

RESPONSE: In developing the toxicity factors for the human health-based criteria, data from oral studies are utilized if available. If no suitable oral data exist, inhalation studies are used. In the case of methylene chloride, appropriate oral data are available and therefore form the basis for the criteria.

Polynuclear Aromatic Hydrocarbons (PAHs) N.J.A.C. 7:9B-1.14(c)13

313. COMMENT: DEPE should refrain from adopting numeric criteria based on structural similarity unless sufficient, defensible data are available. Specifically, in response to the DEPE request for comment (Basis and Background document, page 25) on applying human health criteria for benzo(a)pyrene (BaP) to seven other PAHs (acenaphthylene, benzo(ghi)perylene, phenanthrene, benzo(k)fluoranthene, chrysene, dibenzo(a,h)anthracene, and indeno(1,2,3-cd)pyrene), the commenter agreed with the DEPE that such extrapolation must have scientifically sound justification and recommended such criteria not be adopted by New Jersey. It is also noted that the USEPA applied extrapolation despite statements made in the Federal Register regarding class criteria without supporting data (45 FR 79318, November 28, 1980). (4)

RESPONSE: The commenter has articulated the DEPE's position on this issue. There are nine PAHs (benz(a)anthracene and 3,4-benzofluoranthene in addition to the seven named by the commenter) for which the USEPA proposed criteria based on BaP (56 FR 58442, November 19, 1991). In its adoption, the USEPA deleted criteria for the three Group D PAHs (acenaphthylene, benzo(ghi)perylene, and phenanthrene) because criteria for these three chemicals should be based on noncarcinogenic effects and there were insufficient toxicity data available to provide risk assessment for these chemicals at the time (57 FR 60887, December 22, 1992). Criteria for the six Group B2 PAHs were adopted by the USEPA for New Jersey waters.

The DEPE included the USEPA criteria for all nine PAHs in its proposal with an invitation to comment. The DEPE stated in the Basis and Background document that the DEPE did not prefer to develop criteria using data for surrogate chemicals, as did the USEPA with data for benzo(a)pyrene, because even relatively minor structural changes within a class of compounds can have pronounced effects on their biological activities.

The DEPE agrees that, in principle, criteria so derived should not be adopted. Thus, the FW2 and SE and SC criteria for the three Group D PAHs will not be adopted. However, for the six Group B2 PAHs for which the USEPA has promulgated criteria for New Jersey, the DEPE will adopt the USEPA criteria as proposed, in order to gain the regulatory flexibility to issue variances. The DEPE intends to address the PAHs issue in a new proposal in view of the recent IRIS update of the slope factor of BaP (IRIS, September 16, 1993). Concurrently, the DEPE may incorporate into the criteria derivation process relative potency considerations, if the information is finalized by the USEPA during its derivation process.

314. COMMENT: The DEPE used toxicological data that are not state of the art in deriving the standards: for example, not applying relative potencies for PAHs. (13)

RESPONSE: The DEPE is aware of efforts to develop relative potencies for PAHs. USEPA has not yet officially developed a position on this issue, but is in the process of preparing a report discussing this. The DEPE is awaiting receipt of this report from the Environmental Criteria and Assessment Office of USEPA, and will evaluate this issue at that time.

Polychlorinated Biphenyls N.J.A.C. 7:9B-1.14(c)13cv

315. COMMENT: The DEPE should use toxicity data for PCB congeners with low and high propensities for biodegradation in aqueous media, as well as for common PCB mixtures, in developing criteria. (16)

316. COMMENT: Since PCBs usually occur as mixtures, it would be appropriate to provide a range of values for each of the physical constants. (16)

317. COMMENT: The range of bioconcentration factors for PCBs should be provided, since one value cannot accurately reflect the range of bioconcentration capacity of all PCB congeners. (16)

318. COMMENT: It is not appropriate to evaluate all PCB congener mixtures together since their environmental fates and transports and toxicities are significantly different. (16)

RESPONSE: The DEPE agrees with USEPA (Water Quality Standards, Final Rule; 57 FR 60848, December 22, 1992) that it is not reasonable to develop mixture-specific criteria for each PCB mixture. Each of the mixtures contains the same chlorinated biphenyl isomers, but in different proportions. Therefore, the carcinogenic isomers that are of concern because of their human health risks would be present in each of the mixtures.

319. COMMENT: Setting standards for total PCBs rather than for specific isomers is overly conservative and not scientifically defensible. (16)

RESPONSE: Since each of the PCB mixtures contains the same compounds in differing proportions, is assumed to produce the same toxic effects and acts through the same mechanism of toxicity, it is logical to base the criteria on total PCBs rather than on individual PCB mixtures. Toxicological data and analytical methodology do not allow for the development of isomer-specific criteria at this time.

320. COMMENT: It was not clear why the DEPE chose the Schaeffer et al. (1984) study over the Norback and Weltman (1985) study used by USEPA as the basis for the PCB risk assessment. (16)

321. COMMENT: The study DEPE used as the basis for the PCB risk assessment (Schaeffer et al., 1984) used one species, one sex, and two dosing regimens. The majority of studies used to determine cancer slope factors involved at least two different species, three dosing regimens, and both sexes. Three or more dose regimens are preferred when using the Linear Multistage Model, since two points will not produce the possible variability in dose. The study used by DEPE does not

measure all endpoints such as liver to body weight ratios and biochemical activity. These deficiencies should be noted along with the cancer slope factor for PCBs. (16)

RESPONSE: The DEPE chose the Schaefer et al. (1984, Toxicol. Appl. Pharmacol. 75:278) study instead of the Norback and Weltman (1985, Environ. Health Perspect. 59:97) study as the basis for the potency factor for PCBs because the Norback and Weltman study employed a variable dosing regimen, while the Schaeffer study used a constant dosing regimen. Both studies employed two dosing groups, one control and one receiving PCBs. While it is desirable to measure endpoints such as liver-to-body weight ratios and biochemical activity, this information is not essential for determination of the potency factor, particularly since the induction of hepatic cancer by PCBs has been demonstrated in several other studies.

Tetrachloroethylene N.J.A.C. 7:9B-1.14(c)13cxiii

322. COMMENT: The temperature at which the vapor pressure occurs should be stated for tetrachloroethylene. (16)

RESPONSE: The vapor pressure given in the Basis and Background document contains a typographical error. It should be stated that the vapor pressure is 14 mm Hg at 20 degrees Celsius (Verschueren, 1983. Handbook of environmental data on organic chemicals. Von Nostrand Reinhold Co.; New York).

323. COMMENT: How does the DEPE's cancer potency factor for tetrachloroethylene compare to the USEPA factor given in HEAST of 0.0018 $(mg/kg/day)^{-1}$ which is 45 times lower than the factor proposed by the DEPE, since both factors are based on the same study? Even though IRIS does not have a promulgated criterion for tetrachloroethylene, HEAST gives a cancer potency factor which is more current than the value cited. (16)

RESPONSE: The FY1992 Annual Health Effects Assessment Summary Table (HEAST) does not give a potency factor for tetrachloroethylene, so it is not clear to what the commenter is referring.

324. COMMENT: The DEPE does not explain why the proposed criteria for tetrachloroethylene based on a 1977 study are more stringent than the USEPA criteria. (12)

RESPONSE: The DEPE criteria for tetrachloroethylene are based on the potency factor developed by the DEPE as the basis for the Health-based Maximum Contaminant Level. The DEPE drinking water standards were promulgated in 1987, and therefore actually are more up-to-date than the USEPA 1980 criteria. Additionally, the drinking water standards are reviewed on a triennial basis, and no information was found which indicates that the tetrachloroethylene potency factor should be revised.

Toxaphene N.J.A.C. 7:9B-1.14(c)13cxvi

325. COMMENT: DEPE needs to clarify its derivation of the proposed saline human carcinogen criterion for toxaphene, which is slightly different from that of the USEPA. (16)

RESPONSE: As stated in the response to Comment 299 above for heptachlor, the development of criteria for toxic substances is discussed in the Basis and Background document. The proposed saline human carcinogen criterion for toxaphene was derived from the equation on page 23, using the specific data for toxaphene listed in Table 4 on page 95. The proposed value of 0.000747 ug/L is slightly different from the USEPA criterion of 0.00075 because of the number of significant figures used.

1,2,4-Trichlorobenzene N.J.A.C. 7:9B-1.14(c)13cxvii

326. COMMENT: Why did the DEPE not use USEPA's Reference Dose for 1,2,4-trichlorobenzene, which is based on a study by Robinson et al. (1987)? Instead DEPE used the earlier study of Watanbe et al. (1978). What were the uncertainty factors applied to the NOAEL, and why were they applied? (16)

327. COMMENT: Why is the USEPA toxicity factor for 1,2,4-trichlorobenzene given in the Health Effects Assessment Summary Table (HEAST) not used by the DEPE? (16)

328. COMMENT: The DEPE provides no rationale for setting criteria based on an inhalation study for 1,2,4-trichlorobenzene, for which the USEPA has not proposed any criterion. (12)

RESPONSE: The DEPE chose not to utilize the study of Robinson et al. (actually 1981, not 1987, J. Toxicol. Environ. Health 8:489) because it did not look for porphyria, a sensitive endpoint for 1,2,4-trichlorobenzene toxicity. The study of Wantanabe et al. (1978, Toxicol. Appl. Pharmacol. 45:322) was utilized becuase it provided the lowest NOAEL. The uncertainty factors utilized were standard ones as follows: 10 for extrapolation from animals to humans, 10 for intraspecies variation, and 10 for extrapolation from a subchronic to a chronic study, for a total uncertainty factor of 1000. The DEPE Reference Dose for 1,2,4-trichlorobenzene forms the basis for the DEPE drinking water standard for this chemical, and was subject to public comment when the standards were proposed. USEPA withdrew the Reference Dose based on the Robinson et al. (1981) study from IRIS, and has not finalized human health-based ambient water quality criteria for this chemical.

1,1,1-Trichloroethane N.J.A.C. 7:9B-1.14(c)13cxviii

329. COMMENT: The DEPE should explain its rationale for selecting a subchronic study as the basis of the risk assessment for 1,1,1,-trichloroethane, when the value presented in HEAST is based on a chronic study. Additionally, why was pharmacokinetic modeling used to derive the human dose when a LOAEL was available from the study? What is the justification for the use of the uncertainty factors applied to the LOAEL? (16)

330. COMMENT: The DEPE should state why the Reference Dose given in HEAST was not used for 1,1,1-trichloroethane, and why its criterion is more conservative than USEPA's.

331. COMMENT: The DEPE's criterion for 1,1,1-trichloroethane was based on inhalation exposure, not oral exposure. (12)

RESPONSE: The DEPE chose to use the subchronic inhalation study of McNutt et al. (1973, Lab. Invest. 32:642) because no suitable chronic or oral studies were available to form the basis for the Reference Dose. The study cited in the 1992 HEAST (Torkelson et al, 1958, Am. Ind. Hyg. Assoc. J. 19:353) is also a subchronic inhalation study. The USEPA withdrew the Reference Dose for this chemical from IRIS, and has not promulgated human health-based criteria.

Pharmacokinetic modeling was necessary in order to convert continuous inhalation exposure to the equivalent oral dose, as explained in NJDWQI, 1987 (Maximum Contaminant Level Recommendations for Hazardous Contaminants in Drinking Water, Appendix B—Health-based Maximum Contaminant Level Support documents), and not to derive a NOAEL or a LOAEL. The uncertainty factors used were 10 for animal to human extrapolation, 10 for intraspecies variation, 10 for subchronic to chronic extrapolation, and 10 for use of a LOAEL rather than a NOAEL.

Trichloroethylene N.J.A.C. 7:9B-1.14(c)13cxx

332. COMMENT: Why did the DEPE develope a potency factor for trichlorethylene rather than using the one presented in USEPA, 1991? (16)

333. COMMENT: The DEPE does not explain why the proposed criteria for trichlorethylene are much more stringent than the USEPA criteria. (12)

RESPONSE: The DEPE recognizes the need to use recent and scientifically valid information for toxicity factors which form the basis for the Surface Water Quality Standards. DEPE has developed toxicity factors for the A-280 drinking water contaminants independently of USEPA, and these are updated on a triennial basis. In some cases, DEPE scientists have made professional judgments which differ from those made by USEPA scientists, resulting in the establishment of differing toxicity factors by the two agencies; these differences do not result from one agency's utilizing more up-to-date information than the other. The DEPE's policy is to utilize New Jersey toxicity factors for those chemicals for which they have been developed and adopted as the basis for drinking water standards. This provides consistency in the criteria developed by different programs within the DEPE.

334. COMMENT: The DEPE needs to explain what the dose in mice of 4.34×10^{-4} mg/kg/day used in calculating the criterion for trichlorethylene represents and how it was derived. (16)

RESPONSE: The dose of 4.34×10^{-4} mg/kg/day represents the dose calculated using the linearized multistage model to result in a 1×10^{-6} lifetime risk of hepatocellular carcinoma or adenoma in male mice in the National Toxicology Program, 1984, study (Carcinogenesis studies of trichloroethylene (without epichlorohydrin) in F344/N rats and B6C3F1 mice, gavage studies; Technical Report Series No. 273). This is described more fully in the NJDWQI, 1987, report (Maximum Contaminant Level Recommendations for Hazardous Contaminants in Drinking Water, Appendix B—Health-based Maximum Contaminant Level Support Documents).

Vinyl Chloride N.J.A.C. 7:9B-1.14(c)13cxxiii

335. COMMENT: Why do the potency factors derived by USEPA and the DEPE for vinyl chloride differ, since the same study was used as the basis for both? (16)

RESPONSE: Although the potency factors derived by both agencies are based on the same study (Feron et al., 1981. Fd. Cosmet. Toxicol. 1988: 317), each agency used different data as the basis of the factor. DEPE based its potency factor on hepatocellular carcinoma in female rats, while USEPA based its potency factor on total tumors in several organs in female rats (USEPA, 1984. Health Effects Assessment for Vinyl Chloride, USEPA/540/1-86/036).

336. COMMENT: There is a USEPA potency factor for vinyl chloride in HEAST. (16)

RESPONSE: The DEPE's policy is to use the toxicity factors which it has developed for those contaminants for which New Jersey has adopted drinking water standards under the A-280 Amendments to the Safe Drinking Water Act. For other contaminants, IRIS toxicity factors are used if available, and if no IRIS toxicity factor exists, 304(a) criteria are used. Generally, HEAST toxicity factors are not used by the DEPE as the basis for the human health-based criteria.

337. COMMENT: The DEPE needs to explain what the dose of 1.4×10^{-5} (mg/kg/day) is and how it was derived in the vinyl chloride risk assessment. (16)

RESPONSE: 1.4×10^{-5} mg/kg/day represents the dose of vinyl chloride expected to result in a 1×10^{-6} additional lifetime cancer risk, based on application of the linearized multistage model to the data on hepatocellular carcinomas in female rats (Feron et al., 1981. Fd. Cosmet. Toxicol. 1988: 317).

338. COMMENT: The DEPE does not explain the greatly increased stringency in its proposed criteria compact with the USEPA criteria for vinyl chloride. (12)

RESPONSE: The USEPA criteria for vinyl chloride is based on the 1980 304(a) criteria and is therefore based on older data than the DEPE proposed criteria.

USEPA Deleted Criteria

339. COMMENT: The DEPE should follow the lead of the USEPA and delete the proposed criteria for the following 12 chemicals: silver, cadmium, chromium, selenium, beryllium, lead, methyl chloride, 1,1,1,-trichloroethane, acenaphthylene, benzo(ghi)perylene, and phenanthrene from the final adoption. The USEPA made the deletion in its final rule because it determined that the criteria was not scientifically supported. (4, 5)

RESPONSE: The DEPE notes that there were 11 chemicals but 12 sets of criteria because separate criteria were included for chromium (III) and chromium (VI) in the USEPA proposal (56 FR 58420, November 19, 1991).

The DEPE reviewed the available information for these chemicals with regard to the propriety of adopting criteria for them and has reached the following conclusions:

- Not adopting: The DEPE agrees that it should not adopt the proposed FW2 and SE and SC criteria for cadmium, selenium, beryllium methyl chloride, and the three Group D PAHs (acenaphthylene, benzo(ghi)perylene, and phenathrene). The DEPE agrees with USEPA that these criteria lack scientific support. The rationale and justification are provided in the Federal Register (57 FR 60885-60887, December 22, 1992). In addition, the DEPE agrees not to adopt the proposed SE and SC criterion for silver for the reason discussed below.

The DEPE's decision not to adopt the criteria for methyl chloride and the three Group D PAHs, and the SE and SC criteria for selenium and for silver is also a natural consequence of the USEPA action. As the DEPE stated in the Basis and Background document, these criteria were proposed so that the DEPE could retain the ability to issue variances and, if the criteria were not adopted by the USEPA, the DEPE would not adopt them either. For methyl chloride and the three Group D PAHs, the criteria proposed by the DEPE were based on the USEPA proposed criteria because the DEPE did not intend to develop criteria using data from surrogate chemicals as did the USEPA. The DEPE also used the USEPA proposed criteria for the SE and SC criteria for selenium and for silver because of the DEPE's concern for developing criteria for chemicals with BCFs below 15 L/kg based on consumption exposure alone.

The issues on PAHs and chemicals with BCFs below 15 L/kg are discussed in the responses to Comments 220 and 313. As the DEPE is deferring promulgation of criteria for the above chemicals, the existing criteria for cadmium and selenium and the best available scientific information criteria will be utilized in the development of chemical-specific water quality based effluent limitations for point source discharges, if needed, as provided at N.J.A.C. 7:9B-1.6(c)4iii.

- Adopting: The DEPE has decided to promulgate the criteria as proposed for chromium, lead, and 1,1,1-trichloroethane, which have been reviewed specifically in conjunction with the State's drinking water program as mandated by the A-280 amendments to the New Jersey Safe Drinking Water Act, (N.J.S.A., 58:12A-1 et seq.). In addition to the chemical-specific discussions in the Basis and Background document on lead (pages 26 and 27) and on 1,1,1-trichloroethane (pages 54 and 56), further support for the proposed criteria is presented in the chemical-specific section of this response document under the respective chemicals (under response to Comments 275 and 276 for chromium, Comments 300 to 306 for lead, and Comments 329 to 331 for 1,1,1-trichloroethane).

While the DEPE is not adopting the proposed SE and SC criterion for silver for the reasons stated above, the DEPE is adopting the FW2 criterion for silver. The USEPA deleted silver in its adoption because it considered argyria, a discoloration of the skin due to exposure to silver, a mere cosmetic effect (57 FR 60886, December 22, 1992). The DEPE, on the other hand, regards argyria as an undesirable, adverse dermal health effect and an adequate endpoint to provide sufficient grounds for adopting the silver criterion as proposed.

Comments Which Are Not About the Proposal

The following comments were outside the scope of the proposed revisions to the Surface Water Quality Standards. Some of these comments dealt with portions of the Surface Water Quality Standards which were not proposed for change, while others dealt with subjects that are not regulated by the Surface Water Quality Standards. These comments have been sorted by topic to facilitate comprehension of the concerns being raised.

White Paper/Settlement

340. COMMENT: The proposal does not respond to the numerous "White Paper" issues submitted to DEPE over the last four years. AEA has expended considerable resources providing this information to the DEPE in an effort to update State regulations, policies and practices. Virtually none of the recommendations AEA has advocated are incorporated into the regulations. Moreover, the Statement of Basis and Notice of Proposed Rulemaking do not even address *why* DEPE has rejected AEA's recommendations. The DEPE's silence is contrary to assurances we received from DEPE staff during meetings, prior rulemaking actions and forums concerning these issues. On February 21, 1991, the DEPE promulgated emergency regulations, but declined to respond to AEA's considerable comments deferring this responsibility to the amended water quality standards now proposed. The lack of comments the Statement of Basis shows that the DEPE has not followed-through on these commitments. (11, 12).

341. COMMENT: AEA is also disappointed by the selected response to public comments contained in the Statement of Basis. These comments do not represent the concerns of AEA with respect to earlier proposals to repromulgate the same water quality standards and implementing policies. The "White Papers" attached to these public comments identify many of the concerns the AEA members have and the concerns the AEA members have raised to the DEPE over the years. The Statement of Basis does not discuss many of these issues, but instead, promotes the false impression that the selected comments are the only concerns of which the DEPE is aware. DEPE should address *all* of the issues and concerns raised in the AEA "White Papers" as committed in prior rulemaking actions on N.J.A.C. 7:9. (11, 12)

342. COMMENT: On March 1, 1991, a group of AEA members, comprising ocean dischargers, challenged the January 1991 repromulgation of the water quality standards. AEA was an *amicus curiae* in the Petition. The Appellate Division petition challenged (1) whether DEPE violated the Administrative Procedures Act ("APA") by failing to respond to public comments, (2) whether substantial evidence in the administrative record supported the regulations, and (3) whether promulgation of final rules violated the notice and comment rulemaking procedures because the DEPE never notified the public that it had reinterpreted several of the regulations.

The DEPE and Petitioners have entered into a consent decree as settlement of the Petition. Under the Agreement of Settlement, the DEPE has promised to either promulgate new regulations or "formally state its intention not to propose new regulations" and to publish the rationale for the selected option. DEPE did not modify its regulations

concerning any of the issues enumerated in the Agreement of Settlement, and did not provide any rationale for rejecting any of AEA's proposals. For these reasons the proposed regulations violate the letter and spirit of the Agreement of Settlement. (11, 12)

343. COMMENT: AEA members submitted to DEPE a "White Paper" addressing the critical issues concerning application of the USEPA "Ambient Water Quality Criteria for Bacteria" for marine and freshwater. DEPE did not respond to the "White Paper" as was agreed to in its settlement with AEA. AEA recommends that DEPE incorporate the recommendations of the "White Paper" into the proposed water quality standards (11, 12)

344. COMMENT: DEPE should withdraw the proposed Surface Water Quality Standards because AEA believes that adoption of the regulations as proposed cannot survive judicial scrutiny due to procedural and substantive defects in the administrative record. These defects include: The failure of DEPE to comply with the letter and spirit of the Agreement of Settlement of *In re: Repromulgation of N.J.A.C. 7:9-1 et seq.,* Appellate Dkt. No. A-3105-90T1. As part of the settlement, DEPE agreed to notice for public comment "rationales" concerning implementation of several policies enumerated in the Agreement of Settlement. Specifically, the Statement of Basis and proposed regulations do not: (1) clarify the anti-degradation policies of the State; (2) clarify mixing zone rules including a discussion of specific rules for enterococcus bacteria; (3) address the issues related to the minimum treatment requirements of N.J.A.C. 7:9-5.8; (4) clarify policies pertaining to whole effluent toxicity; and (5) address the issues presented to DEPE in the several AEA "White Papers." (11, 12)

RESPONSE: At the time of the completion and subsequent publication of the November 2, 1992, "toxics proposal," the DEPE had not yet addressed most of the concerns contained in the numerous "White Papers" and the Settlement Agreement (which was signed by the state Attorney General's office on November 6, 1992). However, the issues contained in the Settlement Agreement have either been addressed or are currently being considered by the DEPE. The status of each issue is as follows:

- Interested Party Review document addressing overall reform of the NJPDES regulations published in the February 1, 1993, New Jersey Register;
- Formal proposal prohibiting mixing zones for bacterial indicators (including enterococci) issued February 1, 1993;
- Weak influent waiver of the percent removal requirements more stringent than 85 percent being expanded to include all domestic treatment works and to apply to limits other than secondary treatment. Anticipated for proposal in the NJPDES regulations;
- Issues related to Minimum Treatment Requirements, found at N.J.A.C. 7:9-5.8, are also being addressed as part of the NJPDES rule writing effort. The DEPE is incorporating portions of the Minimum Treatment Requirements into appropriate portions of the NJPDES regulations, including necessary updates and modifications. The DEPE is still exploring AEA's request for uniform application of the 85 percent removal requirement and the ramifications it would have on antidegradation.
- The DEPE is actively working on revisions to New Jersey's antidegradation policy, paying specific attention to development of a usable and reasonable implementation policy. A draft version of the work completed on the antidegradation policy was presented to the public for initial review in the February 1, 1993, New Jersey Register as part of the Interested Party Review document concerning changes to the NJPDES and Surface Water Quality Standards regulations. This draft version was based on the antidegradation policy developed for the Great Lakes Water Quality Initiative. Public roundtables regarding the issues contained in the Interested Party Review document were held on February 19 and March 26, 1993. A public meeting specifically regarding the draft antidegradation policy was held by the DEPE on March 8, 1993. As a result of the comments submitted on the Interested Party Review and discussions at the March 8th meeting, the DEPE has decided to revise portions of the policy. A final proposal containing these revisions should be available by January 1994;
- The DEPE has reevaluated the relationship of the effluent toxicity standard and water quality-based whole effluent toxicity limits and will address this issue in the basis and background document supporting the NJPDES reform proposal;
- As part of revisions to the Water Quality Management Planning Rules and NJPDES regulations, the DEPE is outlining procedures for development of wasteload allocations and water quality-based effluent limitations, respectively. Some of these revisions were included in the February 1, 1993, Interested Party Review document.
- The DEPE has reevaluated whole effluent chronic toxicity limitations and will address this issue in the basis and background document supporting the NJPDES reform proposal; and
- Since the DEPE has not promulgated the metals criteria as originally proposed, it is still evaluating how to set effluent limitations for metals.

General—Procedural

345. COMMENT: One of the questions raised by the DEPE in the Roundtable Summary is how to make the water quality standards development process more interactive and enhance the role of interested constituencies in that process, with the objective of making the process more efficient and producing a better proposal. Commenters appreciate the opportunity to address these points and have several suggestions.

First, the public forums that the DEPE convened in connection with the proposed water quality standards amendments this past December, and again last month, were useful in informing the regulated community, and presumably other interested constituencies as well, of a number of issues that are being addressed in the water quality standards development process. Commenters encourage the DEPE to convene similar "roundtable" discussions in the future and to do so at an earlier point in the proposal development process.

In addition, commenters suggest that the DEPE consider distributing proposed amendments in a conceptual format and solicit input from interested parties. By launching such "trial balloons" the DEPE can receive meaningful comment in a manner that saves time and effort for all concerned. A discharger should, however, have assurance that, where necessary, information provided by the discharger will be treated as confidential.

Finally, another approach would be for the DEPE to solicit comments informally on preliminary proposals before the drafting process has proceeded to a point where significant changes become difficult. These preliminary proposals can be distributed through trade associations, conservation organizations, municipal associations, etc. Similarly, commenters suggest that the DEPE consider the use of negotiated rulemaking or "Reg-Neg". The object of negotiated rulemaking is to ventilate competing viewpoints regarding possible new regulations in a less formal setting than notice and comment rulemaking, with the goal of reaching a consensus approach. Negotiated rulemaking has proven effective in various recent U.S. EPA rulemaking proceedings. (6)

RESPONSE: The DEPE appreciates the commenter's suggestions and will consider them when undertaking future rulemaking on the Surface Water Quality Standards.

General—Permit Limits

346. COMMENT: Permit limits based on DRBC guidelines should use mixing zones, just as mixing zones are used for other limits. (19)

RESPONSE: Mixing zones will be used, to the extent that they are allowed and appropriate under the applicable regulations, for permit limits based on DRBC water quality guidelines. Mixing zones are not available for permit limits based on DRBC effluent guidelines because the effluent guidelines are intended to apply at the end of the pipe.

347. COMMENT: Metals limits in permits reported as "total recoverable" should be calculated based on the dissolved (bioavailable) portion. (19)

RESPONSE: Metals limits in permits will be calculated based on the adopted form of the criteria for metals. While the DEPE has concluded that the total recoverable form of the metals does not closely enough approximate the bioavailable portion of the metals, it is not clear, at this point, whether the criteria for metals will ultimately be in the form of "Total recoverable concentration times the Water Effects Ratio" or "Dissolved concentration times the Water Effects Ratio."

Facility Specific—Permit Limits

348. COMMENT: Historically, EPA and most states, including New Jersey, have used the most conservative procedures for deriving permit effluent limits. These include:

- steady-state mathematical models;
- assumptions that the "worst-case" physical, chemical, and biological conditions occurred simultaneously;
- the resultant numerical values were never to be exceeded.

This rigorously applied ultraconservative approach yielded permit limits that bear no relation to the actual impacts the discharge would have on the receiving stream. EPA revised its procedures in the TSD

after determining that the "real world", for example, stream and effluent characteristics were independently variable, did not conform to the simplifying assumptions. In actuality, WER's showed that predicted effects were often several orders of magnitude more restrictive than were found in ambient waters.

As a result, the recommended TMDL procedures were changed to advocate the use of dynamic modeling to more accurately depict the influence of dischargers under all stream flow conditions. A number of subsequent studies have verified that this method for establishing effluent limits is fully protective without requiring complicated and costly treatment. DEPE has accepted some but not fully or correctly implemented the TSD methods. This may have been because of resource constraints, but permittees should not have been denied the benefits of the most up-to-date procedures, if they were willing to undertake the costs of implementing them.

We note that DEPE has indicated that it will use the TSD in the future. However, there are no written guidelines or policies that a permittee can rely on for determining whether it is being properly interpreted and applied. Minor inconsistencies can cause major expenditures for treatment that may in fact not be needed. We believe that, with acceptable safety factors, the TSD procedures will yield fully protective effluent limits. (45)

349. COMMENT: The key to any regulatory scheme is the ability to accurately and reliably measure compliance with permitted terms and conditions. Unless the analytical methods specified to determine compliance can unequivocally determine the presence or absence of the limited constituent, for example, metals, organic chemicals, etc., or condition, for example, whole effluent toxicity, then both the public and the permittee are deprived of the certainty of environmental and legal protection promised by the Clean Water Act.

Since the ambient pollutant concentrations that are proposed in the Surface Water Quality Standards are so low, the variability of analytical methods available for measuring them is extremely high. This is primarily due to the differences between measurements made on "pure" laboratory water and ambient waters or effluents "contaminated" with other constituents which cause interference in instrument readings. DEPE should not adopt what are "rules of thumb" methods which have been shown to produce an unacceptable number of "false positive" results.

The CWEA imposes substantial fines and penalties on dischargers, based on strict liability. If a test result exceeds a permit limit regardless of the unreliability of the method, then a penalty will be exacted even when there is no possibility that a particular pollutant could have been added to an effluent. We believe that DEPE has not accounted for the anomalies that have been identified by both the scientific and regulated community. Until this is done, permits should initially contain only monitoring requirements that will establish the appropriate practical quantitation limits (PQLs) for measuring presence or absence of pollutants of concern. (45)

350. COMMENT: Based on whole effluent toxicity information provided to the New Jersey Department of Environmental Protection and Energy (DEPE or the Department) and AT&T-Bell by JMEUC, there is no measurable acute toxicity (NMAT) in 100 percent effluent and no chronic toxicity in 25 percent effluent. Therefore, the proposed numerical effluent limitations that are alleged by DEPE as being necessary to protect aquatic life pursuant to Section 304(l) of the Federal Water Pollution Control Act are clearly misplaced.

Notwithstanding the use of the United States Environmental Protection Agency's (EPA) criteria for saltwater, in lieu of properly adopted water quality standards, we believe that DEPE has failed to apply the latest EPA guidance on the proper interpretation and implementation of the criteria, particularly that it only applies to the dissolved, bioavailable fraction of the total recoverable metals. This oversight may have been due to timing of the development of the draft permit. However, DEPE has a continuing obligation to employ the latest scientific information and translation methods when establishing permit effluent limitations.

Although EPA's Technical Support Document (TSD) is purportedly relied upon for support by the DEPE, its use is selective. Because of the lack of reliable and accurate site-specific dissolved bioavailable metals information, we believe that DEPE has overcompensated by assuming multiple "worst-case" scenario despite the fact that the TSD cautions against such assumptions. The specification of certain unpromulgated testing methods and reporting requirements is also not justified based on the latest information available from EPA and other sources.

As a result of these actions, we believe that DEPE has proposed a draft permit that is based on mistaken interpretation of law or regulations, misapplication of published guidance, and reliance on policies that have not been subjected to "due process" and proper adoption. Our Murray Hill Facility, which has been in compliance with its pretreatment requirements that were established by JMEUC, will be adversely affected by the proposed permit even though JMEUC's current effluent quality has not been shown to be toxic to aquatic life. Therefore, we are submitting the following specific objections to the draft NJPDES Permit issued to JMEUC on July 27, 1992.

Although Section 304(l) of the Federal Water Pollution Control Act, in part, addresses water quality impacts of discharges of toxic pollutants, it does not require that such pollutants be rigidly regulated by permit unless there is reliable proof that any particular pollutant or pollutants prevent the attainment of the designated use of the receiving waters. AT&T-Bell believes that DEPE does not possess sufficient information to accurately determine whether the specific segments of the Arthur Kill, to which JMEUC's POTW discharges, are impaired due to point source discharges of priority pollutants, and if so, whether JMEUC's POTW is responsible for any such impairment. Even if the answers to the preceding questions were affirmative, we believe that DEPE had insufficient data on which to base any reasonable water quality-based limit(s).

The application of ambient water quality criteria is overly restrictive since the Arthur Kill is not known to be affected by metals or trace organics discharged from JMEUC's POTW. In fact, DEPE has indicated that the Arthur Kill has known problems with dissolved oxygen and coliform levels due to combined sewer overflows (CSOs), thus resulting in non-attainment of designated uses. This was cited in a 1985 DEPE report entitled *Use Attainability Analysis of the New York Harbor Complex.*

We contend that the implementation of overly stringent limitations on JMEUC in order to meet water quality goals is unjustifiable and unnecessary, given the potential nonattainability of the criteria due to the other potentially uncontrollable sources. (45)

351. COMMENT: DEPE did not accurately follow EPA's guidance when determining whether water quality-based effluent limitations were necessary for JMEUC. As the basis for its proposed water quality-based limits for metals and cyanide, DEPE concedes that it did not rely upon water quality criteria established as a part of the State's standards. Instead, it relied on guidance documents developed by EPA under §304(a) of the Clean Water Act. Those guidance documents are not part of New Jersey's water quality standards, and have never been subjected to the standards-setting process. DEPE claims that N.J.A.C. 7:9-4.6(c)4iii (1989) authorizes the DEPE to rely on EPA criteria guidance in setting water quality-based limits. But, as the following discussion demonstrates, that rule violates the New Jersey Administrative Procedure Act (APA) and the New Jersey Water Pollution Control Act, and is thus invalid.

The New Jersey Water Pollution Control Act clearly requires DEPE to follow APA procedures in establishing water quality standards, and thereafter to impose effluent limits necessary to meet those standards. DEPE has adopted water quality standards, including numeric criteria for a number of pollutants, albeit not those for which it proposes to set "water quality-based" limits in this case.

Instead, DEPE has adopted N.J.A.C. 7:9-4.6(c)4iii (1989), which provides:

> The DEPE shall utilize the parameter specific criteria contained in N.J.A.C. 7:9-4.14 in the development of chemical specific water-quality based effluent limitations for point source discharges. Whenever parameter specific criteria have not been adopted, the DEPE will utilize the best available scientific information in the development of chemical specific water-quality based effluent limitations for point source discharges. Ambient criteria published by the United States Environmental Protection Agency pursuant to section 304(a) of the Federal Clean Water Act represent the minimum acceptable best scientific information to be used in the development of water quality based effluent limitations for point source discharges.

This regulation purports to allow DEPE to apply EPA guidance documents as if they were State water quality criteria, thereby giving them the same force and effect as criteria that have been tested through the State rulemaking process. Yet EPA's guidance documents have not been through that critical process. Members of the regulated community in New Jersey have never had an opportunity to comment on their scientific legitimacy or their appropriateness for New Jersey waters.

Indeed, the record underlying N.J.A.C. 7:9-4.6(c)4iii (1989) discloses that DEPE never offered the public an opportunity to comment on the

EPA guidance documents it proposed to use. The July 18, 1988 notice of proposed rulemaking for the regulations in which this provision first appeared did not include the EPA guidance documents or any reference to where those documents could be viewed. The notice announcing the final rule is similarly devoid of any reference to the specific criteria values to be used or where the underlying EPA guidance documents could be obtained.

Although DEPE need not have published all of the EPA guidance documents in their entirety, the APA requires DEPE to provide at least some minimum information on the pollutants concerned and the values to be applied, and to indicate how the full text of the EPA guidance documents could be obtained. In fact, the regulations governing agency rule-making allow the incorporation by reference of certain other sources of rules *only if certain conditions are met.* N.J.A.C. 1:30-2.2 requires that

> [a]ny section of a source incorporated by reference shall be made available for public inspection by the adopting agency or the original source for a reasonable fee.

Further, the agency must

adopt and file as a rule appropriate language indicating:

- What is incorporated including either;
- The specific date or issue of the section of the source incorporated; or
- A statement indicating whether the section incorporated includes future supplements and amendments.
- Where and how a copy of the section may be obtained.

Finally, the agency must "file with the Office of Administrative Law as part of a proposed or adopted rule a copy of the section incorporated by reference." When DEPE adopted EPA's water quality criteria guidance documents by reference in N.J.A.C. 9-4.6(c)4iii, it failed to meet these basic, mandatory requirements, thereby violating the APA.

Even if DEPE had offered EPA's criteria guidance documents for comment, those criteria are subject to change by EPA at any time. Even more convincing are DEPE's own statements in the preamble to the final rule, which indicate that the DEPE itself intends to modify the EPA criteria guidance using various *ad hoc* sources of information, none of which were mentioned in the proposed rule or evaluated during the public hearing and comment period. Specifically, the preamble says:

> The USEPA methodology for development of section 304(a) criteria will be used in the development of water-quality based effluent limitations and will be based on human health effects and protection of the aquatic biota. During this interim period, the best available scientific information to be used in development of water quality based effluent limitations will be the most recent values published by the USEPA pursuant to Section 304(a) of the Federal Clean Water Act, with the following modifications to reflect updated scientific information: for those compounds for which New Jersey has developed updated human toxicity factors pursuant to N.J.S.A. 58:12A-12 et seq., those factors will be used; for those compounds in the USEPA's Integrated Risk Information System (IRIS), other than those addressed pursuant to N.J.S.A. 58:12A-12 et seq., human toxicity factors in the IRIS database will generally be used; and for aquatic biota protection for those compounds in the USEPA Aquatic Information Retrieval (AQUIRE) database, aquatic toxicity information in the AQUIRE database will generally be used. Where water quality-based effluent limitations must be calculated for chemicals for which the USEPA has not published section 304(a) criteria, the DEPE will calculate the limitations using the best available scientific information. For this process, preference will generally be given to human toxicity factors provided in the data sources described earlier, and to aquatic information provided in AQUIRE. The DEPE does not necessarily intend to use this interim procedure as a model for its final methodology for developing ambient surface water quality criteria.

In conclusion, DEPE invalidly relied upon EPA criteria guidance in setting water quality-based limits in the Draft Permit. As such, AT&T-Bell requests that these limits be removed in the final permit, and instead be replaced with "monitor only" until more appropriate limits can be established upon the site-specific data. (45)

352. COMMENT: Assuming for this discussion that N.J.A.C. 7:9-4.6(c)4iii (1989) is valid, AT&T-Bell asserts that DEPE misapplied that rule in this case. By its terms, the rule provides that DEPE will "utilize the best available scientific information" in developing water quality-based limits, and will consider EPA's criteria guidance as "the minimum acceptable best scientific information." In explaining the rule, DEPE committed itself to considering more current or site-specific data. Indeed, the preamble to the final rule suggests that DEPE must collect and consider more current and site-specific information before applying EPA's criteria guidance as part of the "applicable standard."

The DEPE-JMEUC Administrative Record lacks any evidence that DEPE collected or considered more current or site-specific data before applying EPA's criteria guidance to evaluate JMEUC's effluent and to derive the proposed limits. In fact, the Record did not contain any information on the specific data used in the calculation of the limits nor the calculations themselves. As such, AT&T-Bell believes that it is absolutely essential for DEPE to collect and consider more current, site-specific information before applying EPA's guidance to derive water quality-based limits. Such information is necessary to temper the EPA criteria, which EPA recognizes often may be too restrictive.

In a Federal Register notice announcing the availability of certain criteria guidance documents, EPA acknowledged:

> States may appropriately modify these [criteria] values to reflect local conditions. In certain circumstances, the criteria may not accurately reflect the toxicity of a pollutant because of the effect of local water quality characteristics or varying sensitivities of local populations. For example, in some cases, ecosystem adaptation may enable a viable balanced aquatic population to exist in waters with high natural background levels of certain pollutants. Similarly, certain compounds may be more or less toxic in some waters because of differences in alkalinity, temperature, hardness, and other factors.

EPA also says of its criteria guidance derivation technique:

> If sound scientific evidence indicates that a particular aspect of the Guidelines is not appropriate for a specific substance, then some other more appropriate procedure should be used.

Further, in response to comments concerning the highly restrictive nature of the criteria, EPA explains that the criteria should be used in conjunction with an implementation policy allowing the development of site-specific criteria and standards.

> Although the Guidelines might be viewed as making the "worst case assumptions," the implementation policy will determine whether the site-specific water quality criteria and standards will be based on these assumptions ...
>
> The implementation policy being developed by EPA will allow site-specific criteria to be higher or lower than the criteria derived using the Guideline, when adequate information is available.

DEPE goes on to emphasize the need for flexibility in using the EPA guidance to establish State standards.

> ... [T]he criteria may be modified to reflect local environmental conditions and human exposure patterns before incorporation into programs such as water quality standards. If significant impacts of site-specific water quality conditions in the toxicities of pollutants can be demonstrated or significantly different exposure patterns of these pollutants to humans can be shown, section 304(a)(l) criteria may be modified to reflect these local conditions.

The Fact Sheet and Statement of Basis DEPE issued for the draft JMEUC Permit offer no evidence that DEPE collected and considered more current, more accurate, and more site-specific data before applying EPA's criteria guidance to derive water quality-based limits for the facility. We submit that the DEPE has an obligation to do so. Its failure in this regard renders its proposed limits invalid.

Even if DEPE could justify its application of EPA's criteria guidance without first evaluating their appropriateness on a site-specific basis, we contend that DEPE must take into account any data or information offered by JMEUC. For instance, JMEUC has provided at least a year's worth of metals data which shows that the coefficient of variations is generally 0.4 or less compared to the value of 0.6 uniformly applied by the DEPE. Any failure to take this and other data into account clearly would render DEPE's proposed limits arbitrary and capricious. (45)

353. COMMENT: EPA has published, but has not yet promulgated, national criteria for a number of pollutants which it believes will prevent acute or chronic toxicity to aquatic life. The various criteria documents contain *caveats* regarding the proper application of the numerical values. In addition, EPA has published a number of guidance documents (for example, "Water Quality Standards Handbook," "Interim Guidance on Interpretation and Implementation of Aquatic Life Criteria for Metals," and "Technical Support Document") that further elaborate on the development and transformation of the criteria into water quality standards. Assuming for the sake of discussion that N.J.A.C. 7:9-4.6(c)4iii (1989) is valid, in JMEUC's draft NJPDES Permit, there is no apparent recogni-

tion by DEPE of these documents in the development of limits. Specifically, the EPA interim criteria guidance raises the following issues:

• Metals criteria guidance issued in 1980 by EPA recommends the use of the total recoverable method of metals analysis; criteria guidance issued in 1984 recommends the acid soluble method. In the Interim Guidance, it is noted that the use of either of these methods may result in the overestimation of toxicity. DEPE used water quality criteria developed by the two cited questionable analytical methods in the development of the Draft Permit limits. These water quality limits then were used for arsenic, beryllium, cadmium, copper, cyanide, lead, mercury, nickel, silver, and zinc.

• The basis for the questionability of the analytical methods stems from the fact that bioavailability and toxicity vary with the form of metal present. In particular, the soluble form of metals to be regulated in the Draft Permit is more toxic than the particulate form.

EPA's Interim Guidance states ... "Because of the greater fraction of particulate water in ambient waters, as well as the higher levels of dissolved organic binding agents in ambient water, the fraction of metal that is biologically available may often be lower under ambient field conditions than under laboratory conditions ...". Nowhere in JMEUC's Draft Permit has DEPE addressed this issue.

• EPA recommends three alternate methods of approaching the interpretation of ambient water quality standards. The three methods are:

—Actual measurement of total recoverable metals with comparison to national standards.

—Measurement of actual dissolved metals in ambient waters and comparison to criteria.

—Comparison of actual site water toxicity to laboratory toxicity.

The above three methods scale from a simplistic, conservative method to an accurate, complex type. The DEPE is required to develop permit limits to protect existing or designated uses. We contend that the use of the EPA ambient water quality criteria without accounting for site-specific considerations is invalid.

Furthermore, EPA's §304(a) water quality criteria guidance values are based upon data that primarily represent the dissolved form of metals. DEPE has incorrectly equated these dissolved metals-based criteria to total recoverable metals limits for the NJPDES Draft Permit.

EPA's water quality criteria for metals are based on data that represent the toxicity of metals in the dissolved phase or form. DEPE has established proposed permit limits for JMEUC's outfall designated No. 001 based on total recoverable metals, by assuming that the water quality criteria (which are based on dissolved metals concentrations) are equivalent to the total recoverable metals concentration. This assumption is not scientifically supported and ignores the basis of the water quality criteria, the wealth of data on the bioavailability of metals as a function of metal speciation, and the chemodynamics of metals in aqueous systems. (45)

354. COMMENT: EPA's criteria guidance documents for protection of aquatic life from a variety of pollutants in saltwater ("saltwater criteria") are intended to protect 95 percent of all saltwater species nation-wide. As discussed above, EPA recognizes that site-specific factors, such as differences in the sensitivities of resident species or certain water quality factors, may cause its criteria guidance to be over protective or under protective of aquatic life in certain locations. AT&T-Bell believes that EPA's saltwater criteria are more stringent than necessary to protect aquatic life in the Arthur Kill for the following reasons:

• According to DEPE's §304(l) list, ambient water quality in the Arthur Kill may exceed EPA water quality criteria for several metals, yet a wide variety of sensitive species inhabit the Kill.

• Based on a recent EPA study, the criteria are of questionable validity for several metals.

• Although the Arthur Kill is classified as SE-3, a designation indicating that the waterbody has not attained all fishable and swimmable uses, available data suggest that the causes of any non-attainment are low dissolved oxygen concentrations and high concentrations of coliform bacteria, not concentrations of the ten metals or cyanide.

Therefore, we believe that this site-specific information demonstrates that EPA's criteria guidance, as DEPE has applied them, are unduly restrictive and do not constitute the best scientific information in this case. (45)

355. COMMENT: The fact that many sensitive species are resident in the Arthur Kill and do not appear to be impaired by the JMEUC's POTW effluent suggests that EPA's criteria are too stringent to be applied to this site. Although the Arthur Kill has been subjected to a variety of long-term anthropogenic stresses such as dredging, the discharge of municipal and industrial wastewaters, nonpoint source discharges, and discharges from combined sewer overflows, site-specific information as compiled in a study report by PSE&G for their Sewaren Station shows that many sensitive species are present in the segment to which JMEUC's POTW discharges.

PSE&G's study identified a wide variety of species resident in the Arthur Kill, including 26 taxa of phytoplankton; 22 taxa of microzooplankton; 44 taxa of macrozooplankton; 47 taxa of benthic macroinvertebrates; and over 50 taxa of fish. For fish, PSE&G's report concluded that the number of species and the abundance of fishes in the Arthur Kill has increased substantially during the past 17 years, coincident with improvements in dissolved oxygen. The incidence of fish parasites, disease, and abnormalities was negligible. The fish species were collected during the seasons when they were expected to be present and in the habitats where they were expected. The aquatic community was not dominated by heat-tolerant species. Thus, the diversity, structure, and function of the fish community is approaching the community development which might be expected for such a physically-altered and much-used waterbody.

The wide variety and numbers of sensitive species present in this area of the Arthur Kill demonstrate that, although some pollutants may be present in concentrations exceeding EPA national quality criteria, such concentrations have not prevented populations of these sensitive species from inhabiting the Arthur Kill.

Many of these sensitive species are not only present, but quite abundant. PSE&G's study concluded that the phytoplankton, zooplankton, benthic macroinvertebrate, and fish communities of the Arthur Kill are typical of those found in similar salinity regimes in similar estuaries. For example, the taxonomic composition and relative abundance of benthic macroinvertebrate taxa collected in 1988 approached typical patterns for the Hudson River and Raritan River estuaries. Therefore, AT&T-Bell believes that EPA's criteria for the metals and cyanide for which DEPE has proposed water quality-based effluent limits are too stringent. (45)

356. COMMENT: EPA has long recognized that soluble fractions of metals are primarily responsible for causing toxicity to aquatic life and that the "total recoverable metals" method for setting permit limits or measuring compliance with effluent limitations is overly conservative. EPA's criteria guidance for arsenic, beryllium, cadmium, chromium, copper, lead, mercury, nickel, silver and zinc are based on the dissolved (or "active") fractions of these metals, with the exception of trivalent and hexavalent chromium, which are based on valence state. This consideration of only the "bioavailable" portions of metals is consistent with a wealth of scientific data evaluating bioavailability of metals as a function of metal speciation and the chemodynamics of metals in aqueous systems.

DEPE has evaluated JMEUC's POTW effluent and proposed permit limits for Outfall 001 using total recoverable metals methods, thereby assuming that EPA's water quality criteria reflect concentrations of total recoverable metals necessary to protect the most sensitive species of aquatic life. We contend that this is incorrect. If DEPE wishes to use EPA's criteria guidance to characterize effluents and receiving waters, and to set water quality-based limits for JMEUC, it must account for this inactive fraction correctly. DEPE must re-evaluate the effluent and receiving water concentrations after adjusting the data collected to reflect only the active metal fraction. Then, if it determines that water quality-based limits are still warranted, it must revise any proposed limits for Outfall 001 to reflect only the active metal fractions, thereby complying with the terms of EPA's criteria guidance. Subsequent to the adoption of the lists, EPA has recognized that total recoverable metals in most instances overestimate the toxicity potential. Additionally, much of the available chemical specific data may have been of little value because of laboratory contamination and the analytical methods used. (45)

357. COMMENT: It is our understanding that most of the proposed metals limits could not be met by source control because background and residential metals contributions alone are enough to cause exceedances. Given that, the only way to potentially achieve limits is via very expensive unit process addition at JMEUC's POTW. Potential advanced post-secondary methods are chemical addition (lime) with subsequent clarification and possibly filtration as well as reverse osmosis. These options are expensive on both a capital and an operations and maintenance basis. The costs of meeting strict metals limits are cited in the following excerpt from Priority Pollutant Criteria and the Clean Water Act, Water Environment and Technology, December 1991:

"• CH2M HILL [a national wastewater consulting firm] estimated the capital cost of lime and soda precipitation combined with reverse osmosis at the San Jose/Santa Clara [California] POTW at $395 million. Annual

operations and maintenance costs were estimated at $87 million for a flow rate of 125 mgd, for an equivalent annual cost of $133 million at eight percent over 15 year period. 450 tons/day of sludge would be produced from these processes.

• Central Contra Costa County Sanitary District (CCCSD) [California] estimated the capital cost of lime treatment and reverse osmosis for its 30-mgd plant at $130 million, with an annual operating cost of $35 million. The equivalent annual cost is $50 million at eight percent over 15 years. This would require a 300 percent increase in the CCCSD sewer service charge to about $300 per year.

• A James M. Montgomery [a national wastewater consulting firm] study at the Palo Alto, California wastewater treatment plant indicated that both lime precipitation and reverse osmosis would be needed to meet EPA priority pollutant criteria for metals. At a flow rate of 23 mgd, construction costs would be about $104 million and annual operating costs would be about $21 million, for an equivalent annual cost of $33 million at eight percent over 15 years. An estimated 86 tons of lime sludges, and about four mgd of brine from reverse osmosis would require disposal.

• Eisenberg, Olivieri & Associates [a wastewater consulting firm] estimated the equivalent annual costs over a 15-year period for lime treatment and reverse osmosis for the 20-mgd Sunnyvale, [California] POTW at $34 to $44 million per year."

Even with extensive post-secondary treatment, it is likely that some of the metals limits, especially copper and mercury, will not be technically achievable.

With regard to the use of post-secondary treatment to remove trace organics, the technologies cited for trace metals removal would probably be capable of reducing organics as well. If trace organics are the only parameters of concern, post-secondary treatment by granular activated carbon (GAC) would be an effective alternate treatment technology. The capital and operations and maintenance costs for GAC would be very high.

Therefore, we assert that any finding that water quality-based permit effluent limitations are necessary, in the absence of properly analyzed ambient and effluent quality data, is arbitrary, and will result in capital and operational costs to JMEUC and its direct dischargers that are not scientifically justified.

Based on the above, we object to the imposition of the water quality-based permit effluent limits as proposed in JMEUC's Draft Permit, and request DEPE to reanalyze the ambient and effluent quality such that more reasonable limits can be developed. Furthermore, these limits need to be assessed with regard to the technical achievability by a POTW, such as JMEUC, and with consideration to the economic impact placed on its users. (45)

358. COMMENT: If all the industries in the JMEUC collection area could reduce their metals dischargers to zero, the draft limits for JMEUC could still not be met due to background residential and commercial contributions. Even if the draft limits could be consistently met, it is not technically viable for industries to achieve zero metals discharge through pretreatment.

Depending on the actual pretreatment limits used (which will be very stringent based on the draft limits), the cost to industry in the collection area will be prohibitively high. It is estimated that if all major industries in the electroplating and metal finishing categories in the JMEUC collection area had to install pretreatment consisting of hydroxide precipitation and ion exchange, which constitutes a very high degree of treatment, the total capital cost would be 40 to 60 million dollars. For the other major industries in the JMEUC contributing areas, it has been assumed that biological treatment followed by hydroxide-lime precipitation and reverse osmosis pretreatment would be used. The estimated capital cost for these facilities would be 35 to 55 milion dollars. The total estimated capital cost would, therefore, be 75 to 115 million dollars for major industry in the area. These estimates do not include the smaller industries in the area. The potential impact of constructing pretreatment facilities at these projected costs may cause industries to relocate or cease operations, resulting in the loss of jobs and tax revenues.

The potential loss of the industrial user fees to JMEUC as a result of facility relocation or closure will cause the need for higher residential user fees. This increase, coupled with increased capital and operations and maintenance costs for the potentially required upgrades by JMEUC, may lead to residential user fees which are unreasonable and inequitable as compared to those paid in other areas of New Jersey. This would lead to residential relocation and economic distress in the service area.

Furthermore, once these proposed water quality-based limits become final in the permit, anti-backsliding rules will prevent JMEUC from receiving a modified permit relaxing any limits, if subsequent analyses show that the proposed limitations are not necessary to protect water quality.

AT&T-Bell's Murray Hill Facility, as a direct industrial discharger to the JMEUC, would need to construct and operate a highly advanced wastewater treatment system to pretreat wastewater to these overly-stringent water quality-based limits for metals. We question the achievability of these limits with available treatment systems that have not been demonstrated to consistently produced zero metals effluent. Under the recently promulgated New Jersey Clean Water Enforcement Act, any violations caused by exceedances on ultra-low or zero discharge limits imposed by the JMEUC on their industrial dischargers will result in fines and other stipulated actions. As such, we request that the DEPE reconsider that Draft Permit limits based on reanalysis of ambient and effluent quality, and on the technical achievability and economic impacts placed on JMEUC's direct industrial dischargers. (45)

359. COMMENT: The quantity of sludge produced from post-secondary treatment and pretreatment will be high. The amount of sludge generated would result in additional energy requirements for sludge handling and transport. The additional energy requirements would then result in increased air emissions. The sludge generation, itself, results in additional solid waste loading to landfills and other sludge disposal facilities. If reverse osmosis is required, there are very high energy costs associated with both running the reversed osmosis system as well as brine evaporation.

AT&T-Bell requests that NJDEPE take these additional impacts into consideration and re-evaluate the water quality-based metals limits in the draft JMEUC Permit. (45)

360. COMMENT: We contend that the criteria NJDEPE has applied, both in the §304(l) process and in developing the proposed water quality-based permit limits, are neither legally nor technically valid. At present, DEPE has no valid saltwater criteria for the 10 metals or cyanide. Without such criteria, it is not possible to properly evaluate the need for water quality-based limits or to derive any necessary limits. Thus, we request that DEPE defer setting any water quality-based limits until legally and technically valid criteria can be developed on a site-specific basis.

In developing appropriate site-specific criteria, DEPE should avoid using statistical techniques that suffer from the same flaws as EPA's techniques for calculating criteria guidance values. Specifically, DEPE should not use EPA's "recalculation procedure" for deriving site-specific criteria. That procedure involves modifying EPA's criteria guidance values by deleting any toxicity data on non-resident species and substituting any available toxicity data on resident species. Site-specific criteria calculated using this procedure frequently are more stringent than the original criteria, even if the species used in the calculation are less sensitive than the species on which the original calculation was performed. This anomalous result is an artifact of EPA's statistical procedures, rather than any legitimate toxicological difference. Thus, this procedure does not provide an appropriate alternative for calculating site specific values. EPA's statistical procedure for deriving aquatic life criteria can be modified to better fit the entire data base, so that the confidence intervals used have more statistical validity.

In addition, there are the following issues of concern regarding whole effluent toxicity testing requirements, which we request that DEPE specifically address:

• Whole effluent toxicity testing results have been shown to have high variability. Tests have shown the coefficient of intralaboratory variability (SD/mean × 100) have averaged 34 percent for acute and chronic with ranges of 0 to 166 percent and 0 to 83 percent, respectively. Nowhere is this variability accounted for. This variability has particular concern, since a Toxic Reduction Evaluation (TRE) may be unreasonably triggered for only two violations because of the high probability of false positives.

• Whole effluent toxicity can degrade rapidly in receiving water due to potential absorption, hydrolysis, oxidization, photolysis, biodegradation, and precipitation. Rate and degree of degradation are dependent on the receiving water. No factors are included in the extrapolation of laboratory data to field data to account for this degradation.

• The whole effluent toxicity evaluation assumes maximum flow at maximum concentration with minimum assimilative capacity at any time. This is an overly conservative assumption.

Based on the results of whole effluent toxicity testing, the uncertainty associated with the test methods, the failure to heed the cautions expressed by EPA in the Technical Support Document, and the interim metals guidance, AT&T-Bell objects to the water quality effluent limitations for metals. In lieu of these limits, we request that DEPE provide in JMEUC's permit more appropriate metals limits that would be "monitored only" until sufficient, accurate data can be collected. (45)

361. COMMENT: The New Jersey Water Pollution Control Act requires that, prior to imposing any water quality-based permit limits more stringent than effluent standards and/or minimum treatment standards, the DEPE must hold a public hearing to:

> determine if there is a reasonable relationship between the economic and social costs of achieving such limitations, including any economic or social dislocation in the affected community or communities, and the social and environmental benefits to be obtained, including the objective of restoring and maintaining water quality of the State, and to determine whether such effluent limitations can be implemented with available technology or with other control strategies.

If an affected person demonstrates through the hearing process that there is "no reasonable relationship between the economic and social costs of compliance and the benefits to be obtained," then the limits must be modified.

AT&T-Bell hereby requests a public hearing be held pursuant to this provision. As the comments above suggest, we believe that the evidence presented at that hearing will demonstrate that the extremely high costs of complying with the proposed limits, especially metals, as well as the negative socio-economic impacts that may result therefrom, far outweigh the relatively negligible water quality benefits to the Arthur Kill.

While JMEUC's Draft Permit provides for an optional public hearing if the DEPE determines "there is a significant degree of public interest," such a test would be inadequate to satisfy the requirements of N.J.S.A. 58:10A-8. The public hearing requirements of N.J.S.A. 58:10A-8 is not discretionary; DEPE *must* provide a public hearing prior to the imposition of any water quality-based limitations, regardless of the degree of public interest. (45)

362. COMMENT: Pursuant to N.J.A.C. 7:9-4.9(a)2, AT&T—Bell, as an interested party who discharges directly to JMEUC, hereby requests a modification of the proposed water quality-based permit limits for JMEUC's POTW Outfall 001. N.J.A.C. 7:9-4.9(a)2, which allows a modification of any water quality-based limit, provides:

The criteria for modifying water quality-based effluent limitations on a case-by-case basis are:

[T]he applicant for modification of effluent limitations for parameters that are currently equal to or currently do not meet the water quality criteria ... must demonstrate, to the satisfaction of the DEPE, after public notice (including notice to affected municipalities) and a public hearing (where sufficient public interest exists), that:

- The water quality criteria are not attainable because of natural background, or;
- The water quality criteria are not attainable because of irretrievable man-induced conditions, or;
- natural, ephemeral, intermittent, or low-flow conditions or water levels prevent the attainment of the water quality criteria, unless these conditions may be compensated for by the discharge of sufficient volume of effluent discharges without violating State Water Conservation Requirements to enable uses to be met, or;
- controls more stringent than those required by Sections 301(b) and 306 of the Federal Clean Water Act would result in substantial and widespread adverse social and economic impact.

According to DEPE's 1984 "Basis and Background for the Proposed SWQS & Wastewater Discharge Requirements," this regulation is based on (1) EPA's regulations authorizing downgrading of designated uses, and (2) EPA guidance indicating that a temporary variance from or modification to water quality-based permit limits is allowable under the same circumstances that could justify downgrading.

Because New Jersey's water quality rule is based upon the Federal rules, it is appropriate to look to Federal guidance for interpreting that rule. Although all of the factors spelled out in DEPE's modification have relevance here, the most compelling is the "widespread adverse social and economic impact" factor. With respect to this factor, EPA's "Water Quality Standards Handbook" suggests that States consider such economic factors as the potential for plant closures and unemployment, the level of employment in the area, the effect of installation of additional control measures on plant expansion or modernization, and the effect on a facility's profitability (the latter effect with regard to the various facilities who discharge directly to the POTW). EPA emphasizes that the state's evaluation of these effects must be site-specific, and should form the basis for a decision as to whether the effects are "substantial and widespread."

EPA's guidance makes it clear that cost considerations are relevant in setting water quality-based limitations. Meeting the proposed limits would impose inordinarily high compliance costs for both the POTW and its industrial dischargers, assuming meeting those limits proves feasible at all. The potential impact of constructing industrial pretreatment facilities may cause industries to relocate, thus resulting in loss of jobs and tax revenues. This relocation will then result in higher residential user fees due to the loss of industrial user fees. This coupled with JMEUC's increased capital and operations and maintenance costs for the required POTW upgrades, may lead to unreasonable user fees, which could then lead to economic distress in the service area. (45)

363. COMMENT: The Draft Permit's Fact Sheet has listed several parameters as detectable. However, JMEUC has stated that their data has not detected these parameters in their effluent. As such, the cited parameters should not be included in the permit with limitations.

Specifically, the Draft Permit includes specific limits for the following parameters, which JMEUC has reported as non-detectable:

- Arsenic
- Mercury
- Beryllium
- Fluorene
- Volatile Organics
  - —Acrolein
  - —Acrylonitrile
  - —Benzene
  - —Bromoform
  - —Carbon Tetrachloride
  - —Chlorobenzene
  - —Chlorodibromomethane
  - —Chloroethane
  - —2-Chloroethylvinylether
  - —Chloroform
  - —Dichlorobromomethane
  - —1,1 Dichloroethane
  - —1,2 Dichloroethane
  - —1,1 Dichloroethane
  - —1,2 Dichloropropene
  - —Cis 1,3 Dichloropropene
  - —Trans 1,3 Dichloropropene
  - —Ethylbenzene
  - —Bromomethane
  - —Chloromethane
  - —1,1,2,2 Tetrachloroethane
  - —Tetrachloroethene
  - —Toluene
  - —1,2 Trans-Di-chloroethene
  - —1,1,1 Trichloroethene
  - —1,1,2 Trichloroethane
  - —Trichloroethene
  - —Vinyl Chloride
- Base/Neutral Organics
  - —Di-N-Butyl-phthalate
  - —N-Nitrosodiphenylamine
- Acid Extractable Organics
  - —2,3-Dimethylphenol
- Pesticides
  - —Beta-BHC

DEPE apparently used method detection limit (MDL) values for particular parameters in setting limits. It is invalid to use an MDL instead of a maximum reported value in the determination of whether or not a parameter has been detected. Therefore, the overall basis for the development of performance based limits is questionable in these instances.

As such, we object to having these cited parameters included in the Draft Permit, and we request that the DEPE either exclude them from the final permit, or revise the requirement to "monitor only" for the cited parameters. (45)

364. COMMENT: The PQL is the value at which a laboratory has confidence in the quantification of a value for a particular parameter. DEPE has used the method detection limit (MDL) in the development

of some specific limitations. We contend that the use of MDL's in writing specific limits is not valid.

The MDL cannot be used as the lower reporting limit because, by definition (40 CFR §136.2(f) (1991)), it is the lowest measurement at which the laboratory analyst has confidence in whether or not the pollutant being measured is present, but not necessarily *quantifiable.* Thus, measurements above the MDL, but below the PQL, provide an inappropriate basis for reporting.

DEPE has recognized this issue in the development of the *Proposed Ground Water Quality Standards* which were issued in January, 1992. In that document, the DEPE is proposing the use of PQL's for compliance purposes. DEPE has indicated that a minimum factor of five times the MDL would typically be used with potentially higher values used if, for instance, matrix interference is a problem. Specifically, the document states that alternate PQL limits should be considered where:

- "the DEPE's PQL is not valid for ... the matrix;"
- "an alternative PQL is appropriate; and,"
- "the alternative PQL will not mask the presence of other constituents, rendering them nondetectable due to the presence of other constituents."

In conclusion, we contend that it is arbitrary for DEPE to require JMEUC to meet permit limits below the PQL. In light of the potential regulatory consequences associated with permit violations, we assert that permit limitations should not be set below reasonable, practical quantitation levels. Otherwise, the permittee is subject to liability for apparent permit "exceedances" that are actually a function of expected and unavoidable quantitative variations inherent in analytical techniques. Instead, DEPE should set permit limits above the level at which the laboratory analyst has confidence in the accuracy of the quantitative result, particularly taking matrix effects into consideration. (45)

365. COMMENT: There are a number of effluent limitations identified as being performance-based. There is no authority in Federal or State law for this derivation technique to be applied to a Publicly Owned Treatment Works such as JMEUC. Therefore, AT&T-Bell objects to any limitations so identified. If there is no water quality basis for limiting them, then they should be stated as "monitor only."

If, for the sake of discussion, we assume that DEPE has the authority to apply performance-based standards to a POTW, then we assert the following:

- With regard to the DEPE's base data used in the Draft Permit in the development of the performance based limits, the Fact Sheet indicates that means, standard deviations and 95th percentile values were calculated using log-normal distributions. No reference is made to the specific database used in this calculation nor could such calculations be found in the Administrative Record and verified. As such, these limits have no basis without data being supplied by the DEPE. Furthermore, the numerical values used in specific performance-based limitation appeared to be lower than historical data indicates.
- With regard to the DEPE's methodology used in the Draft Permit for performance versus water quality-based limits, a water quality-based standard is used if the performance-based standard is more than 20 times the water quality-based effluent limit (WQBEL), and the reasonable potential finding is negative. This interpretation results in inconsistent and discontinuous limits being set based on numerical evaluation. The use of this method, where the potential finding is negative, is questionable for parameters where there are no present limits and there is no potential for backsliding. (45)

366. COMMENT: The plume models recommended for use by DEPE, which were used by Lawler, Matusky and Skelly Engineers (LMS) for JMEUC's plume study, are steady state types developed for use in deep-water marine environments. They are not appropriate for shallow discharges such as that at Outfall 001. Other limitations of these models for this particular application include such items as the discharge angles and port geometry, which could not be appropriately modeled. These models do not account for the dynamic mixing processes typical of the relatively shallow estuarine environment of the Arthur Kill. These dynamic processes include dispersion and mixing caused by tidal action, wind action and salinity gradients.

Because the DEPE relied on the results of the UOUTPLM model as presented in the LMS report, particularly to define the Instream Waste Concentration (IWC) applicable to the chronic criteria, AT&T-Bell believes that alternative modeling technologies should have been used.

Since the LMS study was completed in 1989, EPA has developed a new generation of mixing zone models that are not as limited as the one used. The EPA's Cornell Mixing Zone Expert System (CORMIX) is a series of software systems for the analysis, prediction, and design of aqueous toxic or conventional pollutant discharges into watercourses. The CORMIX2 model for multiport diffuser outfalls collects the relevant data for the ambient and discharge situation, computes the governing dimensionless parameters, and classifies the discharge into one of many possible hydrodynamic configurations. The corresponding hydrodynamic simulation is then run to determine plume centerline dilutions at various distances downstream.

The CORMIX2 model is typically used to simulate deeply submerged multiport diffuser discharges. Since the JMEUC's Outfall 001 is a single port (open-ended pipe) discharge that is relatively shallow (12.1 ft. from center of pipe to water surface), the discharge may be simulated with CORMIX2 as an analogous negatively buoyant near-bottom discharge.

Additionally, dilution of effluent following discharge into the tidal waters of the Arthur Kill occurs within three overlapping regions. The region closest to the discharge is characterized by rapid dilution due to the momentum of the effluent, which entrains ambient dilution water. Following initial dilution, the plume enters region two, where the plume's buoyant rise towards the water surface may provide additional rapid dilution.

At the end of region two (zone of initial dilution or ZID) the plume is either fully mixed over the water column or is established as a surface or submerged wastefield of limited vertical and lateral extent. Within zone three, relatively low rates of additional dilution occur due to lateral and vertical diffusion induced by ambient turbulence.

Dilution processes within all three zones are influenced by ambient currents and density differences between ambient waters and the effluent plume. For near-surface discharges, critical conditions for volumetric effluent dilution occur during periods of high ambient surface water density and low effluent density, when the plume is trapped as a thin layer at the water surface. In contrast, critical conditions for volumetric effluent dilution of near-bottom discharges occur during periods of low ambient bottom water density and high effluent density, when the buoyant rise of the plume may be restricted to a portion of the water depth.

The concentration of effluent anywhere within a discharge plume is related to effluent volumetric dilution by the following formula:

$$C_{plume} = C_{amb} + (1-C_{amb})/S_v$$

where C_{plume} is the effluent concentration within a plume, C_{amb} is the effluent concentration in plume dilution water, and S_v is the effluent volumetric dilution factor within a plume. This equation demonstrates that levels of effluent within a plume are related both to the effluent volumetric dilution and to background build-up of effluent outside the plume. Background buildup (C_{amb}) is controlled largely by residual (non-tidal) currents, ambient mixing and effluent decay rates. For example, during periods of low residual circulation (low Arthur Kill discharge and low winds), effluent previously discharged on an outgoing tide may return to the discharge area during subsequent incoming tides. Thus, background build-up may result in lower effluent diltuion than found using steady-state plume models, such as CORMIX2.

The MIT Transient Plume Model (TPM) can be used to simulate background buildup and effluent dilution around the existing outfall discharge, due to tidal and residual currents measured in the Arthur Kill.

TPM can simulate the effect of land and bottom boundaries on dilution of effluent discharge. Its simulation of vertical plane sources consists of the continuous placement of numerous puffs or clouds of effluent mass at the location of the ZID. The orientation of this plane source is a function of its deflection by time variable ambient currents. TPM predictions of receiving water concentration at a given location and instant in time following start of discharge are determined by superimposing contributions from all previously discharged clouds of mass. Previously discharged clouds are allowed to spread spatially in three dimensions and decay over time, as a function of specified vertical and horizontal diffusion coefficients and effluent decay rate.

In conclusion, AT&T-Bell believes that the limitations of the modeling performed in the 1989 Dilution Study are significant enough to warrant additional study and evaluation using other more recently developed and applicable models as stated above. In previous objections stated within our Attachment A, we have cited the need for more accurate, site-specific data to be collected. We think that coupling this additional data with updated modeling analyses will result in more appropriate water quality limits for JMEUC. (45)

367. COMMENT: WET test results, like all other analytical measurements, are variable. That is, repeated testing of the same sample over time, even by the same laboratory using the same method, likely will produce somewhat different results. Such variability is unavoidable. Although a number of studies have characterized the intra-laboratory (for example, within laboratory) and inter-laboratory (for example, among laboratories) variability of WET tests, there are no established criteria for acceptable levels of WET test variability.

In the Draft Permit, however, DEPE proposes to set a chronic limit designed to ensure that specific effects (for example, lethality, and decreased growth or reproduction) do not occur at a given effluent concentration equal to the instream waste concentration ("IWC") identified in the Fact Sheet (that is, 5:1, or 20 percent effluent instream). Compliance with this No Observable Effect Concentration (NOEC) limit is established by applying "analysis of variance" techniques to the results of bioassays run on a test concentration at the IWC and on a control, to determine whether there is a significant difference between the control and IWC test results at the 95 percent confidence interval. By definition, using the 95 percent confidence interval means that, for every 20 tests performed by a discharger, one excursion may occur when, in fact, the effluent was not actually toxic. This analysis only considers intra-laboratory variability. If inter-laboratory variability, which is larger than intra-laboratory variability, is considered, the probability of false positives is much larger.

EPA takes the position that the variability of WET tests is acceptable. EPA has frequently stated that inter-laboratory coefficient of variations (CV) for WET tests are similar to those for routine chemical analyses and, therefore, the variability of WET tests is acceptable.

But there is a fundamental difference in the procedures used to estimate the variability and precision of WET tests and those used for chemical analyses. Simply put, the accuracy or "true value" of toxicity tests cannot be determined, while the accuracy of chemical analyses can be determined. "Accuracy" in this sense means the ability of the test to measure the true toxicity of an effluent. The true toxicity of an effluent cannot be measured because there is no such thing. The toxicity of an effluent is a function of the test method, the types and concentrations of chemicals present, the sensitivities of the test organisms to the chemicals in the effluent, and the test conditions.

Consequently, with WET tests, one can never be sure what the tests are actually measuring. In contrast, the accuracy of analytical chemistry procedures can be determined. The true concentrations of the chemical used to determine the precision of an analytical procedure is known, because the test method's precision is determined by running tests on a known quantity of the chemical to be measured, added to pure water. Consequently, EPA has not correctly characterized the variability of the tests used to measure compliance with the WET limits in the Draft Permit.

EPA recognizes that test variability is a problem, especially for the sort of single concentration test proposed by DEPE. In its Technical Support Document, EPA states:

> [i]t is not accurate to assume that two dilutions (the receiving water concentration [RWC] and control) are all that are ultimately necessary for determination of compliance with a toxicity limit. If the toxicity tests are conducted with only the control and one effluent concentration (i.e., the RWC) the error and variability associated with this type of statistical analysis is large.

In short, EPA does not unequivocally support the type of WET limit proposed by DEPE in this case. This type of limit increases the probability of false positive measurements of toxicity.

Any toxicity-based limit should be imposed so as to reduce this probability for error, not increase it. Potential alternatives that could be used to avoid random variation causing apparent exceedances of the WET limits include (1) using an average limit or (2) establishing a limit expressed as a pattern of toxicity over time, rather than a single test or set of tests on a given effluent sample. With the use of averages, care must be taken to place some restraint on variation about the average. The same logic as is used for averages in chemical-specific criteria development should be applied, which is to use the geometric mean, rather than the arithmetic mean, to estimate the average. (45)

RESPONSE: All of these facility/permit specific comments have been forwarded to the Wastewater Facilities Regulation Program for consideration during proceedings held on the individual permits and responses will be provided as part of the proceedings on the permit.

368. COMMENT: The Surface Water Quality Standards should include provisions for using indicator parameters. Allowing the use of indicator parameters will be protective of human health and the environment without unduly burdening permit holders. The advantages of using indicator parameters are:

- Reduce costs of analysis and reporting.
- Reduce the potential for analytical errors through the reduction in the number of analyses.
- Reduce the cost to the State in regulating a permittee.
- Decrease the complexity of permitting and reporting. (18)

RESPONSE: The commenter has not provided enough information for the DEPE to understand what type of indicator parameters were being suggested. DEPE invites the commenter to submit specific information on the indicator parameters being suggested so that they may be evaluated.

369. COMMENT: The last entry, in N.J.A.C. 7:9B-1.4, definitions section, is "Zone." Considering the multiple definitions in which the word "zone" is used in the proposed regulations, this definition is probably unnecessary and in its present form confusing. (38)

RESPONSE: "Zone" was included because the classification system used by the Delaware River Basin Commission for the mainstem of the Delaware River is based on numbered "Zones." The DEPE will consider removing this definition through a future rulemaking.

370. COMMENT: The proposed regulations allowing DEPE to adopt, without further public notice and comment, Section 304(a) criteria published after the proposed regulations become effective violates the APA. This procedure nullifies the notice and comment rulemaking requirements of the APA and the New Jersey Water Pollution Control Act ("NJWPCA"). DEPE should delete or modify this provision.

DEPE proposes relying on CWA Section 304(a) criteria to develop chemical-specific water quality based effluent limitations "whenever parameter specific criteria have not been developed." DEPE deprives the citizens of New Jersey of the opportunity to challenge the scientific legitimacy of the CWA Section 304(a) criteria and their appropriateness to the waters of New Jersey. This violates the notice and comment rulemaking procedures of the APA. Adoption of the criteria in this manner is without legal force and effect. (11, 12)

RESPONSE: The comments are referring to N.J.A.C. 7:9B-1.6(c)4iii, which was adopted in 1989. This section of the Surface Water Quality Standards does not allow the DEPE to adopt the Section 304(a) criteria without the opportunity for public comment. Instead, it spells out what the DEPE will use in developing water quality based effluent limitations when promulgated criteria are not available. Public comment on such criteria and their use would be accepted during the public comment period on any permit issued that included limitations based on these "Best Available Scientific Information Based Criteria." Additionally, once these numbers are developed, it is the DEPE's intent to propose them through the normal rulemaking process for incorporation into the Surface Water Quality Standards as was the case with the criteria contained in the November 2, 1992 proposal.

371. COMMENT: Almost all of the criteria, with certain risk-based adjustments, developed by NJDEPE and published in Basis for Best Available Scientific Information Criteria, April 1992 (BASIC), were originally derived by USEPA using literature reviews and supplemental laboratory toxicity testing. Many of USEPA's criteria were published in the early 1980s and have not been updated even though subsequent studies have shown that recommended numerical values and analytical methods, for example, total recoverable metals, when directly translated into water quality standards have resulted in unanticipated levels of over protection. It is obvious from review of the bibliography of the BASIC document that USEPA's most current thinking on criteria and its uses was not considered. (45)

RESPONSE: The BASIC document is not the document developed in support of the proposal. There was a Basis and Background document developed and sent to all who received copies of the proposal from the DEPE. Review of the bibliography contained in the Basis and Background document will show that it is based on more recent information than the BASIC document was. Additionally, the DEPE has not adopted everything in the proposal (aquatic protection-based criteria for metals are among the proposed changes not adopted) because of comments submitted that provided more recent information that significantly changed the basis for certain proposed criteria.

The proposed criteria that were based on the 1980s USEPA 304(a) criteria documents still represent the current 304(a) criteria. Attempts by the DEPE to recalculate these criteria were unsuccessful because of a lack of acceptable toxicological studies. Accordingly, the criteria proposed and being adopted are as updated as they could be.

372. COMMENT: It is expected that widespread impacts are occurring and will continue to occur due to current DEPE-recommended methodologies for applying metals criteria. This will affect hundreds of permittees in New Jersey. Even facilities which discharge into large streams may suffer significant economic impacts when the background sources exceed the numeric criteria expressed as total recoverable metals or stringent mixing zone procedures are applied, as has occurred to dischargers on the Arthur Kill. (11, 12)

RESPONSE: The DEPE is not adopting aquatic protection-based criteria for the metals at this time. Aquatic protection-based criteria for the metals will be proposed separately with the water effects ratio included as part of the criteria. Additionally, the ongoing effort to revise the NJPDES regulations is examining the methods used to translate the criteria into permit limits to avoid widespread impacts from unnecessary regulation of pollutants. These efforts are expected to resolve the concerns expressed by the commenter.

373. COMMENT: Each metal has a separate set of conditions under which it hydrolyses to form cationic and anionic hydrolyzed metal as well as metal hydroxides. This is unique to each metal and a function of pH. Therefore, pH must become the criteria by which metal concentration analyses are guided by. It is suggested it be done at the lowest pH determined by a 90 percent confidence test that is observed in the receiving water body or at the lowest pH in the permit, whichever is lower. (29)

RESPONSE: pH is one of the factors that can affect the toxicity of the metals. Section 304(a) criteria documents issued by the USEPA indicate that the USEPA looked for definable relationships between the many factors (including pH) that can affect the aquatic toxicity of the metals. No such relationship could be defined for pH, while a relationship could be defined for hardness. Accordingly, the USEPA 304(a) criteria include correction factor for hardness only. The DEPE is not adopting aquatic protection-based criteria for the metals as part of this adoption. When new criteria are proposed for the metals they will incorporate water effects ratios into the criteria. Use of the water effects ratio accounts for the conditions the commenter is concerned about.

374. COMMENT: The criteria state that pH should be between 6.5 and 8.5. But natural pH values are frequently less than 6.5. The minimum pH in ground water samples from the Middle Delaware River Basin was 5.2, which is 20 times more acid than 6.5. Furthermore, surface water samples frequently have lower pH values than ground water samples, and the pH of rain water is often below 5.2. In fact, the criteria for pH in the Pinelands (PL) are "between 3.5 and 5.5" (N.J.A.C. 7:9B-1.14(b)1ii). pH levels above 8.5 also occur naturally. Likewise, the criteria for phosphorus are unnatural. (8)

375. COMMENT: The criterion for petroleum hydrocarbons states: "The goal is none detectable utilizing the USEPA Environmental Monitoring and Support Laboratory Method (Freon Extractable—Silica Gel Adsorption—Infrared Measurement)." The goal of none detectable would be violated under some natural conditions. The infrared method of analysis required measures the stretch in the carbon to hydrogen bond, and all organic substances have carbon to hydrogen bonds. The freon extraction, silica gel adsorption eliminates the most organic compounds containing other elements. However, there are many naturally occurring hydrocarbons that are found in more than just petroleum. For instance, so-called petroleum hydrocarbons are likely to be detected in water from a pristine swamp. Is setting criteria which are routinely violated in nature necessary? (8)

RESPONSE: The Surface Water Quality Standards, at N.J.A.C. 7:9B-1.5(c)1, specify that whenever the water quality criteria are not met due to natural conditions, the natural conditions are to be used as the criteria. Because of this provision, the commenter is incorrect in stating that the criteria are "unnatural." Additionally, this provision in the Surface Water Quality Standards prevents the possibility of having criteria that are routinely violated by nature.

376. COMMENT: In the development of effluent limitation policies, the DEPE has not taken into account 40 CFR 122.44(d)(i-iii), which requires that the State establish "reasonable potential" for a discharge to cause an excursion above a water quality standard before regulating the effluent. (18)

RESPONSE: The only substantive change proposed to N.J.A.C. 7:9-4.5(e)8 (now codified as N.J.A.C. 7:9B-1.5(e)8) was the addition of a provision explicitly authorizing compliance schedules. No change relating to which chemicals should be regulated under what conditions was proposed. "Reasonable potential," as discussed in the cited Federal regulation, means that the discharge of particular toxic pollutants after compliance with USEPA defined technology-based limitations, at a particular site could be expected to cause or contribute to a violation of Surface Water Quality Standards. The cited section does not mandate that the states establish "reasonable potential" before regulating a discharge. Instead, it requires that wherever "reasonable potential" exists the states must regulate. However, the DEPE is currently revising its NJPDES regulations and one of the items being considered is a section indicating how the pollutants to be regulated will be determined by the DEPE. "Reasonable potential" will be part of discussions and deliberations on how to identify toxic pollutants which must be regulated.

377. COMMENT: The existing water quality standards allow for modification of water quality-based effluent limitations for individual discharges to waters of the State. However, NJDEPE water quality standards do not specifically allow for aquatic site-specific water quality criteria by modifying existing criteria. DuPont recommends that an additional section be included in the proposed Water Quality Standards to explicitly allow and indicate how to derive numerical aquatic site specific criteria. (5, 36)

378. COMMENT: CIC/NJ, in concert with its member companies, recommends that the DEPE creates an additional section incorporating the USEPA guidelines by reference or extracting the appropriate methodology to derive numerical aquatic site-specific criteria. (5)

379. COMMENT: It is suggested that the DEPE provide for the use of water-effect ratios in the determination of surface water quality criteria and/or in the determination of permitted effluent criteria. There must be a method provided to easily adjust permit limitations to have improvements in water quality criteria cost-effectively and the ability of the public to pay for improved water quality criteria. (33)

380. COMMENT: Modification of criteria/effluent limitations through the use of the USEPA water effects ratio (WER) procedure can result in changes of an order of magnitude or more. The NJDEPE should incorporate use of the WER procedure into the Surface Water Quality Standards and NJPDES regulations/programs. (45)

381. COMMENT: AEA endorses the availability of the broad array of procedures to obtain site-specific adjustments. DEPE should supplement the regulations with guidance or case-studies so the AEA members know what is expected of them should they elect to pursue one or more site-specific adjustments. (11, 12)

RESPONSE: Although the Surface Water Quality Standards do not explicitly discuss site-specific criteria, they do not preclude them and the DEPE can entertain requests for site-specific criteria. However, because of the concerns expressed in the comments, the DEPE intends to propose a revision to the Surface Water Quality Standards which will explicitly include provisions for developing aquatic site-specific water quality criteria. Additionally, the DEPE will be incorporating water effects ratios into the criteria for metals, thereby providing for the appropriate adjustments without the need for additional administrative proceedings.

382. COMMENT: The proposed New Jersey standards establish the basis for selecting between FW2-NT or SE criteria in New Jersey standards. It would be based on the location of 3.5 ppt salinity. The Delaware River Basin Commission's Toxics Management Subcommittee has concluded that in the Delaware River the boundary point for fresh and salt water is the Delaware Memorial Bridge, at R.M. 68.7. Therefore, we offer that this section be changed accordingly. (14)

RESPONSE: The DEPE will propose a modification to this policy to reflect the Delaware River Basin Commission's adoption of the Delaware Memorial Bridge as the delineation between fresh and saline waters.

383. COMMENT: The DEPE's definition of "intermittent" is problematic in that it implies that any stream, regardless of its watershed's drainage characteristics, can only be intermittent at an MA7CD10 flow of less than 0.1 cfs. While this definition may be easy and convenient for implementation from the standpoint of a permit writer or regulator establishing permit limitations, the definition is somewhat meaningless to the regulated community, because there is no clear guidance on how best to accurately measure what the MA7CD10 flow is.

The important consideration is that hydrological models in use for natural surface water flow assessment are simply not designed to provide an indication of a stream's intermittency. Because one of the main sources of information to permittees and the NJDEPE is the USGS, it is clear that the DEPE should provide a more clear basis for establishing that a stream is intermittent. The DEPE should develop and prepare a list of all intermittent streams in the State of New Jersey as part of the adopted regulations and provide appropriate basis and background documentation, since the regulatory definition of "intermittent"

is vague and subject to interpretation. The DEPE should address NJPDES-permitted discharges into streams classified as intermittent in an individual and site-specific manner, since it is inappropriate and scientifically erroneous to require that discharges meet ambient water quality criteria at the "end of pipe" in cases where the entire flow of the intermittent stream during the majority of the time is the discharged effluent. (37)

RESPONSE: This provision has been in the Surface Water Quality Standards since 1981, is not within the scope of the proposal and the DEPE is not aware of any significant problems with its implementation or interpretation. The methods which would be expected to be used routinely would be direct calculation when flow records are available, indirect calculation from flow data on stations within the drainage area, and indirect calculation based on projected runoff per square mile of drainage area. There is no one "best" method to accurately determine what the flows are and professional judgment must be utilized in selecting an appropriate method.

It is not possible to develop a list of all intermittent streams in the State of New Jersey. By their nature, these are small streams which frequently do not show up on most maps. One way to try to develop such a list would be to examine satellite images of New Jersey to identify every location where stormwater runs off in a defined manner. This would be an extremely costly and time consuming effort when no significant problems have been brought to the DEPE's attention over the last 23 years.

The DEPE does not agree that it must address NJPDES-permitted discharges into streams classified as intermittent on a site-specific manner. Channels carrying wastewater effluent that receive or discharge to natural waters are themselves "waters of the State." In these situations the quality of the effluent must be high enough to provide for the designated uses of the "waters" in the channel. Where there is no flow other than the effluent, there is no assimilative capacity available and the quality of the effluent leaving the discharge pipe would have to meet the applicable surface water quality criteria. Thus the DEPE has concluded that no change need be made to the regulation.

384. COMMENT: The Surface Water Quality Standards should include provisions for using indicator parameters. Allowing the use of indicator parameters will be protective of human health and the environment without unduly burdening permit holders. The advantages of using indicator parameters are: reduce costs of analysis and reporting; reduce the potential for analytical errors through the reduction in the number of analyses; reduce the cost to the state in regulating a permittee; and decrease the complexity of permitting and reporting. (18)

RESPONSE: Conceptually there is nothing that would preclude the use of indicator parameters. In practice it has been difficult to identify substances that would be appropriately regulated by indicator parameters. The commenter has not suggested the use of any particular indicator parameter, nor provided any examples, that could be used for particular substances. The DEPE will consider the use of indicator parameters when it reviews literature on such parameters or when specific suggestions are submitted.

385. COMMENT: The DEPE should include specific language to allow for regulatory flexibility in the case of environmental restoration/remediation.

> N.J.A.C. 7:9B-1.5(d)5 That allows lower water quality is necessary to accommodate environmental restoration/remediation and/or important economic or social development...
>
> N.J.A.C. 7:9B-1.8(a)1 because of necessary and justifiable environmental restoration/remediation and/or social or economic development...
>
> N.J.A.C. 7:9B-1.8(a)3iv would result in substantial and widespread adverse environmental, social and economic impact.
>
> N.J.A.C. 7:9B-1.9(a)1i water quality criteria should be allowed because of necessary and justifiable environmental restoration/remediation and/or social or economic development.
>
> N.J.A.C. 7:9B-1.9(a)2iv would result in substantial and widespread adverse environmental, social and economic impact.

This will allow the DEPE to consider the overall environmental impact, not just the surface water considerations. (18)

RESPONSE: The DEPE believes that the existing regulations covering environmental restoration/remediation provide enough flexibility to cover the overall environmental impact associated with these types of activities within the constraints established by the enabling statutes. No change is being made to the regulation.

386. COMMENT: The standards are proposed to be applied uniformly through the entire State of New Jersey. We believe that each watershed has its own unique characteristics and assimilative abilities. We suggest each watershed be evaluated individually and be regulated accordingly. (34)

RESPONSE: The DEPE has initiated water quality management through a watershed approach. A pilot effort is currently underway in the Whippany watershed. Use of the watershed approach will satisfy the concerns raised by the comments. Additionally, the DEPE will be proposing a new section for inclusion into the Surface Water Quality Standards covering site-specific criteria. Incorporation of provisions on site-specific criteria will ensure that criteria can be tailored to the unique water chemistry/biotic community of a particular watershed.

387. COMMENT: NJMHA seeks a program which can be self-administered by its members operating a discharge to surface water. In order to continue to operate affordable housing communities, operators constantly seek to limit expenses. Programs which require retention of specialized technicians hinder such efforts. Requirements that technical experts be retained to assist with everyday operations impose added costs. (41)

RESPONSE: Operation of wastewater treatment facilities is not an activity which can be carried out by untrained personnel. While the goal of reducing costs, wherever possible, to keep housing costs down is laudable, it is not practicable in all situations. Operation of wastewater treatment facilities is one such area where specific knowledge and skills are required to maintain a satisfactory facility. Thus the DEPE has concluded that no change need be made to the regulation.

388. COMMENT: The DEPE must engage in independent water testing. The DEPE must select a series of test points through the State and, on a regular basis, sample the water quality. If this independent process is commenced, can the contribution of both point and nonpoint sources on water quality in the State be fully assessed and accurate permit limits calculated. (41)

RESPONSE: The DEPE has an ongoing ambient monitoring program of approximately 80 stations. In addition there are additional stations being monitored in support of the watershed management program. The number of stations in the watershed management program will vary by the specific configuration and flow characteristics of the watershed. Over time, the DEPE's intent is to assess the contributions of point sources, stormwater runoff, combined sewer overflows and nonpoint source runoff on surface water quality.

389. COMMENT: Blue Mine Brook was classified as FW2-TM. This Brook was sampled in conjunction with a Green Acres application for the "Wyanokie Highlands" project by the Division of Fish, Game and Wildlife. As a result of that sampling it was recommended that the brook, upstream of the Weis Ecology Center pool, be considered as Trout Production. Mr. Stanton of Bureau of Freshwater Fisheries agreed that Blue Mine Brook should be classified as FW2-TP. (39)

RESPONSE: The DEPE will propose the reclassification of Blue Mine Brook to FW2-TP in the next proposal of reclassifications if the Bureau of Freshwater Fisheries agrees that the sampling data indicate that is the proper classification.

390. COMMENT: Fate and transport of chlorine produced oxidants in aquatic systems would render them non-toxic at concentrations well above proposed criteria. Fate and transport processes should be considered when proposing criteria for compounds such as chlorine produced oxidants with high solubilities, vapor pressures and low K_{ow} values. (16)

RESPONSE: Fate and transport of chlorine produced oxidants would act to reduce their concentration in the waters, bringing them to levels that were in compliance with the criteria. Fate and transport would not necessarily act to reduce the toxicity of a given concentration of chlorine produced toxicants remaining in the water column. The effect of the fate and transport of pollutants is most appropriately taken into account during the development of water quality-based effluent limitations that are based on modeling, and taken into account the concentration present as the discharged effluent moves away from the point of discharge. No change to the regulation is needed.

391. COMMENT: RES (NJ)'s proposed permit contains several limits based on DRBC guidelines. In the draft permit, DEPE proposed DRBC guideline-based limits without the benefit of the mixing zone used for other water quality-based limits. DRBC itself has explained, in its discussion of its criteria, that they were guidelines that should be applied

with discretion. DRBC does not prohibit their application using mixing zones, and the new Surface Water Quality Standards regulations should so indicate. (19)

RESPONSE: The commenter is apparently mixing up the basis of an individual permit with provisions of the Surface Water Quality Standards. The DEPE makes case-by-case decisions on mixing zones for all parameters in the Surface Water Quality Standards except bacterial indicators. Mixing zones are not allowed for bacterial indicators as a matter of policy. (The DEPE has already initiated proceedings to formalize this policy into regulation.) If the commenter is referring to a decision not to allow a mixing zone for bacterial indicators, the DEPE may impose appropriate limitations that are at least as stringent as the DRBC requirements. If the question concerns another parameter, the question must be raised during the proceedings on the permit.

392. COMMENT: The DEPE should be commended for its proposal that a watershed approach, rather than a site-specific approach, be used in the future for permitting. As noted by the DEPE, the watershed approach requires that massive amounts of data be gathered. As previously stated, similar to efforts in the air program, the DEPE should first identify resources to establish its own sampling network. That data gathering process is time and resource consuming. However, the result is a more comprehensive approach to permitting based on consideration of all contributors to water quality both point source and nonpoint source. The NJBA strongly suggests that the DEPE complete its data collection and watershed studies prior to the adoption of these proposed Surface Water Quality Standards. To do otherwise would be premature since the result of the studies might indicate that certain capital improvements are unnecessary. (Karen)

RESPONSE: The DEPE acknowledges and appreciates the support expressed by the commenter for the watershed approach to permitting. While the DEPE appreciates the commenter's concern about making unnecessary capital improvements, it is not possible to suspend the DEPE's permitting operations. However, to the extent practicable, permitting decisions involving significant capital expenditures are being rescheduled to allow for review under the watershed approach. Additionally, the DEPE is allowing interested parties to undertake watershed modeling, with DEPE guidance, to ensure that decisions involving significant capital expenditures can be made under the watershed approach.

393. COMMENT: The New Jersey Legislature and the DEPE have developed a comprehensive program for the regulation of wetlands (see the Fresh Water Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq. (The "FWPA") and its implementing regulations). Based on the existence of this comprehensive statutory and regulatory scheme, which is more stringent than Federal standards, there is no need to commence regulation of wetlands outside the existing program. However, if DEPE representatives have made a determination that further regulation of wetlands must be proposed, or if USEPA should make such a determination, then any proposal must be consistent with the existing freshwater wetlands program. This may require that the Freshwater Wetlands Protection Act be revised to reflect these changes. In addition, any proposal must also include a procedure implementing the standards in a manner that is consistent with the existing wetlands program. The NJBA also requests the DEPE to clarify how the incorporation of wetlands into the Surface Water Quality Standards will provide for a more standardized and predictable water quality certification program. (23)

RESPONSE: The DEPE has concluded that it must incorporate provisions dealing with wetlands into the Surface Water Quality Standards in order to satisfy Federal water quality standards requirements. Incorporation of the wetlands into the Surface Water Quality Standards will result in classification of wetlands by designated uses, establishment of criteria applicable to the different classifications of wetlands and development of implementation procedures that will indicate how decisions on water quality certificates will be made. This will provide for a more standardized and predictable water quality certification program by codifying the criteria and implementation procedures that will be used in evaluating whether a project can be expected to conform to the Surface Water Quality Standards. The DEPE is aware of the Freshwater Wetlands Protection Act and court interpretations of how the existence of this act limits the DEPE's authority to regulate wetlands outside of the act. As wetlands are incorpoated into the Surface Water Quality Standards these limits will be factored in.

394. COMMENT: USEPA's national criteria assume that the receiving water is or can reasonably be populated by species that are pollutant sensitive and that pollution exposure will occur during the critical life stage of that species. If these assumptions regarding resident species are not correct, the USEPA criteria calls for a site-specific adjustment. It is clear that for many intermittent streams in New Jersey, even though designated for aquatic life uses, the ambient waters cannot support the test species during their sensitive life stages. For these waters, site-specific adjustments are needed. (13)

RESPONSE: Intermittent streams receiving a constant flow of effluent may, in fact, be able to support sensitive species during critical life stages. The DEPE agrees with the commenter's statement that there is a need to be able to make site-specific adjustments to the criteria and will be proposing specific provisions for incorporation into the Surface Water Quality Standards which will deal with site-specific criteria.

395. COMMENT: AEA interprets the proposed water quality standards to contain adjustment procedures for the water quality criteria set forth at N.J.A.C. 7:9B-1.14. The adjustment procedures include the statement of general policies proposed at N.J.A.C. 7:9B-1.5(f)4 and 5; the policies concerning development of water quality based effluent limitations proposed at N.J.A.C. 7:9B-1.6; the variance procedures proposed at N.J.A.C. 7:9B-1.9 and the use redesignation procedures proposed at N.J.A.C. 7:9B-1.10. None of these provisions explicitly address site-specific water quality standards for all pollutants and in all waters of the State. AEA recommends that the DEPE promulgate a section entitled "Site-specific Water Quality Standard" to make clear the intention of the regulations and which would contain the recommendations set forth below.

In response to these comments, AEA requests that DEPE: (1) confirm that these provisions, in fact, authorize DEPE to adjust water quality standards and water quality based effluent limitations to reflect site-specific conditions upon an appropriate scientific demonstration; (2) modify the proposed regulations to specify acceptable scientific protocols for site-specific standards such as those set forth in the 1983 Water Quality Standards Handbook and to specify that site-specific standards are appropriate in those water bodies meeting the circumstances outlined in 40 CFR § 131.10(g); and (3) publish guidance implementing these policy determinations that are consistent with applicable USEPA guidance.

However, should DEPE determine that AEA has misinterpreted the intention of the proposed regulations, then AEA opposes promulgation of these regulations because they do not include adjustment procedures to account for site-specific conditions. AEA encourages DEPE to promulgate adjustment procedures in its final regulation that conform to USEPA policies as set forth in the 1983 Water Quality Standards Handbook and at 40 CFR § 131.10(g).

To summarize, AEA fully supports incorporation of adjustment factors into the water quality standard regulations and of the availability of site-specfic water quality standards. These procedures are necessary to assure that the applicable water quality standards reflect the toxicologically effective concentration of a pollutant in the specific ambient water. Consideration of site-specific factors are of paramount importance to the membership of AEA whose municipal waste water discharges do not, as a rule, cause or contribute to toxic impacts to aquatic life or human health in ambient waters. (11, 12)

RESPONSE: The DEPE confirms the commenter's interpretation that the provisions of the Surface Water Quality Standards cited by the commenter allow the DEPE to approve site-specfic criteria upon an appropriate scientific demonstration. Further, the DEPE agrees that there is a need for specficiation of the protocols which can be used to develop site-specific criteria and the circumsntances under which water bodies qualify for such criteria development. Finally, the DEPE intends to propose site-specific criteria provisions for inclusion into the Surface Water Quality Standards which will explicitly provide for site-specific criteria and provide implementing procedures for their development and adoption.

396. COMMENT: Paragraph (c)4 of proposed N.J.A.C. 7:9B-1.6 sets forth site-specific procedures to develop chemical specific water quality based effluent limitations. The proposed regulation provides that:

> The [DEPE] will utilize the following methodologies in the development of chemical specific water quality based effluent limitations for point source discharges.
>
> Scientifically defensible technical approachcs such as calibrated and verified mathematical water quality models developed or adapted for a particular stream, simplified modelling approaches, as outlined in "Water Quality Assessment" (EPA-600/6-82-004), a

simple mass balance, or bioassay procedures, as contained in N.J.A.C. 7:[9-]18, shall be utilized by the DEPE in developing water quality based effluent limitations.

AEA interpets this provision to authorize the use of statistical modeling and bioassay data to develop water quality based effluent limitations. Presumably, whenever science demonstrates that a less restrictive water quality based effluent limitation will protect the reasonable uses of the ambient water, DEPE will impose that limitation in the New Jersey Pollutant Discharge Elimination System ("NJPDES") permits.

AEA supports this interpretation of the proposed regulation and recommends that DEPE publish guidance concerning acceptable approaches. In the absence of guidance, AEA cannot support the regulations as proposed because we cannot determine how the rule will affect our membership. DEPE's past implementation of "case-by-case determination" policies has fluctuated over time and from staff member to staff member. Inconsistent implementation of similar policies in the past underscores the need for clear and consistent guidance on how DEPE will implement this important regulation. (11, 12)

RESPONSE: The DEPE currently provides the requested guidance on a case-by-case basis. In order to eliminate most situations requiring case-by-case guidance and ensure consistency, the DEPE is working on a provision on site-specific criteria for incorporation into the Surface Water Quality Standards. Additionally, the sections of the Surface Water Quality Standards dealing with modeling and development of water quality-based effluent limitations will be revised to clarify their intent and modify their application. Implementation procedures will also be developed for use with these provisions. It should be noted that the Clean Water Act Amendments of 1987 specifically require the states to adopt chemical-specific ambient water quality criteria. USEPA regulations provide that whenever there is a reasonable potential for the adopted numerical criteria to be exceeded, water quality-based effluent limitations will be required. This matter will be the subject of ongoing discussions with the USEPA as the DEPE explores alternate approaches (some of which have been approved for other states by other USEPA Regions).

397. COMMENT: AEA requests that DEPE publish guidance concerning implementation of its variance regulation and guidance concerning procedures for obtaining redesignation of uses. (11, 12)

RESPONSE: Guidance concerning procedures for redesignation of uses has been published by the USEPA (Water Quality Standards Handbook; USEPA; December 1983; Chapter 3) and is available for the commenter's use. The DEPE will be revising the variance provisions of the Surface Water Quality Standards and will provide implementing guidance.

398. COMMENT: AEA interprets the proposed water quality standards as providing considerable flexibility to DEPE to consider site-specific factors. The same flexibility exists for those rules related to development of water quality based-effluent limitations. Although the regulation may read broadly, AEA requests that DEPE clarify the intent of these regulations. This clarification should, at a minimum, explicitly state that site-specific water quality standards are available for all waters of New Jersey and from all water quality standards, site-specific adjustments are appropriate for those types of ambient waters identified in 40 CFR § 131.10(g), and the 1983 Handbook of Water Quality Standards set forth a scientifically appropriate procedures for calculating site-specific adjustments. (11, 12)

RESPONSE: The DEPE will be clarifying the intent and approach of these provisions as it revises them. Clarification of the waters and standards for which site-specific criteria are available will be spelled out in the proposed revisions.

399. COMMENT: Water quality standards violations can result from unavoidable corrosion of the water supply piping system at an industrial facility. Water quality standards amendments recently adopted by the Delaware Department of Natural Resources and Environmental Control ("DNREC") provide that a facility will not be deemed responsible for a water quality exceedance that results from normal corrosion of the facility's piping. To qualify for this exception, the discharger is required to show that the water quality standard would not have been exceeded in the absence of the piping corrosion, the rate of corrosion was normal, and no economically or technically practicable alternative water supply or piping was available to the facility.

The DNREC also provides a credit for pollutants in intake water. In order to qualify for this exception based on background pollutant concentrations the discharger is required to show that water quality standards would not be violated in the absence of background pollutant concentrations, no activity at the industrial facility significantly contributes to the water quality violation, there is no statistically significant difference between concentrations of the subject pollutant in wastewater effluent and intake water supply, and there is no economically and technically practicable alternative supply of intake water.

Commenters recommend that the DEPE adopt similar provisions as part of the current surface water quality standards amendment process. (6)

RESPONSE: The DEPE will consider the suggested change to the Surface Water Quality Standards as part of the revision of its variance provisions. Consideration of a "credit" for pollutants in intake waters is more appropriately the subject of revisions to the NJPDES regulations. Therefore, this suggestion has been forwarded to the group working on revisions to the NJPDES regulations for consideration.

400. COMMENT: There is a fundamental unfairness for a few people to get permits that run a hundred pages, and for most everybody not to get new permits at all. When talking about intervals of decades as opposed to the five-year scheme that's mandated, a template for decision making that contemplates agreement through a reasonable compliance process is necessary. (10)

RESPONSE: The DEPE has been working to reduce the backlog of NJPDES permits and rewrite the NJPDES regulations to provide a more efficient and predictable process. Until this effort is completed there will be differences in permits that reflect the time period that the permit was developed/issued. However, once the process is completed this situation should not exist. Significant progress has been made in reducing the backlog and the DEPE continues to make reduction of the NJPDES backlog and rewriting the NJPDES regulations high priorities.

401. COMMENT: The proposed DEPE revisions to the stormwater management regulations include preparing an updated stormwater and nonpoint source pollution control BMP Manual, a draft of which has been published for comment. We believe that the design and control of stormwater facilities and other nonpoint sources in accordance with BMPs is the most effective and realistic way to protect the surface water quality. Moreover, stormwater facilities designed in accordance with these procedures should be permitted by rule, subject to local review for compliance with the BMP requirements. Stormwater management facilities and other nonpoint discharges which are determined to comply with the BMPs should also be exempted from NJPDES permitting and monitoring requirements. (23)

RESPONSE: These comments are outside of the scope of the Surface Water Quality Standards and have been forwarded to the Stormwater and Nonpoint Pollution programs for consideration.

402. COMMENT: Current DEPE regulations state "for a discharge into tidal waters where the salinity varies from less than 3.5 ppt. to greater than 3.5 ppt., or the salinity data is inconclusive, the DEPE shall establish as water quality based effluent limitations the more stringent of the criteria of freshwater or saltwater."

The significance of the 3.5 ppt. salinity limit and how this figure was chosen to determine when one should apply the concept that "the more stringent of the freshwater and saltwater criteria" would be utilized for the permit derivation is not fully understood. How was the 3.5 ppt. value chosen? (5)

403. COMMENT: How was the 3.5 ppt. salinity figure chosen to determine when you should apply the concept that "the more stringent of the freshwater and saltwater criteria" would be utilized for permit derivation? There is a significant difference in the derivation of the proposed human health water quality criteria for saltwater and fresh water. The proposed freshwater criteria are more restrictive since they take into account the consumption of water and organisms and saltwater criteria only take into account consumption of organisms since the water is not potable. There is not a separate freshwater criterion based only on the consumption of organisms.

Waters with salinities that vary above and below 3.5 ppt. are not suitable for drinking and most are not classified as drinking water sources. It is our understanding that DEPE feels that waters within the 3.5 ppt. salinity range would be suitable for drinking if desalination is used to produce fresh water. Therefore, the water should be protected for drinking. The majority of these type waters would require a reclassification of the water bodies for use as a drinking source.

This proposed approach is overly protective for a use that does not currently exist for some waters. These waters would need to be reclassified for drinking use. DuPont recommends that the human health criteria for waters not classified for drinking water use be based only on consumption of organisms. If the use of these waters are ever changed the human health criteria can be changed to reflect this.

Thus, DuPont recommends that DEPE include criteria that only take into account consumption of organisms in the proposed standards for brackish waters and waters not classified for drinking water. These criteria can then be utilized in such cases when the salinities vary above and below 3.5 ppt. and other such cases where the surface water is not classified potable. (36)

RESPONSE: The 3.5 ppt. value was selected after discussion with the State's fisheries biologist as the appropriate salinity point for differentiating fresh water and saline water fisheries. Waters with salinities that vary above and below 3.5 ppt. may not be suitable for use as drinking water. However, the intent of N.J.A.C. 7:9B-1.5(e)6 is to ensure that there is no impact on the designated uses in areas with salinities below 3.5 ppt., due to the tidal movement of water from areas in which the salinity varies above and below 3.5 ppt. into areas where the salinity is always below 3.5 ppt.

N.J.A.C. 7:9B-1.5(c)4 Mixing Zones

404. COMMENT: A critical aspect in developing water quality-based limitations is the establishment of an appropriate mixing zone. The proposed water quality standards define mixing zones as follows:

> "Mixing Zones" mean localized areas of surface waters, as may be designated by the DEPE, into which wastewater effluents may be discharged for the purpose of mixing, dispersing, or dissipating such effluents without creating nuisances or hazardous conditions, or violating the provisions of this subchapter.

The proposed water quality standards announce general policy considerations that pertain to mixing zones without any guidance concerning how DEPE will implement these policies. Guidance for the development of mixing zones was supposed to be issued by DEPE under the terms of the Agreement of Settlement of litigation challenging prior rulemaking. Nevertheless, AEA is concerned with several of the general policies enumerated in the proposed regulations, as follows:

- Water quality within a mixing zone may fall below applicable water quality criteria provided the existing and designated uses outside the mixing zone are not adversely impacted;
- Mixing zone requirements will be determined by the DEPE on a case-by-case basis taking into special consideration the extent and nature of the receiving waters so as to meet the intent and purpose of the criteria and standards;
- The total area and volume of a waterway or waterbody assigned to mixing zones shall avoid interfering with biological communities or populations of important species to a degree which is damaging to the ecosystem or which diminishes other beneficial uses disproportionately. Furthermore, significant acute mortality of aquatic biota shall not occur within the mixing zone; and
- Zones of passage shall be provided for the passage of free-swimming and drifting organisms wherever mixing zones are allowed.

While AEA supports these general policies, further clarification of the regulation is necessary to avoid confusion and disparate application of the policies. For example, the lack of guidance for determining appropriate mixing zone dimensions severs the relationship of mixing zone size to aquatic life impacts. Additionally, the absence of proper implementation guidance precludes AEA from making meaningful comments on the reasonableness of DEPE's mixing zone policy. The AEA offers the following comments to the mixing zone policies announced by DEPE, and recommends that the DEPE adopt these comments as guidance for the derivation of properly allocated mixing zones:

- The proposed mixing zone policies should allow consideration of actual organism exposure in place of assumptions about geometric areas. USEPA described the process for deriving mixing zones that are appropriately protective of aquatic life uses in the 1991 Technical Support Document for Water Quality-based Toxics Control ("TSD"). AEA recommends that the DEPE incorporate the TSD policies into the proposed regulations.
- Mixing zone determinations must consider actual exposure time in the zone. Reliance upon fixed areas to calculate the allowable zone, which do not consider actual exposure of an organism to toxicants, is scientifically indefensible. AEA recommends that DEPE promulgate final mixing zone policies premised on the actual "time of exposure" within the zone.
- The proposed water quality standards are intended to protect beneficial uses from two types of adverse impact: acute toxicity or chronic toxicity. To properly assess the probability of aquatic toxicity impacts within a proposed mixing zone, exposure must be determined on the basis of (1) the averaging period for adverse impact, and (2) the appropriate stream flow model. Assessment of acute toxicity should be made on the basis of 24 hour acute bioassay (WET) testing, which properly corresponds to the averaging period used to develop acute criteria. Acute zones may then be defined on the basis of distance traversed using the appropriate dynamic flow model. Where effluent is not acutely toxic, no mixing zone limit is required. The use of the entire available flow should be permitted. Chronic toxicity should be assessed on the basis of 30 day chronic bioassay testing, corresponding to the exposure used chronic criteria development. Chronic zone boundaries should be defined on the basis of dynamic modeling. Noncarcinogenic human health based criteria should similarly be developed on the basis of actual exposure within the zone using a dynamic flow model.
- Determination of actual mixing zone exposure is dependent upon the appropriate flow model. The proposed water quality standards suggest different flow models for each toxicity category regulated. For acute criteria, DEPE recommends the use of the minimum average flow with a statistical recurrence interval of 10 years (MA1CD10). Chronic criteria are to be assessed on the basis of the minimum average seven consecutive day flow with a statistical recurrence interval of 10 years (MA7CD10). The noncarcinogenic human health-based criteria proposal calls for assessments at the minimum average 30 consecutive day flow with a statistical recurrence interval of five years (MA30CD5). Exposure to carcinogenic risk-based criteria is assessed at the long term harmonic mean flow. The overall intent of the proposed flow models is to assess organism exposure.
- The only scientifically defensible manner of exposure assessment in the mixing zone is to use a flow model allowing correlation between drifting organisms in the zone to the duration of toxicant exposure used in criteria development. However, with the exception of the use of harmonic mean flow, AEA objects to the use of overly conservative flow models such as MA7CD10 and MA30CD5 which are "worst case" scenarios and do not allow the accurate estimation of probable exposure within the mixing zone. For chronic concerns, if complete mixing is demonstrated to occur in less than a 12 hour period, the full stream should be allocated to the mixing zone. The chronic standard is a 30 day standard and assessment of mixing at 12 hours retains a conservative margin of safety.
- Steady state models such as MA7CD10 and MA30CD5 are conservative, and do not consider daily variations of and relationships between flow, effluent, and the environmental conditions within the receiving stream. Therefore, the actual probability of a water quality standard excursion within an allocated zone is not determinable under a steady-state model. AEA recommends that DEPE authorize use of dynamic modeling to refine the projected mixing zone concentrations of noncarcinogenic human health based criteria.
- Consideration of bioaccumulative pollutants in deriving mixing zones is improper.
- Consideration of carcinogenic chemicals in deriving mixing zones is improper.
- Carcinogenic risk based criteria are inappropriate for effluent or receiving water.
- Where no acute toxicity is demonstrated, the full stream should be allocated to the mixing zone. (11, 12)

RESPONSE: No changes were proposed to the mixing zone portions of the Surface Water Quality Standards in the November 2, 1992, proposal. The DEPE is working on implementation guidance for mixing zones through the NJPDES rule writing effort. All of the issues covered by the Agreement of Settlement are being coordinated through the NJPDES rule writing group. The considerations and suggestions presented above will be considered by the rule writing group in developing their mixing zone implementation guidance.

405. COMMENT: Mixing zone limitations for bioaccumulative pollutants are improper and DEPE should not delineate mixing zone boundaries for bioaccumulative pollutants. DEPE should regulate bioaccumulative pollutants through a proper dynamic model which determines the total allowable loading to the receiving stream. (11, 12)

RESPONSE: Mixing zone limitations would not necessarily be developed specifically for bioaccumulative pollutants. Instead, it is more likely that mixing zone limitations would be developed for acute and chronic pollutants. Where evidence exists to show that a bioaccumulative pollutant is present in the flesh of aquatic organisms at levels that would render those organisms unfit for consumption or their intended use, the DEPE may establish specific restrictions for those pollutants. Consideration of mixing zones approaches for bioaccumulative pollutants is being coordinated by the NJPDES rule writing group.

N.J.A.C. 7:9B-1.5(d) Antidegradation

406. COMMENT: AEA opposes repromulgation of the State's antidegradation policies unless and until DEPE publishes the reasonable and realistic implementation guidance promised. Over the past several years AEA and the DEPE have discussed issues pertaining to the manner in which the antidegradation policies have been implemented.

After each discussion, DEPE made a commitment to publish implementing guidance so that the regulated community and DEPE staff would have a common understanding of the scope of the antidegradation policies. Despite these assurances, DEPE has not published implementing guidance and DEPE staff continue the practice of inconsistent and case-by-case application of the antidegradation policies. Therefore, AEA opposes the proposed regulation for the following reasons:

First, AEA has provided DEPE a "White Paper" concerning implementation of the antidegradation policies which we urge the DEPE to adopt. The White Paper presents an overview of how USEPA regions are implementing the Federal antidegradation policy. The White Paper discussion of how other parts of the country are implementing these policies would improve the DEPE's case-by-case strategy. Unfortunately, the proposed regulation does not address any of the significant issues raised in our White Paper.

Second, AEA insists that DEPE clarify the procedures for implementing the antidegradation policies because of DEPE practices over the past several years. DEPE has used the antidegradation policies as a last defense against modifying effluent limitations to reflect limitations that are scientifically and legally defensible. The elastic application of the antidegradation policies to avoid imposition of reasonable effluent limitations is a recent phenonmenon which has not been prompted by any changes in federal guidance, DEPE regulations or case law.

Third, USEPA has advised the DEPE that the antidegradation policies are equivalent to a narrative water quality standard for which DEPE **must** promulgate procedures and guidance for implementing the narrative standard. On March 31, 1988, and again, on August 31, 1988, USEPA advised the DEPE that it must "develop procedures for implementing the State antidegradation policy in all waters which may be considered high quality waters according to Federal Regulations." DEPE has not fulfilled this Federal requirement.

Fourth, the failure of DEPE to clarify existing antidegradation policies violates the letter and spirit of the settlement of the litigation. *In re: Repromulgation of N.J.A.C. 7:9-1 et seq. on January 17, 1991.* Appellate Division Dkt. No. A-3105-90T1. Under the Settlement Agreement, DEPE agreed to either publish new antidegradation policies (including any implementing guidance), or publish its "intention not to promulgate new policies." Regardless of which approach it proposed, DEPE agreed to provide the reasons for its decision. The Settlement Agreement, in pertinent part, provides as follows:

> Clarification of the antidegradation policies set forth in N.J.A.C. 7:9-4.5, including whether DEPE can or should set forth in regulation policies for determining whether specific economic or social development justifies specific degradation of water quality.
>
> The proposed regulations do not fulfill the DEPE's obligations under the Agreement of Settlement. The proposed regulations do not clarify what level the economic or social degradation may justify specific degradation of water quality.

Fifth, AEA cannot predict how DEPE will apply the antidegradation regulation to a particular circumstance. This has caused the AEA members considerable costs in both monetary outlays, as well as time and effort. As public entities, we believe the taxpayers resources are better invested in a clear and straightforward policy where the permittee and DEPE know what is expected of each other. Accordingly, AEA urges DEPE to rescind its recent practices and adopt the protocol recommended in AEA's White Paper. The recommended protocol provides a reasonable balance between social and economic development and maintenance of the State's water quality. (11, 12)

RESPONSE: These comments are outside the scope of this proposal. The DEPE did not propose readoption or amendments to New Jersey's antidegradation policy in the November 2, 1992, "toxic proposal." However, the DEPE is actively working on revisions to New Jersey's antidegradation policy, paying specific attention to development of a usable and reasonable implementation policy. This is being done in part in response to a settlement agreement that the DEPE entered in which it was agreed that the DEPE would develop and propose a workable implementation policy for New Jersey's antidegradation policy. A draft version of the work completed on the antidegradation policy was presented to the public for initial review in the February 1, 1993, New Jersey Register as part of the Interested Party Review document concerning changes to the NJPDES and Surface Water Quality Standards regulations. This draft version was based on the antidegradation policy developed for the Great Lakes Water Quality Initiative. Public roundtables regarding the issues contained in the Interested Party Review document were held on February 19 and March 26, 1993. A public meeting specifically regarding the draft antidegradation policy was held by the DEPE on March 8, 1993.

As a result of the comments submitted on the Interested Party Review and discussions at the March 8th meeting, the DEPE has decided to revise portions of the policy. It is anticipated that a final proposal containing these revisions will be available by January 1994, in fulfillment of the Agreement of Settlement.

N.J.A.C. 7:9B-1.6(c)5 Whole Effluent Toxicity Testing

407. COMMENT: The proposed water quality standards implement a chronic toxicity testing protocol which requires further clarification. The significant test variability associated with chronic toxicity testing and absence of quantitation levels renders the distinct possibility of "false positive" results, which may subject AEA members to the automatic fines and penalties provisions of the Clean Water Enforcement Act. In addition, neither DEPE nor USEPA has demonstrated the relationship between chronic toxicity test results and aquatic life impacts. (Such effects have been correlated to higher level acute impacts only.) (11, 12, 13)

408. COMMENT: Many laboratories are finding that their chronic toxicity tests show false positives. That is, the control solutions used for chronic toxicity tests are showing significant mortality rates. Those background mortality rates in the control population are not, however, being accounted for in the evaluation of the toxicity of an industrial facility's effluent discharge. That is a significant problem and needs to be addressed as a condition precedent to any expansion of chronic toxicity testing by NJPDES permittees. (6)

409. COMMENT: The proposed test protocol for chronic toxicity testing is derived from an inappropriate adoption of guidance as a normative rule. In 1984, USEPA published Development of Water Quality-Based Permit Limitations For Toxic Pollutants: National Policy (hereinafter "National Policy") advocating biological testing as a necessary supplement to traditional, chemical-specific methodologies. The basic policies expressed in the National Policy are incorporated into USEPA's subsequent policies and remain as national policy. DEPE relies on the National Policy in developing the proposed chronic toxicity procedures which will serve as biological monitoring requirements in NJPDES permits. By proceeding in this manner, the DEPE automatically imposes biological monitoring requirements as an enforceable permit limitation, and not as an investigation trigger to determine whether future limitations are necessary. As proposed, the violation of a permit limitation will occur even though no exceedance of Whole Effluent Toxicity (WET) standards may have previously been demonstrated (that is, a reasonable potential to exceed is not indicated in the administrative record). This approach is contrary to USEPA regulations pertaining to the circumstances under which a permit must contain effluent limitations for whole effluent toxicity. (11, 12)

410. COMMENT: The proposed test procedures exhibit substantial variability which is not reflected in test requirements. The administrative record available to AEA shows that DEPE did not consider chronic test variability when establishing the chronic toxicity implementation protocol. This failure is AEA's principal objection to these proposed regulations.

Sources of variability that are widely recognized to influence the outcome of toxicity tests are species sensitivity variability, test methodology variability, and variability in correlation to receiving water impacts. In particular, it is well recognized in the scientific community that pH variations can cause apparent toxicity from ammonia where none exists. Species vary in their sensitvity to different chemicals and effluents, and these differences may range over several orders of magnitude. Intraspecies variability exists as well as inter-species variability. Finally, there is substantial data to show that WET testing variability is higher than for chemical analyses. Chronic WET testing, in particular, does not reliably distinguish the presence or absence of toxicity because of the

numerous sources of test variability. Additionally, a USEPA investigation of *Ceriodaphnia dubia* responses to *acute* toxicity levels of a known toxicant varied from 0.23 to 1.91 g/L. This illustrates the inherent variability of the test. It is recommended that the DEPE amend the proposed chronic WET requirements to reflect the expected test variability. This should be done through the establishment of Practical Quantitation Levels (PQL) for the chronic WET procedure, just as done for instrumental chemical analyses. The test results, without a PQL, will be ambiguous and not reflect an accurate quantification of chronic toxicity in the effluent. (11, 12, 13)

411. COMMENT: DEPE requires that test species represent the more sensitive species for the receiving water but "need not be indigenous to, nor occur in the waters in question." The DEPE does not explain its use of non-indigenous test species in chronic toxicity testing for assessing aquatic toxicity in the receiving stream. There is no information addressing why or under what circumstances use of surrogate species is appropriate. The lack of any explanation prevents meaningful public comment on the proposal. Until a scientific basis for the use of non-indigenous test species in chronic toxicity tests is provided, the DEPE should withdraw the proposed chronic WET requirements in the proposal and use chronic toxicity test procedures for diagnostic/survey purposes only. (11, 12)

412. COMMENT: Correlation of toxicity test results with instream impacts has not been demonstrated. USEPA has investigated this question through eight studies as part of its Complex Effluent Toxicity Testing Program (CETTP). This effort indicates that: (1) the CETTP was performed without the benefit of a formal statistically-based experimental design; (2) the studies primarily focused on correlating only significant acute instream toxicity, not low-level chronic toxicity to community effects; (3) significant correlation occurred for only 22 percent of the individual comparisons; (4) the site specific factors confounded relationships among effluent toxicity, ambient toxicity, and community effects; and (5) the conditions examined in the studies were markedly different from those used as the basis for toxicity permit limits. Thus, there is no basis to conclude that chronic toxicity limitations are scientifically related to the protection of aquatic life uses. Until the relationship between chronic WET results and instream impacts is clarified, chronic WET testing is, at best, useful for evaluating **suspected** toxicity, but is not appropriate for establishing enforceable permit limitations. (11, 12, 13)

413. COMMENT: Under the proposed WET test provisions, interpretations of test results can be replete with error and can be meaningless. The derivation of toxicity limitations must require the demonstration of a dose response to conclude that effluent toxicity was the cause of an "apparent" toxicity event. Requirements for the development of a dose response curve should be added to any proposed use of the WET before they can be adopted. (11, 12)

414. COMMENT: The proposed adoption of the chronic whole effluent toxicity (WET) test protocol will create many of the same problems for dischargers that the chemical analyses has. Many investigators have shown that this particular test, which is a surrogate for ambient monitoring, is flawed because of the high laboratory variability observed and its inability to account for any detoxifying conditions in the receiving stream. Even though USEPA believes the concept is valid, it has not been proven by rigorous testing. As with some chemical analyses, many "false positive" results have been obtained. If this highly suspect test method is adopted, permittees will not only be subject to unjustified enforcement action but also unnecessary expenditures for increased monitoring, and perhaps treatment costs trying to eliminate toxicity that doesn't truly exist. (45)

415. COMMENT: Biomonitoring test protocols have not been properly promulgated (that is, have not undergone proper scientific scrutiny through public notice and opportunity for comment under USEPA's 40 CFR Section 136 guidelines), difficulties with the test procedure and interpretation of results cannot be fully explored. All test organism responses in a toxicity test are not attributable to the effluent, and the extent that natural biological variability of the test species contributes to the test outcome remains unaccounted for under test protocols currently used. (13)

416. COMMENT: The species of organism selected for use in effluent toxicity testing can have a significant influence on the test outcome. Species differ in their sensitivity to different chemicals and effluents, and these differences may range over several orders of magnitude. In some instances a fish species (for example, fathead minnow) may be more sensitive to a particular toxicant than a given invertebrate species (for example, Ceriodaphnia), while for other effluents the converse may be true.

Intra-species variability exists as well as inter-species variability. It has been demonstrated that certain invertebrate test species reproduce asexually under certain culture conditions, thereby limiting the genetic variability of experimental animals to the heterozygosity of the parent. Through artificially limiting the natural selection of test species genetics, hyper- or hypo-sensitive test specimens can result. This issue is highlighted because test results are compared to *control* performance, which may be dramatically different from test to test. Thus, there is no means to screen out hypersensitive individuals to avoid false indications of increased toxicity when that has not actually occurred. (13)

417. COMMENT: USEPA, in an attempt to demonstrate that WET testing variability was essentially comparable to that of chemical analyses, conducted a Discharge Monitoring Report Quality Assurance Performance Evaluation (DMR-QA11) in 1991. This report compiled nationwide analytical results for metals, conventional pollutants, non-conventional pollutants, and acute and chronic WET tests using fathead minnows and *Daphnia*. Based on the reported findings coefficient of variation (CVs) for various analytical methods were derived and compared. Biomonitoring methods were found to consistently show the highest CVs of any methodology, ranging from 20 percent for fathead minnow acute LC50 to 50 percent for *Daphnia* chronic results as compared to CVs of 3 to 11 percent for analytical chemical methods for metals. The extreme disparity between variability of analytical chemical techniques and biomonitoring methods is particularly ironic, since USEPA, in its response to comments on the 1991 Technical Support Document for Water Quality-based Toxics Control (TSD), stated "EPA is comfortable with the conclusion that whole effluent toxicity tests are no more variable than chemical analytical methods and therefore stands behind the recommendation that toxicity test methods be used in NPDES permits." Given the above information, reliance on those assertions appeared to be misplaced. In reality, the toxicity test procedures are no more reliable than USEPA's most unreliable procedures.

Chronic WET testing, in particular, cannot distinguish the presence or absence of toxicity because of the numerous sources of test variability. USEPA recognized this factor and attempted to minimize this influence by establishing cutoff limits for control performance. At a minimum, controls must demonstrate 80 percent survival, minnows must weigh at least 0.25 grams, and *Ceriodaphnia* must produce at least 15 offspring. If the controls fail to meet these criteria the test must be restarted. While USEPA has developed criteria for rejecting ill-performing controls, and thereby reduced the incidence of false negative results, no such adjustment is available when the test organisms assigned to the effluent beakers begin to exhibit impairment due to **natural** causes. All reductions in growth, survival, or reproduction are **assumed** to be due entirely to toxicity in the effluent tested. Therefore, false positive tests are virtually certain to occur, particularly if the control performs worse than the mean species' performance. The chronic WET test, therefore, has a built-in bias towards false positive results.

Thus, a discharger might develop a record of apparent "toxicity" exceedances, the sources of which can never be fully identified. The implications of false positive test results extend beyond the immediate exposure to fines and penalties under the Clean Water Act: increased insurance costs, degraded bond ratings for municipalities, an unjustifiably blighted compliance history and the possibility of third-party citizen suits may utlimately result from test protocols biased towards finding "toxicity" where none exists.

In a USEPA investigation by Norberg-King, *Ceriodaphnia dubia* response to **acute** toxicity levels of a known toxicant was shown to vary from 0.23 to 1.91 g/L. These data verify that WET testing results may vary dramatically for **identical** effluents. The assumption that all organism responses are due to effluent toxicity has no reasonable scientific support. Biomonitoring permit requirements must reflect expected test organism variability, whatever its causes. (13)

418. COMMENT: In biological toxicity testing, the sources of variability in a test species' response to an effluent are analogous to the instrumental noise inherent in analytical chemical methods. Both are random interferences with test accuracy which determine the threshold for obtaining accurate and reproducible measurements. In instrumental analytical methods, MDL and PQL are established using known concentrations of analyte in a blank; in toxicity testing, the proper way to define the MDL and test organism sensitivity variability is to first determine the "difference from control" variability in species response when ex-

posed to known concentrations of a reference toxicant. Once the variation in response (difference from control) of the test organism to the same concentration of reference toxicant **over time** has been quantified, the random variations in testing methodology and organism sensivity can be assessed. Once an estimate of background variation in testing methodology and organism sensitivity (PQL) has been obtained, the lowest effluent concentration which produces a normalized mean "difference from control" equal to or greater than the PQL would be the value of LOEC used for regulatory purposes.

Until PQLs are established for WET analyses, test results are ambiguous and do not accurately quantify chronic toxicity. Appropriate PQLs for other analytical determinations intended for regulatory control purposes have been established under 40 CFR 136. It is inconsistent for a state regulatory agency to adopt WET protocols, or USEPA to insist on the adoption of enforceable biomonitoring limits, without establishing PQLs for that procedure as is done for other analytical methods. (13)

419. COMMENT: The establishment of enforceable permit toxicity limits is wholly inappropriate without adequate safeguards to account for test method variability. Unless inter-laboratory variability in test results is assessed, and PQLs for chronic WET testing established, substantial uncertainty accompanies test determinations. Dischargers could be subject to unnecessary fines, penalties, or expenses for increased treatment technology because of perceived "toxicity" that does not in fact exist. (13)

420. COMMENT: Any requirement for chronic toxicity testing should be implemented by the DEPE on a selective, case-by-case basis as opposed to simply requiring chronic toxicity testing as a standard permit requirement. The DEPE has already assembled significant acute toxicity test data. Any additional requirement for chronic toxicity testing should be limited to problem areas that have been revealed by the record of acute toxicity test data. This will conserve the resources of the DEPE and New Jersey taxpayers, as well as NJPDES permittees, and limit chronic toxicity testing to situations where there is already evidence, based on acute toxicity testing, that justifies chronic toxicity testing. (6)

421. COMMENT: The proposed Surface Water Quality Standards specify chronic aquatic life protection criteria for a number of pollutants. These criteria are stated as four-day averages. Commenters are particularly concerned that the adoption of chronic criteria would be the precursor for a general requirement for chronic toxicity testing. Such a generic requirement would not be justified. Commenters have been performing acute toxicity tests for a number of years. The results of those tests have consistently shown no adverse environmental impact. While chronic toxicity testing may be appropriate where there is evidence of acute toxicity, the toxicity tests performed for commenters' facilities have consistently shown the absence of toxicity concerns. Moreover, commenters' electric power generating facilities are very stable, steady-state operations. Unlike other types of industrial facilities, commenters' power plants do not engage in variable batch processing or produce slug loads of effluent that have characteristics that were not evaluated in previous toxicity tests. (6)

RESPONSE: In the following responses, the DEPE has responded to all significant and relevant comments presented above "topic by topic" rather than responding to each item each time it was mentioned in a comment. This will help eliminate the restatement of points made by the DEPE and provide a more detailed, concise and understandable response. Additional information was received by the DEPE from the Association of Environmental Authorities after the close of the public comment period. This additional information has not been considered in preparation of this response document, but will be considered as part of the DEPE's rule writing efforts, which are currently ongoing. It should be noted that a large portion of what was included in that additional submittal has already been addressed, during permitting proceedings, by the DEPE, and as reiterated in the responses to comments that follow.

It should be noted that many of the comments deal with test procedures, test variability, demonstration of reasonable potential to cause or contribute to a violation of criteria, and other implementation issues. None of these are related to the Surface Water Quality Standards revisions under discussion here. No changes were proposed to the sections of the Surface Water Quality Standards relating to Whole Effluent Toxicity. A discussion of the issues raised has been included here because of the general interest the issues raised are believed to have with the regulated community. The DEPE's response follows:

Test Variability

The DEPE does not agree that significant test variability is associated with chronic toxicity tests. Several sources are cited in support of the position that the variability of chronic testing is high. The DEPE's review of those sources, however, does not support these contentions. Specifically, it is stated that the data provided in Warren-Hicks et al. (Warren-Hicks, W. and B.R. Parkhurst. 1992. *Performance Characteristics of Effluent Toxicity Tests: Variability and its Implications for Regulatory Policy.* Envl. Toxicol. Chem. 11:793-804.) indicates that inter-laboratory differences between the measured endpoints in a chronic test (for example, growth, reproduction and survival) are high. The information provided in that paper, however, only illustrates the variability of survival between tests at similar test concentrations. It does not investigate all of the chronic test endpoints. Further, in order for the results of the paper to be applicable to a given data set, the permit limit must be an intermediate toxicity range and not one of the test concentrations. Part V, of the Interim Chronic Toxicity Testing Methodologies For Use in the NJPDES Permit Program, Version 1.0 (NJDEPE; February 1989) document, requires that the permit limit be included in any chronic test as one of the test concentrations, thus eliminating this concern regarding compliance. Therefore, although the results of this paper make a vaild point that the survival in the test concentrations around a No Observed Effect Concentration (NOEC) may vary in similar tests, the results of the study do not support the variability of chronic testing as a whole. It should be noted that in the conclusion of the paper, the author points out that he does not dispute the intrinsic value of the use of chronic tests in a regulatory environment.

Also cited were the results of DeGraeve et al. (DeGraeve, G.M., et al. *Precision of the EPA Seven-Day* Ceriodaphnia dubia *Survival and Reproduction Test, Intra- and Inter-laboratory Study.* En-6469, Research Project 2368-2. Battelle Columbus Division, Columbus, Ohio (1989)) in support of the contention that adequate laboratory personnel do not exist to complete chronic toxicity tests, and that inter- and intra-laboratory variability for chronic testing is high. Although the DEPE has not yet been able to obtain a copy of that paper to review, review of a subsequent and similar paper by the same author (DeGraeve, G.M., J.P. Cooney, D.O. Mcintyre, T.L. Pollock, N.G. Reichenbach, J.H. Dean and M.D. Marcus. 1991. *Variability in the Performance of the Seven-Day Fathead Minnow* (Pimephales promelas) *Larval Survival and Growth Test: An Intra- and Inter-laboratory Study.* Envl. Toxicol. Chem. 10:1189-1203) does not support these contentions. Specifically, it is important to look at the reasons as to why several tests in a study may not have been completed. For example, several tests were not completed in the later study due to an initial misunderstanding about the number of tests required for each test material, and a laboratory's inability to obtain the necessary number of newly hatched fry required to initiate the test. In the results of the completed later study, 96 percent of 140 tests were successfully completed. It should be noted that this author also concludes, as a result of these studies, that the variability of the seven-day Fathead minnow chronic toxicity test was similar to the variability observed with other toxicity tests, and with analytical chemistry measurements of environmental samples.

Also cited in support of the argument about test variability were the results of Norberg-King (Norberg-King, T., 1988. An Interpolation Estimate for Chronic Toxicity. The ICp Approach, U.S. Envl. Prot. Agency, Environmental Research Laboratory—Duluth). The DEPE's review of this paper indicates that the data illustrated high test variability because the tests in the study were not all conducted identically as they would be with compliance testing under the State program. Specifically, of the 15 tests conducted in the study, 10 were conducted with one dilution series while the other five were conducted with another, three different dilution waters were used, and in some tests the effluent samples were renewed daily while in the others, effluent samples were renewed every other day. These differences in test procedures can significantly affect the consistency of toxicity test results. Variations in test procedure of this nature do not occur with compliance testing. Therefore, the data provided in this paper cannot be used to substantiate variability in identical chronic toxicity test results. It is important to note that the purpose of this paper was not to demonstrate test variability but to explain the analysis of a chronic test endpoint. Therefore, it was not necessary for the author to use identical tests to satisfy the objectives of the study.

The DEPE went beyond evaluating the cited references and evaluated other studies from the available scientific literature for information regarding chronic test variability. Several scientific papers were found

which indicate acceptable chronic test variability. Specifically, in Parkhurst et al. (Parkhurst, B.R., W. Warren-Hicks, and L.E. Noll. 1992. *Performance Characteristics of Effluent Toxicity Tests: Summarization and Evaluation of Data.* Envl. Toxicol. Chem. 11:771-791), the authors identified, compiled, summarized and evaluated published and unpublished data from intra-laboratory and inter-laboratory studies on the variability of acute and chronic effluent toxicity tests for single chemicals and effluents. Mean Coefficients of Variation (C.V.) for intra-laboratory studies were smaller than those for inter-laboratory studies. Mean intra- and inter-laboratory C.V.s for chronic tests were generally equal to or smaller than those from acute tests. In Anderson et al. (Anderson, S.L. and T.J. Norberg-King. 1991. *Precision of Short-Term Chronic Toxicity Tests in the Real World.* Envl. Toxicol. Chem. 10:143-145), a study was conducted on the inter-laboratory precision of chronic toxicity tests with three toxicants. Four types of tests indicate that short term tests for chronic toxicity can be performed reliably by most laboratories. The data further demonstrate that the biological toxicity tests recommended by the USEPA can be conducted with a precision similar to that of many types of conventional chemical-specific measurements and are robust with respect to typical day-to-day variations in test performance. Therefore, since the precision of analytical procedures is generally considered acceptable, the precision of toxicological methods must likewise be considered acceptable.

Given this information and the information provided by the USEPA in the "Technical Support Document For Water Quality-based Toxics Control" March 1991 (EPA/505/2-90-001) on chronic test variability, the DEPE does not agree that significant test variability is associated with chronic toxicity tests. Substantial literature exists which states that the variability of chronic toxicity tests is within the range of those of chemical testing, and in fact, are sometimes better. Contrary to the comments submitted, chronic USEPA WET protocols have gained general acceptance within the relevant scientific community as established by the references cited above, including those cited by the Association of Environmental Authorities, which have been peer reviewed by the scientific community. Therefore, the DEPE does not believe that the arguments presented on test variability warrant revision or reconsideration of the applicable provisions of the Surface Water Quality Standards.

Relationship to Instream Impacts

Comments submitted indicate that the results of chronic toxicity tests do not correlate with instream impacts, but no information was provided during the comment period supporting this comment. The DEPE is not aware of any information which supports this statement. In fact, data available to the DEPE contradict these comments. In Schimmel, et al. (Schimmel, S., G. Morrison, M. Heber. 1989. *Marine Complex Effluent Toxicity Program: Test Sensitivity, Repeatability and Relevance to Receiving Water Toxicity.* Envl. Toxicol. Chem. 8:739-748.), numerous field tests were conducted using the saltwater USEPA chronic test methods and the results indicated that tests on receiving waters accurately reflect the toxicity of the effluents measured directly. Receiving water impacts, when observed, were generally near-field in nature. The author concluded that test methods developed are sensitive, efficient, reliable and environmentally relevant measures of effluent toxicity and offer promise for reducing adverse impacts from point-source discharges in near coastal waters. The precision of the test results provided highly reproducible toxicity data and in nearly all cases, if effluent concentrations measured in the receiving waters equaled or exceeded the effect concentrations determined directly in effluent toxicity tests, the receiving waters were also toxic to the same species.

Further, in Eagleson, et al. (Eagleson, K.W., D.L. Lenat, L.W. Ausley and F.B. Winborne; 1990; *Comparison of Measured Instream Biological Responses With Responses Predicted Using the* Ceriodaphnia dubia *Chronic Toxicity Test;* Envl. Toxicol. Chem.; 9:1019-1028.), instream toxicity was predicted with whole effluent toxicity tests. These results were then compared to the observed instream response of the aquatic community. Forty-three comparisons were conducted in freshwater flowing systems using *Ceriodaphnia dubia* chronic toxicity test procedures and standardized qualitative sampling of benthic macroinvertebrates. In 88 percent of the comparisons there was agreement between both measures. These data suggest that the use of chronic effluent toxicity testing as a regulatory tool is effective and appropriate. Also, Standard Reference Toxicant (SRT) data submitted by certified laboratories shows consistent response of the test species to these toxicants. Thus, the data indicates that "false positives" are not occurring to any significant extent.

The Association of Environmental Authorities cites an abstract and a manuscript which has not yet been published, in support of their comments. However, given the significance of the issue in question, the DEPE will give preference to published peer reviewed scientific literature in making decisions. Given this assessment, the DEPE has determined that the comments submitted do not warrant the elimination or modification of chronic toxicity provisions of the Surface Water Quality Standards.

Absence of PQL's and the Occurrence of False Positives

The DEPE agrees that test organism health influences the variability of toxicity tests as established by Dorn (Dorn, P.B. and J.H. Rodgers Jr.; 1989; *Variability Associated with Identification of Toxics in National Pollutant Discharge Elimination System (NPDES) Effluent Toxicity Tests;* Environmental Toxicology and Chemistry; 8:893-902), and as discussed in the comments. However, Dorn states that Standard Reference Toxicant tests (SRT) run concurrently with effluent toxicity tests can provide an additional control to aid in evaluating the health of the test animals, which may be the basis for decisions regarding compliance. Routine SRT testing is a requirement of the DEPE's chronic toxicity testing program. Thus, as suggested by Dorn, the use of SRT data could support the assertion that the compliance test results do not accurately reflect the characteristics of the effluent, if the SRT results also showed inconsistent toxicity values.

Please note that an example provided by Dorn, where the variability in the control survival exceeds the variability of effluent-impacted toxicity tests for *Mysidopsis bahia,* does not provide a basis for the overall variability of the chronic test. The specific instance to which the author is referring is a decline in culture stock for this species which occurred in 1986 due to over harvesting. At that time, the DEPE temporarily suspended the use of mysids until culture populations were again established and test organism health was considered acceptable.

The DEPE also questions the use of the term "false positives" in regard to toxicity test results on effluents. In chemical specific testing, a "standard" consisting of a known amount of the specific chemical can be used to determine the variability of the test method. There is no "standard" available for complex effluents which can change over time. The lack of a specific measure of the variability of the test method with a given effluent is compensated for through the use of a control. Method and test organism sensitivity/variability would be checked using the results of the control replicates. Another way to check method/organism sensitivity and variability in aquatic toxicity tests is through the use of reference toxicant tests. In reference toxicant tests a toxicity test is run, using the same methodology/organism that will be used for the compliance tests, using a reference toxicant of known toxicity. The results of the test can be compared to the expected results and deviations from the expected results indicate a problem with the conduct of the test or the organisms used. Where investigations cannot identify the cause of measured toxicity, and the controls and reference toxicant tests are within acceptable bounds, it is not correct to simply assume that the toxicity was "not there." Given that many compounds exist which have not yet been identified, and that interaction of compounds may unknowingly occur to cause toxicity, the DEPE does not feel that any unexplained incidence of toxicity could be concluded to be a "false positive." If the cause of a toxicity incident, however, was proven to be the result of a test artifact, and sufficient information was available to support that fact (for example, SRT data), those items would be taken into account in decisions on penalties and requirements for Toxicity Reduction Evaluations.

All laboratories conducting chronic toxicity tests for compliance purposes in New Jersey are required to conduct routine SRT testing and include controls in all toxicity test dilution series. This testing helps ensure that test organism health and test procedures are consistent, and that they are not affecting the test results in any manner. As stated previously, the consistent results exhibited by the SRT data available from tests run in New Jersey suggest that false positives are not occurring to any significant extent. Additionally, in order for test results to be deemed acceptable, a dose response relationship must be exhibited by the test data, and certain acceptability criteria, such as minimum control survival and/or weight, must be met. If the data do not show a dose response relationship, the test is deemed unacceptable and is not used by the DEPE for any purpose. Therefore, the DEPE has taken precautions to ensure that test results are representative of effluent quality.

Chronic toxicity testing methods used by the DEPE are virtually identical to published saltwater and freshwater USEPA procedures, which have been available since 1988 and 1990 respectively. Additionally, as part of the Interim Chronic Toxicity Testing Methodologies For Use In the NJPDES Permit Program, Version 1.0 (NJDEPE, February 1989)

document, laboratories that want to conduct chronic toxicity testing for compliance purposes are required to conduct routine SRT Testing, to monitor test procedures and species sensitivity. Virtually all SRT data submitted to date has shown acceptable variation, with data points consistently obtained within control limits. Further there is no requirement in the NPDES or NJPDES regulations that test methods must be promulgated in regulation prior to use. USEPA has never included their toxicity testing methods in 40 CFR 136 yet they are used throughout the country. Therefore, the DEPE believes that chronic toxicity test procedures are adequately standardized, with acceptable test performance to use within the NJPDES permit program. Finally, the DEPE is working on development of a proposal to adopt chronic toxicity test procedures in the Laboratory Certification Regulations.

Use of Non Indigenous Test Species

In accordance with N.J.A.C. 7:9-4.5(f)1, test species used for effluent toxicity testing need not be indigenous to, nor occur in the waters in question because it is the objective of the DEPE to use test species that are representative of the more sensitive aquatic biota from the different trophic levels of the waters in question. The rationale for this is that sensitive test organisms that are not indigenous to an area are being used as surrogates for sensitive indigenous organisms. Use of nonindigenous organisms was included in the Surface Water Quality Standards to avoid forcing dischargers to undertake research programs to develop standardized culturing and test procedures for the indigenous organisms. Instead, they are able to use organisms for which culturing and test procedures have already been developed and standardized, thereby saving the regulated community money. However, it should be noted that the Surface Water Quality Standards do not preclude the use of indigenous organisms for toxicity testing. In order to do so standardized culturing and test procedures would have to be developed and approved by the DEPE, in addition to demonstrating that the selected indigenous test organism represents a sensitive test organism.

Reasonable Potential and Authority to Mandate Chronic Toxicity Limits

Regulatory requirements exist which mandate the inclusion of whole effluent chronic toxicity limitations in permits. Section 101(a) of the Clean Water Act (CWA) establishes a national policy of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. In addition, section 101(a)(3) of the CWA and N.J.A.C. 7:9-4.5(a)3 states that the discharge of toxic pollutants in toxic amounts is prohibited. Under sections 301(b)(1)(c) and 402 of the CWA, dischargers with NPDES permits must meet all of the technology-based requirements of the CWA as well as more stringent requirements necessary to achieve State water quality standards, established under section 303 of the CWA.

In 40 CFR 122.2, USEPA defined "Whole Effluent Toxicity" as "the aggregate toxic effect of an effluent measured directly by a toxicity test." Section 122.44(d) further states that where it is determined that a discharge causes, shows a reasonable potential to cause, or contributes to an excursion above the narrative criterion, the permitting authority must establish effluent limits for whole effluent toxicity.

Factors which the DEPE considers in making a determination regarding reasonable potential are described in Chapter 3 of the "Technical Support Document for Water Quality-based Toxics Control" and 40 CFR 122.44(d)(1)(ii). Specifically, the DEPE must consider factors such as dilution, type of receiving water, existing controls on pollution sources and variability of the effluent in determining whether reasonable potential exists for chronic whole effluent toxicity exists for specific discharges.

N.J.A.C. 7:9B-1.6

422. COMMENT: DEPE proposes to utilize steady-state models to apply the proposed criteria. These modeling approaches incorporate several arbitrary worst-case assumptions such as:

- drought flow conditions instream (for example, MA7CD10);
- lowest hardness instream;
- poor plant performance;
- highest facility flow; and
- exceedance of criteria during most critical life stage.

These procedures are outdated and overly conservative. Continued use of these modeling approaches will force dischargers to incur increased capital costs for advanced treatment technology that will not produce corresponding protection of the environment.

In contrast to DEPE's proposed adoption of steady-state modeling, we request that the DEPE adopt USEPA recommendations for using dynamic modeling approaches to establish appropriate effluent limitations. In general, steady-state analyses tend to be more conservative than dynamic models because they rely on worst case assumptions. Dynamic modeling methodologies produce less stringent effluent limits, based on a more accurate estimate of actual pollutant concentrations in the receiving water, that fully protect the environment.

Despite admitted shortcomings with the historically used steady-state approaches, and USEPA's acknowledgment that the criteria are very conservatively established, the proposed water quality standards continue to support use of outdated modeling procedures that provide even further conservatism. We, therefore, recommend that DEPE specify that the most scientifically defensible methodology is a statistical model, consistent with the criteria and USEPA Technical Support Document recommendations, and authorize use of that procedure whenever applying the criteria. When a steady state low flow is used (for example, MA7CD10), modify the proposed standards to require review of model input parameters and make adjustments that ensure improbable events are not assumed to occur. For example, use expected instream conditions under low flow as the model input parameters; assume that the wasteload allocation is the average effluent performance required and scale up the wasteload allocation to the 95 to 99 percentile performance level. This would conform to USEPA guidance, protect the uses and not impose overly stringent permit limitations. (11, 12, 13)

423. COMMENT: The Surface Water Quality Standards, proposed at N.J.A.C. 7:9B-1, require the use of conservative steady state wasteload allocation models to determine effluent limitations for compliance with numerical water quality standards. (Specification of design flows at N.J.A.C. 7:9B-1.5(c)2, methodology for development of chemical specific water quality-based effluent limitations at N.J.A.C. 7:9B-1.6(c)4, criteria established as "not to be exceeded" at N.J.A.C. 7:9B-1.14(c), calculation of instream waste concentrations using design ambient flow rates at N.J.A.C. 7:9B-1.6(c)5, calculating instream waste concentrations using design flow rates at N.J.A.C. 7:9B-1.6(c)5 and by establishing design ambient flows as the basis for evaluating water quality criteria compliance at N.J.A.C. 7:9B-1.5(c)2.) These steady state models are overly conservative and result in effluent limitations that are far more restrictive than required to comply with the numerical water quality standards.

An alternative to the strict use of steady state wasteload allocation models is the use of dynamic models. Dynamic models use estimates of the effluent variability and the variability of receiving water assimilation factors to develop effluent limitations. This type of wasteload allocation model represents the best scientific approach because effluent and receiving water characteristics are evaluated realistically, as probabilistic distributions, and the modeling results yield probabilistic distributions of instream concentrations which are directly comparable to numerical water quality standards (for example, once in three year frequency of criteria exceedance).

The following modifications to the proposed standards are recommended:

- Allow for toxicity and numeric criteria exceedance frequencies in accordance with the best available scientific information.
- Specifically allow for water quality-based permit derivation through the use of dynamic models for all criteria classes.
- Draft protocols for the use of dynamic models in the development of water quality-based effluent limitations. (13)

424. COMMENT: The use of reliable probabilistic or dynamic modeling to determine total maximum daily loads (TMDLs) based on expected ambient and effluent conditions, rather than using multiple conservative assumptions in steady-state models, often result in substantially higher effluent limitations which would still protect the designated uses of the receiving stream. The DEPE should modify its regulations to allow the use of such models. (45)

425. COMMENT: Commenters encourage the DEPE to authorize use of dynamic models, such as the Monte Carlo simulation model, rather than relying exclusively on steady-state models for determining permit limits. Although a detailed discussion of modeling would be beyond the scope of these comments, it should be noted that use of steady-state models should be limited to situations where whole effluent toxicity test data and daily receiving water flow records are not available and there is little, if any, data measuring the chemical constituents in wastewater effluent. On the other hand, where such data are available USEPA recommends the use of dynamic modeling techniques. See U.S. EPA, Technical Support Document for Water Quality-Based Toxics Control, 97 (1991). The use of the probability distributions that dynamic models provide in place of worst-case conditions under steady-state modeling has become accepted practice. As USEPA explains:

Dynamic modeling techniques explicitly predict the effects of receiving water and effluent flow and of concentration variability. The three dynamic modeling techniques recommended by EPA for WLAs [wasteload allocations] are continuous simulation, Monte Carlo simulation, and lognormal probability modeling. These methods calculate a probability distribution for RWCs [receiving water concentrations] rather than a single, worst-case concentration based on critical conditions. Prediction of complete probability distributions allows the risk inherent in alternative treatment strategies to be directly quantified. (6)

RESPONSE: The DEPE does not believe that the Surface Water Quality Standards regulation prohibits or precludes the use of dynamic models. The same issue came up in regard to the USEPA toxic criteria adoption (December 22, 1992) and the USEPA response is relevant here. In response to a question asking "whether the specification of the applicable hydrological baseline mandated the use of steady state models and eliminated the use of dynamic models for wasteload allocations" the USEPA replied:

Generally the low flows specified explicitly contain duration and frequency of occurrence which represent certain probabilities of occurrence. Likewise the criteria for the priority pollutants are defined with duration and frequency components. Dynamic modeling techniques explicitly predict the effects of variability in receiving water, effluent flow, and pollutant concentration. USEPA has recommended and described three dynamic modeling techniques for performing wasteload allocations in section 4.5 of the 1991 Technical Support Document: Continuous simulation, Monte Carlo simulation and lognormal probability modeling. These procedures allow for calculating wasteload allocations to meet the criteria for priority toxic pollutants without using a single, worst-case concentration based on a critical condition.

Thus USEPA believes that either dynamic modeling or steady state modeling can be used to implement the criteria.

The DEPE similarly believes that dynamic modeling can be used to develop wasteload allocations and permit limitations. However, the number of comments indicating a belief that the Surface Water Quality Standards regulation prohibit or preclude the use of dynamic models makes it clear that the regulation needs to be modified to clearly indicate that dynamic modeling is allowed. Accordingly, the DEPE will prepare language for inclusion in a future Surface Water Quality Standards proposal which explicitly authorizes the use of dynamic modeling. Protocols for the use of dynamic models in the development of total maximum daily loads and wasteload allocations are being considered/developed by the DEPE's NJPDES rule writing group. It should be noted, that in many situations the use of a steady state model will suffice. In those situations, the DEPE and/or the dischargers would be expected to decide not to spend the additional time and money needed to develop and use a more sophisticated model.

N.J.A.C. 7:9B-1.14(c)1 Bacterial Indicators

426. COMMENT: USEPA published its criteria to assist states in establishing water quality standards to protect bathing beach areas. The specific use intended to be protected by these criteria is full body contact recreation (that is, swimming). DEPE's proposed enterococci criteria mirror USEPA's recommendation for designated beach areas only. The criteria document recommends enterococci criteria to substitute for fecal coliform for water contact recreation uses. USEPA has stated that adoption of the *E.coli* or enterococci as the indicator organism in bacteriological standards provides better indicators of human health risks than total or fecal coliform.

Nevertheless, the "White Paper" (Translation Of Ambient Water Quality Bacteria Criteria Into Permit Effluent Limitations; AEA; January 1992) raises several critical issues regarding bacterial criteria including, but not limited to, the following: (1) the significant variability in the relationship between enterococci and measured health effects that USEPA recognizes may occur in marine waters of differing salinities; (2) the lack of clear instructions from USEPA regarding the application of criteria where full body contact cannot be achieved (for example, shallow streams, long ocean outfalls); (3) the failure of permitting authorities to apply the criteria in the water column after a mixing zone; (4) the failure of USEPA to develop wasteload allocation procedures for establishing permit effluent limitations for bacteria; (5) the lack of information on whether existing disinfection systems can meet the criteria at the end of the pipe without major expenditure; and (6) the variability experienced in testing for enterococci.

The proposed Surface Water Quality Standards include both enterococci and fecal coliform criteria for fresh and salt waters. The proposed Surface Water Quality Standards retain outdated fecal coliform levels of 200/100 ml in fresh and salt water. Furthermore, DEPE applies this criterion to the general fresh and salt water classifications (FW2, SE1, SC) without limiting its applicability to areas with actual use of the waters for full body contact recreation (swimming). Similarly, the enterococci criteria are not explicitly limited to designated bathing areas under the proposed Surface Water Quality Standards, even though they were developed for this designated use alone. AEA objects to application of the enterococci criteria because it is very conservative and the historical application of fecal coliform criteria has not been accompanied by any significant outbreak of disease caused by municipal effluents. (11, 12)

427. COMMENT: The USEPA 304(a) enterococci criteria are only applicable as ambient criteria in designated bathing areas and should not be incorrectly treated as a technology-based limits to be met at the end of the pipe. The proposed standards fail to adequately consider the likelihood of body contact recreation downstream of the discharge. The criteria document instructs users to adjust the criteria for receiving waters presenting little likelihood of bodily contact; for example, streams that are too shallow and cold, ocean outfalls, and other areas not conducive to swimming.

The studies upon which the 304(a) criteria are based provide risk assessments related to the number of indicator bacteria present to the number of people exhibiting medical symptoms, mostly gastrointestinal, after total immersion (swimming). The enterococci criteria are based on the same risk level and resulting level of protection as existing bacterial criteria. Although there has been some criticism of the statistical analysis of the data collected, there has been no rebuttal to the methodology which determined the appropriate organisms to be monitored and a general linear relationship, albeit weak at times, between illness and presence of certain organisms. This relationship is less clear in waters of varying salinity.

The underlying studies included in the enterococci 304(a) criteria document are more rigorous than previous fecal coliform studies used to derive in the water criteria for both marine and freshwaters. The fecal coliform criteria that had been used for a number of years were based on the observed numerical relationship between total coliform and fecal coliform reduced by a 50 percent safety factor. The total coliform value, 2300/100 ml, was selected because various studies had shown that there appeared to be a barely detectable illness risk associated with "swimming" when less than this concentration was present in the water. After applying the ratio, 18 percent, and a safety factor, a fecal coliform criteria of 200/100 ml was established as a monthly geometric mean. DEPE has adopted this state water quality criterion.

Subsequent studies indicated that fecal coliform is not the best surrogate for exposure to pathogenic organisms in full body contact recreation. Statistical analysis, as well as a review of the bacteriology of coliform organisms, indicates that enterococci are probably more reliable indicators of pathogens in both fresh and marine bathing beach waters and that *E. coli* is equally reliable in freshwater. Therefore, USEPA recommends that these two organisms, as appropriate, be used when states revise their water quality standards during the triennial review process. As a result, several states have adopted, and USEPA has approved, water quality standards based on the 304(a) criteria document, adjusted for risk. Delaware's marine criterion for enterococci is 110/100 ml and Maine's criterion for *E. coli* is 77/100 ml. USEPA's evaluation of the new bacterial indicators did not demonstrate that the current fecal coliform criteria are not sufficiently protective, particularly as applied by DEPE (that is, end of pipe limitation without consideration of dilution). (11, 12)

428. COMMENT: The bacteria criteria should apply to beach areas only. In keeping with the mandate that "criteria must be used in a manner that is consistently with the way in which they were derived if the intended level of protection is to be provided in the real world," the criteria for bacteria must only be applied to designated bathing areas in New Jersey. The bacteriological criteria were developed from information and data gathered at beaches where full immersion of the body (swimming) was the route of exposure. Illness caused by ingestion was the effect measured and the pathogenic cause was presumed to be related to the number of reliable indicator organisms present in the water.

There was considerable variability in the number of indicator organisms present at the various study beaches. However, USEPA statistically manipulated the data to produce national uniform criteria

for marine and freshwaters based on acceptable risks in full body contact bathing beach areas. The risk was defined as 19 illnesses per 1000 swimmers in marine waters and 8 illnesses per 1000 swimmers in freshwaters. States may choose a higher or lower risk when translating the criteria into standards to protect the designated use of a waterbody. They may also establish a lesser level of protection for waters that are not amenable to full immersion recreation or adjust the criteria for other site-specific factors (for example, salinity).

USEPA's freshwater full body contact recreation criteria is based upon a lower risk level of eight illnesses/1000 versus 19 illnesses/1000 for marine waters. If the marine protection level were applied to fresh water, the acceptable geometric mean enterococci freshwater value would have been about 70/100 ml. The only apparent reason USEPA proposed differing protection levels was to have a uniform criterion and to remain consistent with prior criteria derivation assumptions for the fecal coliform criteria. Both the marine and freshwater criteria recognize that adjustments should be made for receiving waters that have limited body contact. As described in Table 4 to the criteria document, the level of protection may appropriately vary with the degree of bathing use, as follows.

	Maximum # of bacteria/100 ml sample		
	Freshwater		Marine Water
	E. coli	Enterococci	Enterococci
Designated Beach Area	235	61	104
Mod. Full Body Contact	298	89	124
Lightly Used Full Body Contact	406	108	276
Infrequently Used Full Body Contact	576	151	500

Based upon this table, it is clear that higher enterococci levels are acceptable, depending upon the expected receiving stream uses and outfall locations. For example, because ocean outfalls are not located in "designated beach areas" and swimming uses are not occurring at the outfall point due to the depth of the water, the appropriate maximum instream concentrations could be 500/100 ml.

Streams that are too shallow, cold or otherwise not conducive to swimming need not have enterococci criteria that are fully protective for primary contact recreation. A criterion for such streams, if necessary at all, should not be less than 151/100 ml. As noted in USEPA's Water Quality Standards Handbook, "common sense must be used in deciding whether a use is sufficiently likely to be an 'existing use' rather than merely incidental, or, indeed whether it will occur at all." In any event, the criteria or standards are to be achieved in the receiving water and not at the end of the pipe. In sum, if enterococci is adopted, DEPE should eliminate water quality standards for fecal coliform and restrict the application of the enterococci criteria to those waters having full body contact as a reasonable designated use. (11, 12)

429. COMMENT: After adoption of scientifically defensible water quality standards, DEPE must translate them into effluent limitations. Unfortunately, the USEPA criteria document does not define appropriate translator mechanisms other than to state clearly that they are in the water criteria and the degree of bathing usage should be considered. As with any other "pollutant," these criteria are amenable to the wasteload allocation process which generally uses mathematical models in conjunction with a mixing zone analysis to derive effluent limitations for discharge permits. For bacteriological criteria, this process has been subject to substantial confusion and error. Because USEPA mistakenly included the fecal coliform criteria as technology-based limits in the original promulgation of the Secondary Treatment Guidelines, 40 C.F.R. Part 133, in 1973, but subsequently deleted them in 1975, permit writers have incorrectly required compliance with water quality standards for bacteria at the end of the pipe even though substantial dilution of the effluent may occur in the receiving stream. Moreover, many states established disinfection design criteria to achieve "substantially complete disinfection." This level of disinfection has generally been considered to be 200 MPN/100 ml fecal coliform (that is, identical to the water quality criteria). There is, however, no correlation between enterococci and fecal coliform as they are completely unrelated bacteria groups. Thus, while historical use of the fecal coliform disinfection practice has led to sufficient public health protection, there is no basis to conclude that similar application of enterococci standards is necessary or appropriate.

Historically, most dischargers achieved reliable disinfection of fecal coliform primarily using chlorine with an average detention time of 30 minutes. As a consequence, the levels of enterococci and/or *E. coli* in the effluent were most likely reduced substantially and, therefore, their concentrations in the water columns were less than the recommended criteria. One study has shown that when receiving waters are in compliance with the fecal coliform criteria, they are also usually meeting the new enterococci criteria. The study did not determine the number of each type of organism in any discharges that may have impacted the receiving waters.

Another study, primarily directed toward determining the effectiveness of current disinfection systems in controlling enterococci, showed that even though they were present in the discharge and exceeded the criteria in the pipe, dilution in the receiving stream reduced their concentration to well below the recommended water quality criteria. During the observation period, fecal coliform numbers in the effluent were in compliance with the criteria. The data did show that the enterococci criteria could not always be met at the end of the pipe. There was also significant difficulty in reproducing the bacteriological analyses. The disinfection tests clearly showed that effectiveness, as measured by enterococci, was dependent upon the amount of free available chlorine that could be achieved in the contact chamber. The number of enterococci was directly proportional to the amount of ammonia in the effluent because ammonia complexes free chlorine.

Since most wastewater treatment systems may be unable to consistently achieve the new criteria at the end of the pipe, substantial costs will be incurred to modify the biological and/or disinfection process unless dilution in the mixing zone is allowed and the criteria are applied to properly account for the degree of body contact recreation that is likely. It is recommended that DEPE allow use of mixing zones, and the like, because there is no evidence of health threats at the point of discharge under current disinfection practices. (11, 12)

430. COMMENT: In order to consistently achieve the proposed criteria at the end of the pipe, substantial costs will be incurred unless dilution in the mixing zone and degree of likely body contact recreation are considered. Although there is considerable scientific disagreement concerning USEPA's data analysis, there is no dispute that USEPA's risk assessment methodology was appropriate. However, freshwater limits were arbitrarily reduced by a factor of 2.5, rendering them far more protective than considered acceptable for marine bathing areas. The principal USEPA study showed that enterococci was probably the better indicator organism to measure potential pathogen contamination in bathing beach marine waters and was equally appropriate in freshwaters when properly applied to body contact recreation areas. It was also determined that *E. coli* could be reliably used in freshwater.

The monthly geometric mean and maximum any day values for these bacteria, in the water column, as specified in the criteria document where selected to assure that only an acceptable number of illnesses per 1000 swimmers (total immersion of the head) would occur. They are clearly values to be measured in the receiving stream and to be adjusted depending upon the likelihood of full body contact recreation. Past permitting practice has been to treat bacteria limits as technology-based (that is, to be achieved at the end of the pipe) because the original Secondary Treatment Guidelines (40 C.F.R. Part 133) identified them as such. USEPA subsequently deleted fecal coliform limitations from this regulation in 1975 and stated that they were to be addressed as ambient water quality standards. Continuation of past permitting practices is not legally or technically defensible unless specifically authorized by regulation. Application of such practices for enterococci is clearly inconsistent with the criteria document and will lead to over regulation and unnecessary expenditure of public resources.

Effluent limitations for enterococci and other bacteria were to be established using total maximum daily loads (TMDLs). The Recommendations (Section 2) in "Health Effects Criteria for Marine Recreational Waters" anticipates that the criteria will be translated into permit limitations through the wasteload allocation (WLA) process accounting for the degree of body contact recreation present. Dilution and die-off prior to beach exposures are to be recognized as well as the potential for full immersion where effluent limitations for bacteria are formulated. ("The beach is in non-compliance with the criteria if the geometric mean of several bacterial density samples exceeds [the criteria].")

As previously noted, a North Carolina study showed that enterococci in the receiving waters were generally less than the criteria when disinfection, as measured by the number of fecal coliform in the effluent, was substantially complete. Although an Oregon study showed that current disinfection practices would not always meet the enterococci criteria at the end of the pipe, dilution in the receiving stream assured that the

criteria were not exceeded during the normal recreational season. Thus, proper application of the new criteria should not result in increased disinfection requirements. (11, 12)

431. COMMENT: In July 1992, Oregon decided to defer application of the state's enterococci criteria for three years pending a more thorough review of the appropriateness and proper application. Citing problems with implementation of the new enterococci criteria, appeals to permits based on the criteria, and emerging new scientific information, Oregon has elected to "take another look at this standard" and withdraw it pending further study. Oregon reinstated the previous criteria based on fecal coliform until completion of the further study of the enterococci criteria.

Similarly, California has refused to adopt the USEPA's enterococci or *E. coli* criteria in place of the coliform criteria because of lack of evidence that the coliform criteria fail to protect public health or that the enterococci criteria better protect public health. California researchers found that "[c]oncentrations of *E. coli* and enterococci in waste constituents in recreational waters can differ substantially in proportions to concentrations of virus and other illness-causing organisms, from the proportions that occurred in waters recently studied by USEPA." California researchers also found that the enterococci criteria may be inappropriate for discharges in marine waters because enterococci tends to persist in sea water longer than fecal coliform, requiring increased treatment to meet the enterococci criterion. Furthermore, recent research has not shown a clear-cut trend linking enterococcus and reported illnesses.

These examples show that adoption of the enterococcus criteria are not mandatory and DEPE should only promulgate the enterococci criteria if a need can be shown. Significant scientific uncertainity about the viability of the criteria exists and no adverse public health impacts have been documented with existing disinfection practices. Implementation of the criteria in the face of such scientific uncertainty would expose dischargers to enormous costs for uncertain benefits to the public health. (11, 12)

432. COMMENT: USEPA criteria for enterococci were intended to be applied to bathing areas where full body contact was anticipated and not at end-of-pipe. Before additional construction and operation costs are incurred, the enterococci criteria should be withdrawn pending further research on the reasonableness and appropriateness of the criteria. (20)

433. COMMENT: NJDEPE cannot simply say that all bacterial parameters must be met at the end of pipe. Morever, NJDEPE has not justified applying the enterococci criteria as "end of pipe" criteria. (28)

434. COMMENT: NJDEPE background data on exceedances of fecal coliform and enterococci in some streams, is very limited and indicates that this pollution is most likely from non point sources. If this is the case then the non point source pollution should be controlled and not used to justify tighter control of point sources. (28)

435. COMMENT: NJDEPE indicates that SC waters are classified primary contact recreation. The depth and distance from shore of the outfall diffusers was not relevant. SC waters are also designated for shellfish harvesting. NMCRSA feels that the likelihood of direct contact with their undiluted effluent is extremely remote and therefore, mixing zones can and should be applied if enterococci is put in their permit. (28)

436. COMMENT: N.J.A.C. 7:9-4(e)4 allows the DEPE to allow for mixing zones on a case-by-case basis. However, the DEPE should be required to justify the action that they take. (28)

437. COMMENT: The DEPE indicates that the cost factor for compliance is the reason for the request for using mixing zones and that the potential health implications outweigh these economic considerations. The Basis and Background document indicates that current methods for controlling bacteria are sufficient. Therefore, NMCRSA fails to see how the potential health implications can outweigh economic considerations. (28)

438. COMMENT: The DEPE has failed to show that the present criteria for fecal coliform are not protective of the health of the residents of New Jersey and that the enterococci criteria selected will cost the residents millions of dollars. It should be questioned whether the USEPA has directed New Jersey to enact enterococci criteria or whether this is just one more good idea from the DEPE. New Jersey should question other states which have enacted similar criteria and exactly what levels have been provided for enterococci and whether or not mixing zones have been allowed for enterococci. (33)

439. COMMENT: The DEPE knows full well by its own tests that the discharge of unchlorinated wastewater by ocean outfalls has no measurable effect upon the surfacewater quality. It is the understanding of the Western Monmouth Utilities Authority, that the DEPE has run tests in Long Branch or other beach areas where disinfection facilities were shut off and samples taken in the surf. No bacterial violations were found. These studies should be released. (33)

440. COMMENT: The enterococci criterion of 33 might be a very appropriate number to use for swimmers in recreational bathing beaches, but does it have any relevance in a discharge limit of a sewage treatment plant. (26)

441. COMMENT: The DEPE has proposed a criterion of 61/100 ml at any time for enterococci. USEPA suggested the same value for human health reasons for recreational swimming beaches, but the recommended value was an average of 33 for 30 day average. Unfortunately, the value suggested for swimming beaches was proposed as a criterion for enterococci. The commenter feels that it's a misapplication of background data from the Federal document and should be applied more in terms of averages and not as maximum at any time. It is desired that the DEPE will address this issue in the course of review. (2, 3)

RESPONSE: These comments are outside the scope of this proposal. The DEPE did not propose revisions, in the November 2, 1992, Surface Water Quality Standards "toxics proposal," prohibiting mixing zones for bacterial indicators. The DEPE did, however, propose to prohibit mixing zones for bacterial indicators in a separate proposal which appeared in the New Jersey Register on February 1, 1993. The comment period for the February proposal closed March 12, 1993.

Most of the comments submitted to the DEPE in response to the DEPE's November 2, 1992, "toxics proposal" that concerned the prohibition of mixing zones for bacterial indicators were submitted after the close of the February proposal comment period. However, these comments are almost identical to those that were submitted to the DEPE in response to the DEPE's February 1, 1993, Surface Water Quality Standards proposal. It is requested that commenters review the upcoming adoption notice for the February 1, 1993, Surface Water Quality Standards proposal for responses to comments regarding the prohibition of mixing zones for bacterial indicators.

N.J.A.C. 7:9B-1.14(c)5 Phosphorus

442. COMMENT: New Jersey's Surface Water Quality Standards contain narrative criteria for nutrients and specific numerical criteria for total phosphorus. These appear at N.J.A.C. 7:9-4.5(g) and 7:9-4.14(c)6, respectively. Furthermore, N.J.A.C. 7:9-5.7(b) contains effluent standards for phosphorus discharges to fresh water lakes, ponds, reservoirs, and tributaries to these water bodies. The narrative criteria, in general, state that nutrient concentrations in fresh waters of the State of New Jersey should be kept to levels such that they do not result in nuisance plant growth, or otherwise render the waters unsuitable for designated uses. These narrative criteria further state that DEPE may establish water quality based effluent limitations to avoid such impacts. Such an approach is reasonable, although as currently described subjective and ill-defined.

The numerical criteria for phosphorus basically require that the concentration of total phosphorus in impoundments or their tributaries not exceed 0.05 mg/L, and that total phosphorus in free flowing streams not tributary to impoundments shall not exceed 0.1 mg/L when phosphorus is the limiting nutrient. Although we have not been able to specifically identify the basis for these criteria, it appears that they probably have been derived from the USEPA Quality Criteria For Water ("The Red Book" July 1976, or "The Gold Book" May 1986). In fact, the USEPA decided to not present national criteria for phosphate phosphorus for the control of eutrophication. The USEPA indicated that total phosphates as phosphorus should not exceed 0.05 mg/L in any stream at the point where it enters any lake or reservoir, nor 0.025 mg/L within the lake or reservoir. Although the New Jersey numerical criteria for phosphorus are similar, it is important to point out that the USEPA values are for total phosphate phosphorus whereas the New Jersey criteria are for total phosphorus. The USEPA criteria document goes on further to indicate that a desired goal for the prevention of plant nuisances in streams or other flowing waters not directly discharging to impoundments is 0.1 mg/L total P. It is unclear whether this numerical value applies to total phosphorus or total phosphate phosphorus. We believe it is the latter since the document is dealing with phosphate

phosphorus in its title and throughout its entire discussion. Again, the New Jersey criteria are numerically identical to the USEPA goal although for total phosphorus rather than phosphate phosphorus.

In its desire to control eutrophication in fresh water systems, the State of New Jersey included the numerical criteria for total phosphorus in the water quality standards recognizing that phosphorus is typically the limiting nutrient in fresh water systems. In recent years, it has become widely recognized that strict implementation of the numerical criteria would likely result in water quality based effluent limitations for phosphorus in a large portion of the wastewater discharges to fresh water systems within the State. The consequences of such a program are dramatic with no clearly established corequisite benefit. It is not clear from either a scientific or regulatory basis that the current numerical criteria for total phosphorus in the New Jersey Water Quality Standards are required in order to prevent eutrophication in fresh water systems. As noted above, the USEPA criteria document did not propose criteria for phosphate phosphorus for the control of eutrophication.

It is interesting to note how other states have chosen to prescribe water quality criteria for phosphorus. The USEPA in September 1988 issued a document entitled, "Phosphorus Water Quality Standards Criteria Summaries: A Compilation of State/Federal Criteria" (EPA 440/5-88-012, NTIS #PB89-141444). Within this document summaries of phosphorus criteria within the water quality standards of various states are presented. Although a number of states have numerical criteria some of which are similar to those in New Jersey, it is interesting to note that a large number of States have no criteria at all for phosphorus. The State of Texas for example notes that, "... sufficient information on nutrient cycling in Texas waters and cause-effect relationships between nutrient concentrations and water quality is not presently available." A number of States rely upon narrative criteria similar to that in N.J.A.C. 7:9-4.5(g) including the provision for specification of site specific nutrient criteria and/or permit limitations to be established to control excessive plant growth. Some States prescribe seasonally varying criteria or criteria in terms of a frequency distribution (for example see Arizona and Hawaii).

Based upon our review of other State criteria, it is clear that there is a widely diverging opinion as to how and if criteria for phosphorus should be established. This should not be surprising. Whether or not a particular body of water will experience eutrophication and excessive plant growth is a function of many variables. It is widely known that streams can assimilate greater phosphorus loads than impounded bodies of water. Flow rate, residence time, depth, ability for solar radiation to penetrate the water column, and a multitude of other factors contribute to whether a specific body of water is at risk with respect to nutrient loading. Consequently, we conclude that it is not possible to globally establish criteria for phosphorus or for nutrients in general. What New Jersey's Water Quality Standards can do is specify statewide criteria/policies which prescribe how site specific criteria can be established. Anyone who has been involved in understanding how effluent limitations for nutrients should be established knows that those limitations cannot be established on a statewide basis. Such policies cannot even be implemented on a watershed basis where the watersheds are of the magnitude of "the Raritan" or "the Passaic." It is clear that much smaller segments perhaps subwatersheds as large as for example the Lamington River or the Rockaway River may be feasible for the establishment of nutrient criteria.

In the past year or two, Omni Environmental Corporation has been involved in a partnership between NJDEPE and various municipalities in performing "nutrient studies" which we expect will contribute significantly to our further understanding of how nutrients should be regulated within the State of New Jersey. We believe that partnership has been a very valuable and positive experience for both the State of New Jersey and permittees, wherein both sides (the regulated community and the regulatory community) recognized a dilemma which required resources for resolution and which would not be well served by impetuous regulatory decisions stipulating effluent limiations which (a) could not be met, and (b) would only lead to confrontational adversarial arguments.

The Surface Water Quality Standards should not specifically focus on establishing narrative or numerical criteria for phosphorus alone. Instead, the present system should be modified to prescribe statewide criteria/policies for control of nutrients. Such criteria/policies must include both (a) narrative criteria, and (b) numerical goals. Appropriate concepts will be presented below. However, initially we wish to present an example of the type of criteria/policies that we envision may be valuable in the State of New Jersey. Such an approach is present in the criteria for the State of Arkansas as repeated here.

> Nutrients—Materials stimulating algal growth shall not be present in concentrations sufficient to cause objectionable algal densities or other nuisance aquatic vegetation. As a guideline, total phosphorus shall not exceed 100 ug/L in streams or 50 ug/L in lakes and reservoirs except in waters highly laden with natural silts or color which reduce the penetration of sunlight needed for plant photosynthesis, or in other waters where it can be demonstrated that algal production will not interfere with or adversely affect designated uses and/or fish and wildlife propagation. The Commission may establish alternative nutrient limitations for lakes, reservoirs and streams, and shall incorporate such limitations into appropriate water quality management plans.

The Arkansas criteria are particularly interesting in that they first state a set of objectives (that is, avoiding objectionable algal densities or other nuisance aquatic vegetation). These criteria then present a numerical guideline, albeit for total phosphorus only, which is expected to achieve the objective. We think that such an approach is valuable in that it states an objective and then prescribes a means which, in general, meets that objective, although recognizing that on a case-by-case/site specific basis, alternative numerical criteria may be appropriate.

DEPE should delete the numerical criteria for total phosphorus contained in N.J.A.C. 7:9-4.14(c)6 and the effluent standards contained in N.J.A.C. 7:9-5.7(b). In lieu of this, we suggest that the State of New Jersey augment the nutrient criteria/policies in N.J.A.C. 7:9-4.5(g). We believe that the focus should be away from a phosphorus criteria to a nutrient criteria/policy. That criteria/policy should include both narrative criteria and numerical goals.

The narrative criteria should state that nutrients should not be present in quantities sufficient to cause excessive plant growth. Excessive shall be defined as (1) rendering the waterway unsuitable for the designated uses, (2) causing violations of water quality criteria for other parameters (for example, depression of dissolved oxygen due to respiration and decay of plants, exceedances of pH criteria due to photosynthetic activity, etc.), and (3) resulting in significant changes in macroinvertebrate and fish populations. Determination of whether excessive growth has occurred may not always be simple. Criteria (2) above may be fairly easy to determine by monitoring for parameters such as dissolved oxygen and pH. Criteria (1) above may be somewhat more difficult but can be tested via surveys and actual observances of the uses of the waterway. For example, cessation of the use of a waterway as a potable water supply would clearly document that a designated use as a potable water supply is not being achieved; or substantial reductions in recreational fishing by anglers would indicate that a waterway's designated use as a recreational resource is not being achieved. Criteria (3) above is likely more difficult to test because it requires a significant commitment of resources for periodic monitoring of both the macroinvertebrate and the fish community. Such would have to be conducted on some kind of routine basis by state agencies. If this is fiscally impossible, then the definition of whether excessive plant growth has occurred would be determined by using only the first two criteria above.

A second aspect of the nutrient criteria/policy would provide numerical goals for phosphorus and nitrogen. We believe that NJDEPE should conduct additional research into the exact numerical values which should be included in such a criteria. However, as a point of departure for such research, consider the values presented in the attached Table 1. These values are presented for discussion purposes and are not presented as recommendations for adoption. NJDEPE or an authorized agent must conduct current detailed literature and other research in order to prepare a recommendation for adoption.

Several points with respect to Table 1 must be made. In our opinion, it is clear that the biologically available form of nutrients should be regulated and not the total concentration of nutrients. Therefore, we do not recommend a criteria for total phosphorus but rather for total dissolved orthophosphate phosphorus which is the most convenient and presently available method for determining the biologically available forms of phosphorus. Similarly for nitrogen, we recommend that the goals be prescribed for total dissolved inorganic nitrogen (that is, ammonia nitrogen + nitrite nitrogen + nitrate nitrogen) and not for total nitrogen. The numerical values for phosphorus in Table 1 are identical to those currently in the New Jersey Surface Water Quality Standards. Without having conducted any further research, these numbers appear to be reasonable although clearly they should be adopted as goals and

not as statewide criteria. We would abandon the specification of a goal of 0.05 mg/L for streams at the point where they enter impoundments.

The values for nitrogen in Table 1 are not nearly as well established as those for phosphorus. Substantial literature research must be conducted, and perhaps NJDEPE may need to conduct algal bioassays to develop numerical criteria. The ratios of nitrogen to phosphorus in Table 1 are in line with the stoichiometric coefficients for nitrogen to phosphorus in aquatic plants.

The numerical goals would not be applicable during periods of the year when light and temperature, not nutrient availability, control plant growth (that is, approximately November 1st through February 28th). It seems foolish to require effluent limitations for nutrients when it is physically impossible for plants to grow due to other limitations such as temperature and light. Indeed temperature and light may still be limiting in the months between March and October, and further consideration must be given to this aspect of Table 1.

Presentation of recommendations for water quality criteria without consideration of implementation is irresponsible. Consequently, we have addressed this issue below. Determination as to whether the narrative criteria are being met will of course be a more complex problem than determination as to whether the numerical goals are being met. Consequently, we recommend a step-wise implementation approach, starting with an evaluation of whether the numerical goals are being met. If these goals are not met, then it would trigger a determination as to whether the narrative criteria are being met. Determination as to whether the numerical goals are being satisfied can be easily determined. In the case where point sources may be causing exceedance of the goals, simple monitoring upstream, downstream, and in the effluent of the point source can demonstrate whether the goals are being met and whether a point source is likely to be responsible for exceedance of the goal. We believe it is the responsibility of the permittees within the State of New Jersey to demonstrate at least on a permit renewal time frame (that is, every five years) that the goal is being met. If no point sources are present within a segment/subwatershed, then we believe it is the responsibility of the State of New Jersey to determine if the goal is being met through periodic monitoring (for example, once every five years).

If the numerical goals are being met, then it is likely that the narrative criteria are being met, although such is not necessarily the case. If the numerical goals are not being met, then a determination must be made as to whether the narrative criteria are being satisfied. Again, the agency/entity responsible for determining whether the narrative criteria are being met will be either the permittee or the State of New Jersey depending upon the presence or absence of point source discharges and their impacts as determined by initial receiving water quality monitoring of nutrient concentrations. For example, if monitoring demonstrates that a point source is causing exceedance of the numerical goals, then it will be the responsibility of the permittee to determine if the narrative criteria are being satisfied. This will require study of the physical, chemical, and biological characteristics of the receiving water, as well as a determination as to whether designated uses are being satisfied. This should not be an inordinate task, and the permittee should recognize that it is their responsibility to acquire such information if they are indeed discharging nutrients in concentrations which exceed otherwise accepted numerical goals. If the permittee demonstrates that the narrative criteria are being met even though the numerical goals are not being met, then no effluent limitations for nutrients would be required. However, periodically (for example, every five years), the permittee would be required to demonstrate that the narrative criteria are being satisfied.

If both the narrative criteria and the numerical goals are not being met, then consideration must be given to setting effluent limitations for point source discharges and/or instituting best management practices for control of nonpoint source inputs. If the criteria and goals are not being met and it has been demonstrated that a point source discharge is contributing to violation of the narrative criteria and the numerical goals as demonstrated by studies performed by the permittee, then two options are available. The permittee may accept effluent limitations established by NJDEPE in order to satisfy the numerical goals. Such effluent limitations may be determined using reasonable steady-state critical conditions such as MA30CD5 flows and monthly average temperatures. If such effluent limitations as determined by NJDEPE are acceptable to the permittee, then a reasonable compliance period for the permittee to construct the facilities necessary to meet those limitations can be implemented. If the permittee believes that NJDEPE's limitations are excessive and inappropriate, then the permittee shall have the option to perform additional investigations to determine the phosphorus effluent limitations necessary to satisfy the narrative criteria as opposed to strictly satisfying the numerical goals. The permittee may consider use of statistical models which will more reasonably determine effluent limitations. Such limitations would be established to satisfy the narrative criteria only and not the likely more strict numerical goals. However, it would be the responsibility of the permittee to provide a suitable technical basis for such limitations upon which NJDEPE may rely. Furthermore, as part of this investigation, the permittee may consider whether effluent limitations for the point source discharge alone are sufficient to meet the narrative criteria. If nonpoint sources preclude the attainment of the narrative criteria, then effluent limitations for the point source discharge shall not be required until such time as a comprehensive program for control of both point and nonpoint source inputs of nutrients can be established.

If the narrative criteria are not being met and point source discharges are absent, not significantly contributing to, or not responsible for exceedance of the narrative criteria, then it will be the responsibility of the State of New Jersey to investigate and institute best management practices for control of nonpoint source inputs in order that the narrative criteria can be attained. We understand that a mechanism does not exist for such a program. We recommend that the State investigate a funding program which might include grants to municipalities for institution of BMPs to reduce nutrient loadings to fresh water systems. Without such a cooperative program between the State and the municipalities, control of nonpoint source nutrient loads will never be effective.

We believe that it is necessary to control nutrient inputs to the fresh water systems of the State of New Jersey. However, we further believe that such controls are not necessary in every instance and that statewide criteria and/or effluent standards should not be prescribed. The problem is site specific and cannot be analyzed and implemented on much greater than a subwatershed basis. Above we have proposed a blueprint which we think is workable. It relies upon a combination of narrative criteria which express the objectives which must be achieved in controlling nutrient loadings, as well as numerical goals which prescribe some minimum level of water quality within which the narrative criteria are expected to be met. We believe that the current system which prescribes numerical criteria and numerical effluent standards should be abandoned and that the State's current nutrient policies should be augmented to include the narrative criteria and numerical goals.

TABLE 1*

Nutrient Numerical Goals for Control of Excessive Plant Growth
March 1-October 31

	Total Dissolved Orthophosphate Phosphorus (mg/L)	Total Dissolved Inorganic Nitrogen (mg/L)
STREAMS	<0.1	<1.0
IMPOUNDMENTS	<0.05	<0.5

• These values are presented for discussion only and are not recommended for adoption. Detailed literature and other research must be conducted before a recommendation can be presented. See text for explanation/comments.

RESPONSE: This topic was outside the scope of the November 2, 1992 rule proposal. However, the DEPE appreciates the comments and suggestions provided on the regulation of phosphorus. These comments will be considered as the DEPE reevaluates its approach to regulating phosphorus.

N.J.A.C. 7:9B-1.14(c)13 Ammonia

443. COMMENT: DEPE's readoption of the current ammonia standards for trout and non-trout surface water classifications has widespread impact throughout the state as every municipal discharge contains ammonia. Because of the ubiquitous nature of this pollutant, it is critical that the standards reflect the latest available scientific information on this subject.

Generally, effluent limits are established on a "not to exceed" basis. Engineers translate this to mean a 95 to 99 percentile compliance projection. Ammonia removal is an "all or nothing" process for engineers, because one cannot design a facility to remove intermediate levels of ammonia. Facilities achieving full nitrification will reduce ammonia to reflect 90 to 95 percent removal, consistently. Thus, in order to avoid needless capital improvements, DEPE must establish reasonable ammonia limitations.

There is no proposed revision to the water quality standards for ammonia at this time. Instead, DEPE relies on outdated and erroneous USEPA Red Book criteria which will force dischargers to expend large sums to achieve scientifically unjustifiable water quality standards. DEPE admits that "[a]doption of these new and updated water quality criteria will correct most of the criteria which could be considered overly stringent when compared to the Gold Book criteria. The one exception to this statement is the ammonia criteria." This is not satisfactory to the AEA membership, all of whom discharge ammonia. This rule should incorporate the latest scientific evidence which shows that prior USEPA criteria values are overly stringent.

In 1976, USEPA published water quality criteria known as the Red Book, which recommended a 0.02 mg/L unionized ammonia criterion for aquatic life protection. The lowest reported acute value for salmonids (0.2 mg/L NH_3) was used to develop the 0.02 mg/L standard by applying an application factor of 10 (more recently known as an acute/chronic ratio). The purpose of the application factor was to establish a "no effect concentration or level" (NOEC or NOEL) or chronic criteria. The chronic criterion was a 24-hour standard representing a constant, permissible exposure to 0.02 mg/L NH_3 in the receiving water.

DEPE proposes these as the water quality criteria. AEA objects to these criteria on two grounds. First, the Red Book criteria, even if adopted, contains a calculation error. DEPE must repropose ammonia standards based on correct calculations. Second, USEPA has published superseding ammonia criteria which reflect better scientific information. The DEPE, which relies on the USEPA criteria in virtually all other instances, must adequately explain its departure in this instance. (11, 12)

444. COMMENT: The 1984 criteria and New Jersey's current ammonia criteria are based on information that does not reflect the latest available information relative to fishery impacts. Subsequent USEPA studies did not verify either the assumed pH or temperature effects contained in the 1984 criteria. Because of the uncertainties surrounding the pH/temperature algorithm, several states have appropriately declined to adopt USEPA's pH/temperature variable criteria. Even USEPA recognizes that the 1984 criteria are not appropriate during winter months for warm water fishery uses, and are not appropriate at temperatures above 20 degrees Celsius. The DEPE should promulgate ammonia criteria reflecting the best available scientific information. At a minimum, this would require significant revision to USEPA's 1984 Ammonia criteria. The following addresses the commenter's concerns relative to those criteria.

Since publication of the Red Book criteria, USEPA and virtually all states have recognized that warm water fisheries do not require the same level of ammonia protection as is necessary to sustain cold water fisheries. From 1976 to 1984, most states adopted constant warm water fishery unionized ammonia criteria in the range of 0.05 to 0.10 mg/L. USEPA's 1984 criteria Document also recognizes that warm water fisheries require less protection than cold water fisheries; however, the difference in suggested protection levels is less than prior USEPA recommendations (warm water criteria are about 1.4 times cold water criteria at certain pH levels).

The 1984 304(a) criteria are premised on a dramatically different approach to ammonia toxicity regulation than the Red Book standard. Prior to adoption of the 1984 304(a) criteria, USEPA suggested that a fixed unionized ammonia standard would protect aquatic life uses. The amount of total ammonia that could be discharged to meet the fixed standard varied with pH and temperature. Generally, much higher total ammonia levels were acceptable at low pH and low temperature. As a consequence, few municipalities received ammonia limitations for winter months because of the reduced toxicity under those conditions.

The 1984 304(a) criteria suggests that the ammonia standard fluctuate with pH and temperature. This approach renders the criteria dramatically more stringent under low pH and low temperature conditions. In addition, USEPA assumes that chronic toxicity will increase more dramatically than acute toxicity under low and high temperature and pH. Generally, USEPA suggests increasing the acute/chronic ratio from 16 to 24 as pH decreases below 7.7_{su}. This last adjustment was not included in the 1983 draft criteria, but was added as a further safety factor in the final 1984 criteria. Although supported by the data, less stringent chronic standards for pH above 7.7_{su} and temperature above 20 degrees were not incorporated into the document. This ensured that the document would not relax the 0.05 mg/L warm water criterion used in many states.

The following table compares the previously acceptable chronic unionized ammonia criteria with the 1984 304(a) criteria at several pH and temperature levels:

Fixed Criteria	1984 Document	Fixed/1984 Difference
0.05-0.1 mg/L	0.043 (T = 25°C; pH = 7.7)	1.2-2.3
0.05-0.1 mg/L	0.022 (T = 10°C; pH = 7.7)	2.3-4.5
0.05-0.1 mg/L	0.0083 (T = 25°C; pH = 7.0)	6.0-12
0.05-0.1 mg/L	0.0042 (T = 10°C; pH = 7.0)	11.9-23.8

The 1984 304(a) criteria are far more stringent than prior approaches and would result in significantly greater requirements for ammonia removal throughout the State of New Jersey. Imposition of these requirements is not justified. The scientific community has challenged the validity of the 1984 criteria. Members of the ammonia toxicity document peer review committee have raised serious concerns regarding the proposed approach (notably Drs. Thurston and Lee). This led to careful scrutiny of the technical basis for the 1984 304(a) criteria and the inclusion of numerous caveats regarding their use. DEPE must incorporate these caveats in order to promulgate criteria applying the best available scientific information.

First, the 1984 304(a) criteria document expressly states that site-specific criteria should be considered whenever application of the criteria leads to stringent results because of the uncertainties inherent in the criteria approach. Second, the criteria document identified several issues related to water quality modeling for ammonia. These issues are as follows:

1. The criteria should be applied on a three year return frequency;
2. For POTWs, the acceptable averaging period for chronic criteria should be 30 days;
3. The chronic criteria should not be used to develop winter limitations for warm water fisheries without site-specific information; and
4. For temperatures above 20 degrees Celsius, site-specific criteria are suggested due to limited information on temperature impacts.

As described in points 1 and 2 above, the USEPA criteria, on which DEPE relies, is based on a return frequency approach (that is, once in three years). USEPA adopted statistical modeling procedures to implement the ammonia toxicity criteria. The proposed criteria, therefore, should do likewise, and not as proposed, use steady-state modeling procedures to impose more stringent water quality standards and permit limits than the intended statistical modeling procedure and that are necessary to protect water quality. Points 3 and 4 raise significant uncertainties about USEPA's new approach (that is, pH and temperature dependent criteria) and the 1984 criteria recommended against the use of the new criteria in certain instances:

> Site-specific criteria development is strongly suggested at temperatures above 20°C because of the limited data available to generate the criteria recommendation, and at temperatures below 20°C because of the limited data and because small changes in the criteria may have significant impact on the level of treatment required in meeting the recommended criteria.

The 1984 USEPA ammonia criteria are apparently valid nationally only when the water temperature is exactly 20 degrees Celsius. This occurrence is atypical for the waters of New Jersey and the proposed standards should reflect this obvious fact. As noted, the 1984 criteria relied on limited toxicity data at higher temperatures; therefore, site-specific criteria development is "strongly suggested." Regarding the technical data supporting USEPA's new pH/temperature adjustment on toxicity that lead to this cautious approach the 1984 criteria document states:

> The very limited amount of data regarding effects of pH on chronic NH_3 toxicity also indicate increasing NH_3 toxicity with decreasing pH, but the data are insufficient to derive a broadly applicable toxicity/pH relationship. Data on temperature effects on acute NH_3 toxicity are limited, and somewhat variable, but indications are that NH_3 toxicity to fish is greater as temperature decreases. There is no information available regarding temperature effects on chronic NH_3 toxicity.

The Federal Register notice for the 1984 ammonia criteria also cautions against using it for wasteload allocation modeling. There is limited data on the effect of temperature on chronic toxicity. USEPA will be conducting additional research on the effects of temperature on ammonia toxicity in order to fill perceived data gaps. Because of this uncertainty, additional site-specific information should be developed before these criteria are used in wasteload allocation modeling.

Subsequent to the publication of the 1984 criteria, on December 6, 1985, USEPA internally agreed not to use its published chronic toxicity approach to set winter ammonia limits for warm water fisheries until completion of further temperature effects research. In the interim, USEPA advised imposition of winter limitations based on acute criteria.

Significant new research, much of it conducted by USEPA, has been completed since issuance of the 1984 ammonia criteria document, and this new information confirms that the 1984 criteria are erroneous and that substantially increasing ammonia levels will fully protect aquatic life uses. Some of the most significant discrepancies that require recalculation of USEPA's ammonia criteria are as follows:

- USEPA withdrew the white sucker chronic data and acute:chronic ratio (A/C) of 30 which requires a lowering of the 1984 criteria A/C ratio from 16 to 13.5.
- Two of the highest A/C ratios (fathead minnow (20) and rainbow trout (14)) were based upon life cycle histopathological endpoints after continuous exposures of two years or more. Such long term exposures cannot physically occur under the calculation and permitting regime used by DEPE (7/Q/10, high temperatures, restricted seasonal adjustment). When the histopathological endpoints are appropriately excluded, as required by USEPA criteria guidance, to reflect an exposure scenario of critical temperature, low flow, design flow, assumed worst plant performance, the A/C ratio is reduced from 13.5 to about eight.
- Subsequent USEPA research could not verify that the assumed pH and temperature algorithm used to establish the 1984 chronic criteria reflects expected impacts. USEPA's latest field tests on a number of warm, cold, and cool water species did not discern adverse aquatic life effects at exposures three to nine times the criteria. Therefore, a constant criteria approach appears appropriate based upon the most recent data.
- In applying criteria, USEPA recommends use of statistical modeling methodologies which more precisely reflect effluent limits necessary to achieve USEPA criteria by avoiding multiple worst case assumptions. Statistical results are typically two to five times higher than the results of steady-state models. Thus, steady state model applications should generally allow less restrictive criteria to offset additional safety factors included in the application methodology.

Because of the acknowledged uncertainties surrounding USEPA's suggested approach to ammonia toxicity regulation, USEPA conducted additional research on the effects of pH and temperature on ammonia toxicity. On October 7, 1987, Battelle Corp. completed a USEPA funded report entitled, The Effect of Temperature on the Acute and Chronic Toxicity of Unionized Ammonia to Fathead Minnows and Channel Catfish. The results of that research were intended to address whether the assumed temperature effect used to establish chronic criteria was appropriate. Because there were significant problems with the testing, USEPA never acted on the data contained in that report. (Problems with channel catfish tests were encountered and rendered that data useless, and significant pH variation and low DO occurred in the minnow tests). The fathead minnow results, indicated that the 1984 criteria approach was unnecessarily stringent, as follows:

- The effect of pH on chronic toxicity, if any, is substantially less than previously estimated;
- Chronic endpoints below 10 to 12 degrees Celsius have little meaning for warm water species because fish growth and reproduction do not occur below these temperatures;
- The fathead minnow acute/chronic ratio for shorter term chronic exposures is four to six, not twenty. Thus, the appropriate national acute/chronic ratio for warm water fisheries should be about eight, not sixteen as previously estimated if only short term exceedances were allowed; and
- Temperature effect between 10 and 25 degrees Celsius is 2.5 to 3.0 times less than previously estimated.

This new information challenges the core assumptions of the pH/temperature approach embodied in the 1984 criteria. Temperature effects below 10 degrees celsius are essentially nonexistent and significantly less restrictive limits should apply above 20 degrees celsius. Nevertheless, the published USEPA criteria predict chronic toxicity levels to remain constant or decrease. These data indicate that USEPA's criteria under predicts allowable exposures at both high and low temperatures.

USEPA researchers from the Monticello lab conducted further temperature effects research on fourteen freshwater organisms (five fish, nine invertebrates), but could "not clearly demonstrate any relationship between ammonia toxicity and temperature." Additional pH related research, conducted as part of USEPA's development of the saltwater ammonia criteria, could not confirm a pH/temperature effect for many species, and therefore it was not used in setting the criteria. In addition, USEPA changed the acute/chronic (A/C) ratio applicable to both the fresh and salt water documents from 16 to about 13, due to the deletion of the previously relied upon white sucker chronic data, which increased the chronic standards by approximately twenty percent.

A recent study performed by Biological Monitoring, Inc. (BMI) of Blacksburg, Virginia, examining seasonal ammonia criteria for a small warm water fishery stream in Virginia, supports the theory that chronic toxicity of unionized ammonia is only slightly related to temperature and is probably unrelated to pH. Consistent with the Battelle Study cited above, the temperature effect (if any) in this study was approximately one-third of the value predicted using the USEPA 1984 temperature toxicity derivations. The BMI study determined that the geometric mean acute/chronic ratio, based on sensitive representative species testing, was nearly the same in cold and warm water and both were well below the ratio determined by USEPA in 1984 (5.7 and 7.2 respectively). A re-evaluation of the warm water species chronic toxicity data utilized by USEPA in 1984, deleting (1) the white sucker data (54 Fed. Reg. 19230 (May 4, 1989)), and (2) histopathological endpoints, yields a geometric mean A/C ratio of 8.3, which is consistent with the A/C ratios observed in the BMI Study.

The USEPA laboratory data developed since the publication of the 1984 criteria (by both USEPA and other laboratories) have not confirmed the pH/temperature chronic toxicity relationship used by USEPA in that document. Furthermore, more recent information indicates that the A/C ratio for warm water fisheries is generally overestimated by USEPA by a factor of two, especially for cold water (fall/winter) conditions. Thus, the foundation of the 1984 ammonia criteria is of questionable scientific validity. Accordingly, DEPE should not propose surface water ammonia criteria relying on that methodology.

In a 1988 study of the USEPA methodology underlying the ammonia criteria, William J. Lewis criticizes the curve-fitting procedures and simplifying assumptions used to derive the temperature and pH corrections for the ammonia criteria. The upper and lower confidence limits for the criteria relationships between pH, temperature, and ammonia criteria produced a zone of uncertainly ranging from 63 to 159 percent of the nominal criteria value. Ammonia concentrations that deviate by 50 percent or more from the criterion table values could therefore not be considered biologically distinct. The degree of uncertainly in the relationship between LC_{50} and temperature is even larger than for pH. Lewis concludes that the ideal level for protection may "deviate considerably" from the USEPA criteria.

Because of a lack of sufficient data to define the pH-toxicity curve for individual species, USEPA assigned fixed values. Lewis found that, while there is evidence of increasing toxicity of unionized ammonia as pH increases above 8.5, the small amount of data precludes a conclusion of any such correlation. USEPA's national criteria numbers are based on an assumption that the LC_{50} values flaten at a pH of 8.0. The introduction of the curve introduces bias that underestimates the LC_{50} at pH 8.0 to 8.5 and overestimates it at pH values above 8.5. Underestimating the LC_{50} in the 8.0 to 8.5_{su} pH range is of great significance and is not equaled out by overestimating above 8.5_{su} because a relatively small percentage of surface waters in New Jersey have pH above 8.5_{su} and a substantial proportion of surface waters have pH between 8.0_{su} and 8.5_{su}. Thus, there is a bias built into the data to ensure inaccurately low LC_{50} values within the range of a great proportion of New Jersey surface waters that distorts the perceived relationship between pH and ammonia toxicity.

Lewis also found a high degree of uncertainty in the relationship between LC_{50} and temperature for individual species. Temperature cannot account for approximately half of the variance in these relationships. On a relative basis, the scatter for data applicable to individual species is much larger than it is for the pH relationship. The 1984 criteria document acknowledged that interactions between pH and temperature were not quantifiable using present data but, nonetheless, suggested a pH/temperature dependent approach. In addition to direct variation, there is a compounding of variance in the pH and temperature corrections when the two are used together in making individual LC_{50} estimates for combinations of pH and temperature.

Most significantly, the same scientists upon whose research the 1984 criteria is based, have since published findings that contradict the 1984 criteria approach. Because of these subsequent admissions, continued reliance on the data of these researchers, as incorporated in the USEPA ammonia criteria, is arbitrary and capricious. A 1988 study by Thurston, noted the following ammonia toxicity data gaps: (1) extreme pH and temperature; (2) natural buffering systems; (3) prior acclimation at sub-acute ammonia concentrations; and (4) short-term and cyclic "spike" concentrations. Acclimation, in particular, allowed for substantially less restrictive ammonia limitations. This condition is frequently encountered downstream of municipal discharges.

In 1985, two other authors, Willingham and Thurston, conducted site-specific studies of ammonia toxicity and found that trout exposed to ammonia concentrations exceeding the USEPA criterion experienced *enhancement* rather than impairment. Life cycle laboratory studies were conducted at Bozeman, Montana to determine chronic effects of ammonia on rainbow trout by Thurston in 1990. In that study, even though trout were exposed to mean ammonia concentrations up to seven times the USEPA critera, no adverse chronic effects were observed. Data from the 1990 Thurston study shows significantly improved survival (96-hour LC_{50} values) for rainbow trout acclimated to ammonia concentrations up to 0.09 mg/L. Prolonged acclimation increased fish tolerance to peak concentrations of ammonia. Acclimation to ammonia discharges is expected at points below any municipal wastewater treatment facility.

Russo, another of the USEPA researchers who compiled the 1984 criteria, also pointed out problems with the pH/temperature toxicity matrices in the 1984 criteria. In a 1988 experiment, coho salmon alevins were exposed to constant ammonia concentrations and temperatures, and variable pH and water chemistries. These experiments report the optimum pH survival range at 8.7 plus or minus 0.7. Toxicity increased both above and below that range. Thus, USEPA chronic criteria should increase significantly at pH above 7.7, contrary to the approach taken in the 1984 criteria. Addition of five percent NaCI also significantly suppressed ammonia toxicity while increasing $NaHC0_3$ buffering increased toxicity.

USEPA has also conducted field tests to determine whether the recommended criteria were reasonable thresholds for adverse aquatic life impacts to salmonids and other cool and warm species. In Ammonia Effects on Macroinvertebrates and Fish in Outdoor Experimental Streams, (EPA-Duluth and Monticello Lab (1987), Hermanutz determined that acceptable ammonia exposures using constant criteria (that is, non-pH/temperature dependent) could be significantly above those recommended in the 1984 criteria. The exposures ranged from sixty to ninety days, contrary to the criteria recomendation allowing only four to 30 day exposures. The 1991 TSD at Table 1-1 presented some of the field test data verifying the 1984 criteria values are clearly too conservative. USEPA could not even discern impacts on rainbow trout with non-pH/temperature dependent criteria where the average unionized ammonia levels were five times the 0.32 mg/L trout criteria. (These results were similar to Thurston's 1990 results.) White sucker (previously assumed very sensitive) were found to have no impacts at nine times a 0.05 mg/L unionized ammonia standard. In general, a 0.10 mg/L unionized ammonia level is acceptable for extended exposures.

USEPA reported impacts on channel catfish at a concentration of 0.05 mg/L. Closer inspection of the Hermanutz report, however, does not support this conclusion. It appears that the difficulties in handling channel catfish, similar to those experienced in the Battelle Study, were also experienced by Hermanutz. Three channel catfish tests were run with dramatically different results. In the first channel catfish exposure (1983-A), adverse effects were encountered even at extremely low exposures (0.011-0.026 ug/L unionized ammonia). The previously reported channel catfish chronic level was 0.280 mg/L (an order of magnitude higher). In the second (1984-A) and third (1984-B) channel catfish tests, slight growth impacts occurred at 0.153 mg/L and no growth impacts occurred at exposures to 0.209 mg/L, respectively. Based upon the two followup exposure analyses, it is apparent that an unionized ammonia criterion of 0.10 mg/L should be fully protective of channel catfish.

The following chart compares no effect chronic exposure results from USEPA's instream studies presented in the 1991 TSD and the 1984 criteria document's laboratory predictions.

Unionized Ammonia (as N *in* mg/L)

	Field	Laboratory	Note
Fathead Minnow	0.45	0.104	Chronic input not detected at 4.5 times lab chronic value.
Bluegill	0.15	0.093	No chronic impact at 1.5 times laboratory value.
Channel Catfish	0.15-0.21	0.103-0.28	Chronic impact registered near predicted value.
White Sucker	0.45	0.058	Chronic input not detected at 7.0 times lab chronic value.
Rainbow Trout	0.15	0.03-0.07	No chronic impact at two to five times laboratory value.
Walleye	0.15		Walleye would not be considered "sensitive species" based on these results.

One of the most important factors to note in USEPA's "field verification" study is that USEPA did not attempt to compare results with its recommended pH/temperature variable criteria. USEPA itself used fixed criteria levels (0.05, 0.25, 0.45) which were met under "average stream pH and temperature ... concentrations of un-ionized ammonia varied daily and seasonally due to natural pH and temperature fluctuations." Application of the pH and temperature dependent criteria as originally proposed by USEPA, demonstrates even greater deviation from USEPA's national criteria with no observed adverse effect.

USEPA follow-up studies have verified that the acute/chronic ratios for trout, fathead minnow, and white sucker are in error by a factor of two to four. The true geometric average acute/chronic ratio for warm water species should be on the order of six to eight. Contrary to information contained in the 1984 criteria, white sucker are far less sensitive to ammonia toxicity than indicated.

Where only short term chronic exposures are anticipated (i.e., less than sixty days), DEPE should delete the histopathological endpoints contained in the national chronic criteria. These endpoints reflected second generation spawning impacts after one to two years of exposure. When these endpoints are not included in the calculation, the rainbow trout acute/chronic ratio is six rather than fourteen and the fathead minnow acute/chronic ratio is 4.5 rather than 20. The recalculated acute/chronic ratio becomes eight, i.e., doubling the acceptable ammonia levels to a level of 0.10 mg/L un-ionized ammonia or 0.0822 mg/L (as N). This concentration level conforms to the results of USEPA field and laboratory research concerning acceptable ammonia toxicity exposures.

The latest scientific data supports modified summer and winter chronic ammonia toxicity limits. USEPA's research indicates that adverse chronic effects are not anticipated where long term (30 to 90 days) un-ionized ammonia levels do not exceed 0.10 mg/L. None of the chronic tests reported in the 1984 criteria for warm water species fell below this level at a pH above 7.0_{su}. Assuming the validity of the acute pH/temperature algorithm, when an appropriate acute/chronic ratio of 8.0 is used, USEPA's acute data yields similar results for a wide range of pH/temperature combinations.

These USEPA follow-up studies demonstrate that the Red Book and 1984 national criteria are unnecessarily stringent and that the pH/temperature algorithm is not supported by credible scientific information. The prior laboratory testing appears to have significantly "over predicted" aquatic life impacts in all cases. This is not surprising, given the scant information that was underlying the 1984 criteria proposed approach to criteria development.

Several states have rejected the 1984 criteria approach because of the more recent scientific information. For example, in its 1990 triennial review, Delaware deferred adoption of USEPA's proposed criteria and scheduled further review of the new information. California did not adopt USEPA's amonia criteria after carefully considering new and additional data identifying the scientific uncertainties with the 1984 criteria Document. The State Water Resources Control Board of California concluded that "the questions raised by these studies suggest that much more research is needed before this criteria document should be relied upon to commit resources that may not be necessary." To date, California has not adopted USEPA's criteria and relies primarily on acute criteria (ranging from 0.8 to 0.4 mg/L) to avoid adverse instream impacts from un-ionized ammonia.

Other factors dramatically affect effluent limitations derived to meet ammonia toxicity objectives. Three of the most important factors are (1) the critical conditions of the receiving stream, (2) the upstream pH levels,

and (3) the type of model selected. Statistical models, rather than steady-state modeling, can best predict actual instream water quality. Steady-state modeling generally employs a number of conservative assumptions such as the simultaneous occurrence of (1) low flow, (2) design plant flow, (3) poor plant performance, and (4) a high instream temperature. Because of the significant number of conservative assumptions involved, the selected pH often reflects the average plant condition.

More refined modeling methodologies generally yield more reflective (and, therefore, more reasonable) results. For example, statistical models generally avoid multiple worst case assumptions and better predict actual instream water quality. Experience shows that statistical models, such as those recommended for use in the 1984 criteria, will produce conclusions two to five times higher than steady-state models, depending upon the types of conservative assumptions employed in the model development. Even where steady-state models are employed, statistical methodologies may convert the model output into thirty day permit effluent limitations. The DEPE proposal to use steady-state 7Q10 flow for effluent limit derivation yields an overly and unnecessarily stringent result. USEPA's 1984 criteria recognized that 30Q5 or 30Q10 flows are more appropriate in applying ammonia criteria for POTWs designed to remove ammonia. Therefore, increased flows should be allowed for ammonia. Finally, DEPE should establish seasonal limitations in all cases. Increased stream flow and decreased temperatures should accompany winter discharges. Increased ammonia levels will not pose a concern under these conditions and should be granted.

The continued reliance on the Red Book to establish un-ionized ammonia criteria is not scientifically defensible. The 1984 304(a) criteria document recommendations on development of pH/temperature dependent criteria also lack scientific support as subsequent USEPA research has demonstrated that the pH/temperature algorithm is not supported and that the recommended criteria are far too stringent. In particular, the acute/chronic ratio is in error by a factor of two given the regulatory regime used to set effluent limitations and acclimation must be considered in assessing impacts downstream of municipal facilities. Lastly, use of a 7Q10 flow is not justified in light of research confirming that (1) it produces unnecessarily stringent limits and (2) 30 day exposures are fully protective.

The following recommendations regarding adoption and implementation of ammonia toxicity criteria are proposed:

- The criteria should be fixed (that is, not pH/temperature dependent);
- The applicable 30 day average standards should be:
  - —0.05 mg/L—trout
  - —0.10 mg/L—non-trout
  - —Return Frequency—once in three years;
- Standards should be applied under 30Q5 flows where steady state models are employed;
- Dynamic modeling should be stated as the preferred modeling methodology. (11, 12)

445. COMMENT: There is no proposed decision to the water quality standards for ammonia, in spite of the fact that there should be. DEPE relies on outdated and erroneous USEPA criteria, which will force dischargers to expend large sums to achieve scientifically unjustifiable water quality standards. (20)

446. COMMENT: The proposed seasonal increase in the discharge of ammonia during the winter months, addresses the needs of aquatic life, but does not take into account the impacts such actions will have on our customers as well as our ability to meet the strict standards of SDWA. The presence of ammonia at the levels proposed in the raw water sources produces chloramines when chlorinated for disinfection. Chloramination is a disinfection process that is effective at reducing trihalomethanes in the treatment process but not as effective as a pre-disinfectant. However, individuals on kidney dialysis must be alerted to this so that they may take necessary precautions. The consequences if not addressed can be fatal. This proposal will severely interfere with the disinfection process and attribute to problems with taste and odor in drinking water. Additionally, ammonia can form an intermediate dichloramine byproduct which has an unpleasant taste and odor. As proposed, the ammonia standard will impinge upon the water industry's ability to produce safe product in accordance with present and proposed Federal SDWA amendments. (32, 34, 44)

447. COMMENT: According to work published by Wetzel in 1983, proportions of NH_4+ and NH_4OH (undissociated) in water are dependent on pH and temperature. Both pH and temperature should be considered in the derivation of surface water quality for ammonia.

NJDEPE sets precedence for considering environmental variables that have the potential to impact toxicity/bioavailability/solubility with the consideration of hardness in its total recoverable metal criteria. What is the scientific justification for not considering pH and temperature? (16)

RESPONSE: These comments are outside the scope of the November 2, 1992 proposal. The DEPE did not propose revision to the ammonia criteria as part of the November 2, 1992, "toxics proposal." As described in the November 2, 1992 proposal, the DEPE is in the process of developing New Jersey specific ammonia criteria. The DEPE has hired an outside consultant to develop New Jersey specific ammonia criteria. Acute and chronic aquatic life protection ammonia criteria, specific to different types of waterbodies (for example, saline, fresh-nontrout waters), were developed and presented to the DEPE for review. These draft criteria were presented to the public for initial review in the February 1, 1993, New Jersey Register as part of an Interested Party Review document concerning changes to the NJPDES and Surface Water Quality Standards regulations.

Closer examination of the draft criteria by the DEPE revealed the need to eliminate several of the studies originally used to calculate the chronic criteria from the data base. Several of the studies were eliminated because they did not meet USEPA guidelines for utilization in criteria development. As a result, the criteria are being recalculated by the DEPE's consultant. Comments submitted to the DEPE on ammonia criteria are being forwarded to the consultant for consideration. In addition, the DEPE has decided to update the economic impact analysis originally completed by the DEPE's consultant for the New Jersey specific ammonia criteria to consider recent monitoring data, new ammonia dischargers, and approximately 50 waterbodies whose surface water classification changed as of July 26, 1993.

A formal proposal containing the updated New Jersey specific, aquatic protection-based ammonia criteria and economic impact analysis should be available in 1994. The DEPE will also include human health-based criteria for ammonia which will be developed based on considerations of the formation of chloramines, interference with effective disinfection, and problems with taste and odor in the finished water.

Practical Quantitation Levels

448. COMMENT: DEPE proposes adopting practical quantitation levels (PQLs) to reduce analytical uncertainty. We support this approach and PQLs should be determined for each analyte/method for which DEPE establishes an enforceable control limit. However, the following issues concerning development of appropriate PQLs where compliance determinations for extremely low analyte concentrations are to be made on a routine basis must be addressed. Recommendations to reduce the risk of "false positive" test results and misdirected enforcement and compliance strategies are also provided.

- DEPE must consider analytical variability in determining the detection limit for an analyte. Two major sources of analytic variation are matrix effects or interferences and laboratory errors. Use of modern methods and technologies produce different analytic results for the same sample because of different operators, equipment, and conditions. The Method Detection Limit (MDL) capabilities differ from lab to lab. Individual analysts operating at the same lab also produce variation.
- Uncertainty of analytical procedures must be considered in establishing PQLs. Basic analytical chemistry references such as Standard Methods and Principles of Environmental Analysis explain that if a measurement is repeated many times under identical conditions, the results of each measurement will be distributed randomly about a mean value because of uncontrollable or experimental error. The PQLs should account for this variability.
- PQLs should be established so that false positives (reporting an analyte present when it is not) and false negatives (reporting an analyte as not present when it is) have a probability of occurrence of less than one percent.
- Data should be collected and analyzed to provide highly reliable data. (The reported concentration has a confidence level of 99 percent.)
- Regulatory limits and compliance monitoring requirements should only be imposed for an analyte when laboratories certified for the analyst and necessary analytical method are available. (11, 12)

449. COMMENT: Many of the PQLs proposed for surface water have been derived using factors significantly different than those used by the USEPA to set PQLs, resulting in values that are not likely to be routinely quantifiable by New Jersey-certified laboratories. Many of the PQLs are also substantially below "routine" calibration points performed by

laboratories. Accordingly, it would be appropriate for the DEPE to submit performance evaluation samples to the State-certified laboratories and verify that a high percentage of the laboratories can quantitate analytes on the proposed list to ± 40 percent of the PQL. (16)

450. COMMENT: N.J.A.C. 7:9B-1.5(e)7 sets effluent limitations at detection limits when effluent limitations pursuant to N.J.A.C. 7:9B-1.6 are less than the detectable concentrations. It is recommended that N.J.A.C. 7:9B-1.5(e)7 be deleted. (18)

451. COMMENT: The use of the practical quantitation level (PQL) as the basis for making compliance determinations when water quality-based NJPDES permit limits are below the analytical quantitation level is supported. (4)

452. COMMENT: The changes in freshwater criteria for many of the toxic substances adopted by New Jersey in 1989 are beyond Best Available Control Technology (BACT). In addition, the limits for some substances are below their respective Method Detection Levels (MDLs). It is our belief that implementation of such criteria would be impossible to achieve, monitor and enforce. BACT and MDL should be considered in a proposed change to any criterion. (25)

453. COMMENT: The use of Enforceable Levels (ELs) in conjunction with PQLs should provide New Jersey with appropriate regulatory control limitations. As stated in Scott Weiner's September 18, 1992 letter, "it is anticipated that the PQLs would become more sensitive over time and enable the DEPE to improve its regulatory efforts." Because PQLs will be lowered over time, the effectiveness and predictability of ELs will also be reduced. (18)

454. COMMENT: In the justification for ELs, the DEPE states that any measurement between the PQL and the MDL is subject to great variation and uncertainty, and therefore, should not be used as a regulatory limit. We agree with the above statement and with the establishment of ELs, and we concur with the DEPE's conclusion that because of chance variation in measurements at these low levels, measurements below the PQL should be considered neither as excursions nor as violations of permit limitations. (18)

455. COMMENT: Because of the possibility of false detections at or above the PQL over a long period of time due to variability in the measurement process, we conclude that one exceedance of a PQL should not automatically trigger a violation or modifications to a facility's permit. At a minimum, the DEPE should use two consecutive exceedances. We believe, however, that this reopener clause is not warranted. (18)

456. COMMENT: The DEPE did not indicate the number of laboratories that were used in the determination of an MDL because the laboratories with identical values were eliminated from the original list of laboratories. Additionally, the study did not take into account the effects of matrix interferences. We therefore conclude that the Interlaboratory Method Detection Limits (IMDL) as stated do not represent a true method detection level. (18)

457. COMMENT: Detection limits for many pollutants are susceptible to interferences in the effluent sample. If the effluent limit and/or a pollutant is established as non-detectable, then a permittee must be able to use an analytical method that has a reliable detection limit. Despite USEPA's contention that its chronic toxicity bioassay test protocol has an acceptable coefficient of variation and correlates with instream impacts, the scientific as well as the regulated community has continued to question the reliability of this test for establishing permit limitations. The specification of test methods, chemical or biological, which are known to produce "false positive" results is particularly unjust, considering the substantial penalties that can be imposed under the Clean Water Enforcement Act (CWEA). The NJDEPE should modify its regulations to ensure that only analytical methods with reliable detection limits are used in regulatory programs. (45)

458. COMMENT: A regulatory definition should be clear and succinct so that it is understood by reasonable people. Most of the criteria in these standards are quantitatively defined. To determine a quantity, a measurement must be made. Thus, a quantitative standard must be reliably measurable, or it is subject to arbitrary and capricious interpretations. These proposed regulations require measurements which are not physically measurable, such as concentrations for some of the regulated substances.

Any criterion for a parameter which is less than that parameter's PQL is essentially unmeasurable. Only nine percent of the regulated human carcinogens are measurable at the concentration of their criteria. As noted by chemists in the DEPE, improvements in laboratory techniques and laboratory quality control might decrease PQLs by about 40 percent within the coming decade. But such an improvement in laboratory technology would only make five percent more of these regulated human carcinogens measurable at the level of their criteria. Even with foreseeable technological advances, over 85 percent of these criteria are and will be unmeasurable. (8)

459. COMMENT: One possible consequence of regulating to a concentration that can not be measured is based on the fact that the DEPE now assumes, in its NJPDES fee structure, that, when a substance is undetectable, its concentration is one-half the MDL (N.J.A.C. 7:14A-1.8(g)1i(1)). The logical extension of this policy is that whenever a substance is not detected it may become a pollutant to be regulated. For most substances which have criteria less than PQLs, one half of the MDL would exceed the parameter's criterion, and, thus, be illegal. The DEPE has been known to add to a permit substances to be monitored, and regulated, for which there was no evidence that the substances might be increased over background levels in the effluent. This opens up the possibility that the DEPE might add to the list of regulated parameters in a permit a substance which could not be measured at the level of its criterion, and which would never be detected in the effluent. (8)

460. COMMENT: It is interesting to see that DEPE is proposing the use of the PQL. The use of PQL is the right and the only way to arrive at an enforcement limit. Anything below a PQL should be recognized as having such a large error involved in the measurement as to be unable with the implications of the Clean Water Enforcement Act. (26)

461. COMMENT: Using an MDL in any type of enforcement action is inappropriate. The MDL is just a statistic which is generated in a laboratory. Intra- and inter-laboratory variations are common among MDLs.The values also vary significantly depending upon the instrument, voltage level, and in some cases sun spot cycles. Therefore, an MDL can not be possibly used as an enforcement level. (26)

462. COMMENT: The commenter agrees with the portion of the DEPE's discussion of PQLs indicating that for two compounds, acrolein and acrylonitrile, it can multiply the MDL by 10 instead of five. (26)

463. COMMENT: USEPA, 40 CFR Section 136 usually lists several methods to do an analysis. For lead, both flame atomic absorption graphite and flame atomic absorption plasma methods acceptable. These methods will have significantly different MDLs. Graphite furnace is in general the more sensitive technique. If the graphite furnace PQL is set as the enforcement level, it should be understood that the other methods are being eliminated. Whether to go with the most sensitive method or the least sensitive method of the USEPA labeled acceptable methods is an important consideration. (26)

464. COMMENT: A precise and accurate number is needed where the Clean Water Enforcement Act has a window of plus or minus 20 percent before mandatory fines go into effect. The PQLs have to be geared to be within those windows, which will affect the multiplier significantly. (26)

465. COMMENT: The PQLs table shows both 500 and 600 methods to determine PQLs. Drinking water methods (500 methods) in general, are considerably more sensitive than the waste water methods (600 methods). To use a waste water method to try to determine levels of concentrations lower than drinking water MCLs is not appropriate. (26)

466. COMMENT: PQLs should probably be part of the Surface Water Quality Standards because the permit users have to be familiar with those numbers. (26)

467. COMMENT: If existing permits are below the PQL, those permits are not enforceable. (26)

468. COMMENT: DEPE raised an interesting question as to what to do when the health or carcinogenic risk concentrations, specifically one-in-one-million risk factor, are far below the PQLs? It is appropriate to set the standard at the one-in-one-million risk level in a drinking water situation. This risk assessment is based on an average 150 pound person drinking two liters of water a day for 70 years. However, it is not a reasonable assumption to make for sewage effluent. No one drinks treated sewage effluent at two liters a day for 70 years. (26)

469. COMMENT: The surface water quality criteria are 10, 100, 1000 times, sometimes more than that below the PQLs. These are far below any reasonable limit of measurement and are purely theoretical numbers. I do not believe they can be used in an enforcement situation. (26)

470. COMMENT: The DEPE asked whether a Minimum Level (ML) should be used instead of PQL. An ML is different from each laboratory, one can use a lower calibration point of .5 and another can use a lower calibration point of .25. What is DEPE going to enforce? The commenter thinks the PQL is the way to go. (26)

471. COMMENT: The proposed water quality standards contain a procedure for translating numeric criteria into enforceable effluent

limitations where the numeric criteria are below the detection level for that pollutant. The proposed translation protocol misapplies and misinterprets test results. As a consequence, AEA members will be exposed to automatic fines and penalties even though the effluent quality does not exceed water quality standards. Under the proposed water quality standards, DEPE considers a pollutant to be present in a discharge where its existence has not been determined:

> Where the effluent limitations developed pursuant to N.J.A.C. [7:9-4.6] **7:9B-1.6** are below the level of detectability of the procedures in N.J.A.C. 7:18 the DEPE will use an effluent limitation of nondetectable in any NJPDES permit or DAC.

This approach does not consider a number of important factors regarding the presence of an analyte in a sample of effluent or ambient water. The critical factors not considered include (1) inherent test method variability increases for analytes where levels are close to the detection limit, and (2) the appropriate confidence interval associated with each method determination for each analyte tested. These factors must be considered in determining whether a pollutant actually exists at a level of regulatory concern. If not, the decision is not scientifically defensible. Additionally, enforceable limits may be established only where the limit is equal to or greater than PQL. (11, 12)

472. COMMENT: More than half of the proposed criteria would not be attained by commercial laboratories using USEPA contract required quantitation and detection limits. The DEPE has listed the surface water quality criterion for 2,3,7,8-TCDD as 14 parts per quintillion (14×10^{-12} mg/L), a level which is at least three orders-of-magnitude below the analytical capability of the limited number of commercial laboratories in the county that are qualified to perform high-resolution analyses of this compound. (16)

RESPONSE: The DEPE appreciates the comments submitted in response to its Interested Party Review notice on Practical Quantitation Levels. This notice was not a proposal of PQLs, but initiation of a dialogue on the subject of PQLs. The broad scope of the comments submitted reflect the complexity of developing and successfully implementing Practical Quantitation Levels. These comments will be considered by the DEPE as it develops chemical specific Practical Quantitation Levels and necessary implementation guidance and policies. The DEPE expects to publish a PQL proposal in 1994.

Combined Sewer Overflows

473. COMMENT: The proposed regulations must recognize the special nature of stormwater and nonpoint source discharges from nonindustrial facilities and still protect the surface water quality of the state. The proposed regulations should recognize the fact that stormwater by its nature is extremely different than other point sources. The discharges are intermittent in their nature, and vary in quality and quantity during and between storm events. As a result, the techniques and procedures delineated in the proposed Surface Water Quality Standards to evaluate the impact of these discharges are inappropriate.

In recognition of the special nature of stormwater discharges from nonindustrial facilities, and consistent with current DEPE policies, the adopted Surface Water Quality Standards should stipulate that the stormwater discharges are subject to a different set of regulatory requirements in line with the BMPs currently being considered by the DEPE in their proposed revisions to the stormwater management regulations. (23)

474. COMMENT: The proposed regulation of combined sewer overflows ("CSOs") and other related stormwater dischargers appears to apply the water quality standards to these discharges in the same manner as point sources. We object to this proposal and recommend several policies reflecting the transient nature of CSO discharges. Regulation of CSO/stormwater discharges will force municipalities to expend public resources correcting an imaginary environmental problem. Adoption of these recommendations should achieve a balance between capital improvement expenditures and environmental protection.

Water quality based effluent limitations are based on low flow (MA7CD10) conditions when the major influences on water quality are the point sources themselves. Because discharge from CSOs is intermittent, the application of rigid water quality standards is inappropriate and overly stringent.

First, it is recommended that DEPE formally eliminate acute and chronic numeric criteria for CSO and stormwater discharges. The intermittent nature of these discharges precludes reasonable application of chronic criteria, and rarely, if ever, would require acute criteria. Because CSO discharges are transient, DEPE must reevaluate its criteria and standards using the flow duration and organism exposures to reflect the impact of wet weather flows (typically storm event flows). Low flow assumptions are inconsistent with most wet weather flow events.

Second, the DEPE should rely on whole effluent toxicity ("WET") test data, which will verify whether the CSO discharge adversely impacts ambient waters, in place of numeric criteria. This approach is simpler and focuses attention to discharges adversely affecting the ambient waters.

These recommendations reflect the fact that CSO discharges are more like nonpoint source discharges than point source discharges. DEPE flexibly applies water quality requirements to nonpoint source discharges. Similar flexibility is warranted for CSO discharges.

The following are recommended modifications to the proposed water quality standards which fully account for the intermittent nature of CSO/stormwater discharges.

> The input of pollutants from wet weather events is intermittent, and may not occur during all runoff events. Exposure of aquatic organisms to pollutants during these episodes is often of short duration and is separated by extended periods of time which allow for organism recovery. Because concentration and exposure patterns of pollutants are different for diffuse wet weather dischargers and continuous point source dischargers, the same water quality standards should not be applied to these groups without modification.
>
> John L. Mancini and Alan H. Plummer, Jr. identify several characteristics of urban runoff that cause water quality impacts different from the impacts caused by point sources: (1) the intermittent nature of the loadings, (2) the variability within and between events, and (3) the relatively high suspended solids concentrations in the discharges. They found that rainfall event durations average approximately six hours for many locations in the United States and the interval between storms averages 80 hours. The interval between storms is therefore over ten times longer than the rainfall durations. They conclude that the ratio of exposure duration and period between exposures, of one to 12, indicates that the usual definition of chronic effects is not applicable to urban runoff. The following is an explanation of why the criteria are not applicable to CSO discharges.
>
> The scientific community recognizes that the effect of pollutants in natural settings is a function of both variations in exposure concentrations and durations of exposure. USEPA and DEPE's numerical water quality criteria are derived from laboratory data from mortality after 48 or 96-hour exposures to constant concentrations of pollutants. Data obtained from lethal bioassays usually consist of tabulated values of the percent mortality observed at various times of exposure for several concentration levels of a contaminant. The laboratory procedures employed consist of exposure of a random sample of organisms to a constant concentration of contaminant in an experimental chamber with periodic observations of organism mortality. The methods used to develop the criteria therefore do not employ the classic concept of dose-response relationships when establishing the allowable concentration and averaging period.
>
> Scientifically, the promulgated criteria are not appropriate for use in evaluation of the impacts from intermittent discharges such as urban runoff. Water quality criteria compliance monitoring from sources that are driven by wet weather events should consist of measurement of both concentration and exposure duration. However, toxic criteria are normally expressed solely as concentrations. Methods are available to demonstrate procedures for development of wet weather criteria which consider duration and exposure concentrations.
>
> For example, USEPA's water quality criteria for copper and lead consist of two concentration numbers, each of which has an associated averaging period or exposure duration. The criteria for copper and lead consider the exposure duration of four days for criterion continuous concentration (CCC) (chronic concentration) and one hour for the criterion maximum concentration (CMC) (acute concentration). The criteria suggest return frequencies of three to 10 years depending on the level of environmental stress.
>
> Consideration of the intermittent nature of CSO loads generally yields less stringent water quality criteria. Mancini and Plummer calculated metal concentration and mean recurrence interval for various ratios of the urban drainage area to the stream drainage area using computations developed from the statistical methods

which USEPA has indicated are appropriate for examination of receiving water concentrations of toxics. Assumptions included in these calculations were: (1) the stream concentration of the metal was zero, (2) the total metals concentration were compared to the allowable acute concentration, (3) the acute criteria was applied to exposures of no greater than 1 hour and the average event duration was approximately six hours for urban runoff. For copper, the soluble concentration is approximately 50 percent of the total concentration. The effects of this assumption can be examined by increasing the allowable acute criteria for urban runoff by a factor of two. When this is done, the instream concentration of copper exceeds the revised acute criteria for drainage area ratios of 100 to one. Calculations were based on concentrations and coefficient of variation of the metals for an average site, urban runoff flow, and base stream flow. Their studies indicated that urban runoff metals concentrations exceed the USEPA acute criteria for all metals.

In these studies copper was the controlling toxicant. For copper, instream concentrations were calculated to exceed the allowable chronic concentration for drainage area ratios of 1000 to one. This drainage area ratio could include almost all urban runoff discharges since many discharges are into small drainage tributaries which carry the runoff to the main receiving water. The exposure duration is six times the USEPA duration associated with the acute criteria. This further suggests that urban runoff at almost all locations will exceed promulgated criteria and require treatment.

Treatment of urban runoff discharges is often unnecessary when the water quality standards include consideration of the characteristics of the intermittent wet-weather discharges. The concentrations at which intermittent exposures would cause mortality is reduced by factors of three to seven. Such modifications to water quality criteria should consider:

- Exposure durations and intervals between events.
- Chemical forms of the toxicant.
- Genus and/or species to be protected.
- Toxicity employing bioassays using urban runoff.

We recommend that DEPE withdraw the proposal for rigid application of stringent return frequencies and averaging period. These policies assume constant exposures and, therefore, fail to account for the intermittent nature of stormwater discharges.

USEPA regulations state that "permits must be written to ensure CSO discharges do not cause violations of water quality standards." Water quality standards that do not address the time-variable, intermittent nature of CSO impacts, are not appropriate standards to regulate CSO discharges. USEPA recognizes the necessity of adjusting water quality standards for nonpoint source impacts:

> There should be 'flexibility in water quality standards to address the impact of time and space components of [nonpoint sources] as well as naturally occurring events.' This involves the consideration of the variability of natural conditions, magnitude and frequency of impact, the level of acceptable risk.

CSO discharges have the same characteristics as non-point source discharge and DEPE should adopt similar "flexibility in applying the water quality standards."

A state may establish subcategories of uses on a site-specific basis in accordance with USEPA's regulations. For example, if recreation is a designated use of a particular water body segment, the state might prohibit a use subcategory such as swimming during storm events. The impact on designated uses of such a prohibition would be minimal, given that very few people go swimming during wet weather events.

A state may also promulgate segment-specific modifications to water quality standards, or promulgate water quality standards that reflect seasonal uses of the receiving water. Alternatively, a water body's designated use may be revised on a temporary basis during certain times of the year. For example, the state could remove swimming as a designated use during a particular season historically known to have numerous significant storm events (for example, April-May) when the designated use is not commonly employed.

Another option is to develop acute/short-term water quality standards that reflect the intermittent nature of CSOs. Such a standard would allow a limited number of increased pollutant discharges that do not have a detrimental impact on receiving waters. These acute standards should contain appropriate periods of exposure for certain pollutants, to reflect that higher levels of discharges over a short duration may have no adverse impacts on water quality standards or designated uses. A state may also provide for limited exceptions to water quality standards that allow temporary violations which do not have an adverse impact on designated uses. USEPA recognizes exceptions for nonpoint sources:

In cases of short term excursions beyond numerical criteria that result from conditions that exceed the approval [nonpoint source] controls design criteria, narrative criteria, biological assessments and other on-site evaluations should be used to determine whether designated uses in fact have been adversely affected, and to determine whether future action is appropriate to restore or protect the designated uses.

The former and currently proposed water quality regulations authorize DEPE to "establish seasonal effluent limitations when it determines that such seasonal limitations are necessary due to seasonal variations in treatment performance caused by ambient conditions and, that the seasonal limitations will not cause or contribute to violation of the Surface Water Quality Standards." Periods of high rainfall or snow melt such as mid-winter and late spring would be optimal periods for the DEPE to implement such seasonal variations for CSOs. In its response to comments on the readoption of N.J.A.C. 7:9 and application of seasonal limitations under N.J.A.C. 7:9-4.5(e)(3), the DEPE stated that it "is still evaluating this request and will provide a definitive response ... later this year."

DEPE could also authorize use of flow variable permits to allow for increased pollutant discharges during wetter years or wetter periods during a year. In response to a comment regarding the use of flow variable permits, DEPE opined that examination of the current standards "failed to disclose langague which precludes the issuance of flow variable permits." The DEPE again said that it would evaluate the issue and provide a definitive answer later this year.

Because of the intermittent nature of and limited exposure caused by stormwater discharges and CSOs, strict application of water quality standards to these discharges is not appropriate. DEPE should formally recognize the unique characteristics of storm event discharges through adoption of the following:

- Elimination of numeric criteria for wet weather CSO discharges;
- Use of whole effluent toxicity test data to determine whether the wet weather flow had adversely impacted the receiving waters;
- Regulate wet weather flows based on duration and time of exposure.

Adoption of these policies will achieve cost-effective environmental protection from wet weather flows. The focus of the DEPE's policies will shift towards regulating only those wet weather events that can cause or have the reasonable potential to cause significant adverse environmental impacts.

It is recommended that DEPE incorporate the above-discussed modifications to the currently proposed water quality standards for CSO/stormwater events. Delaying implementation of some kind of variance or waiver, places many CSO dischargers at risk of permit violations and automatic fines and penalties under the Clean Water Enforcement Act. Adoption of the regulations as proposed will compel CSO dischargers to spend enormous sums of money to attempt to comply to water quality standards established for continuous discharges at low flow streams. Clearly, application of any chronic criteria to CSO discharges is misplaced. The essence of CSO wet weather discharges is an intermittent and abrupt event which comports with the basis of acute criteria but not with chronic criteria, which is designed to protect for long-term sublethal continuous exposure. (11, 12)

RESPONSE: The DEPE's program for dealing with Combined Sewer Overflows (CSO) is a staged approach. At the present time the DEPE's emphasis is on the elimination of dry weather CSO discharges. Concurrently, data is being gathered to better define the nature of the CSO discharges, both dry and wet weather. Based on the information gathered, the DEPE will develop a control strategy to deal with wet weather CSOs. The second phase is likely to address the control of large solids and of floatable contaminants.

Stormwater/nonpoint source control strategies currently being put in place by the DEPE focus on the use of Best Management Practices (BMPs). As the BMPs are implemented there will be monitoring to determine their effectiveness and provide a basis for refining the BMPs or deciding that another approach is required. No changes to these ongoing programs are expected to result from this adoption.

None of the suggested modifications to the November 2, 1992 proposal can be made at this time because they represent substantial changes to the proposal which require issuance of a new proposal. The DEPE has set up programs to deal specifically with CSOs, stormwater and nonpoint sources of pollution. These comments will be forwarded to the appropriate programs for further consideration.

475. COMMENT: No specific methodology for calculating the nonpoint contribution from a ground water mixing zone is provided, although, the new definition of total maximum daily load includes, among other things, load allocations for nonpoint source of pollution. Certain scenarios that could happen under the proposed ground water standards (proposed N.J.A.C. 7:26D) will create a circumstance where the surface water criteria would become the limiting factor for certain discharges (that is, ground water emanating from a Regulated Unit of a Waste Management area, N.J.A.C. 7:14A-6.15, where the point of compliance is either within or immediately upgradient of a surface water). Therefore, the surface water standards should provide a methodology for allocating waste loadings from these nonpoint sources. (43)

RESPONSE: The DEPE recognizes the need for providing guidance on how to estimate the impact of nonpoint source discharges of ground water. In an effort to develop an approach for dealing with this the DEPE has solicited proposals to identify/develop models that could be used to quantify nonpoint source ground water discharges and factor them into the total maximum daily load and wasteload allocation processes. Until appropriate model(s) are available, best professional judgment, simple mass balances and surface water studies will continue to be used.

476. COMMENT: A commenter requested that the DEPE clarify the nonapplicability of the proposed Surface Water Quality Standards to stormwater detention and retention basins. Naturally occurring rainfall does not necessarily meet the proposed Surface Water Quality Standards. While it appears not to be the DEPE's intent to apply the proposed standards to these basins, if the modified definition of "surface waters" is literally applied, such a conclusion could be made. Accordingly, clarification in this respect is requested. (23)

477. COMMENT: The proposed Surface Water Quality Standards appear to apply to stormwater discharges and other nonpoint water sources on nonindustrial sites. As a result, unless stormwater and other nonpoint sources are made exempt from the regulations, or expressly permitted under a BMP policy, the regulations would cause major disruptions, delays and costs in the planning and development of stormwater facilities with no significant improvement in surface water quality. As such, if these types of facilities become subject to the evaluation and permitting requirements outlined in the Surface Water Quality Standards, there would be major economic implications on the development community and general public, for both new and existing construction, with no real benefit. A strict interpretation of this policy would be a prohibition against the discharge of untreated stormwater into a detention basin even though the basin itself is designed to provide the treatment. (23)

RESPONSE: The DEPE will continue to determine on a case-by-case basis, as part of the permitting process, whether "artificial waterbodies" that are part of approved treatment works or stormwater handling facilities are expected to meet the Surface Water Quality Standards. There is no intent to change the current stormwater or nonpoint source management programs of the DEPE through this adoption. Additional discussions will be held with the stormwater/nonpoint source programs to ensure that this adoption does not cause a disruption of these programs.

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

CHAPTER 9B

SURFACE WATER QUALITY STANDARDS

SUBCHAPTER 1. SURFACE WATER QUALITY STANDARDS

7:9B-1.1 Scope of subchapter

Unless otherwise provided by rule or statute, this subchapter shall constitute the rules of the Department of Environmental Protection and Energy governing matters of policy with respect to the protection and enhancement of surface water resources, class definitions and quality criteria, use designation and quality criteria for the mainstem of the Delaware River including the Delaware Bay, the classification of surface waters of the State, procedures for establishing water quality based effluent limitations, modification of water quality based effluent limitations, procedures for reclassifying specific segments for less restrictive uses and procedures for reclassifying specific segments for more restrictive uses pursuant to N.J.S.A. 13:1D-1 et seq., the New Jersey Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., and the Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq.

7:9B-1.2 Construction

This subchapter shall be liberally construed to permit the Department and its various divisions to discharge their statutory functions.

7:9B-1.3 Severability

If any subchapter, section, subsection, provision, clause, or portion of this chapter, or the application thereof to any person, is adjudged unconstitutional or invalid by a court of competent jurisdiction, such judgment shall be confined in its operation to the subchapter, section, subsection, clause, portion, or application directly involved in the controversy in which such judgment shall have been rendered and it shall not affect or impair the remainder of this chapter or the application thereof to other persons.

7:9B-1.4 Definitions

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

. . .

"Category one waters" means those waters designated in the tables in N.J.A.C. 7:9B-1.15(c) through (h), for purposes of implementing the antidegradation policies in this subchapter, for protection from measurable changes in water quality characteristics because of their clarity, color, scenic setting, other characteristics of aesthetic value, exceptional ecological significance, exceptional recreational significance, exceptional water supply significance, or exceptional fisheries resource(s). These waters may include, but are not limited to:

1. Waters originating wholly within Federal, Interstate, State, County, or Municipal parks, forests, fish and wildlife lands, and other special holdings that have not been designated as FW1 in this subchapter;

2. Waters classified in this subchapter as FW2 Trout production waters and their tributaries;

3. Surface waters classified in this subchapter as FW2 Trout Maintenance or FW2 Nontrout that are upstream of waters classified in this subchapter as FW2 Trout Production;

4. Shellfish waters of exceptional resource value; or

5. Other waters and their tributaries that flow through, or border, Federal, State, County or Municipal parks, forest, fish and wildlife lands, and other special holdings.

. . .

"Department" means the New Jersey Department of Environmental Protection and Energy.

. . .

"Existing uses" means those uses actually attained in the waterbody on or after November 28, 1975, whether or not they are included in the Surface Water Quality Standards.

"Federal Act" means the "Federal Water Pollution Control Act" (33 U.S.C. § 1251 et seq.) including all subsequent supplements and amendments.

. . .

"FW1" means those fresh waters that originate in and are wholly within Federal or State parks, forests, fish and wildlife lands, and other special holdings, that are to be maintained in their natural state of quality (set aside for posterity) and not subjected to any man-made wastewater discharges, as designated in N.J.A.C. 7:9B-1.15(h) Table 6.

"FW2" means the general surface water classification applied to those fresh waters that are not designated as FW1 or Pinelands Waters.

"Groundwater" means that portion of water beneath the land surface that is within the zone of saturation (below the water table) where pore spaces are filled with water.

. . .

"Important species" means species that are commercially valuable (for example, within the top 10 species landed, by dollar value); recreationally valuable; threatened or endangered; critical to the

organization and/or maintenance of the ecosystem; or other species necessary in the food web for the well-being of the species identified in this definition.

...

"Long term harmonic mean flow" means the number of daily flow measurements divided by the sum of reciprocals of the flows; in other words, it is the appropriate design flow for health effects occurring after long term exposures and is calculated by

$$n / \sum_{i=1}^{n} (1/Qi)$$

where n is the number of recorded flows and Q is the combined receiving water and effluent flow.

"MA1CD10" means the minimum average one day flow with a statistical recurrence interval of 10 years.

"MA7CD10" means the minimum average seven consecutive day flow with a statistical recurrence interval of 10 years.

"MA30CD5" means the minimum average 30 consecutive day flow with a statistical recurrence interval of five years.

"Measurable changes" means changes measured or determined by a biological, chemical, physical, analytical method, conducted in accordance with USEPA approved methods as identified in 40 C.F.R. 136 or other analytical methods (for example, mathematical models, ecological indices, etc.) approved by the Department, that might adversely impact a water use (including, but not limited to, aesthetics).

...

"NJPDES" means New Jersey Pollutant Discharge Elimination System.

...

"Outstanding National Resource Waters" means high quality waters that constitute an outstanding national resource (for example, waters of National/State Parks and Wildlife Refuges and waters of exceptional recreational or ecological significance) as designated in N.J.A.C. 7:9B-1.15(i).

...

"River mile" or "R.M." means the distance, measured in statute miles, between two locations on a stream, with the first location designated as mile zero. Mile zero for the Delaware River is located at the intersection of the center line of the navigation channel and a line between the Cape May Light, New Jersey, and the tip of Cape Henlopen, Delaware.

...

"Surface water classifications" means names assigned by the Department in this subchapter to waters having the same designated uses and water quality criteria (for example, FW1, PL, FW2-NT, SE1, SC, Zone 1C).

"Surface Water Quality Standards" means the New Jersey rules which set forth a designated use or uses for the waters of the State, use classifications, water quality criteria for the State's waters based upon such uses, and the Department's policies concerning these uses, classifications and criteria.

"Surface waters" means water at or above the land's surface which is neither groundwater nor contained within the unsaturated zone, including, but not limited to, the ocean and its tributaries, all springs, streams, rivers, lakes, ponds, wetlands, and artificial waterbodies.

...

"Total maximum daily load" means the sum of individual wasteload allocations for point sources and load allocations for nonpoint sources of pollution and natural background sources, tributaries, or adjacent segments.

"Total recoverable metal" means the concentration of metal in an unfiltered sample following treatment with hot dilute mineral acid (as defined in "Methods for Chemical Analysis of Water and Wastes", EPA-600/4-79-020, March 1979, incorporated herein by reference).

"Toxic substances" or "toxic pollutants" means any pollutant identified pursuant to the Federal Act, or any pollutant or combination of pollutants, including disease causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly or indirectly by ingestion through food chains, will, on the basis of the information available to the Department, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions, including malfunctions in reproduction, or physical deformation, in such organisms or their offspring.

"TP" means trout production.

"Trout maintenance waters" means waters designated in this subchapter for the support of trout throughout the year.

"Trout production waters" means waters designated in this subchapter for use by trout for spawning or nursery purposes during their first summer.

"Unsaturated zone" *[(vadose zone)]* means the subsurface volume between the land's surface and the top of the saturated zone (water table), where moisture does not fill all the pore spaces in the formation or soil.

"USEPA" means the United States Environmental Protection Agency.

["Vadose waters" means water contained within the unsaturated zone (vadose zone).]

"Wasteload allocation" means the portion of a receiving water's total maximum daily load that is allocated to one of its existing or future point sources of pollution.

"Water quality based effluent limitations" means effluent limitations established so that the quality of the waters receiving a discharge will meet the Water Quality Criteria and Policies of this subchapter after the introduction of the treated wastewaters.

"Wetlands" means those areas that are inundated or saturated by surface water*[,]* ***or*** groundwater*[, or vadose water]* at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions, commonly known as hydrophytic vegetation. The Department shall evaluate the parameters of hydrology, soils, and vegetation to determine the presence and extent of wetlands.

"Zone" means the general surface water classification applied to the mainstem Delaware River and Delaware Bay.

7:9B-1.5 Statements of policy

(a) General policies are as follows:

1.-3. (No change.)

4. The discharge in domestic or industrial wastewater of carcinogenic, mutagenic, or teratogenic substances is of particular concern to the Department. Human health-based ambient criteria have been established for carcinogenic substances at levels which would result in no greater than a one-in-one-million lifetime excess cancer risk for Group A and B carcinogens, under exposure assumptions appropriate for the designated uses of the waterbody. Criteria for Group C carcinogens, for which reference doses are not available, have been established at levels which would result in no greater than a one-in-one-hundred thousand lifetime excess cancer risk.

5.-6. (No change.)

(b) Interstate waters policies are as follows:

1. The designated uses and water quality criteria for the fresh and saline waters under the jurisdiction of the Delaware River Basin Commission shall be as established in accordance with N.J.A.C. 7:9B-1.13, 1.14(c), and 1.14(d).

2. The designated uses and water quality criteria for waters under the jurisdiction of the Interstate Sanitation Commission in the New Jersey/New York metropolitan area shall be as established in this subchapter, or in accordance with the prevailing Water Quality Regulations of the Interstate Sanitation Commission, including all amendments and future supplements thereto, whichever are more stringent.

(c) General technical policies are as follows:

1. The natural water quality shall be used in place of the promulgated Water Quality Criteria of N.J.A.C. 7:9B-1.14 for all water quality characteristics that do not meet the promulgated Water Quality Criteria as a result of natural causes.

2. Water quality criteria are expected to be maintained during periods when nontidal or small tidal stream flows are at or greater than the appropriate design flow. For carcinogenic effect-based

human health criteria, the design flow shall be the long term harmonic mean flow. For noncarcinogenic effect-based human health criteria, the design flow shall be the MA30CD5 flow. For acute aquatic life protection criteria, the design flow shall be the MA1CD10 flow. For chronic aquatic life protection criteria the design flow shall be the MA7CD10 flow. The design flow for all other criteria shall be the MA7CD10 flow.

3. (No change.)

4. Mixing zones policies are as follows:

i.-v. (No change.)

vi. Where waste discharges would result in heat dissipation areas in such close proximity to each other as to impair protected uses, additional limitations shall be prescribed to avoid such impairment.

vii. (No change.)

5. All analytical data to be incorporated by the Department in water quality monitoring or other activities shall be from laboratories approved or certified by the Department for the analysis of those specific parameters. If certification is not offered for the specific parameter, the laboratory performing the analysis shall, at a minimum, hold certification in the category of certification covering that type of parameter.

(d) Antidegradation policies are as follows:

1.-4. (No change.)

5. Where water quality exceeds levels necessary to support the designated uses, including, but not limited to, propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the Department finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the Department's continuing planning process as set forth in the Statewide Water Quality Management Plan (see N.J.A.C. 7:15), which includes, but is not limited to, the NJPDES Regulations (N.J.A.C. 7:14A), that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located.

6. These antidegradation policies shall be applied as follows:

i. (No change.)

ii. For Pinelands waters, the Department shall not approve any activity which alone or in combination with any other activities, might cause changes, other than toward natural water quality, in the existing surface water quality characteristics. This policy shall apply as follows:

(1) (No change.)

(2) Dischargers holding valid NJPDES permits as of May 20, 1985 shall be allowed to continue discharging under the terms of their existing NJPDES permits provided that the discharge is not creating any water quality problems and that the designated uses are being attained. If a water quality problem has been created or the designated uses are not being attained, the NJPDES permit shall be modified to eliminate the water quality problem or attain the designated uses.

(3) Existing dischargers shall be subject to all the provisions of this subchapter when they apply for modification or expansion of their existing discharge.

iii.-iv. (No change.)

7.-8. (No change.)

9. Modifications of water quality based effluent limitations established to implement this antidegradation policy may be granted pursuant to N.J.A.C. 7:9B-1.8 and 1.9.

(e) Water quality based effluent limitation policies are as follows:

1.-2. (No change.)

3. The Department may establish seasonal effluent limitations when it determines that such seasonal limitations are necessary due to seasonal variations in treatment performance caused by ambient conditions and, that the seasonal limitations will not cause or contribute to violation of the Surface Water Quality Standards.

4. (No change.)

5. Modifications of water quality based effluent limitations established to implement the water quality standards (which includes the Antidegradation Policies) granted pursuant to N.J.A.C. 7:9B-1.8 and 1.9, shall provide for effluent limits at least as stringent as those required pursuant to sections 301, 306, and 307 of the Federal Clean Water Act or the Minimum Treatment Requirements of N.J.A.C. 7:9-5.8, where applicable, whichever are more stringent.

6. (No change.)

7. Where the effluent limitations developed pursuant to N.J.A.C. 7:9B-1.6 are below the level of detectability of the procedures in N.J.A.C. 7:18 the Department will use an effluent limitation of nondetectable in any NJPDES permit or DAC.

8. Compliance schedules may be issued in accordance with N.J.A.C. 7:14A-2.8(a)1 when it is demonstrated by a discharger that new or revised water quality-based effluent limitations, based on ambient criteria adopted or revised after July 1, 1977, cannot be consistently met with the facility's existing treatment process. No schedule of compliance may be allowed for parameter specific water quality based effluent limitations where the parameter specific ambient water quality criterion, which was the basis for developing that limitation, was adopted prior to July 1, 1977 and has not been revised since adoption.

(f) Bioassay and biomonitoring policies are as follows:

1. Bioassay test species selection criteria follow:

i.-iii. (No change.)

2. (No change.)

3. The Department, in order to further characterize the toxicity of a discharge, may allow or require the use of other procedures including, but not limited to:

i. Bioaccumulation testing;

ii. Mutagenicity testing; and

iii. Measures of the structure and function of the aquatic community in the receiving waters.

4. (No change.)

5. Parameter specific water quality criteria for toxic substances in a waterbody may be established by the Department when adequate data, from appropriate bioassays or scientific literature, are available as follows:

i. Appropriate bioassays, for purposes of this policy, shall include both acute definitive and chronic definitive bioassays; and

ii. The amount of bioassay data or scientific literature needed to support adoption of a parameter specific criterion in a given waterbody will be determined by the Department on a case-by-case basis.

(g) Nutrient policies are as follows:

1.-2. (No change.)

3. The Department may establish site-specific Water Quality Criteria for nutrients in lakes, ponds, reservoirs or streams, in addition to or in place of the criteria in N.J.A.C. 7:9B-1.14, when necessary to protect existing or designated uses. Such criteria shall become part of these Water Quality Standards.

4.-6. (No change.)

7:9B-1.6 Establishment of water quality based effluent limitations

(a) Water quality based effluent limitations shall be established where technology based effluent limitations, established pursuant to Sections 301(b) and 306 of the Federal Clean Water Act, or toxic effluent standards, established pursuant to Section 307 of the Federal Clean Water Act, and/or Minimum Treatment Requirements set out in N.J.A.C. 7:9-5.8, are insufficient to attain, maintain and protect the designated and existing uses, water quality criteria and policies of this subchapter.

(b) The conditions of a Draft NJPDES Permit or a Draft DAC shall include any water quality based effluent limitations developed pursuant to (c) below, in addition to any other appropriate conditions. The water quality based effluent limitations may be modified as a result of hearings held on the Draft NJPDES Permit or Draft DAC provided that the water quality based effluent limitations incorporated into the Final NJPDES Permit or DAC must be consistent with the provisions of this subchapter (including, but not limited to, N.J.A.C. 7:9B-1.5, 1.6(c), 1.8, and 1.9).

(c) The Department may develop water quality based effluent limitations for a single point source discharger in response to an application for DAC or NJPDES permit. The procedure to be followed by the Department in developing such effluent limitations shall be as follows:

1. For Category One waters, as defined in N.J.A.C. 7:9B-1.4, draft water quality based effluent limitations shall be assigned to a point source discharger so as to protect the existing water quality from any measurable or calculable changes. The Department shall establish draft water quality based effluent limitations, as appropriate, for those parameters contained in N.J.A.C. 7:9B-1.14, as well as any other parameters the Department believes may have a detrimental effect on the designated or existing uses.

2. For Category Two waters, as defined in N.J.A.C. 7:9B-1.4, draft water quality based effluent limitations shall be assigned to a point source discharge so as to:

i. Maintain water quality characteristics that are generally better than or equal to the water quality standards at a level that will protect the existing and designated uses; and

ii. Bring water quality characteristics that are generally worse than the water quality criteria, except as due to natural conditions, up to the water quality criteria.

3. The following information shall be submitted by the applicant for a water quality based effluent limitation, in addition to any information required pursuant to N.J.A.C. 7:14A:

i. Type of waste (domestic or industrial) to be discharged, accompanied by an analysis of the treated and untreated wastewater characteristics;

ii. Type of treatment process and level of treatment being considered;

iii. United States Geological Survey Topographic Maps, 7.5 Quadrangle series, showing treatment facility locations, discharge point, and the location of other treatment facilities on the receiving stream within five miles of the proposed discharge;

iv. Name and classification of receiving stream including a description of the stream's existing beneficial uses; and

v. Stream analyses, which shall include:

(1) A flow analysis to determine the appropriate long term harmonic mean, MA30CD5, MA1CD10, or MA7CD10 flow; and

(2) A water quality analysis program to be developed in coordination with the Department and to include, at a minimum, sampling stations upstream and downstream of all existing discharges, as well as the proposed discharge.

4. The Department will utilize the following methodologies in the development of chemical specific water quality based effluent limitations for point source discharges:

i. (No change.)

ii. Scientifically defensible technical approaches such as calibrated and verified mathematical water quality models developed or adapted for a particular stream, simplified modelling approaches, as outlined in "Water Quality Assessment" (EPA-600/6-82-004), a simple mass balance, or bioassay procedures, as contained in N.J.A.C. 7:18, shall be utilized by the Department in developing water quality based effluent limitations.

iii. The Department shall utilize the parameter specific criteria contained in N.J.A.C. 7:9B-1.14, in the development of chemical specific water quality based effluent limitations for point source discharges. Whenever parameter specific criteria have not been adopted, the Department will utilize the best available scientific information in the development of chemical specific water quality based effluent limitations for point source discharges. Ambient criteria published by the United States Environmental Protection Agency pursuant to section 304(a) of the Federal Clean Water Act represent the minimum acceptable best scientific information to be used in the development of water quality based effluent limitations for point source discharges.

5. The following methodologies may be utilized by the Department in developing water quality based whole effluent toxicity limitations for point source discharges:

i. When using acute definitive bioassays as the measure of whole effluent toxicity, the following effluent toxicity limitation formula may be utilized:

$$L_A = \frac{I}{F}(100)$$

Where: L_A = Toxicity limitation expressed as an acute definitive LC50 or EC50, in percent effluent.
F = Application factor, 0.05 where toxicity is due to non-persistent substances or 0.01 where toxicity is known or suspected to be due to persistent substances, or an alternative application factor developed in accordance with N.J.A.C. 7:9B-1.5(f)4.
I = Critical instream waste concentration, determined in accordance with the methods in (c)5ii below.

(1) A draft limitation must meet the requirements of the effluent standard for toxic discharges found in N.J.A.C. 7:9-5.7.

(2) If the calculated limit, L_A, is greater than 100 percent effluent, the draft limit shall require that no measurable acute toxicity occur in any bioassay test concentration, including 100 percent effluent, above normal background mortality levels for the test organism population.

ii. The critical instream waste concentration, I, is determined as follows:

(1) For non-tidal streams, or small tidal streams with a cross-sectional area not greater than 1,000 square feet at mean sea level and a freshwater inflow MA7CD10 not greater than 10 cfs:

$$I = \frac{[Q_R]\ Q_E}{Q_E + Q_S}$$

Where: Q_E = Effluent Flow
Q_S = Upstream freshwater MA7CD10 flow

(2) For all other waterbodies the instream concentration, I, will be determined on a case-by-case basis utilizing applicable scientific methods, including, but not limited to, plume models and the mixing zone concept.

iii. When utilizing chronic bioassays as the measure of whole effluent toxicity, the following effluent toxicity limitation formula may be utilized:

$$L_C = I\ (100)$$

Where: L_C = Toxicity limitation expressed as a chronic NOEC in percent effluent.
I = Critical instream waste concentration, determined in accordance with the method of (c)5ii above.

iv. If the calculated limit, L_C, is greater than 100 percent effluent, the draft limit shall be 100.

6. Water quality based effluent limits for chlorine produced oxidants based on the criteria in N.J.A.C. 7:9B-1.14(c)14 are not applicable where:

i. The aquatic community of a waterbody is exposed to one or more point source discharges of non-contact cooling water that is intermittently chlorinated to control condenser biofouling;

ii. The total period of such exposure to chlorinated wastewater is two hours per day or less; and

iii. The maximum concentration of chlorine produced oxidants in the effluents of such discharges shall not exceed 200 ug/L.

7:9B-1.7 Waterway loadings in areawide water quality management plans

Any total maximum daily load, wasteload allocation, or load allocation established as an amendment to an areawide water quality management plan under N.J.A.C. 7:15-3.4 shall be consistent with all of the provisions of this subchapter.

7:9B-1.8 Procedures for modifying water quality based effluent limitations for individual dischargers to Category One waters

(a) An applicant requesting modification of a water quality based effluent limitation, established on a case-by-case basis, must demonstrate, to the satisfaction of the Department, after public notice (including notice to affected municipalities) and a public hearing (where sufficient public interest exists), that:

1. Some change in ambient water quality should be allowed because of necessary and justifiable social or economic development;

2. Alternative effluent limitations, at least as stringent as the technology based effluent limitations required by either sections 301, 306, and 307 of the Federal Clean Water Act, or the effluent limitations resulting from application of the minimum treatment requirements in N.J.A.C. 7:9-5.8 (where applicable), whichever are more stringent, will not interfere nor be injurious to the existing or designated uses; and

3. Where the requested modified effluent limitations would result in contravention of the water quality criteria or the degradation of the natural water quality, whichever is less stringent:

i. The water quality criteria are not attainable because of natural background; or

ii. The water quality criteria are not attainable because of irretrievable man-induced conditions; or

iii. Natural, ephemeral, intermittent, or low flow conditions or water levels prevent the attainment of the use, unless these conditions may be compensated for by the discharge of sufficient volume of effluent discharges without violating State water conservation requirements to enable uses to be met; or

iv. Controls more stringent than those required by Sections 301(b) and 306 of the Federal Clean Water Act would result in substantial and widespread adverse social and economic impact.

(b)-(e) (No change.)

(f) Where water quality criteria are not currently met the Department shall not grant a modification, as set forth in this section, establishing an effluent limitation less stringent than the limitation(s) in the existing permit, unless the criteria are not met because of natural conditions.

7:9B-1.9 Procedures for modifying water quality based effluent limitations for individual dischargers to Category Two waters

(a) (No change.)

(b) Where water quality criteria are not currently met the Department shall not grant a modification, as set forth in this section, establishing an effluent limitation less stringent than the limitation(s) in the existing permit, unless the criteria are not met because of natural conditions.

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

7:9B-1.10 (No change in text.)

7:9B-1.11 Procedures for reclassifying specific segments for more restrictive uses

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

(e) A reclassification for more restrictive uses shall be made whenever:

1. (No change.)

2. Where a reclassification for less restrictive uses has been granted pursuant to N.J.A.C. 7:9B-1.10, the bases for the reclassification no longer exist; or

3. (No change.)

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

7:9B-1.12 (No change in text.)

7:9B-1.13 Designated uses of mainstem Delaware River and Delaware Bay as set forth in the "Delaware River Basin Commission, Administrative Manual—Part III Water Quality Regulations," Article 3, dated May 22, 1991 including all amendments and future supplements thereto

(a) The designated uses for the mainstem Delaware River and Delaware Bay are those contained in "Delaware River Basin Commission, Water Quality Regulations, Administrative Manual—Part III," Article 3, dated May 22, 1991, including all amendments and future supplements thereto.

(b) The designated uses for other waters under the jurisdiction of the DRBC are as set forth at N.J.A.C. 7:9B-1.15(d).

7:9B-1.14 Surface water quality criteria

(a) Surface water quality criteria for FW1 waters shall be maintained as to quality in their natural state.

(b) Surface water quality criteria for PL waters are as follows:

1. (No change.)

2. The water quality criteria for existing discharges are the water quality criteria contained in "Surface Water Quality Standards" as adopted in March 1981, except that:

i. The criteria for Nitrate-Nitrogen and pH promulgated in N.J.A.C. 7:9B-1.14(b)1 for PL waters apply instead of the 1981 criteria; and

ii. The criteria for phosphorous and toxic substances promulgated in N.J.A.C. 7:9B-1.14(c) apply instead of the 1981 criteria, as though the freshwater portions of the PL waters were classified as FW2 and the saline portions were classified as SE1.

(c) Surface Water Quality Criteria for FW2, SE and SC Waters:

Surface Water Quality Criteria for FW2, SE and SC Waters
(Expressed as maximum concentrations unless otherwise noted)

Substance		Criteria	Classifications
1. Bacterial quality (Counts/100 ml)	i.	Bacterial Indicators shall not exceed, in all shellfish waters, the standard for approved shellfish waters as established by the National Shellfish Sanitation Program as set forth in its current manual of operations.	Shellfish Waters
	ii.	Fecal Coliforms:	
		(1) Fecal coliform levels shall not exceed a geometric average of 50/100 ml.	Within 1500 feet of shoreline in SC waters.
		(2)-(4) (No change.)	
	iii.-iv.	(No change.)	
2. Dissolved oxygen (mg/l)	i.	Not less than 7.0 at any time;	FW2-TP
	ii.	24 hour average not less than 6.0. Not less than 5.0 at any time (see paragraph viii below);	FW2-TM
	iii.	24 hour average not less than 5.0, but not less than 4.0 at any time (see paragraph viii below);	FW2-NT (except as in iv below), SE1
	iv.	Not less than 4.0 at any time;	Tidal portions of FW2-NT tributaries to the Delaware River, between Rancocas Creek and Big Timber Creek inclusive.
	v.	Not less than 5.0 at any time;	SC
	vi.	Not less than 4.0 at any time;	SE2
	vii.	Not less than 3.0 at any time; and	SE3
	viii.	Supersaturated dissolved oxygen values shall be expressed as their corresponding 100 percent saturation values for purposes of calculating 24 hour averages.	FW2-TM, FW2-NT, SE1
3. Floating, colloidal, color and settleable solids; petroleum hydrocarbons and other oils and grease	i.	None noticeable in the water or deposited along the shore or on the aquatic substrata in quantities detrimental to the natural biota. None which would render the waters unsuitable for the designated uses; and	All Classifications
	ii.	For "Petroleum Hydrocarbons" the goal is none detectable utilizing the Federal EPA Environmental Monitoring and Support Laboratory Method (Freon Extractable—Silica Gel Adsorption—Infrared Measurement); the present criteria, however, are those of paragraph i above.	All Classifications
4. ph (Standard Units)	i.	6.5-8.5.	FW2, All SE
	ii.	Natural pH conditions shall prevail.	SC

5. Phosphorus, Total (mg/l)	i.	*Lakes:* Phosphorus as total P shall not exceed 0.05 in any lake, pond or reservoir, or in a tributary at the point where it enters such bodies of water, except where site-specific criteria are developed pursuant to N.J.A.C. 7:9B-1.5(g)3.	FW2
	ii.	*Streams:* Except as necessary to satisfy the more stringent criteria in paragraph i above or where site-specific criteria are developed pursuant to N.J.A.C. 7:9B-1.5(g)3, phosphorus as total P shall not exceed 0.1 in any stream, unless it can be demonstrated that total P is not a limiting nutrient and will not otherwise render the waters unsuitable for the designated uses.	FW2
6. Radioactivity	i.	Prevailing regulations including all amendments and future supplements thereto adopted by the U.S. Environmental Protection Agency pursuant to Sections 1412, 1445, and 1450 of the Public Health Services Act, as amended by the Safe Drinking Water Act (PL 93-523).	All Classifications

Recodify existing 8.-11. as 7.-10. (No change in text.)

11. Temperature and Heat Dissipation Areas	i.	(No change.)	
	ii.	Heat Dissipation Areas	
		(1) Streams	FW2-TM, FW2-NT, All SE
		(i) Not more than one-quarter (¼) of the cross section and/or volume of the water body at any time;	
		(ii) Not more than two-thirds (⅔) of the surface from shore to shore at any time; and	
		(iii) These limits may be exceeded by special permission, on a case-by-case basis, when a discharger can demonstrate that a larger heat dissipation area meets the tests for a waiver under Section 316 of the Federal Clean Water Act.	
		(2) Lakes, Ponds, Reservoirs, Bays or Coastal Waters: Heat dissipation areas will be developed on a case-by-case basis.	FW2-TM, FW2-TP, FW2-NT, All SE, SC

12. (No change in text.)
13. Toxic Substances (ug/l):

NOTE: Except as noted, aquatic life criteria followed by an (a) represent acute aquatic life protection criteria as a one-hour average*[,]* ***and*** aquatic life criteria followed by (c) represent chronic aquatic life protection criteria as a four-day average. No exceedance of aquatic life criteria shall be permitted at or above the design flows specified in section N.J.A.C. 7:9B-1.5(c)*[(]*2. Criteria followed by an (h) are noncarcinogenic effect-based human health criteria as a 30-day average with no frequency of exceedance at or above the design flows specified in section N.J.A.C. 7:9B-1.5(c)2. Criteria followed by ***an*** (hc) are carcinogenic effect-based human health criteria as a 70-year average with no frequency of exceedance at or above the design flows specified in section N.J.A.C. 7:9B-1.5(c)2 and are based on a risk level of one-in-one-million. Criteria followed by an (hcc) are for toxic substances considered to be possible human carcinogens *[and are based on a risk level of one-in-one hundred thousand. These criteria, (hc) and (hcc), are carcinogenic effect-based human health criteria]* as a 70-year average with no frequency of exceedance at or above the design flows specified in section N.J.A.C. 7:9B-1.5(c)2 ***and are based on a risk level of one-in-one hundred thousand***. Criteria followed by an (OL) are organoleptic effect-based criteria and are maximum concentrations. *["H" represents hardness, in mg/l as calcium carbonate, in water quality criteria formulas for metals.]*

i. Acenaphthylene	*[(1) 0.0028(hc)]*		*[All FW2]*
	[(2) 0.031(hc)]		*[All SE, SC]*
	Reserved.		
ii. Acrolein	(1)	320(h)	All FW2
	(2)	780(h)	All SE, SC
iii. Acrylonitrile	(1)	0.0591(hc)	All FW2
	(2)	0.665(hc)	All SE, SC
iv. Aldrin	(1)	3.0(a); 0.000135(hc)	All FW2
	(2)	1.3(a); 0.000144(hc)	All SE, SC
v. Aluminum (Total recoverable)	*[(1) 750(a); 87(c)]*		*[All FW2]*
	Reserved.		
vi. Ammonia, un-ionized (24-hour average)	(1)	20(c)	FW2-TP, FW2-TM
	(2)	50(c)	FW2-NT
	(3)	0.1 of acute definitive LC50 or EC50(c)	All SE, SC
vii. Anthracene	(1)	9,570(h)	All FW2
	(2)	108,000(h)	All SE, SC
viii. Antimony ***(Total recoverable)***	(1)	12.2(h)	All FW2
	(2)	4,300(h)	All SE, SC
ix. Arsenic (Total recoverable)	(1)	*[360(a); 190(c);]* 0.0170(hc)	All FW2
	(2)	*[69(a); 36(c);]* 0.136(hc)	All SE, SC
x. Asbestos	(1)	7 million fibers/L(h) (fibers longer than 10 micrometers)	All FW2
xi. Barium ***(Total recoverable)***	(1)	2,000(h)	All FW2
xii. Benz(a)anthracene	(1)	0.0028(hc)	All FW2
	(2)	0.031(hc)	All SE, SC
xiii. Benzene	(1)	0.150(hc)	All FW2
	(2)	71(hc)	All SE, SC
xiv. Benzidine	(1)	0.000118(hc)	All FW2
	(2)	0.000535(hc)	All SE, SC
xv. 3,4-Benzofluoranthene (Benzo(b)-fluoranthene)	(1)	0.0028(hc)	All FW2
	(2)	0.031(hc)	All SE, SC
xvi. Benzo(a)pyrene (BaP)	(1)	0.0028(hc)	All FW2
	(2)	0.031(hc)	All SE, SC
xvii. Benzo(ghi)perylene	*[(1) 0.0028(hc)]*		*[All FW2]*
	[(2) 0.031(hc)]		*[All SE, SC]*
	Reserved.		
xviii. Benzo(k)fluoranthene	(1)	0.0028(hc)	All FW2
	(2)	0.031(hc)	All SE, SC
xix. Beryllium ***(Total recoverable)***	*[(1) 0.00767(hc)]*		*[All FW2]*
	[(2) 0.132(hc)]		*[All SE, SC]*
	Reserved.		
xx. alpha-BHC (alpha-HCH)	(1)	0.00391(hc)	All FW2
	(2)	0.0131(hc)	All SE, SC
xxi. beta-BHC (beta-HCH)	(1)	0.137(hcc)	All FW2
	(2)	0.460(hcc)	All SE, SC
xxii. gamma-BHC (gamma-HCH/Lindane)	(1)	2.0(a); 0.080(c)*[; 0.0186(hc)]*	All FW2
	(2)	0.16(a)*[; 0.0625(hc)]*	All SE, SC
xxiii. Bis(2-chloroethyl) ether	(1)	0.0311(hc)	All FW2
	(2)	1.4(hc)	All SE, SC
xxiv. Bis(2-chloroisopropyl) ether	(1)	1,250(h)	All FW2
	(2)	170,000(h)	All SE, SC
xxv. Bis(2-ethylhexyl) phthalate	(1)	1.76(hc)	All FW2
	(2)	5.92(hc)	All SE, SC
xxvi. Bromodichloromethane	(1)	0.266(hc)	All FW2
(Dichlorobromomethane)	(2)	22(hc)	All SE, SC

xxvii.	Bromoform	(1)	4.38(hc)	All FW2
		(2)	360(hc)	All SE, SC
xxviii.	Butylbenzyl phthalate	(1)	239(h)	All FW2
		(2)	416(h)	All SE, SC
xxix.	Cadmium (Total recoverable)	(1)	*[$e^{(1.128(\ln(H))-3.828)}$(a);]* *[$e^{(0.7852(\ln(H))-3.490)}$(c);]* *[15.9(h)]* ***10(h)***	All FW2
		*[(2)	43(a); 9.3(c); 169(h)]*	*[All SE, SC]*
xxx.	Carbon tetrachloride	(1)	0.363(hc)	All FW2
		(2)	6.31(hc)	All SE, SC
xxxi.	Chlordane	(1)	2.4(a); 0.0043(c); 0.000277(hc)	All FW2
		(2)	0.09(a); 0.0040(c); 0.000283(hc)	All SE, SC
xxxii.	Chloride	(1)	250,000(ol); 860,000(a); 230,000(c)	All FW2
xxxiii.	Chlorine Produced Oxidants (CPO)	(1)	19(a); 11(c)	All FW2
		(2)	13(a); 7.5(c)	All SE, SC
xxxiv.	Chlorobenzene	(1)	22.0(h)	All FW2
		(2)	21,000(h)	All SE, SC
xxxv.	Chloroform	(1)	5.67(hc)	All FW2
		(2)	470(hc)	All SE, SC
xxxvi.	2-Chlorophenol	(1)	122(h)	All FW2
		(2)	402(h)	All SE, SC
xxxvii.	Chlorpyrifos	(1)	0.083(a); 0.041(c)	All FW2
		(2)	0.011(a); 0.0056(c)	All SE, SC
xxxviii.	Chromium (Total recoverable)	(1)	*[16(a); 11(c);]* 160(h)	All FW2
		(2)	*[1,100(a); 50(c);]* 3,230(h)	All SE, SC
xxxix.	Chrysene	(1)	0.0028(hc)	All FW2
		(2)	0.031(hc)	All SE, SC
xl.	Copper (Total recoverable)	*[(1)	$e^{(0.9422(\ln(H))-1.464)}$(a);]* *[$e^{(0.8545(\ln(H))-1.465)}$(c)]*	*[All FW2]*
		*[(2)	2.9(a); 2.9(c)]* ***Reserved.***	*[All SE, SC]*
xli.	Cyanide	(1)	22(a); 5.2(c); 768(h)	All FW2
		(2)	1.0(a); 1.0(c); 220,000(h)	All SE, SC
xlii.	4,4'-DDD (p,p'TDE)	(1)	0.000832(hc)	All FW2
		(2)	0.000837(hc)	All SE, SC
xliii.	4,4'-DDE	(1)	0.000588(hc)	All FW2
		(2)	0.000591(hc)	All SE, SC
xliv.	4,4'-DDT	(1)	1.1(a); 0.0010(c); 0.000588(hc)	All FW2
		(2)	0.13(a); 0.0010(c); 0.000591(hc)	All SE, SC
xlv.	Demeton	(1)	0.1(c)	All FW2 SE, and SC
xlvi.	Dibenz(a,h)anthracene anthracene	(1)	0.0028(hc)	All FW2
		(2)	0.031(hc)	All SE, SC
xlvii.	Dibromochloromethane (Chlorodibromomethane)	(1)	72.6(h)	All FW2
		*[(2)	34(hc)]*	*[All SE, SC]*
xlviii.	Di-n-butyl phthalate	(1)	3,530(h)	All FW2
		(2)	15,700(h)	All SE, SC
xlix.	1,2-Dichlorobenzene	(1)	2,520(h)	All FW2
		(2)	16,500(h)	All SE, SC
l.	1,3-Dichlorobenzene	(1)	2,620(h)	All FW2
		(2)	22,200(h)	All SE, SC
li.	1,4'-Dichlorobenzene	(1)	343(h)	All FW2
		(2)	3,159(h)	All SE, SC
lii.	3,3'-Dichlorobenzidine	(1)	0.0386(hc)	All FW2
		(2)	0.0767(hc)	All SE, SC
liii.	1,2-Dichloroethane	(1)	0.291(hc)	All FW2
		(2)	99(hc)	All SE, SC
liv.	1,1-Dichloroethylene	(1)	4.81(h)	All FW2
		*[(2)	3.2(hc)]*	*[All SE, SC]*
lv.	trans-1,2-Dichloroethylene	(1)	592(h)	All FW2
lvi.	2,4-Dichlorophenol	(1)	92.7(h)	All FW2
		(2)	794(h)	All SE, SC
lvii.	1,3-Dichloropropene	(1)	0.193(hc)	All FW2
		(2)	1700(h)	All SE, SC
lviii.	Dieldrin	(1)	2.5(a); 0.0019(c); 0.000135(hc)	All FW2
		(2)	0.71(a); 0.0019(c); 0.000144(hc)	All SE, SC
lix.	Diethyl phthalate	(1)	21,200(h)	All FW2
		(2)	111,000(h)	All SE, SC
lx.	Dimethyl phthalate	(1)	313,000(h)	All FW2
		(2)	2,900,000(h)	All SE, SC
lxi.	4,6-Dinitro-o-cresol	(1)	13.4(h)	All FW2
		(2)	765(h)	All SE, SC
lxii.	2,4-Dinitrophenol	(1)	69.7(h)	All FW2
		(2)	14,000(h)	All SE, SC
lxiii.	2,4-Dinitrotoluene	(1)	0.11(hc)	All FW2
		(2)	9.1(hc)	All SE, SC
lxiv.	1,2-Diphenylhydrazine	(1)	0.0405(hc)	All FW2
		(2)	0.541(hc)	All SE, SC
lxv.	Endosulfans (alpha and beta)	(1)	0.22(a); 0.056(c); 0.932(h)	All FW2
		(2)	0.034(a); 0.0087(c); 1.99(h)	All SE, SC
lxvi.	Endosulfan sulfate	(1)	0.93(h)	All FW2
		(2)	2.0(h)	All SE, SC
lxvii.	Endrin	(1)	0.18(a); 0.0023(c); 0.629(h)	All FW2
		(2)	0.037(a); 0.0023(c); 0.678(h)	All SE, SC
lxviii.	Endrin aldehyde	(1)	0.76(h)	All FW2
		(2)	0.81(h)	All SE, SC
lxix.	Ethylbenzene	(1)	3,030(h)	All FW2
		(2)	27,900(h)	All SE, SC
lxx.	Fluoranthene	(1)	310(h)	All FW2
		(2)	393(h)	All SE, SC
lxxi.	Fluorene	(1)	1,340(h)	All FW2
		*[(2)	51,100(h)]*	*[All SE, SC]*
lxxii.	Guthion	(1)	0.01(c)	All FW2, SE and SC
lxxiii.	Heptachlor	(1)	0.52(a); 0.0038(c); 0.000208(hc)	All FW2
		(2)	0.053(a); 0.0036(c); 0.000214(hc)	All SE, SC
lxxiv.	Heptachlor epoxide	(1)	0.52(a); 0.0038(c); 0.000103(hc)	All FW2
		(2)	0.053(a); 0.0036(c); 0.000106(hc)	All SE, SC
lxxv.	Hexachlorobenzene	(1)	0.000748(hc)	All FW2
		(2)	0.000775(hc)	All SE, SC
lxxvi.	Hexachlorobutadiene	(1)	6.94(h)	All FW2
		*[(2)	50(hc)]*	*[All SE, SC]*
lxxvii.	Hexachlorocyclopentadiene	(1)	245(h)	All FW2
		(2)	17,000(h)	All SE, SC
lxxviii.	Hexachloroethane	(1)	2.73(h)	All FW2
		(2)	12.4(h)	All SE, SC
lxxix.	Indeno(1,2,3-cd) pyrene	(1)	0.0028(hc)	All FW2
		(2)	0.031(hc)	All SE, SC
lxxx.	Iron ***(Total recoverable)***	*[(1)	1,000(c)]* ***Reserved.***	*[All FW2]*
lxxxi.	Isophorone	(1)	552(h)	All FW2
		*[(2)	600(hc)]*	*[All SE, SC]*
lxxxii.	Lead (Total recoverable)	(1)	*[$e^{(1.273(\ln(H))-1.460)}$(a);]* *[$e^{(1.273(\ln(H))-4.705)}$(c);]* 5(h)	All FW2
		*[(2)	220(a); 8.5(c)]*	*[All SE, SC]*
lxxxiii.	Malathion	(1)	0.1(c)	All FW2, SE and SC
lxxxiv.	Manganese ***(Total recoverable)***	(1)	100(h)	All SE, SC
lxxxv.	Mercury (Total recoverable)	(1)	*[2.4(a); 0.012(c);]* 0.144(h)	All FW2
		(2)	*[2.1(a); 0.025(c);]* 0.146(h)	All SE, SC
lxxxvi.	Methoxychlor	(1)	0.03(c); 40(h)	All FW2
		(2)	0.03(c)	All SE, SC
lxxxvii.	Methyl bromide (Bromomethane)	(1)	48.4(h)	All FW2
		(2)	4,000(h)	All SE, SC
lxxxviii.	Methyl chloride (Chloromethane)	*[(1)	5.7(hc)]*	*[All FW2]*
		*[(2)	470(hc)]* ***Reserved.***	*[All SE, SC]*
lxxxix.	Methylene chloride	(1)	2.49(hc)	All FW2
		(2)	1,600(hc)	All SE, SC
xc.	Mirex	(1)	0.001(c)	All FW2, SE and SC
xci.	Nickel (Total recoverable)	(1)	*[$e^{(0.8460(\ln(H))+3.3612)}$(a);]* *[$e^{(0.8460(\ln(H))+1.1645)}$(c);]* 516(h)	All FW2
		(2)	*[75(a); 8.3(c);]* 3,900(h)	All SE, SC
xcii.	Nitrate (as N)	(1)	10,000(h)	All FW2

xciii.	Nitrobenzene	(1)	16.0(h)	All FW2
		(2)	1,900(h)	All SE, SC
xciv.	N-Nitrosodi-n-butylamine	(1)	0.00641(hc)	All FW2
xcv.	N-Nitrosodiethylamine	(1)	0.000233(hc)	All FW2
xcvi.	N-Nitrosodimethylamine	(1)	0.000686(hc)	All FW2
		(2)	8.1(hc)	All SE, SC
xcvii.	N-Nitrosodiphenyl amine	(1)	4.95(hc)	All FW2
		(2)	16.2(hc)	All SE, SC
xcviii.	N-Nitrosopyrrolidine	(1)	0.0167(hc)	All FW2
xcix.	Parathion	(1)	0.065(a); 0.013(c)	All FW2
c.	Pentachlorobenzene	(1)	3.67(h)	All FW2
		(2)	4.21(h)	All SE, SC
ci.	Pentachlorophenol	(1)	$e^{(1.005(pH)-4.830)}$(a); $e^{(1.005(pH)-5.290)}$(c); 0.282(c)	All FW2
		(2)	13(a); 7.9(c); 8.2(hc)	All SE, SC
cii.	Phenanthrene	*[(1)	0.0028(hc)]*	*[All FW2]*
		*[(2)	0.031(hc)]*	*[All SE, SC]*
		**Reserved.*		
ciii.	Phenol	(1)	20,900(h)	All FW2
		(2)	4,600,000(h)	All SE, SC
civ.	Phosphorous (yellow)	(1)	0.1(c)	All SE, SC
cv.	Polychlorinated biphenyls (PCBs-1242, 1254, 1221, 1232, 1248, 1260, and 1016)	(1)	0.014(c); 0.000244(hc)	All FW2
		(2)	0.030(c); 0.000247(hc)	All SE, SC
cvi.	Pyrene	(1)	797(h)	All FW2
		(2)	8,970(h)	All SE, SC
cvii.	Selenium (Total recoverable)	(1)	*[20(a); 5.0(c); 179(h)]* ***10(h)***	All FW2
		*[(2)	300(a); 71(c); 6,800(h)]*	*[All SE, SC]*
cviii.	Silver (Total recoverable)	(1)	*[$e^{(1.72(ln(H))-6.52)}$(a);]* 164(h)	All FW2
		*[(2)	2.3(a); 65,000(h)]*	*[All SE, SC]*
cix.	Sulfide-hydrogen sulfide (undissociated)	(1)	2(c)	All FW2, SE and SC
cx.	1,2,4,5-Tetrachlorobenzene	(1)	2.56(h)	All FW2
		(2)	3.25(h)	All SE, SC
cxi.	2,3,7,8-Tetrachlorodibenzo-p-dioxin) (TCDD)	(1)	0.000000013(hc)	All FW2
		(2)	0.000000014(hc)	All SE, SC
cxii.	1,1,2,2,-Tetrachloroethane	(1)	1.72(hcc)	All FW2
		*[(2)	11(hc)]*	*[All SE, SC]*
cxiii.	Tetrachloroethylene	(1)	0.388(hc)	All FW2
		(2)	4.29(hc)	All SE, SC
cxiv.	Thallium ***(Total recoverable)***	(1)	1.70(h)	All FW2
		(2)	6.22(h)	All SE, SC
cxv.	Toluene	(1)	7,440(h)	All FW2
		(2)	200,000(h)	All SE, SC
cxvi.	Toxaphene	(1)	0.73(a); 0.0002(c); 0.000730(hc)	All FW2
		(2)	0.21(a); 0.0002(c); 0.000747(hc)	All SE, SC
cxvii.	1,2,4-Trichlorobenzene	(1)	30.6(h)	All FW2
		(2)	113(h)	All SE, SC
cxviii.	1,1,1,-Trichloroethane	(1)	127(h)	All FW2
cxix.	1,1,2-Trichloroethane	(1)	13.5(h)	All FW2
		*[(2)	42(hc)]*	*[All SE, SC]*
cxx.	Trichloroethylene	(1)	1.09(hc)	All FW2
		(2)	81(hc)	All SE, SC
cxxi.	2,4,5-Trichlorophenol	(1)	2,580(h)	All FW2
		(2)	9,790(h)	All SE, SC
cxxii.	2,4,6-Trichlorophenol	(1)	2.14(hc)	All FW2
		(2)	6.53(hc)	All SE, SC
cxxiii.	Vinyl chloride	(1)	0.0830(hc)	All FW2
		(2)	525(hc)	All SE, SC
cxxiv.	Zinc (Total recoverable)	*[(1)	$e^{(0.8473(ln(H))+0.8604)}$(a);]* *[$e^{(0.8473(ln(H))+0.7614)}$(c);]*	*[All FW2]*
		*[(2)	95(a); 86(c)]*	*[All SE, SC]*
		**Reserved.*		

14. (No change in text.)

(d) Surface Water Quality Criteria for waters under the jurisdiction of the DRBC:

1. Mainstem Delaware River and Delaware Bay:

i. For parameters with criteria in "Delaware River Basin Commission, Administrative Manual—Part III, Water Quality Regulations," Article 3, dated May 22, 1991, including all amendments and future supplements thereto, the criteria contained therein are the applicable criteria.

ii. For parameters without criteria in "Delaware River Basin Commission, Administrative Manual—Part III, Water Quality Regulations," Article 3, dated May 22, 1991, including all amendments and future supplements thereto, the criteria at (c) above are the applicable criteria and shall be applied as follows:

(1) Criteria applicable to FW2-NT waters apply where salinities are less than or equal to 3.5 parts per thousand (ppt) at mean high tide;

(2) Criteria applicable to SE waters apply where salinities are greater than 3.5 ppt at mean high tide; and

(3) Where salinities vary from 3.5 ppt or less, to greater than 3.5 ppt, at mean high tide, the more stringent of the FW2-NT or SE criteria apply.

2. Tributaries to the mainstem Delaware River and Delaware Bay:

i. The applicable criteria are those contained in "Delaware River Basin Commission, Administrative Manual—Part III, Water Quality Regulations," Article 3, dated May 22, 1991 including all amendments and supplements thereto; or

ii. The criteria at (c) above, whichever are more stringent.

3. For all waters under the jurisdiction of the DRBC where criteria are not established in "Delaware River Basin Commission, Administrative Manual—Part III, Water Quality Regulations," Article 3, dated May 22, 1991, including all amendments and future supplements thereto, or at (c) above, the Department shall use criteria based upon the best available scientific information, in accordance with N.J.A.C. 7:9B-1.6(b)4iii and (d)1ii above, to establish water quality based effluent limitations.

7:9B-1.15 Surface water classifications for the waters of the State of New Jersey

(a) This section contains the surface water classifications for the waters of the State of New Jersey. Surface water classifications are presented in tabular form. Subsections (c) through (g) contain surface water classifications by major drainage basin. Subsection (h) lists FW1 waters by tract within basins and subsection (i) identifies the outstanding national resource waters of the State.

(b) The following are instructions for the use of Tables 1 through 5 found in N.J.A.C. 7:9B-1.15(c) through (g) respectively:

1.-4. (No change.)

5. To find unnamed waterways or waterbodies or named waterways or waterbodies which do not appear in the listing, use the following instructions:

i.-v. (No change.)

vi. If the waterway or waterbody of interest flows through or is entirely located within State parks, forests or fish and game lands, Federal wildlife refuges, other special holdings, or is a State shellfish water as defined in this subchapter, the Department's maps should be checked to determine if the waterbody of interest is mapped as a C1 water. If the waterway or waterbody does not appear on the United States Geological Survey quadrangle that the Department used as a base map in its designation of the C1 waters, the Department will determine on a case-by-case basis whether the waterway or waterbody should be designated as C1.

vii. (No change.)

6. The following 10 classifications are used for the sole purpose of identifying the water quality classification of the waters listed in the Tables in (c) through (h) below:

i.-v. (No change.)

vi. "SE1" means saline estuarine waters whose designated uses are listed in N.J.A.C. 7:9B-1.12(d).

vii. "SE2" means saline estuarine waters whose designated uses are listed in N.J.A.C. 7:9B-1.12(e).

viii. "SE3" means saline estuarine waters whose designated uses are listed in N.J.A.C. 7:9B-1.12(f).

ix-x. (No change.)

7. (No change.)

(c) The surface water classifications in Table 1 are for waters of the Atlantic Coastal Basin:

TABLE 1

Waterbody	Classification
...	
ABSECON CREEK	
(Egg Harbor)—North and South Branches from their origins downstream to the boundary of the Pinelands Protection and Preservation Area	PL
(Absecon)—Entire length, except portions described above	FW2-NT/SE1
...	
BASS RIVER	
(Oswego Lake)—Source to Pineland Protection and Preservation Area boundary at the Garden State Parkway, except those branches described separately below	PL
(New Gretna)—Pineland Protection and Preservation Area boundary to the boundary of shellfish waters	FW2-NT/SE1
(New Gretna)—Boundary of shellfish waters to Mullica River	SE1 (C1)
(Bass River State Forest)—Tommy's Branch from its headwaters to the Bass River State Forest Recreation Area service road	FW1
(Bass River State Forest)—Falkenburg Branch of Lake Absegami from its headwaters to the Lake	FW1
BATSTO RIVER	
(Browns Mills)—Entire length, except waters described separately below	PL
(Wharton)—Skit Branch and tributaries from their headwaters to the confluence with Robert's Branch	FW1
(Wharton)—The easterly branches of the Batsto River from Batsto Village upstream to the confluence with Skits Branch	FW1
...	
BRISBANE LAKE	
(Allaire State Park)—The lake and its tributaries within the boundaries of Allaire State Park, except Mill Run, which is listed separately, and the tributary described separately below	FW2-NT (C1)
(Allaire State Park)—The easterly tributary to Mill Run upstream of Brisbane Lake, located entirely within the Allaire State Park boundaries	FW1
(Mill Run)—Mill Run from its source to Brisbane Lake	FW2-NT (C1)
(Mill Run)—Mill Run from the outlet of Brisbane Lake to the Manasquan River	FW2-NT (C1)
...	
CEDAR CREEK	
(Cedar Crest)—Source to the boundaries of the Pinelands Protection and Preservation Area at the Garden State Parkway, except branches described separately below	PL
(Berkeley)—Garden State Parkway to Barnegat Bay	FW2-NT/SE1
(Greenwood Forest)—Webbs Mill Branch and tributaries located entirely within the boundaries of Greenwood Forest Wildlife Management Area	FW1
(Greenwood Forest)—Chamberlain's Branch from its origins to a point 1000 feet west of Route 539	FW1
(Greenwood Forest)—Those portions of the tributaries to Chamberlain's Branch originating and wholly contained within the boundaries of the Greenwood Forest Wildlife Management Area	FW1
...	
GREAT EGG HARBOR RIVER	
(Berlin)—Source to confluence with Tinker Branch	FW2-NT
(Berlin)—Tinker Branch, the River from its confluence with Tinker Branch, and all tributaries within the Pinelands Protection and Preservation Area, downstream to the boundary at the Rt. 40 bridge in Mays Landing	PL
(Winslow)—All tributaries or segments of tributaries outside of the boundaries of the Pinelands Protection and Preservation Area, downstream to Rt. 40 at Mays Landing	FW2-NT
(Mays Landing)—Rt. 40 bridge to Great Egg Harbor, except those tributaries described separately below	FW2-NT/SE1
(Mays Landing)—All tributaries or segments of tributaries within the boundaries of the Pinelands Protection and Preservation areas	PL
(Egg Harbor)—Tributaries and all other waters within MacNamara Wildlife Management Area, except tributary described below	FW2-NT/SE1 (C1)
(Tuckahoe)—Stream adjacent to and north of Hawkins Creek, and its tributaries, from their origins to the point where the influence of impoundment begins	FW1
...	
HAWKINS CREEK	
(Tuckahoe)—Source to the point where the influence of impoundment begins	FW1
(Tuckahoe)—Downstream of the influence of impoundment	SE1 (C1)
...	
JIMMIES CREEK	
(Great Bay)—Source to the boundary of Great Bay Wildlife Management Area	SE1 (C1)
(Parkers Landing)—Segments of the Creek outside the boundaries of Great Bay Wildlife Management Area	SE1
...	
MILE THOROFARE (Brigantine)—Entire length	SE1 (C1)
...	
MULLICA RIVER	
(Berlin)—Source to Pinelands Protection and Preservation Area boundaries at the Garden State Parkway, except branches and tributaries described below	PL
(Wharton)—Stream in the southeasterly corner of the Wharton State Forest located between Ridge Rd. and Seaf Weeks Rd., downstream to the boundaries of the Wharton State Forest	FW1
(Wharton)—Gun Branch from its headwaters to US Rt. 206	FW1
(New Gretna)—River and tributaries from the Pinelands Protection and Preservation Area boundary to Great Bay	SE1 (C1)

(Wharton)—Brooks and tributaries between and immediately to the west of Tylertown and Crowleytown, from their headwaters to the head of tide at mean high water FW1
...
SEDGE CREEK (MacNamara)—Entire length SE1 (C1)
...
SKIT BRANCH—See BATSTO RIVER
...
TAUGH CREEK
(Whitesboro)—Entire length, except segment described below SE1 (C1)
(Whitesboro)—Portions outside the boundaries of Marmora Wildlife Management Area SE1
...
TRIBUTARIES, TOMS RIVER
(Holmeson)—Tributaries within the boundaries of the Pinelands Protection and Preservation Area PL
(Van Hiseville)—All tributaries outside the boundaries of the Pinelands Protection and Preservation Area which enter the River between the Rt. 528 bridge, Cassville and the Rt. 547 bridge, Whitesville, except Dove's Mill Branch described separately below FW2-TM
(Toms River)—All tributaries within the boundaries of the Pinelands Protection and Preservation Area PL
(Archer's Corners)—All tributaries outside the boundaries of the Pinelands Protection Area and within the boundaries of Colliers Mills Wildlife Management Area FW2-NT (C1)
...
TULPEHOCKEN CREEK
(Wharton)—Creek and tributaries from their origin to the confluence with Featherbed Branch FW1
(Wharton)—The westerly tributaries and those natural ponds within the lands bounded by Hawkins (Bulltown-Hawkins) Rd., Hampton Gate (Tuckerton) Rd., and Sandy Ridge Rd. FW1
TURTLE GROUND CREEK (Jeffers Landing)—Entire length SE1 (C1)
TURTLE GUT (Ventnor)—Entire length SE1 (C1)
WADING RIVER
(Chatsworth)—Entire length, except tributaries described separately below PL
(Greenwood Forest)—Westerly tributary to Howardsville Cranberry Bog Reservoir and other tributaries located entirely within the boundaries of the Greenwood Forest Wildlife Management Area FW1
...

(d) The surface water classifications in Table 2 are for waters of the Delaware River Basin:

TABLE 2

Waterbody	Classification
...	
ASHROE LAKE (Stokes State Forest)	FW2-NT (C1)
ASHROE LAKE TRIBUTARIES	
(Stokes State Forest)—Tributary to the Lake from Deer Lake and portion of southernmost tributary to Ashroe Lake outside of the Stokes State Forest boundary)	FW2-TP (C1)
(Stokes State Forest)—Southernmost tributary to the Lake from its source to the Stokes State Forest boundary	FW1 (tp)
ASSUNPINK CREEK	
(Washington)—Source to boundary of Van Ness Park, except segments described separately below	FW2-NT
(Roosevelt)—Creek and those tributaries within the boundaries of the Assunpink Wildlife Management Area	FW2-NT (C1)
(Quaker Bridge)—Eastern boundary of Van Ness Park to Quaker Bridge Rd.	FW2-NT (C1)
(Quaker Bridge)—Quaker Bridge Rd. to western Park boundary	FW2-TM (C1)
(Lawrence)—Western Van Ness Park boundary to, but not including, Whitehead Mill Pond	FW2-TM
(Trenton)—Whitehead Mill Pond to Delaware River	FW2-NT
...	
BEAR CREEK (Johnsonburg)—Mud Pond to the Erie-Lackawanna Railroad trestle north of Johnsonburg	FW1
(Frelinghuysen)—Erie-Lackawanna Railroad trestle to confluence with Pequest River	FW2-TM
BEATTY'S BROOK (Penwell)—Entire length	FW2-TP (C1)
BEAVER BROOK (Hope)—Entire length	FW2-NT
BEAVERDAM BRANCH	
(Glassboro)—Source to boundary of the Glassboro Wildlife Management Area	FW2-NT
(Glassboro)—Within the boundaries of Glassboro Wildlife Management Area	FW2-NT (C1)
BEERSKILL	
(High Point State Park)—Source to boundary of High Point State Park at 41° 15'48" N, 74° 45'49" W	FW1 (tp)
(Shaytown)—Boundary of High Point State Park to confluence with Little Flat Brook	FW2-TP (C1)
BIG FLAT BROOK	
(Montague)—Sawmill Pond to confluence with Parker Brook, except segments described under the listing for Flat Brook, below	FW2-NT (C1)
(Sandyston)—Confluence with Parker Brook, through the Blewitt Tract, to the confluence with Flat Brook, except tributaries described under the listing for Flat Brook, below	FW2-TP (C1)
(Tuttles Corner)—Outlet stream from Lake Ashroe to its confluence with Big Flat Brook	FW2-TP(C1)
...	
BUCKSHUTEM CREEK	
(Centre Grove)—Entire length, except segments described separately below	FW2-NT
(Edward G. Bevan—Creek and tributaries within the boundaries of Edward G. Bevan Wildlife Management Area, except those tributaries described separately below	FW2-NT (C1)
(Edward G. Bevan)—Joshua and Pine Branches to their confluence with Buckshutem Creek	FW1
CAT GUT (Mad Horse Creek)—Entire length	SE1 (C1)
CEDAR BRANCH (Manumuskin River)—Source to Manumuskin River	FW1
CEDAR BRANCH (Edward G. Bevan)—Entire length	FW1
CEDAR BRANCH (Edward G. Bevan)—See NANTUXENT CREEK	
CEDAR CREEK	
(Dividing Creek Station)—Entire length, except portions described separately below	FW2-NT
(Edward G. Bevan)—Those tributaries to Cedar Creek that originate in and are located entirely within the boundaries of Edward G. Bevan Wildlife Management Area	FW1
CEDARVILLE POND (Cedarville)	FW2-NT (C1)

CHERRY TREE CREEK (Mad Horse Creek)—Entire length	SE1 (C1)
CLARKS POND (Bridgeton)	FW2-NT (C1)
CLEARVIEW CREEK (Hampton)—Source to Alms House Brook	FW2-NT
CLINT MILLPOND (Beaver Swamp)	FW2-NT (C1)
...	
CRISS BROOK (Stokes State Forest)—Entire length within the boundaries of Stokes State Forest	FW1 (tp)
CROSSWICKS CREEK (Bordentown)—Entire length	FW2-NT
CROW CREEK (S. Dennis)—Entire length	FW2-NT/SE1 (C1)
CULVER'S CREEK (Frankford)—Entire length	FW2-TM
CULVER'S LAKE (Frankford)	FW2-TM
DEER LAKE (Sandyston)	FW2-NT (C1)
...	
DIVIDING CREEK	
(Dividing Creek)—Entire length, except those segments described below	FW2-NT/SE1
(Edward G. Bevan)—Those segments of tributaries that are located entirely within the boundaries of the Edward G. Bevan Wildlife Management Area	FW1
...	
DUNNFIELD CREEK	
(Del. Water Gap)—Source to Rt. I-80	FW1
(Del. Water Gap)—Rt. I-80 to Delaware River, except tributaries described below	FW2-TP (C1)
(Worthington)—All unnamed waters that are located entirely within the boundaries of the Worthington State Forest	FW1
EAST CREEK	
(Dennis)—Source to boundaries of the Pinelands Protection and Preservation Area except those portions described separately below	PL
(Belleplain)—A stream and tributary that originate just south of East Creek Mill Rd., 1.2+ miles north-northeast of Eldora and are located entirely within the boundaries of Belleplain State Forest	FW1
(Eldora)—Boundary of the Pinelands Protection and Preservation Area to Delaware Bay except segment described separately below	FW2-NT/SE1
(Dennis Creek)—Segment within the boundaries of the Dennis Creek Wildlife Management Area	FW2-NT/SE1 (C1)
...	
FLAT BROOK	
(Flatbrook-Roy)—Confluence of Big Flat Brook and Little Flat Brook to the boundary of Flatbrook-Roy Wildlife Management Area, except segments described below	FW2-TP (C1)
(Flatbrookville)—Flatbrook-Roy Wildlife Management Area boundary to Delaware River, except segments described below	FW2-TM
(Walpack)—Segment of the Brook within Walpack Wildlife Management Area	FW2-TM (C1)
(Stokes State Forest)—Two tributaries to Flat Brook which originate along Struble Road in Stokes State Forest to their confluences with Flat Brook within the boundaries of Flatbrook-Roy Wildlife Management Area	FW1 (tm)
(High Point)—All surface waters of the Flat Brook drainage area within the boundaries of High Point State Park and Stokes State Forest, except the following waters:	FW1
1. Saw Mill Pond and Big Flat Brook downstream to the confluence with Flat Brook;	
2. Mashipacong Pond and its outlet stream (Parker Brook) to the confluence with Big Flat Brook;	
3. Lake Wapalanne and its outlet stream to the confluence with Big Flat Brook;	
4. Lake Ocquittunk and waters connecting it with Big Flat Brook;	
5. Stony Lake and its outlet stream (Stony Brook) to the confluence with Big Flat Brook;	
6. Kittatinny Lake, that portion of its inlet stream outside the Stokes State Forest boundaries, and its outlet stream, including the Shotwell Camping Area tributary, to the confluence with Big Flat Brook;	
7. Deer Lake and its outlet stream to Lake Ashroe;	
8. Lake Ashroe, portions of its tributaries outside the Stokes State Forest boundaries, and its outlet stream to the confluence with Big Flat Brook;	
9. Lake Shawanni and its outlet stream to its confluence with Flat Brook;	
10. Crigger Brook and tributary to its confluence with Big Flat Brook	
(Del. Water Gap)—All tributaries to Flat Brook that flow from the Kittatinny Ridge and are located entirely within the boundaries of the Delaware Water Gap National Recreation Area	FW1
FORKED BROOK (Stokes State Forest)—Entire length	FW2-TP (C1)
FURNACE (OXFORD) BROOK	
(Oxford)—Source to railroad bridge at Oxford	FW2-TP (C1)
(Oxford)—Railroad bridge to Pequest River	FW2-NT
FURNACE LAKE (Oxford)	FW2-TM
GARDNERS LAKE (Andover)	FW2-TM
GOOSE POND (Mad Horse Creek)	SE1 (C1)
GOSHEN CREEK	
(Woodbine)—Entire length except segment described below	SE1
(Dennis Creek)—Segment and all tributaries within the Dennis Creek Wildlife Management Area	SE1 (C1)
GRAVELLY RUN (Edward G. Bevan)—Downstream to the Edward G. Bevan Wildlife Management Area boundaries	FW1
...	
KITTATINNY LAKE TRIBUTARY	
(Stokes State Forest)—Source to boundary of Stokes State Forest	FW1 (tp)
(Sandyston)—State Forest boundary to Kittatinny Lake	FW2-TP (C1)
KYMER BROOK (Andover)—Entire length	FW2-NT
LAHAWAY CREEK	
(Prospertown)—Entire length, except tributaries described separately below	FW2-NT
(Colliers Mills)—All tributaries which originate in the Colliers Mills Wildlife Management Area north-northeast of Archers Corners, from their sources to the boundaries of the Colliers Mills Wildlife Management Area	FW1
LAKE—See listing under Name	
LITTLE EASE RUN	
(Glassboro)—Entire length, except portion described separately below	FW2-NT

(Glassboro)—Run and tributaries within the Glassboro Wildlife Management Area, except tributary described separately below	FW2-NT (C1)
(Glassboro)—The portion of a branch of Little Ease Run situated immediately north of Stanger Avenue, and entirely within the Glassboro Wildlife Management Area	FW1
(Glassboro)—The first and second easterly tributaries to Little Ease Run north of Academy Road	FW1
LITTLE FLAT BROOK	
(High Point State Park)—Source to boundary of High Point State Park	FW1 (tm)
(Layton)—State park boundary to, but not including, Hainesville Pond, except tributaries described below or under the listing for Flat Brook above	FW2-TM (C1)
(Flatbrook-Roy)—Tributary which originates north of Bevans-Layton Rd. downstream to the first pond adjacent to the Fish and Game headquarters building	FW1(tm)
(Hainesville)—Hainesville Pond to Rt. 206 bridge, except tributaries described under the listing for Flat Brook, above	FW2-NT (C1)
(Hainesville)—Rt. 206 bridge to confluence with Big Flat Brook, except tributaries described under listing for Flat Brook, above	FW2-TM (C1)
...	
LONE TREE CREEK (Egg Island)—Entire length	SE1 (C1)
...	
MARCIA LAKE	
(High Point State Park)—Entire Lake	FW2-TM (C1)
(High Point State Park)—Outlet stream from the Lake to the confluence with Clove (Mill) Brook	FW2-TP (C1)
MASHIPACONG POND (Montague)	FW2-NT (C1)
...	
MILE BRANCH—Entire length	FW1
...	
MOUNT MISERY BROOK	
(Woodmansie)—Entire length, except segments described below	PL
SOUTH BRANCH, MOUNT MISERY BROOK	
(Lebanon State Forest)—All tributaries to the South Branch that are located entirely within the boundaries of Lebanon State Forest	FW1
(Pasadena)—The two easterly branches of the Branch which are located entirely within the boundaries of the Pasadena Wildlife Management Area	FW1
MOUNTAIN LAKE (Liberty)	FW2-TM
MOUNTAIN LAKE CREEK	
(Liberty)—Source to Mountain Lake	FW2-TM
(White)—Mountain Lake dam to Pequest River	FW2-NT
MUD POND (Johnsonburg)—Pond and its outlet stream, Bear Creek, to the Erie-Lackawanna Railroad trestle north of Johnsonburg	FW1
...	
MUSKEE CREEK	
(Port Elizabeth)—Source to boundary of Pinelands Protection and Preservation Area, except segments described separately below	PL
(Peaselee)—The Middle Branch from its origin to the boundaries of the Peaselee Wildlife Management Area	FW1
(Peaselee)—Those portions of the tributaries to Slab Branch which are located entirely within the boundaries of the Peaselee Wildlife Management Area	FW1
(Bricksboro)—Pinelands Protection and Preservation Area boundaries to Maurice River	FW2-NT
NANCY GUT	
(Nantuxent)—Source to the boundary of Nantuxent Creek Wildlife Management Area	SE1 (C1)
(Newport)—Stream and all tributaries outside of the boundaries of the Nantuxent Creek Wildlife Management Area	SE1
NANTUXENT CREEK	
(Newport Landing)—Entire length, except segment described below	FW2-NT/SE1
(Nantuxent)—All waters within the boundaries of Nantuxent Creek Wildlife Management Area	FW2-NT/SE1 (C1)
NEW WAWAYANDA LAKE (Andover)	FW2-TM
NISHISAKAWICK CREEK (Frenchtown)—Entire length	FW2-NT
OLDMANS CREEK	
(Lincoln)—Entire length, except portion described below	FW2-NT/SE1
(Harrisonville)—Portion within Harrisonville Lake Wildlife Management Area	FW2-NT (C1)
OCQUITTUNK LAKE	
(Stokes State Forest)—Entire lake	FW2-NT (C1)
(Stokes State Forest)—From the outlet of the Lake to the confluence with Big Flat Brook	FW2-TP (C1)
OCQUITTUNK LAKE TRIBUTARY (Stokes State Forest)—Source to Ocquittunk Lake	FW1 (tp)
...	
PEQUEST RIVER	
(Belvidere)—Source to Tranquility bridge except segments described below	FW2-TM
(Whittingham)—Northwesterly tributaries, including Big Spring, located within the boundaries of the Whittingham Wildlife Management Area, southwest of Springdale, from their origins to their confluence with the Pequest River	FW1 (tm)
(Whittingham)—Stream and tributaries within the Whittingham Wildlife Management Area, except those classified as FW1, above	FW2-TM (C1)
(Vienna)—Tranquility bridge to Townsbury bridge	FW2-NT
(Townsbury)—Townsbury bridge to Delaware River, except segment described below	FW2-TM
(Pequest)—Segment and tributaries within the boundaries of the Pequest Wildlife Management Area	FW2-NT (C1)
...	
RANCOCAS CREEK	
NORTH BRANCH	
(North Hanover)—Source to boundary of the Pinelands Protection and Preservation Area at Pemberton	PL
(Pemberton)—Boundary of the Pinelands Protection and Preservation Area to the Delaware River, except tributaries described below	FW2-NT
(Pemberton)—Tributaries within the boundaries of the Pinelands Protection and Preservation Areas	PL
SOUTH BRANCH RANCOCAS CREEK	
(Southhampton)—Source to Pinelands Protection and Preservation Area boundaries at Rt. 206 bridge south of Vincentown	PL
(Vincentown)—Vincentown to Delaware River, except tributaries described separately below	FW2-NT

(Vincentown)—All tributaries within the Pinelands Protection and Preservation Area	PL
COOPER BRANCH RANCOCAS CREEK	
(Woodmansie)—Entire length, except portions described separately, below	PL
(Lebanon State Forest)—Branch and tributaries downstream to Pakim Pond, and tributaries to Cooper Branch located entirely within the Lebanon State Forest boundaries	FW1
DEER PARK BRANCH RANCOCAS CREEK	
(Buckingham)—Stream and tributaries near Buckingham to confluence with Pole Bridge Branch	FW1
MACDONALDS BRANCH RANCOCAS CREEK	
(Woodmansie)—Entire length, except as described separately below	PL
(Lebanon State Forest)—Branch and tributaries located entirely within Lebanon State Forest	FW1
SHINNS BRANCH RANCOCAS CREEK	
(Lebanon State Forest)—Branch and tributaries located entirely within the boundaries of Lebanon State Forest, from their sources to the forest boundary	FW1
(Lebanon Lake Estates)—Forest boundary to lake	PL
ROARING DITCH	
(Heislerville)—Entire length, except segment described below	SE1
(Eldora)—Ditch and all tributaries within the Dennis Creek Wildlife Management Area boundaries	SE1 (C1)
ROWANDS POND (Clementon)—Pond, inlet stream and outlet stream within Rowands Pond Wildlife Management Area	FW2-NT (C1)
RUNDLE BROOK (Del. Water Gap)—Source to Sussex County Route 615	FW1
SALEM CREEK (RIVER) (Salem)—Entire length	FW2-NT/SE1
SAMBO ISLAND BROOK (Del. Water Gap)—Entire length	FW1
SAMBO ISLAND POND (Del. Water Gap)	FW1
SANDYSTON CREEK (Sandyston)—Entire length	FW2-TP (C1)
SAVAGES RUN (East Creek)	
(Lake Nummi)—Entire length, except portions described separately, below	PL
(Belleplain)—Those two tributaries and portions thereof downstream of Lake Nummi and all tributaries to Lake Nummi that are located entirely within the boundaries of Belleplain State Forest	FW1
SAWMILL POND (High Point)	FW2-NT (C1)
SCHOOLEYS MTN. BROOK (Schooley's Mtn.)—Entire length	FW2-TP (C1)
SHABACUNK (SHABBECONG) CREEK (Ewing)—Entire length	FW2-NT
SHAWANNI CREEK (Walpack)—Entire length	FW2-TP (C1)
SHAWANNI LAKE (Stokes State Forest)	FW2-NT (C1)
SHAWS MILL POND (Cedarville)	FW2-NT/SE1 (C1)
TRIBUTARIES	
(Edward G. Bevan)—Cedar and Mile Branches to Shaw's Mill Pond	FW1
...	
STEELE RUN	
(Washington Crossing State Park)—Source to confluence with westerly tributary	FW1
(Titusville)—Confluence with westerly tributary to the Delaware River	FW2-NT
STEENY KILL LAKE (High Point)	FW1
STEEP RUN (Mauricetown)—Entire length	FW2-NT (C1)
STEPHENSBURG BROOK (Stephensburg)—Entire length	FW2-TP (C1)
STONY BROOK (Knowlton)—Entire length	FW2-NT
STONY BROOK	
(Stokes State Forest)—Source and tributaries, wholly contained within Stokes State Forest, from their origins to, but not including, Stony Lake	FW1 (tp)
(Stokes State Forest)—Tributary originating approximately one mile west of the Branchville Reservoir to the confluence with Stony Brook	FW1 (tp)
(Stokes State Forest)—Outlet of Stony Lake to the confluence with Big Flat Brook	FW2-TP (C1)
STONY LAKE (Stokes State Forest)	FW2-TM (C1)
TRIBUTARIES—See STONY BROOK	
STOW CREEK	
(Stow Creek Landing)—Entire length, except tributaries described separately below	FW2-NT/SE1
(Mad Horse Creek)—Tributaries within the boundaries of the Mad Horse Creek Wildlife Management Area	FW2-NT/SE1 (C1)
STRAIGHT CREEK (Berrytown)—Entire length	SE1 (C1)
SUNFISH POND (Worthington)—The pond and its outlet stream to the Delaware River	FW1
...	
TILLMAN BROOK (Walpack)—Entire length	FW1 (tp)
...	

(e) The surface water classifications in Table 3 are for waters of the Passaic, Hackensack and New York Harbor Complex Basin:

TABLE 3

Waterbody	Classification
...	
BEAR SWAMP LAKE (Ringwood State Park)	FW2-NT (C1)
...	
BRUSHWOOD POND (Ringwood State Park)	FW2-TM (C1)
...	
CEDAR POND (Postville)—Pond and all tributaries	FW1
CHARLOTTEBURG RESERVOIR (Charlotteburg)	FW2-TM
CHERRY RIDGE BROOK	
(Vernon)—Tributaries not contained within Wawayanda State Park and Newark Watershed lands	FW2-NT
(Wawayanda State Park)—Brook and tributaries upstream of Canistear Reservoir located entirely within the boundaries of Wawayanda State Park and the Newark Watershed lands	FW1
CLINTON BROOK	
(Mossmans Brook) (W. Milford)—Source to, but not including, Clinton Reservoir	FW2-NT (C1)
(Newfoundland)—Clinton Reservoir dam to Pequannock River	FW2-TP (C1)
CLINTON RESERVOIR (W. Milford)	FW2-TM (C1)
CLOVE BROOK—See STAG BROOK	
COOLEY BROOK	
(W. Milford)—Entire length, except segments described below	FW2-TP (C1)
(Hewitt State Forest)—Segments of the brook and all tributaries which originate and are located entirely within Hewitt State Forest	FW1 (tp)
CORYS BROOK (Warren)—Entire length	FW2-NT
CRESSKILL BROOK	
(Alpine)—Source to Duck Pond Rd. bridge, Demarest	FW2-TP (C1)
(Demarest)—Duck Pond Rd. bridge to Tenakill Brook	FW2-NT
CUPSAW BROOK	
(Skylands)—Source to Wanaque Reservoir, except segment described below	FW2-NT

(Ringwood State Park)—That segment of Cupsaw Brook within the boundaries of Ringwood State Park	FW2-NT (C1)
...	
GRANNEY BROOK—See SPRING BROOK	
GRANNIS BROOK (Morris Plains)—Entire length	FW2-NT
GREAT BROOK	
(Chatham)—Entire length, except segment described below	FW2-NT
(Great Swamp)—Segment within the boundaries of the Great Swamp National Wildlife Refuge	FW2-NT (C1)
GREEN BROOK	
(W. Milford)—Entire length, except those segments described below	FW2-TP (C1)
(Hewitt State Forest)—These segments and tributaries which originate and are located entirely within the Hewitt State Forest boundaries	FW1 (tp)
...	
LAKE STOCKHOLM BROOK	
(Stockholm)—Entire length, except tributaries described separately below	FW2-TP (C1)
(Stockholm)—Portion of westerly tributary, from its origins to about 1,000 feet south of the Route 23 bridge, located entirely within the boundaries of the Newark watershed	FW1 (tp)
(Stockholm)—Brook between Hamburg Turnpike and Vernon-Stockholm Rd. to its confluence with Lake Stockholm Brook, north of Rt. 23	FW1 (tp)
LITTLE POND BROOK (Oakland)—Entire length	FW2-TP (C1)
LOANTAKA BROOK	
(Green Village)—Entire length, except segment described below	FW2-NT
(Great Swamp)—Brook and all tributaries within the boundaries of Great Swamp National Wildlife Refuge	FW2-NT (C1)
LUD-DAY BROK—(Camp Garfield)—Source downstream to its confluence with the southwestern outlet stream from Clinton Reservoir just upstream of the confluence of the outlet stream and a tributary from Camp Garfield	FW1
MORSES CREEK (Linden)—Entire length	FW2-NT/SE3
...	
PACACK BROOK	
(Stockholm)—Outlet of Canistear Reservoir to Pequannock River	FW2-NT
(Canistear)—Brook and tributaries upstream of Canistear Reservoir located entirely within the boundaries of the Newark Watershed	FW1
PASSAIC RIVER	
(Mendham)—Source to Rt. 202 bridge (Van Doren's Mill), except tributaries described separately below	FW2-TM
(Paterson)—Rt. 202 bridge to Dundee Lake dam	FW2-NT
(Little Falls)—Dundee Lake dam to confluence with Second River	FW2-NT/SE2
(Newark)—Confluence with Second River to mouth	SE3
TRIBUTARIES	
(Great Piece Meadows State Park)—Tributaries within Great Piece Meadows State Park	FW2-NT (C1)
PECKMAN RIVER (Verona)—Entire length	FW2-NT
PEQUANNOCK RIVER	
MAIN STEM	
(Vernon)—Source to confluence with Pacack Brook	FW1 (tp)
(Newfoundland)—Pacack Brook to Hamburg Turnpike, (Bench Mark 257) in Bloomingdale except tributaries described separately below	FW2-TM
(Riverdale)—Hamburg Turnpike bridge to Pompton River	FW2-NT
TRIBUTARIES	
(Copperas Mtn.)—Entire length	FW2-TP (C1)
(Smoke Rise)—Entire length	FW2-TP (C1)
(Green Pond Junction)—Tributary at Green Pond Junction from its origin downstream to Route 23	FW1 (tm)
(Jefferson)—Tributary joining the main stem about 3,500± feet southeast of the Sussex-Passaic County line, near Jefferson from its origin to about 2,000 feet upstream of the pond	FW1 (tm)
(Lake Kampfe)—Source to, but not including, Lake Kampfe	FW2-TM
(Lake Kampfe)—Lake Kampfe to Pequannock River, except tributary described separately below	FW2-NT
(Lake Kampfe)—Tributary within the boundaries of Norvin Green State Forest, originating west of Torne Mtn.	FW2-NT (C1)
PILES CREEK (Grasselli)—Entire length	SE3
...	
SMITH CREEK (Woodbridge)—Entire length	FW2-NT/SE3
SPLIT ROCK RESERVOIR (Rockaway)	FW2-TM
SPLIT ROCK RESERVOIR TRIBUTARIES	
(Farny State Park)—Three tributaries within Farny State Park	FW2-NT (C1)
SPRING (GRANNEY) BROOK (Mine Hill)—Entire length	FW2-TP (C1)
SPRING GARDEN BROOK (Florham)—Entire length	FW2-NT
STAG (CLOVE) BROOK (Mahwah)—Entire length	FW2-TP (C1)
STEPHENS BROOK	
(Roxbury)—Entire length, except segment described separately, below	FW2-NT
(Berkshire Valley)—That segment north of the boundaries of the Berkshire Valley Wildlife Management Area	FW1
...	
WHIPPANY RIVER	
(Brookside)—Source to Whitehead Rd. bridge	FW2-TP (C1)
(Morristown)—Whitehead Rd. bridge to Rockaway River	FW2-NT
TRIBUTARIES	
(Brookside)—Entire length	FW2-TP (C1)
(E. of Brookside)—Entire length	FW2-TM
(E. of Washington Valley)—Entire length	FW2-TM
(Gillespie Hill)—Entire length	FW2-TP (C1)
(Shongum Mtn.)—Entire length	FW2-NT
WONDER LAKE (West Milford)	FW2-NT (C1)
WOODBRIDGE CREEK (Woodbridge)—Entire length	FW2-NT/SE3

(f) The surface water classifications in Table 4 are for waters of the Raritan River and Raritan Bay Basin:

TABLE 4

Waterbody	Classification
...	
BLACKBERRY CREEK	
(Oceanport)—Source to a line beginning on the easternmost extent of Gooseneck Point and bearing approximately 162 degrees True North to its terminus on the westernmost extent of an unnamed point of land in the vicinity of the western extent of Cayuga Ave. in Oceanport	SE1

(Oceanport)—Creek below the line described above	SE1 (C1)
...	
CAPOOLONG (CAKEPOULIN) CREEK	
(Sydney)—Entire length	FW2-TP (C1)
...	
PIGEON SWAMP (Pigeon Swamp State Park)—All waters within the boundaries of Pigeon Swamp State Park	FW2-NT (C1)
...	
RARITAN RIVER	
NORTH BRANCH (Also see INDIA BROOK)	
(Pleasant Valley)—Source to, but not including, Ravine Lake	FW2-TP (C1)
(Far Hills)—Ravine Lake dam to Rt. 512 bridge	FW2-TM
(Bedminister)—Rt. 512 bridge to confluence with South Branch, Raritan River	FW2-NT
SOUTH BRANCH RARITAN RIVER	
(Mt. Olive)—Source to the dam that is 390 feet upstream of the Flanders-Drakestown Road bridge and the two tributaries which originate north and east of the Budd Lake Airfield	FW2-NT (C1)
(Mt. Olive)—Dam to confluence with Turkey Brook	FW2-TM (C1)
(Naughright)—Confluence with Turkey Brook to confluence with Electric Brook	FW2-TP (C1)
(Clinton)—Confluence with Electric Brook to downstream end of Packers Island, except segment described separately, below	FW2-TM
(Ken Lockwood Gorge)—River and tributaries within Ken Lockwood Gorge Wildlife Management Area	FW2-TM (C1)
(Neshanic Sta.)—Downstream end of Packers Island to confluence with North Branch, Raritan River	FW2-NT
MAIN STEM RARITAN RIVER	
(Bound Brook)—From confluence of North and South Branches to Landing Lane bridge in New Brunswick and all freshwater tributaries downstream of Landing Lane bridge	FW2-NT
(Sayreville)—Landing Lane bridge to Raritan Bay and all saline water tributaries	SE1
...	

(g) The surface water classifications in Table 5 are for waters of the Wallkill River Basin:

TABLE 5

Waterbody	Classification
BEARFORT WATERS (Wawayanda)	FW2-NT (C1)
BEAVER RUN (Wantage)—Entire length	FW2-NT
BLACK CREEK	
(McAfee)—Source to Rt. 94 bridge, except those tributaries described separately, below	FW2-TM
(Vernon)—Rt. 94 bridge to Pochuck Creek	FW2-NT
TRIBUTARIES	
(Hamburg)—Three tributaries to Black Creek which originate in the Hamburg Mtn. Wildlife Management Area from their sources to the Management Area boundaries	FW1 (tm)
(Rudeville)—Tributaries within the Hamburg Mtn. Wildlife Management Area not classified as FW1, above	FW2-TM (C1)
(McAfee)—Entire length	FW2-TP (C1)
(Vernon Valley)—Entire length	FW2-NT
...	
FRANKLIN POND CREEK	
(Franklin)—Entire length, except those tributaries described separately, below	FW2-TM
(Hamburg Mtn.)—The first tributary, just south of Hamburg Mtn., flowing toward the Wallkill River and located entirely within the Hamburg Mtn. Wildlife Management Area	FW1 (tm)
(Hamburg Mtn.)—Tributaries within the Hamburg Mtn. Wildlife Management Area not classified as FW1 as described above	FW2-TM (C1)
GLENWOOD BROOK (Glenwood)—Outlet of Glenwood Lake to State line	FW2-TM
HAMBURG CREEK	
(Hamburg Mtn.)—Source to Rt. 517 bridge, Rudeville, except tributary described separately below	FW2-TM
(Hardistonville)—Rt. 517 bridge to Wallkill River	FW2-NT
(Hamburg Mtn.)—The third tributary just southwest of Hamburg Mtn. flowing toward the Wallkill River and located entirely within the Hamburg Mtn. Wildlife Management Area	FW1
HANFORD BROOK (Hanford)—Entire length within New Jersey	FW2-NT
LAKE LOOKOUT (Wawayanda)	FW2-NT (C1)
LAKE LOOKOUT BROOK (Wawayanda)—Brook and tributaries from source in Newark City holdings, through the Wawayanda State Park, to confluence with the outlet stream from Lake Wawayanda	FW1
LAKE RUTHERFORD (Wantage)—The Lake and its tributaries	FW1 (tm)
...	
MUD POND OUTLET STREAM (Hamburg)—Outlet stream from the Pond, located within Hamburg Mtn. Wildlife Management Area	FW2-NT (C1)
...	
SAND HILLS BROOK	
(Hamburg Mtn.)—The upstream portion of Sand Hills Brook located entirely within the boundaries of the Hamburg Mtn. Wildlife Management Area	FW1
(Hamburg)—Brook and tributaries beyond Management Area boundaries	FW2-NT
...	

(h) FW1 waters are listed in Table 6 by tract within basins:

Table 6

ATLANTIC COASTAL PLAIN BASIN

...

WHARTON STATE FOREST	MULLICA RIVER WATERSHED
	Deep Run and tributaries from their headwaters downstream to Springer's Brook
	Skit Branch and tributaries from their headwaters downstream to the confluence with Robert's Branch
	Tulpehocken Creek and tributaries from their sources downstream to the confluence with Featherbed Branch
	The westerly tributaries to Tulpehocken Creek and those natural ponds within the lands bounded by Hawkins (Bulltown-Hawkins) Rd., Hampton Gate (Tuckerton) Rd., and Sandy Ridge Rd.

	Stream in the southeasterly corner of the Wharton State Forest, located between Ridge Rd. and Seaf Weeks Rd. downstream to the boundaries of Wharton State Forest
	Brooks and tributaries to the Mullica River between and immediately to the west of Tylertown and Crowleytown, from their headwaters downstream to the head of tide at mean high water
	The easterly branches of the Batsto River from Batsto Village upstream to the confluence with Skit Branch
	Gun Branch from its headwaters downstream to U.S. Route 206
DELAWARE RIVER BASIN	
...	
BELLEPLAIN STATE FOREST	EAST CREEK WATERSHED
	All tributaries to Lake Nummi from their origins downstrem to the lake
	Those two tributaries to Savages Run and portions thereof downstream of Lake Nummi, which are located entirely within the Belleplain State Forest boundaries
	A stream and its tributaries that originate just south of East Creek Mill Rd., 1.2± miles north-northeast of Eldora, and are located entirely within the boundaries of Belleplain State Forest
	WEST CREEK WATERSHED
	The portion of the tributary to West Creek that originates about 0.9 miles southeast of Hoffman's Mill and is located entirely within the boundaries of Belleplain State Forest
	Eastern branch of the easterly tributary to Pickle Factory Pond from its origin to its confluence with the western branch
	Those tributaries to the stream which enter West Creek approximately 0.5 miles upstream of Hoffman's Mill and which are located entirely within the boundaries of Belleplain State Forest
...	
FLATBROOK-ROY WILDLIFE MANAGEMENT AREA	FLAT BROOK WATERSHED
	The tributary to Little Flat Brook which originates north of the Bevans-Layton Rd., downstream to the first pond adjacent to the Fish and Game headquarters building
	Two tributaries to Flat Brook which originate along Struble Rd. in Stokes State Forest, downstream to the confluence with Flat Brook within Flatbrook-Roy Wildlife Management Area boundaries
GLASSBORO WILDLIFE MANAGEMENT AREA	MAURICE RIVER WATERSHED
	The portion of a branch of Little Ease Run situated immediately north of Stanger Avenue, and entirely within the Glassboro Wildlife Management Area
	First and second easterly tributaries to Little Ease Run north of Academy Road
HIGH POINT STATE PARK AND STOKES STATE FOREST	CLOVE BROOK WATERSHED
	The second and third northerly tributaries to Clove Brook, those tributaries to Steeny Kill Lake, Steeny Kill Lake, and those downstream of the Lake which originate in High Point State Park, downstream to the confluence with Clove Brook or to the boundaries of High Point State Park
	The northerly tributaries to Mill Brook due west of Steeny Kill Lake, within the High Point State Park
	FLAT BROOK WATERSHED
	All surface waters of the Flat Brook drainage within the boundaries of High Point State Park and Stoke State Forest except the following:
	(1) Saw Mill Pond and Big Flat Brook downstream to the confluence with Big Flat Brook;
	(2) Mashipacong Pond and its outlet stream (Parker Brook) to the confluence with Big Flat Brook;
	(3) Lake Wapalanne and its outlet stream to the confluence with Big Flat Brook;
	(4) Lake Ocquittunk and waters connecting it with Big Flat Brook;
	(5) Stony Lake and its outlet stream (Stony Brook) downstream to the confluence with the Big Flat Brook;
	(6) Kittatinny Lake, that portion of its inlet stream outside the Stokes State Forest boundaries, and its outlet stream, including the Shotwell Camping Area tributary, to the confluence with Big Flat Brook;
	(7) Deer Lake and its outlet stream to Lake Ashroe;
	(8) Lake Ashroe, the portions of its tributaries outside the Stokes State Forest boundaries, and its outlet stream to the confluence with Big Flat Brook;
	(9) Lake Shawanni and its outlet stream to the confluence with [Big] Flat Brook;
	(10) Crigger Brook and its tributary to the confluence with Big Flat Brook
	SHIMERS BROOK WATERSHED
	The portion of Shimers Brook and its tributaries that are located within the boundaries of High Point State Park
JOHNSONBURG NATURAL AREA	PEQUEST RIVER WATERSHED
	Mud Pond and its outlet stream, Bear Creek, to the Erie-Lackawanna Railroad trestle, north of Johnsonburg
LEBANON STATE FOREST	RANCOCAS CREEK WATERSHED
	Deer Park Branch and tributaries near Buckingham, downstream to the confluence with Pole Bridge Branch
	Tributaries to the South Branch of Mount Misery Brook located entirely within the boundaries of Lebanon State Forest

	Cooper Branch and tributaries downstream to Pakim Pond and those tributaries to Coopers Branch downstream of Pakim Pond that are located entirely within the boundaries of Lebanon State Forest
	Shinns Branch and tributaries located entirely within the boundaries of Lebanon State Forest, from their sources to the forest boundary
	Jade Run located entirely within the boundaries of Lebanon State Forest
	MacDonalds Branch and tributaries located entirely within the boundaries of Lebanon State Forest, from their sources to the forest boundary
...	
WASHINGTON CROSSING STATE PARK	STEELE RUN WATERSHED That portion of Steele Run, located within the boundaries of Washington Crossing State Park, to the confluence with the westerly tributary
WHITTINGHAM WILDLIFE MANAGEMENT AREA	PEQUEST RIVER WATERSHED Northwesterly tributaries to the Pequest River, including Big Spring, located within the boundaries of the Whittingham Wildlife Management Area southwest of Springdale, from their origins to their confluence with the Pequest River
	DELAWARE RIVER WATERSHED Sunfish Pond and its outlet stream to the Delaware River. All unnamed waters located entirely within the boundaries of the Worthington State Forest
	DUNNFIELD CREEK WATERSHED Dunnfield Creek to I-80
PASSAIC RIVER, HACKENSACK RIVER, NY HARBOR COMPLEX BASIN	
A.S. HEWITT STATE FOREST	WANAQUE RIVER WATERSHED Portions of Cooley Brook and tributaries which originate and are located entirely within the boundaries of Hewitt State Forest
	Surprise Lake
	Portions of Green Brook and tributaries which originate and are located entirely within the boundaries of Hewitt State Forest
	West Pond
BERKSHIRE VALLEY WILDLIFE MANAGEMENT AREA	ROCKAWAY RIVER WATERSHED Stephens Brook north of the boundaries of the Berkshire Valley Wildlife Management Area
CITY OF NEWARK HOLDINGS AND WAWAYANDA STATE PARK	PEQUANNOCK RIVER WATERSHED Cedar Pond and all tributaries
	Hanks Pond and all tributaries
	Tributary to Pequannock River at Green Pond Junction from its origin downstream to Route 23
	Tributary joining the main stem of the Pequannock River 3,500± feet southeast of the Sussex-Passaic County line, near Jefferson from its origin to about 2,000 feet upstream of the pond
	Pacack Brook and its tributaries upstream of Canistear Reservoir, located entirely within the boundaries of the Newark watershed and Wawayanda State Park
	Cherry Ridge Brook and its tributaries north of Canistear Reservoir, located entirely within the boundaries of the Newark watershed lands and Wawayanda State Park
	The southern branch of the easterly tributary to Canistear Reservoir
	Pequannock River and tributaries upstream of the confluence with Pacack Brook
	The northwestern tributary to Oak Ridge Reservoir
	The portion of the westerly tributary to Lake Stockholm Brook, from its origins to about 1,000 feet south of the Route 23 Bridge, located entirely within the boundaries of the Newark watershed
	Lud-Day Brook downstream to its confluence with the southwestern outlet stream from Clinton Reservoir just upstream of the confluence of the outlet stream and a tributary from Camp Garfield
	Brook between Hamburg Turnpike and Vernon-Stockholm Road, downstream to its confluence with Lake Stockholm Brook, north of Rt. 23
RARITAN RIVER BASIN	NONE
WALLKILL RIVER BASIN	
CITY OF NEWARK HOLDINGS AND WAWAYANDA STATE PARK	LAKE LOOKOUT BROOK WATERSHED Lake Lookout, Lake Lookout Brook and tributaries from its headwaters in the Newark City holdings, downstream through the State-owned Wawayanda State Park to the confluence with the outlet stream from Lake Wawayanda

...

(i) The following are the Outstanding National Resource Waters of the State:

1. FW1 Waters; and
2. PL Waters.

7:9-6.3 Definitions

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

...

"Surface waters" means water at or above the land's surface which is neither ground water nor contained within the saturated zone, including, but not limited to, the ocean and its tributaries, all springs, streams, rivers, lakes, ponds, wetlands, and artificial waterbodies.

...

["Vadose waters" means water contained within the unsaturated zone (vadose zone).]

...

7:14A-1.9 Definitions

As used in this chapter, the following words and terms shall have the following meanings:

...

"Ground water" means that portion of water beneath the land surface that is within the zone of saturation (below the water table) where pore spaces are filled with water.

...

"Surface waters" means water at or above the land's surface which is neither groundwater nor contained within the unsaturated zone, including, but not limited to, the ocean and its tributaries, all springs, streams, rivers, lakes, ponds, wetlands, and artificial waterbodies.

...

"Unsaturated zone" means the subsurface volume between the land's surface and the top of the saturated zone (water table), where moisture does not fill all the pore spaces in the formation or soil.

...

["Vadose waters" means water contained within the unsaturated zone (vadose zone).]

...

"Wetlands" means those areas that are inundated or saturated by surface*[,]* ***or*** ground*[, or vadose]* water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions, commonly known as hydrophytic vegetation. The Department shall evaluate the parameters of hydrology, soils, and vegetation to determine the presence and extent of wetlands.

...

7:14A-3.14 Calculating NJPDES permit conditions

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

(c) Metals: All permit effluent limitations, standards, or prohibitions for a metal shall be expressed in terms of "total recoverable metal" as defined in 40 CFR Part 136 unless:

1.-2. (No change.)

(d)-(l) (No change.)

(a)

HAZARDOUS WASTE REGULATION PROGRAM

Existing Facility Status

Adopted Amendments: N.J.A.C. 7:26-12.2 and 12.3

Proposed: November 16, 1992 at 24 N.J.R. 4253(a).

Adopted: November 6, 1993 by Jeanne M. Fox, Acting Commissioner, Department of Environmental Protection and Energy.

Filed: November 10, 1993 as R.1993 d.638, **with technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 13:1E-1 et seq., particularly 13:1E-6.

DEPE Docket Number: 47-92-10.

Effective Date: December 6, 1993.

Expiration Date: October 25, 1995.

Summary of Public Comments and Agency Responses:

The Department proposed an amendment to N.J.A.C. 7:26-12.3 on November 16, 1992. The comment period closed on January 16, 1993. One commenter, Safety Kleen, submitted a written comment on three issues. The comment and the agency's responses are summarized below.

1. COMMENT: Many of the Department's regulations are effective upon publication in the New Jersey Register. The 30 day compliance deadline set forth in the proposal is arbitrary and problematic, because it appears to be very short. The deadline does not provide the regulated community adequate time to evaluate and take action, and does not allow the Department adequate time to develop and implement responses required by new regulations. The period for compliance should be extended to 90 days. Alternatively the phrase "by the earlier date of" in the proposed N.J.A.C. 7:26-12.3(j) should be changed to read "by the later date of" the alternate deadlines.

RESPONSE: The Department notes that it cannot modify the notice requirements set forth at N.J.A.C. 7:26-12.3(j) because they are required under Federal regulation. (See 40 CFR 270.1(e)1). Under the RCRA program the regulations of an authorized state such as New Jersey are required to be at least as stringent as those of the Federal program (See 42 U.S.C.A. §6929).

The proposed amendment to N.J.A.C. 7:26-12.3(j) provides that a facility that is required to obtain a hazardous waste facility permit pursuant to this subchapter solely because of a State statutory or rule amendment effective after the facility initially commenced operation may be eligible for existing facility status if the owner or operator of the facility complies, and thereafter remains in compliance, with all existing facility requirements under this section by the earlier date of:

1. Six months after the date of publication of the notice of adoption of the rule which first requires the facility to comply with this chapter; or

2. Thirty days after the date the facility first becomes subject to the standards of this chapter.

The Department notes that the majority of its regulations become effective upon publication. This is usually true when the regulation modifies the manner in which the regulated community is required to proceed. Such current requirements are frequently mandated by State participation in the RCRA authorization program.

Regulations may become operative subsequent to publication in situations where the regulated community will need time to comply with the changes made. For instance, when the Department adopts rules concerning newly regulated materials and the universe of regulated entities increases in size, the Department can establish an operative date subsequent to the effective date of the regulation. The regulation adopted herein, by its terms, allows for up to a six month delay. Existing facility status standards are generally less complex and less costly than standards for fully permitted facilities and can be achieved in a six-month period. See General Standards for Owners and Operators of Hazardous Waste Transportation, Storage and Disposal Facilities, 40 CFR parts 264 and 265, preamble, 45 Fed. Reg. 33159 (May 19, 1980).

Many members of the regulated community may already be in compliance with the substantive requirements of a particular rule before the State in fact promulgates the rule. For example, the State may be in the process of promulgating a rule mandated by the Federal Resource Conservation and Recovery Act (RCRA) program, but in the meantime, the United States Environmental Protection Agency (USEPA) may already have adopted the Federal regulatory counterpart under the Hazardous and Solid Waste Amendments of 1984. In such a case, because the facility owner is already in compliance with Federal requirements, the owner will not need more time to comply with what the State amendment requires. Of course, this compliance overlap does not apply when State-only regulated wastes are the subject of a new rule or amendment.

2. COMMENT: The proposal continues to require that the USEPA be notified and that a Part A application be filed for activities which require a permit solely because of a State statutory or rule amendment. The USEPA does not systematically recognize activities which are not Federally regulated and unless USEPA requires such notification, the regulated entity should not be subjected to such a requirement.

RESPONSE: The Department notes that this comment does not address any change being effected in this rulemaking. Rather, it addresses a pre-existing requirement. However, the Department will address this comment since it reflects some misunderstanding of the requirement and its purpose.

Proposed N.J.A.C. 7:26-12.3(k) provides that to be eligible for existing facility status, an owner or operator of a newly regulated hazardous waste facility shall, within the applicable time period under N.J.A.C. 7:26-12.3(j), notify the USEPA as required by Section 3010 of the Federal Resource Conservation and Recovery Act (42 U.S.C. §6930).

It appears that the commenter is confusing the requirement to submit notification to USEPA with the requirement to submit a Part A application to the Department. The "3010 notification" to USEPA is required to obtain a USEPA identification number for the facility. All new generators, transporters, treaters, storers, or disposers of hazardous waste are required to submit this notification to USEPA even if the waste triggering the notification is regulated only by the State. USEPA's notification form contains a special section pertaining to notification for State-regulated-only wastes. Obtaining a USEPA identification number allows the states to use the manifest form for State-regulated-only wastes and this assists the State in tracking. The "3010 notification" is distinct from the Part A application. Part A applications are submitted to the Department, not USEPA. See N.J.A.C. 7:26-12.2(d).

3. COMMENT: Notifying USEPA of an activity which is not Federally regulated jeopardizes the regulated community's right and ability to comment on a proposed Federal rule regarding the same matter. Notification triggered solely by State requirements should be made only to the Department, not to USEPA. Notification to USEPA should be made only if USEPA recognizes and regulates the particular activity or waste code, or itself requires notification.

RESPONSE: The Department respectfully disagrees with the commenter's assertion that the regulated community's right to comment would be affected by a State regulation which requires notification to USEPA of activities which are not Federally regulated. The regulated community's right to comment is not infringed by such State requirements. There is no Federal regulation which forecloses comment on a Federal rule on the basis that the commenter has already commented on a similar State provision.

Summary of Agency-Initiated Changes:

The notice of the proposed amendment was incorrectly captioned, "Interim Status Facilities." The correct caption is "Existing Facility Status" as reflected in this adoption notice.

On November 18, 1991, the Department adopted amendments to N.J.A.C. 7:26-12.2 which added a new subsection (c) and recodified then existing subsections (c) through (l) as (d) through (m). See 23 N.J.R. 3450(a). Unfortunately, the Department failed to amend cross-references elsewhere in Chapter 26 to the "original" subsections (c) through (l) to reflect the recodification. (There are 11 of these cross-references in N.J.A.C. 7:26.) The recodification of N.J.A.C. 7:26-12.2, especially subsection (e) and (f), which list the information required in Parts A and B of the permit application, has occasioned questions among hazardous waste permitting staff, outside consultants and regulated facilities. Permitting technical manuals, existing hazardous waste permits, and checklists contain numerous cross-references to these subsections.

As a technical change on adoption, the Department has restored the codification of the subsections of N.J.A.C. 7:26-12.2 that existed prior to the adoption of the November 1991 amendments. Accordingly, current subsection (c) has been moved to the end of N.J.A.C. 7:26-12:2 and has been redesignated subsection (m). The intrasection cross-reference in subsection (m) has been amended to reflect this change in codification as well.

Finally, the Department has made technical changes to correct the recodification of N.J.A.C. 7:26-12.3(k)i through iii as (k)1 through 3 and a cross-refernce in N.J.A.C. 7:26-12.3(k)2 from "(d) above" to "N.J.A.C. 7:26-12.2(d)."

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]*):

7:26-12.2 Public participation in the permit process

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

[(c) If the Department, upon examination of a Part A application, has reason to believe that the application fails to meet the requirements of N.J.A.C. 7:26-12.2(e) below, the Department shall notify the owner or operator in writing of such apparent deficiency. Such notice shall specify the grounds for the Department's belief that the application is deficient. The owner or operator shall have 30 days from the receipt of the Notice of Deficiency to respond and to explain or remedy that deficiency. If, after such notification and opportunity for response, the Department determines that the application is deficient, the Department may terminate the facility's existing facility status pursuant to N.J.A.C. 7:26-12.3(f)3.]

Recodify existing (d)-(m) as ***(c)-(l)***. (No change in text.)

(m) If the Department, upon examination of a Part A application, has reason to believe that the application fails to meet the requirements of (d) above, the Department shall notify the owner or operator in writing of such apparent deficiency. Such notice shall specify the grounds for the Department's belief that the application is deficient. The owner or operator shall have 30 days from the receipt of the Notice of Deficiency to respond and to explain or remedy that deficiency. If, after such notification and opportunity for response, the Department determines that the application is deficient, the Department may terminate the facility's existing facility status pursuant to N.J.A.C. 7:26-12.3(f)3.

7:26-12.3 Existing facilities

(a)-(i) (No change.)

(j) A facility that is required to obtain a hazardous waste facility permit pursuant to this subchapter solely because of a State statutory or rule amendment effective after the facility initially commenced operation may be eligible for existing facility status provided the owner or operator of the facility complies, and thereafter remains in compliance, with all existing facility requirements under this section by the earlier date of:

1. Six months after the date of publication of the notice of adoption of the rule which first requires the facility to comply with this chapter; or

2. Thirty days after the date the facility first becomes subject to the standards of this chapter.

(k) The provisions of (j) above shall not apply to any facility that has been denied a hazardous waste treatment, storage, or disposal facility permit, whose existing facility status has been terminated, or to a facility subject to (i) above. To be eligible for existing facility status, an owner or operator of a newly regulated hazardous waste facility shall, within the applicable time period under (j) above:

*[i.]***1.*** Notify the United States Environmental Protection Agency as required by Section 3010 of the Federal Resource Conservation and Recovery Act (42 USC §6901 et seq.);

*[ii.]***2.*** File a Part A application for the facility in accordance with ***N.J.A.C. 7:26-12.2***(d) *[above]*; and

*[iii.]***3.*** Operate the facility in accordance with N.J.A.C. 7:26-9 and 11.

(a)

NEW JERSEY COMMISSION ON RADIATION PROTECTION

Notice of Administrative Corrections Bureau of Radiation Protection Rules Definitions, Ionizing Radiation Terms: Rad and Rem N.J.A.C. 7:28-1.4

Take notice that the New Jersey Commission on Radiation Protection (the "Commission") has discovered errors in the definitions of rad and rem set forth in N.J.A.C. 7:28-1.4(b). The conversion of rad to gray and rem to sievert units in the new International System of Units of 10^2 is incorrect. The correct conversion is 1×10^{-2} gray and 1×10^{-2} sievert, respectively, which is in accordance with the Suggested State Regulations for the Control of Radiation, Volume One, Ionizing Radiation, prepared by the Conference of Radiation Control Program Directors, Inc., and the National Council on Radiation Protection and Measurements NCRP Report No. 82, SI Units in Radiation Protection and Measurements. The error was recently brought to the attention of the Bureau of Radiological Health by an interested certified health physicist. Given the sources cited above and the obvious and easily recognizable nature of this error to the regulated community, the term should be corrected through this notice of administrative correction, published in accordance with N.J.A.C. 1:30-2.7. The Commission is also correcting two typographical errors it detected in the definition of rad. The word "menas" is being corrected to "means" and the word "kiogram" is being corrected to "kilogram."

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

7:28-1.4 Definitions

(a) (No change.)

(b) Ionizing radiation terms:

. . .

"Rad" means the dose corresponding to the absorption of 100 ergs per gram: a measure of the dose of any radiation to body tissues in terms of the energy absorbed per unit mass of the tissue.

i. The new International System of Units replaces the "rad" with the "gray", which [menas] **means** the dose corresponding to the absorption of one joule per [kiogram] **kilogram**. One rad equals [10^2] $\mathbf{1 \times 10^{-2}}$ gray[s].

. . .

"Rem" means a measure of the dose of any ionizing radiation to body tissue in terms of its estimated biological effect relative to a dose of one rad of x-rays. For the purpose of this chapter, any of the following are considered to be equivalent to a dose of one rem:

i. A dose of one rad due to x, gamma, or beta radiation;

ii. A dose of 0.1 rad due to neutrons or high-energy protons;

iii. A dose of 0.05 rad due to particles heavier than protons and with sufficient energy to reach the lens of the eye.

(1) The new International System of Units replaces the "rem" with the "sievert", which means a measure of the dose of any ionizing radiation to body tissue in terms of its estimated biological effect relative to a dose of one gray of x-rays. One rem equals [10^2] 1×10^{-2} sievert[s].

2. (No change.)

...

(c) (No change.)

(a)

GREEN ACRES PROGRAM

Green Acres Grant Program

Readoption: N.J.A.C. 7:36

Adopted Repeal: N.J.A.C. 7:36-8

Proposed: August 2, 1993 at 25 N.J.R. 3405(a).

Adopted: October 26, 1993 by Jeanne M. Fox, Acting Commissioner, Department of Environmental Protection and Energy.

Filed: October 29, 1993 as R.1993 d.609, **without change.**

Authority: N.J.S.A. 13:8A-1, 13:8A-20, 13:8A-35 et seq. and P.L. 1961, c.46; P.L. 1971, c.165; P.L. 1974, c.102; P.L. 1978, c.118; P.L. 1983, c.354; P.L. 1987, c.265; P.L. 1989, c.183; and P.L. 1992, c.88.

DEPE Docket No.: 39-93-07.

Effective Date: October 29, 1993, Readoption;
December 6, 1993, Repeal.

Expiration Date: October 29, 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. 7:36.

INSURANCE

(b)

ADMINISTRATION

Disability Discrimination Grievance Procedure

Adopted New Rules: N.J.A.C. 11:1-3

Proposed: April 5, 1993 at 25 N.J.R. 1327(a).

Adopted: September 13, 1993 by Samuel F. Fortunato, Commissioner, Department of Insurance.

Filed: November 3, 1993 as R.1993 d.618, **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. 17:1C-6(e), 42 U.S.C. §12101 et seq., and 28 C.F.R. §35.107.

Effective Date: December 6, 1993.

Expiration Date: Exempt under 28 C.F.R. Part 35.

On April 5, 1993 a notice of proposed rulemaking was published in the New Jersey Register announcing the proposed adoption by this agency of a grievance procedure to be followed when and if this agency receives a complaint that it had violated or was violating the Americans with Disabilities Act, 42 U.S.C. §12101 et seq. That notice was part of a joint coordinated rulemaking process intended to produce a uniform grievance procedure for all participating agencies with the Department of Law and Public Safety as the lead agency. This notice of adoption concludes the process.

After publication of the notices of proposed rulemaking participating agencies received public comments, which were forwarded to the Department of Law and Public Safety for consolidated review, formulation of replies and revision of the proposed rule, where appropriate. The Summary of Public Comments and Agency Responses is being published under the heading of the Department of Law and Public Safety in this issue of the New Jersey Register. The reader is directed to that agency's notice of adoption to find the comments and replies. The final text of the grievance procedure appears below.

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

SUBCHAPTER 3. DISABILITY DISCRIMINATION GRIEVANCE PROCEDURE

11:1-3.1 Definitions

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

"ADA" means the Americans with Disabilities Act, 42 U.S.C.A. §12101 et seq.

"Agency" means the New Jersey Department of Insurance.

"Designated decision maker" means the Commissioner of Insurance or his or her designee.

11:1-3.2 Purpose

(a) These rules are adopted by the agency in satisfaction of the requirements of the ADA and regulations promulgated pursuant thereto, 28 C.F.R. 35.107.

(b) The purpose of these rules is to establish a designated coordinator whose duties shall include assuring that the agency complies with and carries out its responsibilities under the ADA. Those duties shall also include the investigation of any complaint filed with the agency pursuant to N.J.A.C. 11:1-3.5 through 3.8.

11:1-3.3 Required ADA Notice

In addition to any other advice, assistance or accommodation provided, a copy of the following notice shall be given to anyone who inquires regarding the agency's compliance with the ADA or the availability of accommodation which would allow a qualified individual with a disability to receive services or participate in a program or activity provided by the agency.

AGENCY NOTICE OF ADA PROCEDURE

The agency has adopted an internal grievance procedure providing for prompt and equitable resolution of *[complaints]* ***grievances*** alleging any action prohibited by the U.S. Department of Justice regulations implementing Title 11 of the Americans with Disabilities Act. Title 11 states, in part, that "no otherwise qualified disabled individual shall, solely by reason of such disability, be excluded from participation in, be denied the benefits of or be subjected to discrimination" in programs or activities sponsored by a public entity.

Rules describing and governing the internal grievance procedure can be found in the New Jersey Administrative Code, N.J.A.C. 11:1-3. As those rules indicate, *[complaints]* ***grievances*** should be addressed to the agency's designated ADA Coordinator, who has been designated to coordinate ADA compliance efforts, at the following address:

[(The following address will be specific to the Agency)]
ADA Coordinator
New Jersey Department of Insurance
CN 329
Trenton, New Jersey 08625

1. A *[complaint]* ***grievance*** may be filed in writing or orally, but should contain the name and address of the person filing it, and briefly describe the alleged violation. A form for this purpose is available from the designated ADA coordinator. In cases of

employment related *[complaints]* ***grievances***, the procedures established by the Department of Personnel, N.J.A.C. 4A:7-1.1 et seq. will be followed where applicable.

2. A *[complaint]* ***grievance*** should be filed promptly within *[20]* ***30*** days after the *[complainant]* ***grievant*** becomes aware of the alleged violation. (Processing of allegations of discrimination which occurred before this grievance procedure was in place will be considered on a case-by-case basis.)

3. An investigation, as may be appropriate, will follow the filing of a *[complaint]* ***grievance***. The investigation will be conducted by the agency's designated ADA Coordinator. The rules contemplate informal but thorough investigations, affording all interested persons and their representatives, if any, an opportunity to submit evidence relevant to a *[complaint]* ***grievance***.

4. In most cases a written determination as to the validity of the *[complaint]* ***grievance*** and a description of the resolution, if any, will be issued by the designated decision maker and a copy forwarded to the *[complainant]* ***grievant*** no later than 45 days after its filing.

5. The ADA coordinator will maintain the files and records of the agency relating to the *[complaints]* ***grievances*** filed.

6. The right of a person to a prompt and equitable resolution of the *[complaint]* ***grievance*** filed hereunder will not be impaired by the person's pursuit of other remedies such as the filing of an ADA *[complaint]* ***grievance*** with the responsible Federal department or agency or the New Jersey Division on Civil Rights. Use of this grievance procedure is not a prerequisite to the pursuit of other remedies.

7. The rules will be construed to protect the substantive rights of interested persons, to meet appropriate due process standards and to assure that the agency complies with the ADA and implementing Federal rules.

11:1-3.4 Designated ADA coordinator

(a) The designated coordinator of ADA compliance and complaint investigation for the agency is:

[(The following address will be specific to the Agency)]

ADA Coordinator
New Jersey Department of Insurance
CN 329
Trenton, New Jersey 08625

(b) All inquiries regarding the agency's compliance with the ADA and the availability of accommodation which would allow a qualified individual with a disability to receive services or participate in a program or activity provided by the agency should be directed to the designated coordinator identified in (a) above.

(c) All *[complaints]* ***grievances*** alleging that the agency has failed to comply with or has acted in a way that is prohibited by the ADA should be directed to the designated ADA coordinator identified in this section, in accordance with the procedures set forth in N.J.A.C. 11:1-3.5 through 3.8.

11:1-3.5 *[Complaint]* ***Grievance*** procedure

A *[complaint]* ***grievance*** alleging that the agency has failed to comply with the ADA or has acted in a way that is prohibited by the ADA shall be submitted either in writing or orally to the designated ADA coordinator identified in N.J.A.C. 11:1-3.4 ***within 30 days of the grievant becoming aware of the alleged violation***. A *[complaint]* ***grievance*** alleging employment discrimination will be processed pursuant to the rules of the Department of Personnel, N.J.A.C. 4A:7-1.1 through 3.4, if those rules are applicable.

11:1-3.6 *[Complaint]* ***Grievance*** contents

(a) A *[complaint]* ***grievance*** submitted pursuant to this subchapter may be submitted in or on the form set forth at N.J.A.C. 11:1-3.7.

(b) A *[complaint]* ***grievance*** submitted pursuant to this subchapter shall include the following information:

1. The name of the *[complainant]* ***grievant*** and/or any alternate contact person designated by the *[complainant]* ***grievant*** to receive communication or provide information for the *[complainant]* ***grievant***;

2. The address and telephone number of the *[complainant]* ***grievant*** or alternate contact person; and

3. A description of manner in which the ADA has not been complied with or has been violated, including times and locations of events and names of witnesses if appropriate.

11:1-3.7 *[Complaint]* ***Grievance*** form

The following form may be utilized for the submission of a *[complaint]* ***grievance*** pursuant to this subchapter:

Americans with Disabilities Act Grievance Form

Date: _____

Name of grievant: _____

Address of grievant: _____

Telephone number of grievant: _____

[Disability of grievant: _____]

Name, address and telephone number
of alternate contact person:

_____

_____

Agency alleged to have denied access:

Department: _____

Division: _____

Bureau or office: _____

Location: _____

Incident or barrier: _____

Please describe the particular way in which you believe you have been denied the benefits of any service, program or activity or have otherwise been subject to discrimination. Please specify dates, times and places of incidents, and names and/or positions of agency employees involved, if any, as well as names, addresses and telephone numbers of any witnesses to any such incident. Attach additional pages if necessary.

_____

_____

_____

_____

_____

_____

Proposed access or accommodation:

If you wish, describe the way in which you feel access may be had to the benefits described above, or that accommodation could be provided to allow access.

_____

_____

_____

A copy of the above form may be obtained by contacting the designated ADA coordinator identified at N.J.A.C. 11:1-3.4.

11:1-3.8 Investigation

(a) Upon receipt of a *[complaint]* ***grievance*** submitted pursuant to this subchapter, the designated ADA coordinator will notify the *[complainant]* ***grievant*** of the receipt of the *[complaint]* ***grievance*** and the initiation of an investigation into the matter. The designated ADA coordinator will also indicate a date by which it is expected that the investigation will be completed,

which date shall not be later than 45 days from the date of receipt of the *[complaint]* ***grievance*** unless a later date is agreed to by the *[complainant]* ***grievant***.

(b) Upon completion of the investigation, the designated ADA coordinator shall prepare a report for review by the designated decision maker for the agency. The designated decision maker shall render a written decision within 45 days of receipt of the *[complaint]* ***grievance, if practicable or*** unless a later date is agreed to by the *[complainant]* ***grievant***, which decision shall be transmitted to the *[complainant]* ***grievant*** and/or the alternate contact person if so designated by the *[complainant]* ***grievant***.

(a)

SMALL EMPLOYER HEALTH BENEFITS PROGRAM BOARD

Small Employer Health Benefits Program Communications with Board; Penalties; Severability; Standard Application and Certification Forms; Program Compliance; Continuation and Conversion of Existing Contracts; Fair Marketing Standards; Petitions for Rules

Adopted New Rules: N.J.A.C. 11:21-1.3, 1.4, and 1.5, and 11:21-6, 7, 7A, 17 and 18 and Appendix Exhibits N, O, Q, R, S and T

Proposed: August 18, 1993 in accordance with P.L. 1993, c.162, section 16 (see 25 N.J.R. 4437(a)).

Adopted: November 8, 1993 in accordance with P.L. 1993, c.162, section 16 by the New Jersey Small Employer Health Benefits Program Board, Maureen E. Lopes, Chairperson.

Filed: November 12, 1993 as R.1993 d.644, **with substantive and technical changes** not requiring additional public notice or comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 17B:27A-17 et seq., as amended by P.L. 1993, c.162, section 16, and N.J.S.A. 52:14B-4(f).

Effective Date: November 12, 1993.

Expiration Date: October 15, 1998.

These new rules were proposed and are being adopted pursuant to the procedures set forth at P.L. 1993, c.162, section 16, as therein authorized.

Accordingly, notice of the proposal of these new rules was sent for publication in three newspapers of general circulation in New Jersey, mailed to all known interested parties, and submitted to the Office of Administrative Law (OAL) for publication in the New Jersey Register.

Pursuant to P.L. 1993, c.162, section 16, interested parties were provided a comment period of at least 15 days. As set forth in the notice of proposed new rules, the written comment period ended on October 5, 1993.

Written comments were received from numerous commenters. Not all comments received were responsive to the proposed rules and accompanying appendix exhibits. The Board has responded only to those comments specifically relevant to the proposal.

Readers should note in some instances that although the rules may not have been amended, the Exhibits may have been, and both pieces of the adoption should be reviewed.

Summary of Public Comments and Agency Responses:

The Small Employer Health Benefits Program received timely comments from the following:

The Principal Financial Group
Blue Cross and Blue Shield of New Jersey, Inc.
The Travelers
New York Life Insurance Company
US Life Insurance Company
Fortis Benefits Insurance Company

COMMENT: Several commenters noted that the proposed regulations at N.J.A.C. 11:21-7.3 require, with respect to the definition of a small employer, that a majority of employees be residents of New Jersey. This requirement was not in the statute; but rather, the statute requires that a majority be employed in New Jersey.

RESPONSE: The Board agrees and has corrected this reference in its final regulations consistent with N.J.S.A. 17B:27A-17.

COMMENT: One commenter asked that the Board clarify that language in its regulation at N.J.A.C. 11:21-7.3(a)1 regarding discrimination in the issuance of coverage based on geographic location, so that it is not interpreted to mean that a carrier may not use such information as one factor to determine the premium rate which would be charged for such coverage.

RESPONSE: The Board does not believe such a clarification is necessary. As noted by the commenter, N.J.A.C. 11:21-7.3(a)1 only goes to discrimination in the issuance of coverage based on geography, not rating of the contract. A carrier may use geographic location as a rating factor, and such use will not be considered "discrimination" for the purpose of this section, consistent with the requirements of the Act as amended by P.L. 1993, c.162.

COMMENT: Two commenters requested that a carrier not be required to provide a small employer with premium rate and other information describing all available small employer health benefits plans upon the employer's anticipated conversion to another carrier. It was suggested that such a requirement, contained in N.J.A.C. 11:21-7A.2, is onerous, particularly in light of the many varieties of plans that may result in the marketplace.

RESPONSE: The Board has considered and agrees with these comments, and has amended N.J.A.C. 11:21-7A.2 to require carriers to automatically provide that information with respect to the health benefits plan which is closest to the type of coverage being converted, but to provide information with respect to any other health benefits plans only upon request of the small employer. The Board notes that the Small Employer Health Benefits Program Buyers' Guide will shortly be available to small employers and will contain information on each plan type, including benefit descriptions.

COMMENT: Two commenters requested that the Board amend N.J.A.C. 11:21-7.7 to permit carriers to require a small employer to contribute more than 10 percent of the annual cost of its health benefits plan on behalf of its covered employees.

RESPONSE: The Board cannot do so. N.J.S.A. 17B:27A-24 establishes the maximum contribution requirement (10 percent) which a small employer carrier may impose upon a small employer with respect to its small employer health benefits plan. N.J.A.C. 11:21-7.7 merely is consistent with the maximum established by the Act.

COMMENT: One commenter, an insurance carrier, requested information on how it may obtain copies of the Small Employer Health Benefits Program Buyers' Guide referenced in N.J.A.C. 11:21-17.4. In addition, one commenter requested that the Buyers' Guide be permitted to be obtained from licensed insurance agents as well as carriers.

RESPONSE: The Board will distribute to member carriers printed copies of the Buyers' Guide upon its completion by the Board. In addition, the Board has amended N.J.A.C. 11:21-17.4 to provide that a carrier may provide the Buyers' Guide to small employers through the carriers licensed agents or brokers.

COMMENT: One commenter suggested that the Board amend N.J.A.C. 11:21-7.9(b), which requires a carrier to provide notice to a small employer of its approval/disapproval of an application for insurance within 15 days of its receipt of a completed application, to expand the time to 30 days. It argued that more time was needed for the application review process. Another commenter suggested amending the regulation to provide for compliance within 15 "working" days of receipt, on the basis that such an amendment would be consistent with other time frames provided in the regulations.

RESPONSE: After further consideration, the Board has amended N.J.A.C. 11:21-7.9(b) by adding the word "working" to the language in the regulation. The Board believes 15 working days provides a carrier ample time within which to review a small employer's application for insurance.

COMMENT: One commenter requested that N.J.A.C. 11:21-7.9(b) be modified to allow greater flexibility with respect to the effective date of coverage by permitting a small employer to request a later effective date than that which is contemplated by operation of the regulation. Such an alternative would be useful to a small employer which desires to begin its insurance coverage at a future date.

RESPONSE: The Board agrees substantially with the commenter's suggestion and has amended N.J.A.C. 11:21-7.9(b) consistent with this

request, but has added the requirement that such a request be agreed to by the carrier.

COMMENT: One commenter requested that, in order to permit a more timely and accurate carrier response, N.J.A.C. 11:21-6.2 be modified to permit a carrier to provide a renewal form to a small employer 120 days prior to the renewal of its plan with that carrier, rather than the 90 days required in the regulation.

RESPONSE: The Board agrees with the commenter's suggestion and has amended N.J.A.C. 11:21-6.2, consistent with the commenter's request, by replacing "90" with "120" in the rule.

COMMENT: One commenter suggested that the name of the Application for a Small Group Health Benefits Policy, the Small Health Benefits Enrollment Form and the Small Group Health Benefits Waiver of Coverage, Exhibits N, Q and T of Appendix to N.J.A.C. 11:21, be changed to "Application for a Small Employer Health Benefits Policy," "Small Employer Health Benefits Enrollment Form" and "Small Employer Health Benefits Waiver of Coverage" for consistency sake.

RESPONSE: The Board agrees with the commenter's suggestions and has incorporated the suggestions upon adoption. (Please note that in responding to comments, the former names of these exhibits, as well as the revised names, are used interchangeably throughout.)

COMMENT: One commenter proposed that Section II, Specifications for Coverage, of the Application for a Small Group Health Benefits Policy, Exhibit N of the Appendix be modified to accommodate use by and selection of an HMO.

RESPONSE: The Board agrees with the commenter's recommendation and has modified the Application for a Small Group Health Benefits Policy to enable the form to be used for an HMO.

COMMENT: One commenter recommended adjusting Section I, Reason for Enrollment, of the Small Group Health Benefits Enrollment Form, Exhibit Q of the Appendix to capture information concerning any prior coverage an applicant may have had.

RESPONSE: The Board agrees with the suggested adjustment to Section I of the Small Employer Health Benefits Enrollment Form and has incorporated this change.

COMMENT: One commenter suggested that Section IV of the Small Employer Health Benefits Enrollment Form, Exhibit Q of N.J.A.C. 11:21-6.4, be expanded to include language which describes the preexisting condition exclusion which might apply under the standard small employer health benefits plans, so that employers and employees alike have notice of the exclusion language.

RESPONSE: The Board agrees with the commenter's suggestion. Variability has been added upon adoption to the Small Health Benefits Enrollment Form (Exhibit N) to permit carriers to offer a description of the possible pre-existing condition exclusion. Mandated text also has been provided in case a carrier chooses to describe the exclusion.

COMMENT: One commenter recommended that the HMO Enrollment Application, Exhibit R of the Appendix, be expanded to include an ability to solicit height and weight information from applicants for those HMOs which intend to use health status as part of the rating process. The commenter notes that making this allowance for the HMO Enrollment Application would be consistent with the information captured by the non-HMO Small Employer Health Benefits Enrollment Form, Exhibit Q of the Appendix.

RESPONSE: The Board agrees with the commenter's recommendation. Variability was added to the HMO Enrollment Form to permit those HMOs using an applicant's health status as part of their rating process to obtain height and weight information.

COMMENT: One commenter recommended adjusting the Reason for Enrollment section of the HMO Enrollment Form, Exhibit R of the Appendix, to capture information concerning any prior coverage an applicant may have had.

RESPONSE: The Board agrees with the suggested adjustment to the Reason for Enrollment Section of the HMO Enrollment Form and has incorporated this change. The Board notes that this change is consistent with the change made to Exhibit Q pursuant to a similar comment.

COMMENT: One commenter recommended carriers be allowed to continue to use all their existing enrollment and application forms that conform to a set standard instead of being required to use the standard forms contained in Exhibits N through T of the Appendix to N.J.A.C. 11:21. At the very least, the commenter asks for a generous transition phase in which carriers could utilize existing forms.

RESPONSE: Standardized enrollment and application forms support the Board's goals of bringing consistency and simplicity to the small employer insurance market. Achieving these goals would benefit small employers. The Board recognizes that standardization of forms requires some effort on the part of carriers that service the small employer market, but the Board believes this effort will be short term and outweighed by the benefit to small employers. No provisions for alternate enrollment and/or application forms are being incorporated into the final rule. However, the Board notes that with respect to Exhibits Q and R (employee enrollment information), carriers are permitted to reformat the forms if necessary to accommodate their system so long as the content remains the same as that contained in Exhibit Q and R.

COMMENT: One commenter requested that the Application for a Small Group Health Benefits Policy, Exhibit N of N.J.A.C. 11:21-6.1(a), be amended to include the following data: direct issue indicator, small employer fax number, small employer zip code, identification of any excluded class of employees, life insurance election options and small employer participation agreement.

RESPONSE: The Board agrees with the proposal of adding solicitation of the small employer fax number, small employer zip code and identification of any excluded class of employees to Exhibit N. These additions have been made upon adoption. Exhibit N has also been revised by adding variable language necessary to accommodate a carrier's need to receive a "small employer participation agreement." The use of a "direct issue indicator," which concerns whether delivery of the contract and related materials is through an agent, may be included by a carrier at its option in Section IV, Agent/Producer Information of the Small Group Health Benefits Enrollment Form, Exhibit Q of the Appendix to N.J.A.C. 11:21. Life insurance election options were not included because tie-in sales are prohibited as defined in N.J.A.C. 11:21-7.11, and the Board did not want the application form to suggest otherwise.

COMMENT: One commenter requested that the Enrollment Form and Health Statement, Exhibits Q and S of the Appendix to N.J.A.C. 11:21, be amended to include election of life coverage only, beneficiary designation and employee election of Point of Service, HMO, Dual Choice or Indemnity Plan.

RESPONSE: No change is being made upon adoption to accommodate life insurance information. The Small Group Enrollment Forms and Health Statement are not designed to be used for life insurance. There is a separate enrollment form for HMO coverage (see Exhibit R of the Appendix to N.J.A.C. 11:21). Thus, there is no real need to make the changes suggested by the commenter regarding selection of a delivery system; therefore, the non-HMO Enrollment Form, Exhibit Q of the Appendix to N.J.A.C. 11:21 is not being amended as the commenter suggests.

COMMMENT: One commenter recommended that the Application forms be formatted in a "box" format rather than a "line" format.

RESPONSE: The Board does not believe it is necessary to make the suggested change in the standard enrollment and application forms, knowing of no reason why a "box" format is preferrable for either carriers or consumers.

COMMENT: Two commenters suggested that the initial and annual employer certification forms be consolidated into one form.

RESPONSE: The Board agrees with the commenters' suggestions that both forms could and should be one and the same and is incorporating the change upon adoption. The contents of Exhibit P of the Appendix have been deleted, and the exhibit is now reserved.

COMMENT: Two commenters suggested that the employee waiver form be merged into the employee enrollment form to reduce administrative expense and simplify administration.

RESPONSE: The Board believes that, for many carriers, it is administratively more efficient to have these two forms separate, and, thus, is not merging the employee waiver form and employee enrollment form (Exhibits T and Q respectively of the Appendix to N.J.A.C. 11:21). However, the Board will permit carriers to combine them provided there is no modification of the content of either form, and N.J.A.C. 11:21-6.4 has been revised accordingly.

COMMENT: One commenter suggested amending the application and enrollment forms to include information applicable to enrolling for coverages other than health benefits.

RESPONSE: No change is being made to accommodate other coverage information. The Small Employer forms are not designed to be used for coverage other than health benefits. The Board has no regulatory authority over any coverage other than health benefits plans as defined in N.J.A.C. 11:21-1.2. Further, the Board did not want the design of the forms to suggest that tie-in sales are either permissible or appropriate.

COMMENT: One commenter stated the following with respect to Exhibit N of the Appendix to N.J.A.C. 11:21: a) the requested Effective Date Information should be moved under the Policyholder Information section because the proposed location increases the likelihood that it will be overlooked when the application is being completed; b) hints like "street, city, county, state, zip" should be included when address information is requested; c) a question for Standard Industrial Classification (SIC) code should be added; d) the affiliates question should be rephrased as "does your company have any affiliates, subsidiaries or branch offices? e) section III should be retitled "OTHER INSURANCE INFORMATION (all questions must be answered)"; f) in question 3 of Section III, it would be helpful to have effective date of the prior coverage; g) cancellation date should be rephrased as "termination" date; h) question 6 of Section III should specifically solicit the name of the individual, in addition to an indication of whether they are an employee or dependent; and i) under question 6, the heading should be "Reason for Continuation: Termination, Disability, Other," rather than "Reason for Termination, Disability, Other."

RESPONSE: The Board agrees with the commenter in part, and disagrees in part. The Board is satisfied with the location of the solicitation of the effective date and is making no change in that regard. The Board decided to add the address items suggested. The Board agrees that the SIC code be added and has added this question to the form. The Board is not adopting the suggested change regarding affiliates because the Board believes that the form, as originally proposed, is sufficiently clear in its solicitation of information about an employer's affiliates, subsidiaries, and branch offices, and no further clarification to the form is necessary. The Board does not believe the suggested change regarding the title of Section III is appropriate, since not all questions under the section regard information on other insurance. The Board is adding a question soliciting the effective date of prior coverage to the form and is amending question 3 to read "cancellation/termination" upon adoption. The continuation question (Question 6) has been revised to specifically seek the employee's or dependent's name. No change is being made to the heading, however, since the language does not further clarify this section.

COMMENT: One commenter stated that the proposed application (Exhibit N) should have an option for the selection of employee only coverage. Additionally, the commenter stated that insurers need to know the contribution percentage for dependents, since it is not always the same as for employees, and the form should be revised accordingly.

RESPONSE: The Board agrees with the commenter's comment with regard to employee only coverage since the law does not prohibit employers from electing not to provide dependent coverage. The Board will incorporate the proposed change upon adoption within Exhibit N. The Board disagrees with the commenter with respect to dependent contribution levels since there is no provision in the law dealing with contribution levels for dependent coverage, and no change is being made to capture that information specifically.

COMMENT: One commenter stated that unless the application is also used for coverages in addition to health benefits, there is no need for questions 7 and 8 in Section I of Exhibit N (regarding employee count). The commenter stated that insurers can obtain the employee count information from the employee enrollment forms and from the previous quarters wage/tax statements. Otherwise, question 7 should refer to "eligible" employees.

RESPONSE: The Board disagrees that questions 7 and 8 are unnecessary, especially since the Board has removed the requirement that carriers use wage reports to determine employer eligibility. However, question 7 was modified to refer to "eligible" employees.

COMMENT: One commenter asked what does presently "incapacitated" mean?

RESPONSE: The term "incapacitated" is defined within the health benefits plans at Exhibits A, F and G of the Appendix to N.J.A.C. 11:21.

COMMENT: One commenter offered the following statements or suggestions about the standard employee enrollment and health statement forms, Exhibits Q and S: a) the first item of the Reason for Enrollment question is somewhat ambiguous; b) the continuity of coverage information (name of previous carrier and plan #) are pertinent to more than just the second item of the Reason for Enrollment question; c) the fifth item of the Reason for Enrollment question should be revised to only solicit the addition of dependent(s), and that the completion of an enrollment form shouldn't be used to delete dependents, but if the form is to be used thusly, then the question should be separated into two parts with space added to list dependent(s) to be deleted; d) the authorization and MIB disclosure should be on the health statement form rather than on the enrollment form; e) a smoking/non-smoking question should be added to the health statement form.

RESPONSE: The Board agrees with the commenter in part, and disagrees in part. The Board recognizes ambiguity exists in the first item under "Reason for Enrollment" upon adoption. The deletion of dependents is a variable on the enrollment form. Additionally, the Board notes that, pursuant to N.J.A.C. 11:21-6.3, carriers may reformat Exhibit Q if necessary, so carriers may use a separate form or break out the information on deletions. Therefore, the Board has made no change in response to this comment. The authorization form is needed for more than health statement purposes, and therefore is not being removed from the enrollment form. Since carriers may still rate using health status as a factor, and since smoking clearly impacts the health statement form has been amended, upon adoption, to include an additional inquiry about whether or not an applicant has used tobacco products.

COMMENT: One commenter suggested that the following solicitations be added to the employer application: renewal date with current carrier; if a small employer, current plan; and whether the most recent coverage was canceled due to nonpayment of premium or for fraud.

RESPONSE: The Board agrees with that portion of the suggestion to add a question concerning what plan currently covers the small employer, and has made that change upon adoption. The Board disagrees that the other suggestions are necessary or practical. Since the effective date is now being added to the application form (see previous comment and response), there is no value in soliciting the employers' renewal date; the carrier can calculate that information if, for some reason, it believes it needs to. With respect to questions on non-payment of premium or fraud, it is highly improbable that small employers which were cancelled for those reasons would answer the questions forthrightly, so there is little or no value to making the suggested change.

COMMENT: One commenter asked that the employer application be amended to allow carriers to issue through a trust to a small employer. The commenter requested more variability be added to the application to allow the application to be amended to add wording relevant to adding a small employer to a carrier's trust.

RESPONSE: The Board is adding a statement to the explanation of variability for the employer application (Exhibit N) to allow a carrier to amend the application to reflect the provisions required to subscribe to the carrier's trust.

COMMENT: Two commenters suggested that a question be added to the employer application concerning the class or classes of employees to be excluded from coverage.

RESPONSE: The Board agrees but rather than adding a new question upon adoption the question on the employer application concerning classes of employees included for coverage is being changed to solicit the classes of employees to be excluded for coverage instead.

COMMENT: One commenter suggested that a question be added to the employee application and waiver form (Exhibit Q and T) to include the marital status of legally separated.

RESPONSE: The Board does not believe the commenter's suggested change is necessary. Being legally separated does not preclude a spouse from coverage under the standard small employer benefit plans, and otherwise appears to have no legal bearing as to why someone would or would not choose the coverage.

COMMENT: One commenter asked that the employer application be amended to enable carriers to ask for a list of covered dependents. The commenter states that this enables them to determine eligibility when the coverage is issued instead of when a claim is submitted.

RESPONSE: The Board does not believe adopting the suggested change as part of these forms is necessary. A carrier could utilize its own administrative form to solicit this information.

COMMENT: One commenter suggested that most people would be forced to respond affirmatively to the question on Exhibit S about a gastro-intestinal disorder found on the standard health statement form (Exhibit S).

RESPONSE: Whether this is true or not is questionable. Diagnosis of a gastro-intestinal disorder is somewhat different from a determination that a specific incident resulted from a singular gastro-intestinal occurrence (for instance, vomiting and/or diarrhea due to food poisoning as opposed to ulcerative colitis). That is one of the reasons the Board used the term "gastro-intestinal" rather than "stomach." The Board believes most people will understand the difference. The Board does not believe additional clarification is needed on this question or this form.

COMMENT: One commenter suggested that some time limit be placed on the health statement questions in Exhibit S. Specifically, the commenter states that some restriction should be placed on how an old condition can influence current events.

RESPONSE: The Board notes that these questions may be used only for rating purposes and determination of a preexisting condition. A "yes" response should be explained as requested on the form. Obviously, if a condition was not diagnosed or treated within the prior six months, it cannot influence the preexisting condition exclusion provision which might otherwise be applicable. Carriers will have to determine to what extent old conditions will influence current rating, and they must do so subject to any restraints of law. The Board is not adding further date restriction on the health statement questions set forth in Exhibit S. No change is being made in the final rule.

COMMENT: One commenter would like a question added to the health statement concerning counseling, or an expansion of the mental or nervous disorder category to include counseling.

RESPONSE: The Board did not change the health statement (Exhibit S) to include the vague term "counseling" as either a separate category or a sub-category of mental or nervous disorders. The Board is satisfied that the question as asked is broad enough to include counseling for diagnosed mental or nervous disorders.

Summary of Agency-Initiated Changes:

1. In light of the requirements of N.J.S.A. 43:21-11(g) that wage reports required by the Department of Labor shall be confidential, N.J.A.C. 11:21-6.1(b) and 6.2 have been amended to delete the requirement that carriers obtain a copy of the small employer's New Jersey and Federal quarterly wage reports. Exhibit O has been revised accordingly to request the employee census information in order for the carrier to determine whether the employer is a small employer.

2. N.J.A.C. 11:21-6.3 has been amended to make it clear that carriers that utilize the Health Status form may do so to determine the applicability of any pre-existing condition limitation allowable under N.J.S.A. 17B:27A-17 et seq. (the "Act") as well as for rating purposes.

3. N.J.A.C. 11:21-7.3(a)5 has been amended, in compliance with the confidentiality afforded wage reports under N.J.S.A. 43:21-11(g), to provide that a carrier's determination as to whether an employer is a small employer shall be based upon the small employer's New Jersey Small Employer Certification form, not the wage reports.

4. Upon further consideration, N.J.A.C. 11:21-7.3(a)6 has been deleted since P.L. 1993, c.162 does not permit exclusion of any eligible employee, including union employees, from the determination of whether an employer has two to 49 employees, and is a small employer.

5. N.J.A.C. 11:21-7.9(a)1 has been amended in light of N.J.S.A. 43:21-11(g), to delete the provision that requires a small employer carrier to obtain wage reports.

6. N.J.A.C. 11:21-7.14(a)2 has been amended upon adoption to require carriers to update their database profiles of charges as frequently as the prevailing health care charges system is updated. This reflects the more common practice among current PHCS users and avoids the need for carriers to establish a delayed database system update for certain categories of policyholders and insureds.

7. Question 4, Section II in Exhibit Q which establishes rules relative to the order of benefit determination between automobile and health insurance has been revised in accordance with N.J.A.C. 11:3-37 to clarify the question relative to primary coverage in connection with expense incurred as a result of an automobile related injury.

8. Question 1a, Section III in Exhibit S has been revised in accordance with New Jersey Insurance Department Bulletin #85-3 which lists permissive application questions concerning AIDS to clarify that a diagnosis of AIDS or HIV+ (positive) must have been rendered by a member of the medical profession.

Full text of the adoption follows (additions to proposal added in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*):

11:21-1.3 Communications with the Board

All written communications with the SEH Board shall be submitted to the SEH Board at the following address:

Interim Administrator
New Jersey Small Employer Health Benefits
Program Board
SEH 1
c/o The Prudential Insurance Company of America
P.O. Box 4080
Iselin, New Jersey 08830

11:21-1.4 Penalties

Failure of a carrier to comply with any provision of this chapter may result in the carrier losing its authority to write health benefits in New Jersey and imposition of any and all penalties and action available under law.

11:21-1.5 Severability

If any provision of this chapter or the application thereof to any person or circumstance is found to be invalid for any reason, the remainder of the chapter and the application thereof to other persons or circumstances shall not be affected thereby.

SUBCHAPTER 6. STANDARD EMPLOYER AND EMPLOYEE APPLICATION AND SMALL EMPLOYER CERTIFICATION FORMS

11:21-6.1 Standard application form

(a) All small employer carriers offering small employer health benefits plans with an effective date on or after January 1, 1994, shall use the standard application form approved by the Board and specified in Exhibit N of the Appendix to this chapter incorporated herein by reference.

(b) Small employer carriers shall require any small employer applying for a small employer health benefits plan to be issued by that small employer carrier to complete, as part of the application, the New Jersey Small Employer Certification form approved by the Board and specified in Exhibit O of the Appendix to this chapter incorporated herein by reference. *[The small employer carrier shall obtain from the small employer concurrent with the certification a copy of its most recent New Jersey and Federal quarterly wage report.]*

11:21-6.2 Annual Small Employer Certification Form

Small employer carriers shall require each small employer covered by a small employer health benefits plan issued by the small employer carrier to that small employer to complete each year the *[Annual]* New Jersey Small Employer Certification form approved by the Board and specified in Exhibit *[P]* ***O*** of the Appendix to this chapter incorporated herein by reference. This form shall be sent to the small employer for completion no earlier than *[90]* ***120*** days prior to the renewal of the small employer's health benefits plan. *[Concurrent with the annual certification, the small employer carrier shall also obtain from the small employer a copy of its most recent New Jersey and Federal quarterly wage report.]*

11:21-6.3 Enrollment

(a) Small employer carriers shall require each eligible employee electing coverage under the small employer health benefits plan to complete the Enrollment form approved by the Board and specified in Exhibit Q of the Appendix to this chapter incorporated herein by reference, except that carriers can reformat the standard application in any manner necessary to simplify administration for the carrier without modification of the content of the form. At the end of the standard application in an additional section, a carrier may also require periodic updates of the following information: name changes, primary care physician change, health center change, additions or deletions to family coverage, address changes and State and Federal continuation election.

(b) Small employer carriers offering the HMO plan shall require each eligible employee electing coverage under the HMO plan to complete the enrollment form approved by the Board and specified in Exhibit R of the Appendix to this chapter incorporated herein by reference, except that carriers can reformat the standard application in any manner necessary to simplify administration for the carrier without modification of the content of the form. At the end

of the standard application in an additional section, a carrier may also require periodic updates of the following information: name changes, primary care physician change, health center change, additions or deletions to family coverage, address changes and State and Federal continuation election.

(c) Any small employer carrier who elects to utilize an eligible employee's health status in determining premium rates shall require eligible employees to complete the Health Status form approved by the Board and specified in Exhibit S of the Appendix to this chapter incorporated herein by reference. ***This form may also be utilized by carriers in determining the applicability of any pre-existing condition limitation in accordance with the Act.***

11:21-6.4 Waiver

Any eligible employee who declines coverage under the small employer health benefits plan shall complete the employee waiver form approved by the Board and specified in Exhibit T of the Appendix to this chapter incorporated herein by reference. ***The waiver form may be combined with Exhibit Q, into a single form, at the option of the carrier without modification of the content of either form, except to reformat in any manner necessary to simplify administration.***

SUBCHAPTER 7. PROGRAM COMPLIANCE

11:21-7.1 Purpose and scope

This subchapter sets forth the standards all carriers must meet in offering, issuing and renewing all small employer health benefits plans to any small employer, the small employer's eligible employees, and the dependents of those eligible employees on or after January 1, 1994.

11:21-7.2 Definitions

All words and terms used in this subchapter shall have the meanings as set forth in the Act, N.J.A.C. 11:21-1.2 or as further defined below, unless the context clearly indicates otherwise.

"Affiliated company" means any corporation which is a member of a controlled group of corporations; organization under common control with the small employer; organization which is included with the small employer in an affiliated service group; or other entity required to be aggregated with the small employer, all in accordance with sections 414 and 1563 (without regard to sections 1563(a)(4) and (e)(3)(c)), of the Internal Revenue Code of 1986, as amended.

11:21-7.3 Eligibility and issuance

(a) A small employer carrier shall issue a small employer health benefits plan to any small employer which requests it, pays the premiums therefor and meets the contribution and participation requirements, if any, of the small employer carrier. All small employer health benefits plans that are issued or renewed on or after January 1, 1994, shall provide coverage for all eligible employees and their dependents who elect to participate regardless of their health and without exclusionary riders.

1. A small employer carrier shall not refuse to issue coverage, or discriminate in the issuance of coverage, to a small employer based upon the geographic location of the small employer, except that small employer carriers that are HMOs may refuse to issue coverage to a small employer not physically located in the HMO's service area.

2. A small employer carrier shall not refuse to issue coverage, or discriminate in the issuance of coverage, to a small employer based upon the geographic location of the employees of the small employer, except that:

i. The small employer carrier shall refuse to issue coverage to a small employer if the majority of its eligible employees are not *[residents]* ***employed within the State*** of New Jersey; or

ii. The small employer carrier may refuse to issue coverage if the participating employees are not physically located within the small employer carrier's service area, if the small employer carrier is an HMO.

3. Every small employer carrier, except small employer carriers that are HMOs, shall, as a condition of transacting business in this State, actively offer to small employers the five small employer health benefits plans, including all riders it writes, except as such riders may be restricted by the Board to specific small employer health benefits plans. Small employer carriers that are HMOs shall, as a condition of transacting business in this State, actively offer to small employers every small employer health benefits plan it writes, including all riders it writes, except as such riders may be restricted by the Board to specific small employer health benefits plans.

4. A small employer carrier shall consider the number of all eligible employees of all affiliated companies of a small employer in determining whether an employer is a small employer.

5. At the time of application, the determination of whether an employer is a small employer shall be based upon the *[New Jersey and Federal wage reports of the employer established for the completed calendar quarter immediately preceding the calendar quarter in which the application is dated]* ***small employer's completed New Jersey Small Employer Certification form***.

i. If an employer qualified as a small employer in the immediately preceding calendar quarter, the employer shall be considered a small employer regardless of the status of the employer on the date of application *[of]* ***or*** the effective date of coverage.

ii. If an employer did not qualify as a small employer in the immediately preceding calendar quarter, the employer shall not be considered a small employer, regardless of the status of the employer on the date of application or the proposed effective date of coverage, if any.

[6. If an employer that otherwise does not meet the definition of small employer has fewer than 50 eligible employees, when eligible employees to whom health benefits plan coverage is required pursuant to a union welfare plan are removed from the calculation of the number of eligible employees of the employer, then that employer shall be considered a small employer.]

(b) A small employer carrier shall issue only small employer health benefits plans to an association, trust or multiple employer arrangement to provide coverage to member small employers or to two or more eligible employees of a member small employer.

1. No carrier shall issue a small employer health benefits plan to any association, trust or multiple employer arrangement which bases membership criteria of any small employer or employee of the small employer, in whole or in part, upon the health status or claims experience of the employer or employee.

2. Every small employer member of an association, trust or multiple employer arrangement shall be offered coverage under every small employer health benefits plan issued to the association.

(c) In determining an employer's number of eligible employees, a small employer carrier shall consider in the calculation the number of independent contractors that the employer may include on its application for coverage to the extent that each independent contractor:

1. Is performing a service for the employer pursuant to a written contract for monetary or other legal consideration;

2. Is working exclusively for the employer;

3. Works 25 or more hours per week for the employer;

4. Works on other than a temporary or substitute basis; and

5. The independent contractor relationship has been established to serve a substantial business need of the employer and is not intended primarily to obtain insurance coverage.

(d) Employees who enroll within 30 days of first becoming eligible for coverage shall be accepted for coverage by the small employer carrier without any restrictions or limitations on coverage related to their risk characteristics or that of their dependents, except that a small employer carrier may exclude coverage for preexisting conditions consistent with the provisions of N.J.A.C. 11:21-7.8.

(e) Small employer carriers providing coverage to a small employer's employees working fewer than 25 hours per week under a health benefits plan issued prior to January 1, 1994, or renewed upon its anniversary date prior to March 1, 1994 may continue to cover those employees when the carrier converts the small employer to a small employer health benefits plan on the first anniversary date beginning after February 28, 1994.

1. If continuing to cover such employees, the small employer carrier shall offer to continue coverage for all such employees of

all such small employers converting to a small employer health benefits plan, and shall do so without regard to the small employer health benefits plan to which the small employer converts.

2. Such covered employees shall not be considered in determining whether an employer is a small employer, nor for determining whether the small employer meets the requisite participation requirements.

(f) Small employer carriers providing coverage to a small employer's retired employees under a health benefits plan issued prior to January 1, 1994, or renewed upon its anniversary date prior to March 1, 1994 may continue to cover those retired employees when the carrier converts the small employer to a small employer health benefits plan on the first anniversary date beginning after February 28, 1994, subject to the requirements of (e)1 and 2 above with respect to such covered retired employees.

(g) Small employer carriers covering retired employees and/or employees not working 25 or more hours a week of an employer that becomes a small employer subsequent to January 1, 1994 may continue to cover such retired employees or noneligible employees under a small employer health benefits plan issued to the small employer by the carrier, subject to the requirements of (e)1 and 2 above.

11:21-7.4 Carriers acting as administrators for small employers

(a) A small employer carrier may act as administrator for a small employer's self-funded plan and shall not be considered to be acting in circumvention of N.J.S.A. 17B:27A-17 et seq. if:

1. The small employer's self-funded plan meets the definition of an employee welfare benefit plan at 26 U.S.C. 1002(1) and is not a multiple employer welfare arrangement, in whole or in part, as defined at 26 U.S.C. 1002(40); and

2. The carrier does not issue stop loss or excess risk insurance to the small employer.

(b) A small employer carrier may act as administrator for a self-funded plan for a group of small employers and shall not be considered to be acting in circumvention of N.J.S.A. 17B:27A-17 et seq., if:

1. The group of small employers meets the requirements of 26 U.S.C. 1002(4)(B), establishing the criteria of what constitutes a control group single employer for the purposes of the federal Employee Retirement Income Security Act; and

2. The small employer carrier does not issue stop loss or excess risk insurance to the small employer.

11:21-7.5 Restrictions on replacement of health benefits plans

(a) A small employer who purchases a health benefits plan or rider pursuant to the Act shall not be permitted to purchase a health benefits plan or rider with a greater actuarial value until the first anniversary date of the small employer's existing health benefits plan.

(b) When a small employer replaces a health benefits plan or rider with a health benefits plan or rider of greater actuarial value, the small employer shall not be permitted to change the health benefits plan or rider to one of lesser actuarial value until the anniversary date of the small employer's health benefits plan.

(c) A small employer who has purchased a health benefits plan or rider pursuant to the Act may purchase a health benefits plan or rider of lesser actuarial value prior to the anniversary date of the existing health benefits plan or rider, provided that the existing plan or rider was purchased at least 12 months prior to the latest anniversary date of the plan or rider.

(d) In the event that the previous health benefits plan of a small employer group was cancelled for nonpayment of premiums or fraud, a small employer carrier may:

1. Refuse to issue a health benefits plan to the small employer group for one year from the last date of coverage of the previous plan; or

2. Require the small employer group to pay up to six months of premiums in advance of the issuance of a health benefits plan.

11:21-7.6 Participation requirements

(a) A small employer carrier shall require a minimum participation under the small employer's health benefits plan of 75 percent of eligible employees except as set forth in (b) below. This participation requirement shall be applied by the small employer carrier uniformly among all small employer health benefits plans and all small employers. An eligible employee who is not covered under the small employer's health benefits plan because the employee is covered as a dependent under a spouse's health benefits plan, or is covered under an HMO plan offered by the small employer, shall be counted as covered under the small employer's health benefits plan for the purpose of satisfying participation requirements.

(b) A small employer carrier may, upon approval by the Board, require a minimum participation of less than 75 percent provided that the small employer carrier:

1. Notifies the Board in writing of its minimum requirement;

2. Explains why the lesser requirement is reasonable; and

3. Applies the requirement uniformly to all small employer health benefits plans and to all small employers.

(c) The Board shall notify the small employer carrier in writing within 60 days of the small employer carrier's filing with the Board whether such request is approved.

(d) The small employer carrier shall have a right of appeal if the Board disapproves the small employer carrier's lesser participation requirements, in accordance with procedures established by the Board in its Plan of Operation.

11:21-7.7 Contribution requirements

(a) A small employer carrier shall not require a minimum small employer contribution of more than 10 percent of the annual cost of the small employer's health benefits plan. This contribution requirement shall be applied by the small employer carrier uniformly among all small employer health benefits plans and all small employers.

(b) A small employer carrier may, upon approval of the Board, require a minimum contribution of less than 10 percent provided that the small employer carrier:

1. Notifies the Board in writing of its contribution requirement;

2. Explains why the lesser requirement is reasonable; and

3. Applies the requirement uniformly to all small employer health benefits plans and to all small employers.

(c) The Board shall notify the small employer carrier in writing within 60 days of the small employer carrier's filing with the Board whether such request is approved.

(d) The small employer carrier shall have a right of appeal if the Board disapproves the small employer carrier's lesser contribution requirements, in accordance with procedures established by the Board in its Plan of Operation.

11:21-7.8 Preexisting condition standards

(a) A small employer health benefits plan covering five or fewer eligible employees, as determined on the effective date and each subsequent policy anniversary, shall not deny, exclude or limit benefits, for a covered individual for losses incurred more than 180 days following the effective date of the individual's coverage due to a preexisting condition. A preexisting condition is an illness or injury which manifests itself in the six months before a covered individual's coverage under the small employer health benefits plan becomes effective and for which: the individual received medical care, treatment, or took prescribed drugs; or, an ordinarily prudent person would have sought medical advice, care or treatment in the six months before the individual's coverage starts. A pregnancy which exists on the date an individual's coverage becomes effective is also a preexisting condition.

(b) A small employer carrier shall waive any time period applicable to a preexisting condition limitation period for the period of time an individual was covered under a previous employer's health benefits plan that provided benefits with respect to such services, provided that the qualifying previous coverage was continuous to a date not more than 90 days prior to the effective date of the new coverage. The period of continuous coverage shall not include any waiting period for the effective date of the new coverage applied under the terms of the small employer health benefits plan.

(c) The standards set forth in (a) above shall also apply to a late enrollee under a small employer health benefits plan, unless ten or

more late enrollees request enrollment during any 30 day enrollment period.

11:21-7.9 Effective date of coverage

(a) A small employer carrier, prior to issuing a small employer health benefits plan, may require the following:

1. A completed small employer standard application form including the small employer certification form *[and applicable wage reports]* in accordance with N.J.A.C. 11:21-6.1(a) and (b);

2. Complete employee enrollment material in accordance with N.J.A.C. 11:21-6.3 and 6.4; and

3. An advance premium payment not to exceed one month's premium, except as provided in N.J.A.C. 11:21-7.5(d)2, which shall be refunded to the employer if the small employer health benefits plan is not issued by the small employer carrier.

(b) A small employer carrier shall provide notice to the employer within 15 ***working*** days of receipt by the small employer carrier of the information set forth in (a) above whether the small employer carrier approves or disapproves the employer's application for the small employer health benefits plan. If approved, the effective date of coverage under the small employer health benefits plan shall be no later than the first day of the month following the date of notice of such approval by the small employer carrier ***unless the small employer has requested a later effective date which is agreed to by the small employer carrier***.

(c) At the option and upon the request of the small employer, a waiting period may be applied by the small employer carrier with respect to employees when they first become eligible for coverage, not to exceed six months. Waiting periods may be applied to these employees by class of employee based upon conditions pertaining to employment.

(d) A small employer carrier may offer an automatic checking withdrawal option to small employer groups for the monthly or quarterly payment of premiums. In the event that a small employer carrier elects to offer an automatic checking withdrawal option, the carrier shall offer the same option to all small employer groups, regardless of the size of the group or the type of health benefits plan.

(e) A small employer carrier may require that its small employer groups make monthly or quarterly premium payments through an automatic checking withdrawal option. In the event that a small employer carrier elects to require that its small employer groups pay premiums through an automatic checking withdrawal option, the small employer carrier shall apply this requirement to every small employer group, regardless of the size of the group or the type of health benefits plan.

11:21-7.10 Price quotes; disclosures

(a) A small employer carrier shall provide a price quote to a small employer, directly or through an authorized producer, within 10 working days of receiving a request for a quote and such information as is reasonable and necessary to provide the quote. A small employer carrier shall notify a small employer, directly or through an authorized producer, within five working days of receiving a request for a price quote of any additional information needed by the small employer carrier to provide the quote.

(b) Each small employer carrier shall make reasonable disclosure in price quotes provided to small employers of the provisions concerning the small employer carrier's right to change premiums and the criteria in the small employer carrier's rate filing which affect changes in premium rates.

11:21-7.11 Tie-ins

A small employer carrier shall not require, as a condition to the offer or sale of a health benefits plan to a small employer, that the small employer purchase or qualify for any other insurance products or services.

11:21-7.12 Guaranteed renewal

(a) All small employer health benefits plans that are issued on or after January 1, 1994, must be guaranteed renewable at the option of the small employer, except for the following reasons:

1. Nonpayment of required premiums;

2. Fraud or misrepresentation with respect to coverage of eligible employees or dependents or status as a small employer;

3. The number of employees covered under the small employer health benefits plan is less than the percentage of eligible employees required by participation requirements under the plan;

4. The small employer is no longer a small employer. The determination as to the small employer's status as a small employer shall be made at the anniversary date of the small employer's health benefits plan, in accordance with N.J.A.C. 11:21-7.3(a)5;

5. Noncompliance with a small employer carrier's employer contribution requirements;

6. The number of employees covered under the small employer health benefits plan is less than two;

7. A small employer ceases its membership in an association or trust of employers where the small employer health benefits plan was issued in connection with such membership; or

8. The small employer carrier institutes a withdrawal in accordance with N.J.S.A. 17B:27A-23e and rules promulgated thereunder by the Commissioner.

11:21-7.13 Reporting requirements

(a) Effective January 1, 1995, a small employer carrier shall file annually, with the Board, the following information related to small employer health benefits plans issued by the small employer carrier to small employers in New Jersey:

1. The number of small employers, covered employees and dependent units that were issued small employer health benefits plans in the previous calendar year, separated as to newly issued plans and renewals, and by plan design;

2. The number of small employer health benefits plans in force by three digit zip code as of December 31 of the previous calendar year;

3. The number of small employer health benefits plans that were voluntarily cancelled by small employers in the previous calendar year;

4. The number of small employer health benefits plans that were cancelled or non-renewed by the carrier in the previous calendar year, and the reason for such cancellation or non-renewal; and

5. The number of small employer health benefits plans that where issued to small employers that were uninsured for at least the three months prior to issue.

(b) The information described in (a) above shall be filed with the Board no later than March 15 of each year.

11:21-7.14 Paying benefits

(a) In paying benefits for covered services under the terms of the small employer health benefits plans provided by health care providers not subject to capitated or negotiated fee arrangements, small employer carriers shall pay covered charges on a reasonable and customary standard based on the Prevailing Healthcare Charges System profile for New Jersey, incorporated herein by reference published and available from the Health Insurance Association of America, 1025 Connecticut Avenue, NW, Washington, D.C. 20036-3998.

1. The maximum allowable charge shall be based on the 80th percentile of the profile.

2. Carriers shall use the profile effective as of July 1993, and shall update their databases *[annually beginning January 1995]* ***within 60 days after receipt of periodic updates released by the Prevailing Healthcare Charges Systems***.

SUBCHAPTER 7A. CONTINUATION AND CONVERSION OF EXISTING CONTRACTS

11:21-7A.1 Purpose and scope

This subchapter sets forth the standards all carriers must meet in renewing or continuing any policy or contract delivered or issued for delivery to a small employer prior to January 1, 1994.

11:21-7A.2 Conversion

(a) A policy or contract covering one or more employees of a small employer issued by a carrier prior to January 1, 1994, shall remain in effect at the small employer's option until the first an-

niversary date after February 28, 1994, of that policy or contract, unless the carrier institutes a withdrawal in accordance with N.J.S.A. 17B:27A-23e and rules promulgated thereunder by the Commissioner.

(b) A carrier shall notify each small employer at least 60 days prior to the policy or contract anniversary date that the existing policy or contract will be cancelled on its anniversary date. If the carrier is a small employer carrier, it shall give the small employer an outline of the small employer health benefits plans *[required to be offered by the small employer carrier]* and the premium cost*[s]* for *[each of]* the small employer health benefits plan*[s offered]* ***which is most equivalent to that policy or contract which will be cancelled. Upon request of the small employer, the small employer carrier shall provide an outline and premium costs with respect to any other small employer health benefits plans offered by the small employer carrer***.

11:21-7A.3 Continuation

The requirements of N.J.S.A. 17B:27A-27 shall apply, effective January 1, 1994, to every policy or contract issued to a small employer which is continued in accordance with N.J.A.C. 11:21-7A.2 above.

SUBCHAPTER 17. FAIR MARKETING STANDARDS

11:21-17.1 Plan identification and marketing materials

(a) Each small employer carrier which issues marketing and/or promotional materials in conjunction with the health benefits plans may attach its own name or identification to each of the plans, but shall also identify each of those health benefits plans by the alphabetical designation (A, B, C, D, E, HMO) assigned to it in N.J.A.C. 11:21-3.1. The alphabetical designation shall be clearly identified in the designation of each of the small employer carrier's health benefits plans.

(b) All terms, definitions, and text used in the small employer carrier's marketing and/or promotional material shall be consistent with the Act and this chapter.

(c) Small employer carriers shall not disseminate marketing and/or promotional material specific to the health benefits plans defined at N.J.A.C. 11:21-3 to policyholders or small employers until N.J.A.C. 11:21-3 is effective pursuant to the requirements of P.L. 1993, c.162, Section 16.

11:21-17.2 Retention of marketing and promotional materials

Small employer carriers shall maintain a complete file of all marketing and promotional material specific to the health benefits plans, which it disseminates to consumers, producers, or otherwise publicly disseminates. Small employer carriers shall retain each piece of promotional and marketing materials for a period of three calendar years from the last date the material is publicly disseminated, which shall be deemed its complete file for the purposes of this subchapter. Upon written request of the Board, a small employer carrier shall, within three business days, make available for inspection its complete file of marketing and promotional material to the Board.

11:21-17.3 Certification

(a) Each small employer carrier disseminating marketing and promotional material shall certify that its marketing and promotional material conforms with the requirements of this subchapter. The certification shall be signed by a duly authorized officer of the small employer carrier. Each small employer carrier shall file its initial certification with the Board no later than the first day upon which the small employer carrier disseminates promotional or marketing materials for the health benefits plans to consumers, producers or the public in general.

(b) Small employer carriers shall continue to file a certification as required in (a) above on an annual basis following the filing of its initial certification.

11:21-17.4 Buyers' Guide

Small employer carriers shall set forth in their promotional and/or marketing materials that a Small Employer Health Benefits Buyers' Guide is available and can be obtained upon request, free of charge, by a small employer from the small employer carrier. Small employer carriers shall provide or mail a Buyers' Guide to small employers within three business days of request. ***A small employer carrier may arrange for delivery or distribution of the Buyers' Guide through its licensed agents or brokers.***

11:21-17.5 Producer contracts

(a) A small employer carrier may select those insurance producers, as defined by N.J.S.A. 17:22A-2j, with whom it chooses to contract. No small employer carrier shall terminate or refuse to renew the contract of its insurance producers because of the health status, claims experience, occupation or geographic location of the small employer groups placed by the insurance producer with the small employer carrier.

(b) No small employer carrier shall, directly or indirectly, enter into any contract, agreement or arrangement with an insurance producer that provides for or results in any consideration provided to an insurance producer for the issuance or renewal of a small employer health benefits plan that varies on account of the health status, claims experience, industry, occupation or geographic location of a small employer covered by a small employer health benefits plan.

SUBCHAPTER 18. PETITIONS FOR RULES

11:21-18.1 Scope

This subchapter shall apply to all petitions made by interested persons for the promulgation, amendment or repeal of any rule by the Board, pursuant to N.J.S.A. 52:14B-4(f).

11:21-18.2 Procedure for petitioner

(a) Any person who wishes to petition the Board to promulgate, amend or repeal a rule shall submit to the Board, in writing, the following information:

1. Name and address of the petitioner;
2. The substance or nature of the rulemaking which is requested;
3. The reasons for the request and the petitioner's interest in the request; and
4. References to the authority of the Board to take the requested action.

(b) Within 30 days of its receipt of a petition for rulemaking, the Board shall review the same to ascertain if the submission complies with the requirements of (a) above and, in the event that the Board determines that the submission is not in substantial compliance with (a) above, the Board shall notify the petitioner of such non-compliance and of the particular deficiency or deficiencies in the submission on which the decision of the Board was based. The Board shall also advise the petitioner that any deficiencies may be corrected and the petition may be resubmitted for further consideration.

(c) Any document submitted to the Board which is not in substantial compliance with (a) above shall not be deemed to be a petition for a rule requiring further Board action pursuant to N.J.S.A. 52:14B-4(f).

11:21-18.3 Procedure of the Board

(a) Upon receipt of a petition in compliance with N.J.A.C. 11:21-18.2 the Board shall file a notice of petition with the Office of Administrative Law for publication in the New Jersey Register. The notice shall include:

1. The name of the petitioner;
2. The substance or nature of the rulemaking action which is requested;
3. The problem or purpose which is the subject of the request; and
4. The date the petition was received.

(b) Within 30 days of receiving a petition in compliance with N.J.A.C. 11:21-18.2, the Board shall mail to the petitioner, and file with the Office of Administrative Law for publication in the New Jersey Register, a notice of action on the petition which shall include:

1. The name of the petitioner;
2. The New Jersey register citation for the notice of petition, if that notice appeared in a previous New Jersey Register;

3. Certification by the Board that the petition was duly considered pursuant to law;
4. The nature or substance of the Board's action upon the petition, and
5. A brief statement of reasons for the Board's action.
(c) Board's action on a petition may include:
1. Denying the petition;
2. Filing a notice of proposed rule or a notice of pre-proposal for a rule with the Office of Administrative Law; or
3. Referring the matter for further deliberations, the nature of which shall be specified and which shall conclude upon a specified date. The results of these further deliberations shall be mailed to petitioner and submitted to the Office of Administrative Law for publication in the New Jersey Register.

EXHIBIT N

[Carrier]

APPLICATION FOR A SMALL *[GROUP]* *EMPLOYER* HEALTH BENEFITS POLICY

Please print or type

Policy number: ([Carrier] Use Only)

☐ New Policy ☐ Change in Policy

Requested Effective Date:_____

SECTION I: POLICYHOLDER INFORMATION

1. Policyholder (full legal name of company):_____
2. Tax Identification Number:_____
3. Main Address:_____ *[County:]*_____
Street *City* *State* *Zip*

Mailing Address:_____
Street *City* *State* *Zip*

Telephone: ( )_____ ***Fascimile:** ( )_____ *

4. Name of Correspondent:_____ Title:_____
5. Type of organization: ☐ Corporation ☐ Partnership ☐ Proprietorship
☐ Other (explain):_____
6. Nature of business (specify):_____ ***SIC Code**_____ *
7. Number of ***eligible*** employees in your company: _____
(Eligible employees are those who work at least 25 hours per week)
8. Number of eligible employees to be insured: _____
[(Eligible employees are those who work at least 25 hours per week)]
9. Class or classes to be ***excluded*** *[included]*:_____

10. Insurance Requested For:** ☐ **Employees Only** ☐ **Employees and Dependents

11. *[10.]* Are you subject to the requirements of COBRA? ☐ Yes ☐No

12. *[11.]* Waiting period before employees become insured: (may not exceed 6 months)
Present employees: _____ New Employees _____

13. *[12.]* What percentage of the premium will the employer pay? _____

14. *[13.]* Deposit $_____

Premium Paid: ☐ Monthly ☐ Quarterly [☐ Automatic checking withdrawal]
Premium will be due as of the effective date. The premium for the first month of coverage must be attached.

Affiliates, subsidiaries or branches:

Legal Name & Location	No. ***eligible ees*** *[of employees]* in this company	No. ***eligible ees*** *[of employees]* to be insured	Type of organization	Nature of business

SECTION II: SPECIFICATIONS FOR COVERAGE

***[*HEALTH BENEFITS**

☐ Wraparound (Hospital Base Plan _____ days)

Plan: ☐ A ☐ B ☐ C ☐ D ☐ E ☐***HMO***

Deductible (Options for plans B, C and D only):	☐ $250	☐ $500	☐ $1,000	
***Co-Payment (Options for HMO Plans Only)**	☐ **$5**	☐ **$10**	☐ **$15**	☐ **$20***
Managed Care Delivery System:	☐ PPO	☐ POS	☐ None	

PRESCRIPTION DRUG BENEFITS

Program Type:	☐ Card	☐ Mail Order	☐ Card/Mail Order

***MENTAL AND NERVOUS CONDITIONS AND SUBSTANCE ABUSE BENEFITS**

***Co-Payment Option**	☐ **$5**	☐ **$10**	☐ **$15**	☐ **$20]***

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SECTION III: ALL QUESTIONS MUST BE ANSWERED

*[1. Has this firm or any of its affiliates, either under its present name, or under any other name, ever applied for or been insured for group insurance with [Carrier]? ☐ Yes ☐ No

If "Yes" please furnish year, name of employer and policy number._____]*

[2.] ***1a*** Is there any insurance plan:

[a.] ***•*** now inforce and to be continued? ☐ Yes ☐ No

[b.] ***•*** currently being applied for? ☐ Yes ☐ No

If "Yes" give a description of the plan and name of insurance carrier(s)_____

[3.] ***b*** Name of present or prior group carrier_____

Effective date of prior coverage:** _____* Cancellation/termination*** date:_____

Is the coverage applied for in this application replacing other group insurance? ☐ Yes ☐ No

If "Yes", give reason_____

***Plan being replaced:** ☐ **A** ☐ **B** ☐ **C**☐ **D** ☐ **E** ☐ **HMO** ☐ **Other**_____*

c. Has your firm been uninsured for 3 or more months prior to application** ☐ **Yes** ☐ **No

4. What forms of insurance are now or were in force? ☐ Health Benefits *[or Major Medical]* ☐ Prescription Drugs (Attach copies of Booklet/Certificate and most recent Billing Statement)

5. *[If present carrier provided health insurance,]* Are extended benefits provided in case of termination of *[the plan]* ***health benefits***? ☐ Yes ☐ No

6. To the best of your knowledge are there any current or former employees or their eligible dependents whose health insurance is being continued? ☐ Yes ☐ No

Please provide the following information for each current/former employee or dependent on health continuations.

***Name of* Employee/Dependent**	**Date of Birth**	**Type of Continuation State/Federal/ Extended Benefits**	**Reason for Termination Disability/Other**	**Continuation Dates Start End**

If additional space is needed, attach a separate sheet, signed and dated.

7. To the best of your knowledge:

a. Are any employees or dependents presently incapacitated? ☐ Yes ☐ No

b. Are any dependent children incapable of self-support due to a physical or mental disability? ☐ Yes ☐ No

Additional space to explain if items 1, 2 or 3 were answered "Yes". Refer to the question number, and give details including names, where appropriate.

SECTION IV: AGENT/PRODUCER INFORMATION

[To be supplied by Carrier]

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SECTION V: SIGNATURE

It is understood that no individual shall become insured while not actively at work on a full-time basis, and only full-time employees are eligible. A full-time employee is one who regularly works at least 25 hours per week at his employer's place of business. It is further understood that no agent has power on behalf of [Carrier] to make or modify any request or application for insurance or to bind [Carrier] by making any promise or representation or by giving or receiving any information.

It is further understood that no insurance will be effective unless and until the application is accepted in writing by [Carrier]. No contract of insurance is to be implied in any way on the basis of the completion and/or submission of this application.

Any person who knowingly files a statement of claim, application for insurance, *[or]* enrollment form, ***or certification*** containing any false or misleading information may be subject to criminal and civil penalties.

Dated at_____ on _____

Print name of Officer, Partner or Proprietor

Signature of Officer, Partner or Proprietor

Witness to Signature

Note: If there are any modifications to the statements and answers given in this application (i.e. crossed out, whited-out, erased information), the applicant must attest to the modifications) by giving a complete signature in the margin near the modification.

Explanation of Brackets ***and Text***
Application for a *[Group]* ***Small Employer*** Health Benefits Policy

1. The terms Policyholder and Policy may be replaced with Contractholder of Planholder and Contract or Plan, as appropriate.

2. The terms insurance and insured may be replaced with coverage and covered, as appropriate.

[2.] ***3.*** The reference to Automatic Checking Withdrawal may be deleted if Carrier does not offer such option.

[3. The Wraparound option may be deleted if a Carrier does not offer such option.]

4. The text of the *[Deductible, Managed Care Delivery system and Prescription Drug items]* ***Health Benefits section*** may vary to accomodate the options a Carrier will offer.

For example, if a Carrier does not offer HMO plans, such text may be deleted.

5. Agent/Producer Information may be consistent with a Carrier's usual procedures.

6. If benefits are to be issued through a Multiple Employer Trust, a Carrier may include text which specifies that the employer is requesting participation in a Trust.

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EXHIBIT O

NEW JERSEY SMALL EMPLOYER CERTIFICATION

For a policy of Group Health Benefits Insurance

[Policyholder] ***Employer*** Name Group Policy No.

Address ***Street*** ***City*** ***State*** ***Zip***

***EMPLOYEE CENSUS INFORMATION**

Please include the following persons in the following list:

a. employees, owners, partners, officers, and independent contractors who are actively working for the employer on a regular basis, whether or not they are eligible to be covered under the policy.

b. employees, owners, partners, officers, and independent contractors who are not working, but who are currently covered under the employer's health benefits plan for reasons such as continuation of coverage or total disability.

Please use the following letters to indicate Status:

F: Full-time employee who works 25 or more hours per week
P: Part-time employee who works less than 25 hours per week
T: Temporary employee
I: Independent Contractor
D: Totally Disabled employee
C: Continuee under state or federal law

Name	Date of Employment	Hours worked per week	Status
1.			
2.			
3.			
4.			
5.			
6.			
7.			
8.			
9.			
10.			
11.			
12.			
13.			
14.			
15.			

If additional space is needed, attach a separate sheet.*

SEH-SEC-11/93-1

CERTIFICATION AS A SMALL EMPLOYER IN THE STATE OF NEW JERSEY IN ACCORDANCE WITH NEW JERSEY CH. 162

Group Health Benefits Participation (All Questions Must Be Answered)

An Eligible Employee is one who works on a full-time basis with a normal work week of 25 or more hours. An employee who works less than 25 hours per week or on a temporary or substitute basis is not an eligible employee.

Total # Eligible Employees _____
Total # Eligible Employees applying for health benefits coverage _____
Total # Eligible Employees waiving health benefits coverage under this policy with coverage elsewhere _____
Total # Eligible Employees waiving health benefits coverage under this policy without coverage elsewhere _____

Total # Eligible Employees with Eligible Dependents _____
Total # Eligible Employees applying for Dependent health benefits coverage _____
Total # Eligible Employees waiving Dependent health benefits coverage under this policy with coverage elsewhere _____
Total # Eligible Employees waiving Dependent health benefits coverage under this policy without coverage elsewhere _____

CERTIFICATION

(Please sign and date appropriate section indicating whether or not you meet the definition of a small employer)

A Small Employer is any person, firm, corporation, partnership or association actively engaged in business who during at least fifty percent of its working days in the preceding CALENDAR YEAR/QUARTER, employed NO MORE THAN FORTY-NINE eligible employees and NO LESS THAN TWO eligible employees, the majority of whom were employed in the State of New Jersey. In determining the number of eligible employees, companies which are affiliated companies shall be considered one employer.

I certify that I qualify as a Small Employer in the State of New Jersey.

[I have reviewed the above statements made by me, and they are true and complete.]

***I certify that the information provided to [Carrier] is true and complete. I understand that if the above information is not complete or is not provided to [Carrier] in a timely manner, then health benefits coverage does not have to be offered or continued. I further understand that incomplete or untrue information may void health benefits coverage.**

Any person who knowingly files a statement of claim, application for insurance, enrollment form, or certification containing any false or misleading information, may be subject to criminal and civil penalties.*

_____
Signature of Officer, Partner or *[Proprietor]* ***Owner*** Title Date

*_____
Print Name of Officer, Partner, or Owner*

_____
Signature of Witness Date

[We must have a copy of your most recent State/Federal quarterly wage report]

I certify that I am not a Small Employer in the State of New Jersey, as defined above.

_____
Signature of Officer, Partner or *[Proprietor]* ***Owner*** Title Date

_____
Print Name of Officer, Partner or *[Proprietor]* ***Owner***

_____
Signature of Witness Date

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EXHIBIT P

*[ANNUAL NEW JERSEY SMALL EMPLOYER CERTIFICATION

For a policy of Group Health Benefits Insurance

Policyholder Name _____ Group Policy No. _____

Address _____

CERTIFICATION AS A SMALL EMPLOYER IN THE STATE OF NEW JERSEY IN ACCORDANCE WITH NEW JERSEY CH. 162

Group Health Benefits Participation (All Questions Must Be Answered)

An Eligible Employee is one who works on a full-time basis with a normal work week of 25 or more hours. An employee who works less than 25 hours per week or on a temporary or substitute basis is not an eligible employee.

Total # Eligible Employees _____
Total # Eligible Employees applying for health benefits coverage _____
Total # Eligible Employees waiving health benefits coverage under this policy with coverage elsewhere _____
Total # Eligible Employees waiving health benefits coverage under this policy without coverage elsewhere _____
Total # Eligible Employees with Eligible Dependents _____
Total # Eligible Employees applying for Dependent health benefits coverage _____
Total # Eligible Employees waiving Dependent health benefits coverage under this policy with coverage elsewhere _____
Total # Eligible Employees waiving Dependent health benefits coverage under this policy without coverage elsewhere _____

CERTIFICATION

(Please sign and date appropriate section indicating whether or not you meet the definition of a small employer)

A Small Employer is any person, firm, corporation, partnership or association actively engaged in business who during at least fifty percent of its working days in the preceding CALENDAR YEAR/QUARTER, employed NO MORE THAN FORTY-NINE eligible employees and NO LESS THAN TWO eligible employees, the majority of whom were employed in the State of New Jersey. In determining the number of eligible employees, companies which are affiliated companies shall be considered one employer.

I certify that I qualify as a Small Employer in the State of New Jersey.

I have reviewed the above statements made by me, and they are true and complete.

Signature of Officer, Partner or Proprietor *Title* Date

Signature of Witness Date

We must have a copy of your most recent State/Federal quarterly wage report

I certify that I am not a Small Employer in the State of New Jersey, as defined above.

Signature of Officer, Partner or Proprietor *Title* Date

Print Name of Officer, Partner or Proprietor

Signature of Witness Date

SEH-ASEC-8/93]* *(Reserved)*

EXHIBIT Q

[CARRIER]

SMALL GROUP *[HEALTH]* *EMPLOYER* BENEFITS ENROLLMENT FORM [AND HEALTH STATEMENT]

[Policyholder] (full legal name of company):_____ [Policy] No._____

[Policyholder] Address:_____
Street City State Zip Code

SECTION I: EMPLOYEE INFORMATION

Name:_____ [Telephone:_____]
Last First Middle Initial

[Home Address:]_____
Street City State Zip Code

Occupation:_____ Title:_____

Date of Employment:_____ Hours worked per week:_____

Are you actively at work? ☐ Yes ☐ No If "No", explain_____

Marital Status: ☐ Single ☐ Married ☐ Widowed ☐ Divorced

*[**Reason for Enrollment (Please check appropriate boxes)*

☐ I am an employee of an organization which is applying for coverage.
☐ I am now eligible for coverage *[and:
☐ *I* had no previous coverage during the past 90 days; or]*
☐ *I* had previous coverage during the past 90 days.
Name of previous carrier_____ Plan # _____
***How long were you covered?:** _____*
☐ I previously refused/waived coverage
☐ I am applying for coverage during my organization's HMO open enrollment period. Open enrollment date: _____
☐ I am continuing coverage under state or federal law.
☐ I am adding [deleting] dependent(s)
☐ other (specify)_____ *]*

SECTION II: COVERAGE INFORMATION

1. Persons to be covered: ☐ Employee Only ☐ Employee & Child(ren) ☐ Employee & Spouse ☐ Employee, Spouse & Child(ren)

2. Please provide all information for each person to be covered

Full Name Last, First, MI	Sex	Social Security #	Place of Birth	Birthdate	Height	Weight
Employee						
Spouse						
Child						
Child						
Child						
Child						

3. Indicate whether you and/or your spouse, if any, are enrolled under Part A and/or Part B of Medicare

	Plan A	Plan B	Medicare ID. #
Employee	☐ Yes ☐ No	☐ Yes ☐ No	_____
Spouse	☐ Yes ☐ No	☐ Yes ☐ No	_____

4. *[PIP Selection: Which coverage have you selected to provide benefits under the Personal Injury Protection (PIP) segment of your New Jersey auto insurance?]*
Which coverage have you selected to be primary in the event expenses are incurred as a result of an automobile related injury?
☐ Auto ☐ Medical

[5. Name(s) of Primary Care Physician(s)_____]

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SECTION IV: DECLARATION AND AUTHORIZATION

I hereby apply for the group coverage for which I am or may become entitled. I authorize deductions from my pay for my share of the cost, if any.

I represent to the best of my knowledge and belief, that the statements and answers given above are true and complete. I understand that the information, [other than the health statement information,] shall form the basis upon which I may be included for coverage under the group plan.

I understand that:

a. the coverage applied for will not take effect unless:

- the first premium has been paid to [Carrier]; and
- I am actively at work for full pay on a full time basis on the date coverage is to take effect.

b. no person, except an officer of [Carrier], has authority to: determine whether any certificate shall be issued on the basis of this Enrollment Form and Health Statement; waive or modify any of the provisions of the Enrollment Form [and Health Statement] or any of [Carrier's] requirements; to bind [Carrier] by any statement or promise pertaining to any certificate signed or to be issued on the basis of this Enrollment [and Health Statement;] or accept any information or representation not contained in the written Enrollment Form [and Health Statement.]

c. the Employer is hereby designated my respresentative for the purpose of receiving premiums and remitting them to [Carrier].

***[d. I understand that [Carrier] does not pay benefits for charges for Pre-Existing Conditions until a person covered under the Policy has been continously covered under the Policy for 180 days. I understand that the following are Pre-Existing Conditions:**

- **an illness or injury which manifests itself during the 6 months prior to the date a person's coverage takes effect and for which: a. the person sees a Practitioner, takes prescribed drugs, receives other medical care or treatment or had medical care or treatment recommended by a Practitioner in the 6 months before coverage takes effect; or b. an ordinarily prudent person would have sought medical advice, care, or treatment in the 6 months before coverage starts.**
- **a pregnancy which exists on the date a person's coverage takes effect.]***

Note: Any person who knowingly files a statement of claim, application for insurance, enrollment form [or health statement], containing any false or misleading information may be subject to criminal and civil penalties.

AUTHORIZATION

1. I authorize the sources state below to give to [Carrier], or any consumer reporting agency acting on its behalf, information about me and my minor children, if applying for insurance. Such information will pertain to employment; other insurance coverage; and medical care, advice, treatment or supplies for any physical or mental condition. Authorized sources are: any physician or medical professional; any hospital, clinic or other medical care institution; any insurer; [the Medical Information Bureau;] any consumer reporting agency; any employer.

2. I understand that I may revoke this authorization at any time. I agree that such revocation will not affect any action which [Carrier] has taken in reliance on the authorization. I understand that this authorization will not be valid after 30 months, if not revoked earlier.

3. I know that I have the right to receive a copy of this authorization if I request one.

4. I agree that a photocopy of this authorization is as valid as the original.

(Date Signed)	(Signature of Employee)
(Date Signed)	(Signature of Spouse, if giving a statement of health)
(Date Signed)	(Signature of Child Who is age 18 or older, if giving a statement of health)

["MIB" DISCLOSURE NOTICE (This Notice must be detached and retained by the applicant.)

Information given in your application may be made available to other insurance companies to which you make application for life or health insurance coverage or to which a claim is submitted.

Information regarding your insurability will be treated as confidential except that [Carrier] may however, make a brief report thereon to the Medical Information Bureau, a non-profit membership organization of life insurance companies which operates an information exchange on behalf of its members. Upon request by another member insurance company to which you have applied for life or health insurance coverage or to which a claim is submitted, the Medical Information Bureau will supply such company with the information it may have in its files.

Upon receipt of a request from you, the Bureau will arrange disclosure of any information it may have in your file. If you question the accuracy of information in the Bureau's file, you may contact the Bureau and seek a correction in accordance with the procedures set forth in the Federal Fair Credit Reporting Act. The address of the Bureau's information office is Post Office Box 105, Essex Station, Boston, Massachusetts 02112, telephone number (617) 426-3660.

[Carrier] may also release information in its file to other life insurance companies to whom you may apply for life or health insurance or to whom a claim for benefits may be submitted.]

SEH-ENROLL-8/93-3

Explanation of Brackets
Small *[Group]* *Employer* Health Benefits
Enrollment Form *,* *[and]* Health Statement *and Waiver Form*

1. The terms Policyholder and Policy may be replaced with Contractholder or Planholder and Contract or Plan, as appropriate.
2. If carrier does not need to capture the telephone number, such item may be deleted.
3. Home Address may be replaced with Primary Residence Address.
4. ***If the Carrier uses administrative forms for some of the actions identified in the Reasons for Enrollment section, all or parts of the text may be deleted.***

*[4.]**5.* Additional lines for Child Data may be included.

*[5.]**6.* The space for Names of Primary Care Physicians may be deleted if Carrier does not offer plans which rely upon Primary Care Physicians. If the item is included, it may be expanded to request the name of the Primary Care Physician for each person to be covered.

*[6.]**7.* If the Carrier does not elect to use health information for the purpose of rating ***or assist with establishing the existence of a pre-existing condition***, the health statement should not be included.

*[7.]**8.* If the Carrier does not use MIB information, the reference to MIB in the Authorization may be deleted. The Disclosure may also be deleted.

9. Item d. of the Declaration of Authorization may always be deleted for Carrier may include the text only when the Pre-Existing Condtions provisions may be be applicable.

10. Carrier may elect to produce the Enrollment Form, Health Statement, if used, and Waiver Form as a single form.

EXHIBIT R

ENROLLMENT APPLICATION AND CHANGE FORM

For Employer's Use Only

Company's Name_____

Date of Hire _____ Group No. _____ Effective Date _____

_____ _____
Benefits Administrator's Signature Date

REASONS FOR APPLICATION *(Please indicate why you are submitting this application.)*

_____ New Hire _____ Change (see 3 below) _____ COBRA _____ Open Enrollment _____ Other

Please print in ink all information requested on this application.

1. Eligible Persons to be enrolled—Note: Dependent children may be covered under their parents contract only while unmarried and until they reach age 19 or 23, if full time students. Unmarried, mentally and physically handicapped dependent children can continue beyond the age limits above as long as they remain incapacitated and unmarried.

This next section must be completed in its entirety.

			Birthdate			Sex	
Last Name	First Name	MI	MO	DAY	YR	M or F	Social Security Number
Applicant 1. ☐ Add ☐ Remove							
Spouse 2. ☐ Add ☐ Remove							
Child 3. ☐ Add ☐ Remove							
Child 4. ☐ Add ☐ Remove							
Child 5. ☐ Add ☐ Remove							

*Attach sheet to list additional children. Attach proof if full-time student. Attach proof of disability.

Marital Status: _____ Single _____ Married _____ Divorced

*[*Reason for Enrollment (Please check appropriate response)

_____ I am an employee of an organization which is applying for coverage.
_____ I am now eligible for coverage and:
  _____ had no previous coverage during the past 90 days; or
  _____ had previous coverage during the past 90 days.
    Name of previous carrier _____ Plan # _____
_____ I previously refused/waived coverage.
_____ I am applying for coverage during my organization's HMO open enrollment period. Open enrollment date: _____
_____ I am continuing coverage under state or federal law.
_____ I am adding [deleting] dependent(s).
_____ other (specify) _____*]*

DEPENDENT INFORMATION

Do any of the dependents listed in #1 live at another address? _____ Yes _____ No
If yes, who and at what address?

_____

Explain the circumstances

_____

If any dependent's last name is different from yours, explain the circumstances.

_____

2. PRIMARY RESIDENCE

_____

Street Apt. City State Zip County

TELEPHONE

Home ( ) - Work ( ) - Best place to call during day:_____ Home _____ Work

Are you actively at work? _____ Yes _____ No If no explain_____

Are you a resident of the state of New Jersey? _____ Yes _____ No
Do you maintain a residency in any other state? _____ Yes _____ No
If "Yes," (a) Name of state _____
(b) How much time do you spend there each year? _____

3. COVERAGE (Please mark Coverage and Type of Activity)

_____ Single _____ Family _____ Parent and Child(ren) _____ Husband/Wife

Type of Activity:
_____ New Subscriber
_____ Add/Remove Dependent
Reason_____
Date of Event_____
_____ New Telephone Number
(h)_____ (w)_____
_____ Change Contract Type From/To_____
_____ Name Change From/To_____
_____ Change of [Primary or Gyn] [Health Center]
_____ Withdrawal From Coverage_____
Date of Event_____
_____ New Address

[4. ADDITIONAL DEPENDENT INFORMATION

Have you or any dependent(s) as a [Carrier] health plan member, received care at any [Carrier] health care center? _____ No _____ Yes. If yes, please indicate medical record number in the spaces below. If the name of you or your dependent(s) was different at the time of receiving care please indicate (Eg: Maiden Name)_____

Medical Record Number:_____]

5. OTHER HEALTH CARE COVERAGE *[(Please note that, in some situations, if you are eligible for other health benefits coverage, you are not eligible for this policy.)]*

Are you eligible for other health benefits coverage? (i.e., coverage under your employer's health benefits coverage, Medicare or Medicaid)	☐ Yes ☐ No
If yes, give name and policy no. of other carrier or type of coverage.	
Are other family members eligible for coverage? If yes, specify.	
Are you replacing existing coverage?	☐ Yes ☐ No
If yes, give name and policy no. of other carrier, initial effective date of coverage, date of termination, and specify those covered by policy.	

***[*6. HEALTH STATEMENT**

Note: This information will not be used for any purpose prohibited by law.
Answer each question by checking the "Yes" or "No" box as it applies. If "Yes" is checked, provide details below.

Have you or any dependent to be covered ever had or been diagnosed as having:	Yes	No
1. *[a. AIDS or HIV+ (positive)	☐	☐]*
*[b.]**a.* Alcoholism, Drug Abuse	☐	☐
*[d.]**b.* Arhtritis	☐	☐
*[d.]**c.* Back or Neck Disorder, Injury or Pain	☐	☐
*[e.]**d.* Blood Disorder	☐	☐
*[f.]**e.* Cancer or Tumors	☐	☐
*[g.]**f.* Diabetes	☐	☐
*[h.]**g.* Gastro or Intestinal Disorder	☐	☐
*[i.]**h.* Heart Disorder or Condition or Chest Pain	☐	☐
*[j.]**i.* High Blood Pressure	☐	☐
*[k.]**j.* Kidney or Liver Disorder	☐	☐
*[l.]**k.* Lung or Respiratory Disorder	☐	☐
*[m.]**l.* Mental or Nervous Disorder	☐	☐
*[n.]**m.* Paralysis, Stroke or Epilepsy	☐	☐
*[o.]**n.* Does Pregnancy Exist	☐	☐
Expected Due Date:_____	☐	☐

***2. Have you or any dependent to be covered been diagnosed by a member of the medical profession as having AIDS or HIV+ (positive)?** ☐ ☐]

*[2.]**3.* In the past five (5) years, have you or any dependent to be covered:	Yes	No
a. been examined or treated by a physician or other health care provider for any condition, illness or injury, other than as stated above?	☐	☐
b. been advised to have treatment or surgery or testing that has not been done?	☐	☐
c. been admitted to a hospital or other health care facility as an inpatient?	☐	☐
d. taken prescribed medication(s)?	☐	☐
***e. used tobacco products?**	☐	☐*

***4. Please indicate your height.** _____

5. Please indicate your weight. _____ **lbs.***

Please give details for any "Yes" answers to any parts of questions 1 or 2. Attach a separate sheet if more space is needed for answers. The separate sheet should be signed and dated.

Question # and Letter	Name of Person	Condition	Duration of Symptoms, Treatment Degree of Recovery	Date	Name and Address of Hospitals, Practitioners

]

7. PIP SELECTION

[Which coverage have you selected to provide benefits under the Personal Injury Protection (PIP) segment of your New Jersey auto insurance? _____ Auto _____ Medical]

***Which coverage have you selected to be primary in the event that expenses are incurred as a result of an automobile-related injury?**
_____ Auto _____ Medical*

8. TERMINATION (Check Reasons)

____ Deceased ____ Transferred to Other Coverage ____ Dissatisfied with Benefits ____ Ineligible ____ Moved Out of Area
____ Dissatisfied with Medical Care ____ Dissatisfied with Access

Other, please explain_____

Remarks_____

9. HEALTH CARE *[*CENTER*]* SELECTION

		[HEALTH CARE CENTER	PRIMARY OFFICE NO.	GYN. OFFICE NO.]
Applicant	1.			
Spouse	2.			
Child	3.			
Child	4.			
Child	5.			

10. AUTHORIZATION AND CERTIFICATION

I hereby apply to [carrier] for coverage for eligible dependents listed above and myself.

[I understand that for the 6 months following the effective date of this policy, benefits are not provided for health care services received for (a) conditions for which medical advice, diagnosis, care or treatment was recommended or received during the last 6 months, (b) conditions for which during the last 6 months there were symptoms which would cause a prudent person to seek medical advice, diagnosis, care, or treatment, or (c) pregnancy existing on the effective date of this *[policy]* ***coverage***. (Note: This limitation may not apply if the eligible person transfers from another health benefits plan.)]

[Unless I request otherwise in writing,] I understand that by signing below when I file a claim, [carrier] may pay the health care benefits directly to the provider instead of to me.]

No person, except an officer of [Carrier], has authority to: determine whether any certification shall be issued on the basis of this Enrollment Application and Change Form: waive or modify any of the provisions of the Enrollment Application and Change Form: or any of the requirements form; to bind [Carrier] by any statement or promise pertaining to any certificate signed or to be issued on the basis of this Enrollment Application and Change Form; or accept any information or representation not continued in the written Enrollment Application and Change Form.

I agree that: (a) any physician, hospital or other provider is authorized to provide to [carrier or assignee] information about any eligible person's history: and (b) any company or person having information concerning other health care coverage in force, or available to, any eligible person may give such information to [carrier or assignee].

I state that: (a) I am a resident of New Jersey/[and I reside within (carrier's) service area] (b) the information given on this application is complete to the best of my knowledge and belief and (c) that (carrier) will rely on this information to determine eligibility. I understand that if I omit or falsify any statement in this application (carrier) can cancel *[this contract]* ***my coverage*** as of the original effective date.

Note: Any person who knowingly files a statement of claim, application for insurance, Enrollment Application and Change Form, containing any false or misleading information may be subject to criminal and civil penalties.

Applicant's Signature:_____ Date Signed:_____

Note to all applicants: If we accept your application, a copy of the application will be sent to you. Attach the copy to your *[certificate]* ***evidence of coverage***. It becomes part of your *[certificate with us]* ***evidence of coverage***.

EXHIBIT R

HEALTH MAINTENANCE ORGANIZATION (HMO) ENROLLMENT APPLICATION [AND CHANGE FORM]
SMALL EMPLOYER HEALTH BENEFITS PLAN FOR EMPLOYEES AND DEPENDENTS

CONDITIONS OF ACCEPTANCE

On behalf of myself and the dependents listed on the reverse side, I agree to or with the following:

1. Coverage of applicant and of the listed dependents shall depend on acceptance by (carrier) after a review of the application [and receipt of payment].

2. Applicant is applying for coverage for the applicant, applicant's spouse and any eligible unmarried children under nineteen (19) years of age, unmarried children who are mentally or phsycially incapacitated and who are chiefly dependent upon the applicant or the applicant's spouse for support and maintenance or are unmarried children between the ages of nineteen (19) and twenty-three (23) who are full-time students at an accredited educational institution and receive at least half of their support from applicant and/or applicant's spouse and neither applicant's spouse nor children are eligible for group health benefits coverage.

3. Coverage and benefits are contingent on timely payment of premiums and may be terminated as provided in the Contract.

4. The Contract will determine the rights and responsibilities of [insured(s)] [insured(s)] [enrollee(s)] [member(s)] [subscriber(s)] and will govern in the event it conflicts with any benefits comparison, summary or other description of the health benefits plan.

[5. As a condition to benefits, applicant understands and agrees that (with the exception of emergency procedures as defined in the Contract) all services, in order to be covered by (Carrier), must be performed either by a participating primary care physician or by the participating specialist, hospital or other provider as authorized by prior written referral from the participating primary care physician.]

[6. Applicant agrees to make payment directly to health care providers such copayments as are provided for in the *[Contract]* ***employer's health benefits plan.****

[7. Applicant understands that this coverage will remain in effect regardless of the continued availability of a particular [Health Care Center], primary care physician or other health care provider].

[8. Applicant acknowledges that (carrier's) participating providers, including all participating primary care physicians, are independent contractors and are not agents or employees of (carrier).]

EXHIBIT S

[

SECTION I: HEALTH STATEMENT

Note: This information will **not** be used for any purpose prohibited by law.
Answer each question by checking the "Yes" or "No" box as it applies. If "Yes" is checked, provide details below.

Have you or any dependent to be covered ever had or been diagnosed as having:	Yes	No
1. *[a. AIDS or HIV+ (positive)	☐	☐]*
*[b.]**a.* Alcoholism, Drug Abuse	☐	☐
*[c.]**b.* Arhtritis	☐	☐
*[d.]**c.* Back or Neck Disorder, Injury or Pain	☐	☐
*[e.]**d.* Blood Disorder	☐	☐
*[f.]**e.* Cancer or Tumors	☐	☐
*[g.]**f.* Diabetes	☐	☐
*[h.]**g.* Gastro or Intestinal Disorder	☐	☐
*[i.]**h.* Heart Disorder or Condition or Chest Pain	☐	☐
*[j.]**i.* High Blood Pressure	☐	☐
*[k.]**j.* Kidney or Liver Disorder	☐	☐
*[l.]**k.* Lung or Respiratory Disorder	☐	☐
*[m.]**l.* Mental or Nervous Disorder	☐	☐
*[n.]**m.* Paralysis, Stroke or Epilepsy	☐	☐
*[o.]**n.* Does Pregnancy Exist	☐	☐
Expected Due Date:_____	☐	☐
***2. Have you or any dependent to be covered been diagnosed by a member of the medical profession as having AIDS or HIV+ (positive)?**	☐	☐*
*[2.]**3.* In the past five (5) years, have you or any dependent to be covered:		
a. been examined or treated by a physician or other health care provider for any condition, illness or injury, other than as stated above?	☐	☐
b. been advised to have treatment or surgery or testing that has not been done?	☐	☐
c. been admitted to a hospital or other health care facility as an inpatient?	☐	☐
d. taken prescribed medication(s)?	☐	☐
***e. used tobacco products?**	☐	☐*

Please give details for any "Yes" answers to any parts of questions 1 or 2. Attach a separate sheet if more space is needed for answers. The separate sheet should be signed and dated.

Question # and Letter	Name of Person	Condition	Duration of Symptoms, Treatment Degree of Recovery	Date	Name and Address of Hospitals, Practitioners
					]

SEH-ENROLL-8/93-2

EXHIBIT T

[CARRIER]

SMALL *[GROUP]* *EMPLOYER* HEALTH BENEFITS WAIVER OF COVERAGE

Group Policy No. _____

Policyholder Name:_____

Employee Name:_____ Social Security # _____
Last First MI

Marital Status: ☐ Single ☐ Married ☐ Widowed ☐ Divorced

Date of Employment:_____ Date of Birth_____

I was given the opportunity to enroll in this plan of group health benefits offered by my employer and insured by [Carrier]. I *refuse* the following:

☐ Employee, Spouse and Child(ren) coverage

☐ Spouse coverage

☐ Child(ren) coverage

Reason for Refusal (Please check all appropriate boxes.)

☐ other group coverage sponsored by my employer

☐ other group coverage sponsored by my spouse's employer

☐ other group coverage sponsored by another organization

☐ other reasons (please explain)_____

Please provide name of carrier and policy number:_____

I understand that if I later wish to enroll for any of the coverage(s) refused, I will be required to submit an Enrollment Form and Health Statement, and coverage may be subject to a preexisting conditions exclusion.

_____ _____
Signature of Employee Date

_____ _____
Signature of Witness Date

SEH-WAIV-8/93

(a)

NEW JERSEY SMALL EMPLOYER HEALTH BENEFITS PROGRAM

Relief from Obligations Imposed Under the Small Employer Health Benefits Program

Adopted New Rules: N.J.A.C. 11:21-15

Proposed: September 3, 1993 in accordance with P.L. 1993, c.162, section 16 (see 25 N.J.R. 4577(a)).

Adopted: November 5, 1993 by Samuel F. Fortunato, Commissioner, Department of Insurance in accordance with P.L. 1993, c.162, section 16.

Filed: November 5, 1993 as R.1993 d.629, **with technical changes** not requiring additional public notice or comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 17:1-8, 17:1-8.1, 17:1C-6(e), 17B:27A-17 et seq. and P.L. 1993, c.162.

Effective Date: November 5, 1993.

Expiration Date: October 15, 1998.

These new rules were proposed and are being adopted pursuant to the procedures set forth at P.L. 1993, c.162, section 16, as therein authorized.

Accordingly, notice of the proposal of these new rules was sent for publication in three newspapers of general circulation in New Jersey, mailed to all known interested parties, and submitted to the Office of Administrative Law (OAL) for publication in the New Jersey Register.

Pursuant to P.L. 1993, c.162, section 16d, interested parties were provided a comment period of at least 15 days. As set forth in the notice of proposed new rules, the written comment period ended on October 19, 1993. No comments were received.

Pursuant to P.L. 1993, c.162, section 16e, notwithstanding the receipt of comments, the Commissioner of Insurance (Commissioner) may adopt these rules immediately upon the expiration of the public comment period by filing a copy of the adopted rules with the OAL for publication in the New Jersey Register. These new rules are effective upon the date of filing with the OAL. Since no comments were received, no further notice or report is necessary pursuant to P.L. 1993, c.162, section 16.

Summary of Public Comments and Agency Responses:
No comments received.

Summary of Agency-Initiated Changes:
N.J.A.C. 11:21-15.4(a)1iii is revised to correct a printing error ("relief" changed to "relied") and to conform to the codification of N.J.A.C. 11:2-27 as amended (cite of N.J.A.C. 11:2-27.4(a)1 to 28 revised to read N.J.A.C. 11:2-27.3(a)1 to 29). In addition, the effective date of this subchapter has been appropriately inserted into the definition of "financially impaired" at N.J.A.C. 11:21-15.2(b).

Full text of the adopted new rules follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*):

SUBCHAPTER 15. RELIEF FROM OBLIGATIONS IMPOSED UNDER THE SMALL EMPLOYER HEALTH BENEFITS PROGRAM

11:21-15.1 Purpose and scope

(a) This subchapter establishes the informational and procedural requirements for members requesting relief from obligations to pay assessments pursuant to N.J.S.A. 17B:27A-38 or to offer coverage or accept applications to a small employer, pursuant to N.J.S.A. 17B:27A-26.

(b) This subchapter applies to all members of the SEH Program.

11:21-15.2 Definitions

(a) Words and terms defined at N.J.S.A. 17B:27A-17 and N.J.A.C. 11:21-1, when used in this subchapter, shall have the meanings as defined therein, unless more specifically defined in (b) below or unless the context clearly indicates otherwise.

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

"Applicant" means the member seeking a deferral of its obligation to pay assessments or a waiver of its obligation to offer coverage and accept applications pursuant to N.J.S.A. 17B:27A-17 et seq.

"Financially impaired" means a member which, after *[the effective date of this subchapter]* ***November 5, 1993***, is not insolvent, but is deemed by the Commissioner to be potentially unable to fulfill its contractual obligations, or a member which is placed under an order of rehabilitation or conservation by a court of competent jurisdiction.

"Relief" means a deferral of obligations pursuant to N.J.S.A. 17B:27A-38 or a waiver of obligations pursuant to N.J.S.A. 17B:27A-26, as applicable.

11:21-15.3 Application procedures and filing format

(a) Any member seeking relief may submit such request to the Department at any time, except that requests for relief from payment of assessments pursuant to N.J.S.A. 17B:27A-38 shall be submitted to the Department no later than 15 days following the due date of payment of the assessment.

(b) All requests outlined in this subchapter shall be accompanied by a statement averring a need for relief from the obligation(s), as the case may be, including supporting documentation as set forth in N.J.A.C. 11:21-15.4, and shall specify the statutory and regulatory basis for such relief. A single filing may request relief from more than one obligation, but shall specify each obligation from which relief is sought.

(c) Each request shall be in loose leaf form inserted into standard two-ring or three-ring binders tabbed or otherwise indexed to correspond to the exhibits set forth in N.J.A.C. 11:21-15.4. The loose leaf sheets used in the request shall be eight and one-half inches wide and 11 inches long and punched for two-ring or three-ring binders, as appropriate.

(d) All members requesting relief pursuant to this subchapter shall submit five copies of each request in the format set forth in (c) above.

(e) If a request fails to materially comply with the filing format and information requirements set forth in N.J.A.C. 11:21-15.4 and this section, the Department shall notify the member that its request for relief is deficient and is denied on such grounds. The notice shall also set forth any information or other action required to cure the deficiency(s). If the member intends to pursue its request, the member shall submit the additional information specified or otherwise submit a filing in accordance with the format requirements specified in this section within 15 days of receipt of the Department's notice of deficiency. Failure to submit within 15 days the information necessary in the proper format to cure the deficiency shall result in the member's request being denied.

(f) All requests for relief or other information required pursuant to this subchapter shall be filed with the Department at the following address:

SEH Program
Request for Relief
New Jersey Department of Insurance
Division of Financial Solvency
20 West State Street
CN-325
Trenton, NJ 08625

11:21-15.4 Informational filing requirements

(a) When requesting relief from obligations pursuant to N.J.S.A. 17B:27A-26b or 17B:27A-38, the applicant shall provide with its request the following information in a clear, concise and complete manner:

1. A cover letter stating:

i. The name of the applicant;

ii. The form of relief and, if a deferral of less than the full amount, specific amount/percentage of relief which the applicant is requesting;

iii. A statement of facts *[relief]* ***relied*** upon as the basis under which relief is sought, including the specific factor(s) upon which the Commissioner may find that the member is or would be placed in a financially impaired position as set forth in N.J.A.C. 11:2-*[27.4]***27.3***(a)1 to *[28]* ***29***; and

iv. The name, title, telephone number and telefax number of a contact person familiar with the filing to whom the Department may direct any additional questions;

2. A detailed explanation, with supporting documentation, of the projected effect that fulfillment of the obligation would have on the immediate and long term financial condition of the applicant unless relief is granted as requested;

3. The most recent financial examination report, whether conducted by the applicant's state of domicile or other state;

4. A statement addressing whether the applicant is planning to modify its method of doing business in any way including, but not limited to, new acquisitions or new restructuring;

5. If the applicant is a member of a holding company system, the following shall be provided:

i. A list of all members of the holding company system;

ii. A list of all intercompany transactions for the period beginning January 1 in the year of the filing to the date of the quarterly statement immediately preceding the date of the filing, in the format set forth in the statutory annual statement filed by the applicant; and

iii. A copy of the registration statement filed pursuant to N.J.S.A. 17:27A-3 and the applicant's organizational chart;

6. An actuarial opinion attesting to the adequacy of reserves specifically for all accident and health lines of business, and for all lines of business which the applicant transacts, in the format of and satisfying all requirements for the actuarial opinion and memorandum required to be submitted as a part of the annual statement filed by the applicant.

i. If the applicant is a health maintenance organization, the applicant shall obtain and file an actuarial opinion which complies with the requirements set forth in (a)6 above;

7. A report signed by the attesting actuary referred in (a)6 above, which includes, in summary form if necessary, all data utilized, a complete explanation of methods and assumptions and sufficient additional narrative to account for any features of the data or circumstances necessary for proper interpretation;

8. A copy of the annual statement of the applicant, including all accompanying exhibits, filed with this State immediately preceding the date of the relief filing;

9. Copies of all quarterly statements for the period beginning January 1 in the year of the filing to the quarterly statement immediately preceding the date of the filing;

10. Three year financial projections beginning with the calendar year of the date of the filing assuming relief is granted and assuming relief is denied. The projections shall include, in summary form if necessary, all data utilized, and a complete explanation of methods and assumptions utilized and relied upon by the applicant in making the projections. The projections shall include results for the applicant's operations worldwide by line of business and for the applicant's operations in New Jersey only for health benefits plans issued pursuant to N.J.S.A. 17B:27A-17 et seq. The projections shall assume the same rate of assessment as in the first year for the subsequent years, and shall include projections of the applicant's operating results containing the information and in the format set forth in the following:

i. For life and health insurers, the balance sheet and summary of operations exhibits of the statutory annual statement filed by the insurer;

ii. For property and casualty insurers, the balance sheet and Underwriting and Investment Exhibit of the statutory annual statement filed by the insurer;

iii. For health service corporations, hospital service corporations and medical service corporations, the balance sheet and Underwriting and Investment Exhibit of the statutory annual statement filed by the service corporation; and

iv. For health maintenance organizations, the balance sheet and statement of revenue, expenses and net worth of the annual statement filed by the health maintenance organization;

11. A description of any relief from obligations imposed by this State or any other state granted or in effect within the preceding 12 months, and the basis upon which such relief was granted;

12. A non-refundable filing fee of $1,000, unless the applicant is in rehabilitation or conservation at the time of filing pursuant to N.J.S.A. 17B:32-31 et seq. or such similar law of the applicant's state of domicile; and

13. Any other information the Commissioner may deem relevant to the consideration of the request.

(b) An applicant asserting that the Department's review of its request be evaluated on a particular basis (that is, pre-pooled, post-pooled, consolidated or unconsolidated), shall submit a written statement which sets forth the specific reasons, with supporting documentation, if any, for which it believes evaluation on a particular basis is appropriate to that applicant, and the specific reasons, with supporting documentation, if any, for which evaluation on other bases would be inappropriate.

(c) All filings shall be accompanied by the following certification signed by the chief financial officer of the applicant: "I _____ certify that the attached filing complies with all requirements set forth in N.J.A.C. 11:21-15 and that all of the information it contains is true and accurate. I further certify that I am authorized to execute this certification on behalf of the applicant."

11:21-15.5 Confidentiality of request for relief

(a) All data or information contained in the request for relief filed pursuant to this subchapter shall be confidential and shall not be subject to public disclosure or copying pursuant to the "Right to Know" law, N.J.S.A. 47:1A-1 et seq., except for the following items, but only upon written, specified request and following 10 days written notice by the Department to the member/applicant:

1. N.J.A.C. 11:21-15.4(a)1i and ii—cover letter with name of applicant and describing relief sought;

2. N.J.A.C. 11:21-15.4(a)1iv—name, title, telephone number and telefax number of person familiar with the filing;

3. N.J.A.C. 11:21-15.4(a)3—most recent financial examination report;

4. N.J.A.C. 11:21-15.4(a)5i and ii—list of members of holding company system and intercompany transactions for period preceding date of filing;

5. N.J.A.C. 11:21-15.4(a)8—annual statement filed immediately preceding date of filing;

6. N.J.A.C. 11:21-15.4(a)12—non-refundable filing fee; and

7. N.J.A.C. 11:21-15.4(a)13—additional information required by the Commissioner to evaluate a particular filing.

11:21-15.6 Disposition of request for relief

(a) When the Commissioner determines pursuant to N.J.S.A. 17B:27A-26b or 17B:27A-38 as applicable, that the member is or would be placed in a financially impaired condition through fulfillment of a coverge or assessment obligation or obligations, the Commissioner shall notify the member that its duty to fulfill the applicable obligation shall be waived, or deferred in whole or in part, as appropriate. If the Commissioner defers in whole or in part a member's obligation to pay assessments pursuant to N.J.S.A. 17B:27A-38, the member shall remain liable to the SEH Program for the amount deferred and shall be prohibited from reinsuring any individuals or groups in the SEH Program if it fails to pay assessments.

(b) The Commissioner shall find that a member is or would be financially impaired if:

1. The member has been placed in rehabilitation or conservation pursuant to N.J.S.A. 17B:32-31 et seq. or such similar law of the member's state of domicile;

2. The Commissioner finds that the member is in a hazardous financial condition, as determined pursuant to N.J.A.C. 11:2-27; or

3. The Commissioner finds that fulfillment of the obligation(s) from which relief is sought would place the member in a hazardous financial condition, as determined pursuant to N.J.A.C. 11:2-27.

(c) Any waiver or deferral from a particular obligation granted by the Commissioner pursuant to this subchapter shall be for a specified period as set forth in the notice granting the request, but shall not exceed 12 months from the date of the notice. Any member seeking to continue a waiver or deferral shall file a separate request for relief in accordance with this subchapter no later than 45 days prior to the expiration of the waiver or deferral period set forth in the original notification granting the request. Such a request shall also include a detailed explanation of all actions the applicant has taken and intends to take to cure the financial impairment. Failure to file a properly completed request for relief within the time prescribed shall result in the expiration of the waiver or deferral at the expiration of the period set forth in the original notification granting the request. Nothing herein shall be construed as limiting or prohibiting any member from applying for relief at any time in accordance with this subchapter.

(d) If the Commissioner grants a request for a deferral of payment of an assessment, the terms of the deferral shall include the requirement that the member shall pay to the Board an additional amount representing the loss to the Board of the time value of the assessment for the period of the deferral.

1. In calculating the additional amount to be paid, the member shall use the annual interest rate on one-year U.S. Treasury bills as of the date the assessment was due and payable.

2. In calculating the additional amount to be paid, the period of deferral shall begin on the date that payment of the assessment was due and payable and end on the date of the amount deferred is paid to the Board.

3. The payment of the additional amount set forth in (d) above shall be in lieu of payment by the member of any interest or penalty on the amount deferred, which otherwise may be required under any other rule.

4. The requirement to pay an additional amount as provided in (d) above shall not apply when the reason for granting the deferral is that the member is in rehabilitation or conservation.

11:21-15.7 Hearings

(a) If the Commissioner denies a member's request for relief made pursuant to this subchapter, or if the member objects to the terms of the relief granted, the member may request a hearing on the Commissioner's determination within seven days from the date of receipt of such determination as follows:

1. A request for a hearing shall be in writing and shall include:

i. The name, address, and daytime telephone number of a contact person familiar with the matter;

ii. A copy of the Commissioner's determination;

iii. A statement requesting a hearing; and

iv. A concise statement describing the basis for which the member believes that the Commissioner's findings of fact are erroneous.

2. The Commissioner may, after receipt of a properly completed request for a hearing, provide for an informal conference between the member and such personnel of the Department as the Commissioner may direct, to determine whether there are material issues of fact in dispute.

3. The Commissioner shall, within 30 days of a properly completed request for a hearing, determine whether the matter constitutes a contested case, pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.

i. If the Commissioner finds that the matter constitutes a contested case, the Commissioner shall transmit the matter to the Office of Administrative Law for a hearing consistent with the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

ii. In a matter which has been determined to be a contested case, if the Commissioner finds that there are no good-faith disputed issues of material facts and the matter may be decided on the documents filed, the Commissioner may notify the applicant in writing as to the final disposition of the matter.

11:21-15.8 Notice of the SEH Program

Members requesting relief pursuant to this subchapter shall concurrently provide notice of all such requests to the SEH Program through the Interim Administrator or Administrator, as appropriate. Members shall also provide notice to the SEH Program of all dispositions of such requests by the Commissioner, within 15 days of such disposition.

11:21-15.9 Exceptions for health maintenance organizations due to lack of capacity

(a) Any member HMO asserting that it is not required to offer coverage or accept applications pursuant to the requirements of the Act because it reasonably anticipates that it will not have the capacity in its network of providers within the service area to deliver service adequately to the members of the additional small employer groups, pursuant to N.J.S.A. 17B:27A-26a, shall file the following information with the Commissioner:

1. A cover letter stating:

i. The name of the member HMO;

ii. A statement that the member is not required to offer coverage or accept applications pursuant to the Act because it anticipates that it will not have the capacity in its network of providers within the service area to deliver service adequately to the members of the additional small employer groups, and the basis for that assertion, with supporting documentation, certified by the president or duly authorized officer of the member; and

iii. The number of the member's current individual and group members, listed by provider and classified by the provider's specialty, which shall be updated annually each year the member asserts a waiver pursuant to N.J.S.A. 17B:27A-26a.

(b) The member shall concurrently file the information required pursuant to (a) above with the SEH Program.

11:21-15.10 Other actions by the Commissioner

Nothing in this subchapter shall be construed as limiting the Commissioner's authority to take such action with respect to insurers, health service corporations, medical service corporations, hospital service corporations or health maintenance organizations as may be authorized by law, including, but not limited to, placing an insurer, health service corporation, medical service corporation, hospital service corporation or health maintenance organization in rehabilitation, liquidation or conservation pursuant to N.J.S.A. 17B:32-31 et seq.

11:21-15.11 Penalties

Failure to comply with this subchapter, including all notice requirements set forth herein, may result in the denial of relief requested and imposition of penalties as authorized by law, including any actions that may be taken by the Board pursuant to N.J.S.A. 17B:27A-17 et seq. and the SEH Program Plan of Operation, including, but not limited to, imposition of an interest penalty for assessments due from the member and a recommendation by the Board to remove the member's authority to issue any health benefits plans in this State.

ENVIRONMENTAL PROTECTION AND ENERGY

(a)

NEW JERSEY HISTORIC TRUST

Historic Preservation Revolving Loan Program

Adopted New Rules: N.J.A.C. 7:4B

Proposed: March 1, 1993 at 25 N.J.R. 748(a).

Adopted: October 10, 1993 by the New Jersey Historic Trust, Arijit De, Chairperson.

Filed: November 10, 1993 as R.1993 d.637, **without change.**

Authority: N.J.S.A. 13:1B-15.111.

DEPE Docket No.: 09-93-01.

Effective Date: December 6, 1993.

Expiration Date: December 6, 1998.

Summary of Public Comments and Agency Responses:

On March 1, 1993, the New Jersey Department of Environmental Protection and Energy proposed new rules at N.J.A.C. 7:4B. The New Jersey Historic Trust is adopting the rules as proposed. The rules establish the procedures and criteria under which the New Jersey Historic Trust will make loans for the preservation, improvement, restoration, rehabilitation and acquisition of historic properties. The Trust received one comment which is summarized below:

COMMENT: Violet Cox, Benjamin Temple House, expressed general concern about the time and costs associated with the preparation of an application for funding.

RESPONSE: The New Jersey Historic Trust recognizes this concern and will make every possible effort to streamline the process and documents necessary for making a loan. The Trust believes that the information and documentation required in its regulations are the minimum necessary for an effective and efficient loan program.

The Trust notes that the Regulatory Flexibility Analysis in the notice of the proposed new rules includes a reference to the 50 percent reimbursement limitation for eligible acquisition costs that is applicable to the Trust's grant program, but not to this loan program. While these statements are inaccurate, the text of the rules properly reflects the requirements and term established for the loan program.

Full text of the adoption follows:

CHAPTER 4B
HISTORIC PRESERVATION REVOLVING LOAN PROGRAM

SUBCHAPTER 1. GENERAL PROVISONS

7:4B-1.1 Purpose

This chapter shall constitute the rules of the New Jersey Historic Trust in the Department of Environmental Protection and Energy for the Historic Preservation Bond Program providing for the award of loans on a competitive basis for historic preservation projects, for the preservation, improvement, restoration, rehabilitation or acquisition of historic properties owned by county and municipal governments and by tax-exempt nonprofit organizations in accordance with the P.L. 1987, c.265 and P.L. 1991, c.41.

7:4B-1.2 Definitions

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

"Acquisition" means the process of obtaining an interest in real property for the purpose of preserving or enhancing the historic, cultural or architectural significance of the property. Acquisition may include purchase of title, development rights, life estates, remainder interests, easements or other interests in real property which would result in the preservation of a historic property.

"Act" means the "New Jersey Green Acres, Cultural Centers and Historic Preservation Bond Act of 1987," P.L. 1987, c.265.

"Applicant" means the county or municipal government or nonprofit organization that submits an application for a historic preservation loan.

"Approved project period" means the amount of time prescribed in the project agreement during which the loan recipient must complete the approved historic preservation project.

"County and municipal government" includes all legal subunits and coequal units of county and municipal government.

"Deputy State Historic Preservation Officer" means the Administrator, Historic Preservation Office, Department of Environmental Protection and Energy, designated by the Commissioner of the Department of Environmental Protection and Energy to administer the State Historic Preservation Program to identify and nominate eligible properties to the National Register of Historic Places.

"Historic" as applied to any property, structure, facility or site means any area, site, structure or object approved for listing or which has been certified by as meeting the criteria for listing in the New Jersey or National Register of Historic Places as set forth at N.J.A.C. 7:4. The State Historic Preservation Officer is responsible for identifying and nominating eligible properties to the National Register of Historic Places.

"Historic preservation cost" means the expenses incurred in connection with the historic preservation project for which loan assistance is provided.

"Historic preservation loan" means moneys approved by the New Jersey Historic Trust for funding of a historic preservation project and subject to the terms of an agreement between the Trust and the recipient.

"Historic preservation project" means work directly related to the acquisition, improvement, restoration, stabilization, and/or rehabilitation of a historic property, structure, facility or site.

"Improvement" means the act of upgrading the basic physical condition of a property in a manner consistent with the Standards for the Treatment of Historic Properties (Revised 1992) adopted by the Secretary of the United States Department of the Interior now in effect and as may subsequently be modified, changed or amended. This type of activity includes upgrading mechanical systems, providing appropriate barrier-free access for handicapped persons, and bringing a property into conformance with building costs.

"Loan agreement" means a document executed by the New Jersey Historic Trust and a loan recipient which provides loan assistance of a specified amount for a historic preservation project approved by the Trust.

"Loan recipient" means the county or municipal government or nonprofit organization named in an agreement executed with the Trust to receive loan funds for a historic preservation project.

"National Register of Historic Places," means the list of districts, sites, buildings, structures and objects significant in American history, architecture, archaeology, engineering or culture maintained by the Secretary of the United States Department of the Interior under authority of the National Historic Preservation Act, as amended (16 U.S.C. §§470 et seq.).

"Nonprofit organization" means a corporation organized under the New Jersey Nonprofit Corporation Act, N.J.S.A. 15A:1-1 et seq. and qualified for tax-exempt status under the Internal Revenue Code of 1986 (26 U.S.C. §501(c)).

"Preservation" means the act or process of applying measures to sustain the existing form, integrity, and material of a historic property.

"Reconstruction" is defined as the act of process or depicting, by means of new construction, the form, features, and detailing of a non-surviving site, landscape, building, structure, or object for the purpose of replicating its appearance at a specific period of time and in its historic location.

"Rehabilitation" is defined as the act or process of making possible an efficient compatible use for a property through repair, alterations, and additions while preserving those portions of features which convey its historical, cultural, or architectural values.

"Restoration" is defined as the act or process of accurately depicting the form, features, and character of a property as it appeared at a particular period of time by means of the removal of features from other periods in its history and reconstruction of missing features from the restoration period.

"Secretary of the Interior's Standards" means the Standards for the Treatment of Historic Properties (Revised 1992) adopted by the Secretary of the United States Department of the Interior now in effect and as may subsequently be modified, changed or amended, incorporated herein by reference.

"Site" means the location of a significant event, a prehistoric or historic occupation or activity, or a building or structure whether standing, ruined or vanished where the location itself maintains historic or archaeological value regardless of the value of any existing structure.

"State Historic Preservation Officer" means the Commissioner of the Department of Environmental Protection and Energy designated by the Governor to administer the State Historic Preservation Program and to identify and nominate eligible properties to the National Register of Historic Places. The State Historic Preservation Officer establishes the procedures and criteria located at N.J.A.C. 7:4 for

receiving and processing nominations and approval of areas, sites, structures and objects both publicly and privately owned, for listing in the State Register of Historic Places.

"State Register of Historic Places" means the New Jersey Register of Historic Places consisting of areas, site, structures and objects significant in American history, architecture, archaeology and culture which the Commissioner of the Department of Environmental Protection and Energy is authorized to expand and maintain under the "New Jersey Register of Historic Places Act," N.J.S.A. 13:1B-15.128 et seq.

"Structure" means a work constructed by man and made up of interdependent and interrelated parts in a definite pattern or organization. Structures are distinguished from buildings by their functional and utilitarian nature. Generally, a structure is built for a purpose other than to create shelter.

"Trust" means the New Jersey Historic Trust, a body corporate and politic with corporate succession established in the Department of Environmental Protection and Energy under N.J.S.A. 13:1B-15.111 et seq.

SUBCHAPTER 2. ELIGIBILITY FOR HISTORIC PRESERVATION

7:4B-2.1 Eligible applicants

(a) County and municipal governments and tax-exempt nonprofit organizations are eligible to submit applications for historic preservation loans.

(b) No historic preservation loan will be made to nonprofits or governmental units which are in default on prior obligations to the New Jersey Department of Environmental Protection and Energy.

7:4B-2.2 Eligible property

(a) A historic preservation project is eligible for a historic preservation loan only if, at the time the Trust receives the loan application, the property which is the subject of the project is:

1. Individually listed in the National or State Register of Historic Places;

2. Located within a historic district listed in the National or State Register of Historic Places and identified in the nomination of the district as contributing to the significance of the district;

3. Included in a thematic listing of historic resources in the State National Register of Historic Places; or

4. Certified by the Deputy State Historic Preservation Officer that the property, structure, facility or site is approved for listing or meets the criteria for listing in the State Register of Historic Places as set forth in N.J.A.C. 7:4.

(b) Unless the purpose of the historic preservation loan is to fund an acquisition, a historic preservation project is eligible for a historic preservation loan only if, at the time the Trust receives the loan application, the property which is the subject of the project is:

1. Owned in fee simple by the applicant; or

2. If the property is now owned in fee simple by the applicant, the applicant shall have possession and sufficient control over the property pursuant to a long-term lease to guarantee the continuing preservation, on-going maintenance and public access requirements for the historic property under this chapter. No historic preservation project proposed for leased property shall be approved for funding unless:

i. The lease may not be revoked at will by the lessor;

ii. The unexpired term of the lease is:

(1) For property owned by a county or municipality and leased to the applicant, five years or more as of the date the Trust receives the application for a historic preservation loan; or

(2) For property owned privately and leased to the applicant, 20 years or more as of the date the Trust receives the application for a historic preservation loan; and

iii. The application for the historic preservation loan is endorsed by all owners, lessors and lessees of the leased premises as the case may be.

7:4B-2.3 Historic preservation activities eligible for funding

(a) The following activities are eligible for funding by the historic preservation loan program:

1. Preservation;

2. Rehabilitation;

3. Restoration;

4. Improvement;

5. Acquisition;

6. The following non-construction activities related directly to the development, implementation, operation and monitoring of a historic preservation project;

i. Architectural plans, designs, specifications, cost estimates and other contract documents;

ii. Feasibility studies;

iii. Historic structure reports;

iv. Preservation plans;

v. Historic landscape reports;

vi. Archaeological reports;

vii. Architectural reports;

viii. Engineering reports;

ix. Historic research reports;

x. Project completion reports;

xi. Preparation of a successful loan application;

xii. Construction permits;

xiii. Architectural fees for construction administration services;

xiv. Consultant fees for preparation of reports required by the Trust; and

xv. Market feasiblity studies;

7. Project signs, required under N.J.A.C. 7:4B-5.1;

8. Interpretive signs or plaques approved by the Trust for funding as part of a historic preservation loan; and

9. The following expenses to acquire title or permanent interest in a property, or to refinance the acquisition of an eligible property:

i. Survey costs;

ii. Appraisal fees;

iii. Title searches;

iv. Title insurance;

v. Recording fees;

vi. Inspection fees;

vii. Legal fees associated with acquisition; and

10. Costs to market the property for resale.

(b) Costs incurred in the following activities are not eligible for funding by the historic preservation loan program because they are not historic preservation activities and/or funds are to be used only for capital or acquisition expenses:

1. Construction of new buildings, structures or major new additions to existing buildings or structures, except if such construction is a minor and necessary component of a historic preservation project approved for funding;

2. Reconstruction of buildings or structures which formerly existed, except if such building or structure is a minor or necessary component of a historic preservation project approved for funding;

3. Personnel or administrative overhead or any other indirect cost;

4. Ceremonial expenses;

5. Expenses for publicity (with the exception of the required project sign);

6. Bonus payments of any kind;

7. Charges for contingency reserves;

8. Charges in excess of the lowest bid when the loan recipient is required to use competitive bidding, unless the Trust agrees in advance to the higher cost;

9. Charges for deficits or overdrafts;

10. Damage judgments arising from construction, or equipping of a facility, whether determined by judicial process, arbitration, negotiation, or otherwise;

11. Services, materials, or equipment obtained under any other State program;

12. Costs of discounts not taken;

13. Contract cost overruns, not approved, that exceed all allowable amounts as per the contract specifications;

14. Fundraising;

15. Lobbying;

16. Work including construction, research and preparation of plans and reports not included in the scope of work set forth in the project agreement;

17. The following costs of acquisitions are not eligible:

i. Broker's or realtor's fees;

ii. Legal fees not directly related to acquisition;

iii. Loan discounts or origination fees are generally not eligible for reimbursement unless financial hardship can be demonstrated; and

iv. Other loan application fees;

18. Real property taxes, except in loans for acquisition where the purchase of tax liens is necessary to acquire the property;

19. Increases in land costs in excess of the approved fair market value;

20. Work which does not comply with the Secretary of the Interior's Standards;

21. Work performed on behalf of a county or municipal government which has not been awarded in compliance with the State Contracts Law, N.J.S.A. 52:32-1 et seq. or the Local Public Constracts Law, N.J.S.A. 40A:11-1 et seq. when applicable;

22. Work performed on behalf of a nonprofit organization which has not been awarded in compliance with the state Contracts Law or the Local Public Contracts Law if the cost of the contract for work performed as part of the historic preservation project funded with a historic preservation loan exceeds $50,000;

23. Routine periodic maintenance work except if it is a minor and necessary component of a historic preservation project; and

24. Relocation of structures, buildings or objects unless the following conditions are met:

i. Relocation of the structure, building or object is necessary for its preservation; or

ii. The relocation re-establishes the historic orientation, the immediate setting, and general environment of the property; and

iii. The Deputy State Historic Preservation Officer determines that the property, as relocated, will continue to meet the criteria for listing in the National Register of Historic Places.

SUBCHAPTER 3. HISTORIC PRESERVATION LOAN APPLICATION PROCESS

7:4B-3.1 Procedures

(a) Revolving loan applications will be accepted and reviewed from all eligible applicants on a continuous basis.

(b) To apply for a historic preservation loan, the applicant shall submit a written application, on a form provided by the Trust with specified documents attached to the following address: New Jersey Historic Trust, New Jersey Department of Environmental Protection and Energy, 506-508 East State Street, CN 404, Trenton, New Jersey 08625-0404. The applicant shall include in the application the information listed in (c) below.

(c) The applicant shall include the following information in the application:

1. A statement of and documentation supporting the significance and condition of the property;

2. A narrative description of the proposed project;

3. Cost estimates for proposed work and/or acqusition;

4. Black and white photographs and color slides of the property;

5. Long-range plans for the future preservation of the property;

6. The names and addresses of all owners, all parties with an ownership interest, and if applicable, evidence of ownership or an interest in ownership of the property for which a loan is requested;

7. As applicable, the names of lessors and lessees, and a copy of a long-term lease meeting the requirements of N.J.A.C. 7:4B-2.2(b)2;

8. Evidence of security may be required depending on the loan applicant's creditworthiness and the mortgagibility of the asset to be acquired or on which capital improvement takes place;

9. Evidence of recipient's ability to repay the loan will include information pertaining to source(s) of funds, projected income statements, and previous years annual financial statements as requested by the Trust;

10. If the property for which a historic preservation loan is requested is not listed in the State or National Register of Historic Places, a certification by the Deputy State Historic Preservation Officer that, as of the date of the Trust's receipt of the application, the historic property for which a loan is requested is approved for listing or meets the criteria for listing in the State Register of Historic Places as set forth in N.J.A.C. 7:4-2;

11. A resolution of the governing body of the applying county or municipality, or a resolution of the board of directors of the applying nonprofit organization, recommending the historic preservation project for funding under the Program; and

12. Any other information reasonably necessary to enable the Trust to determine whether the applicant and the proposed historic preservation project are eligible for a historic preservation loan, and the amount which should be allocated to the project under N.J.A.C. 7:4B.

(d) If an application is incomplete, the Trust will notify the applicant and state what is necessary to make the application complete. If the applicant does not submit the necessary information within 30 days after the date of mailing of the notice, the application will be deemed rejected without prejudice.

(e) Applicants not funded will be advised of the reasons for rejection and may submit a revised or new application.

(f) Application materials for projects not funded shall be retained by the Trust for 90 days following the final disposition of the request for loan funds. The materials shall be returned if the applicant submits a written request to the Trust within the 90 day period. After 90 days the Trust may discard all application materials for non-funded projects.

SUBCHAPTER 4. ALLOCATION OF HISTORIC PRESERVATION LOAN FUNDS

7:4B-4.1 Allocation of historic preservation loan funds

(a) Historic preservation loan funds shall be allocated in accordance with an evaluation of applications received by the Trust. The Trust shall evaluate applications based on the following criteria:

1. The balance in the revolving loan fund;

2. The aggregate amount of loans for which requests are pending;

3. Any minimum reserve amount established for the fund; and

4. The extent to which a proposed historic preservation project meets the criteria in N.J.A.C. 7:4B-4.2.

(b) The minimum loan amount to be accepted for review is $25,000. The maximum loan amount to be accepted for review will not exceed 15 percent of the available revolving loan fund balance as of the beginning of the fiscal year (July 1) in which the application is submitted.

(c) Loan amounts will be for a maximum of 40 percent of project funding for all public entities and will not exceed 90 percent of project funding for nonprofit organizations.

(d) The Trust reserves the right to limit the funding to less than the amount requested in an application and to specify the particular aspect(s) of the project it will fund.

7:4B-4.2 Criteria for review and evaluation of applications for historic preservation loans

(a) All applications for eligible historic preservation projects shall, for the purpose of determining priority for funding, be evaluated on the basis of the following competitive criteria:

1. The significance of the resource, which shall involve consideration of the following:

i. The degree to which a property is historically or archaeologically significant, or is significant in the architectural, engineering, scientific, economic, agricultural, educational, social, political, military, or cultural annals of the State, according to the evaluation criteria for the National Register of Historic Places;

ii. The degree of significance locally or at the regional, state, or national level; and

iii. The degree to which a property retains its historical features and setting;

2. The physical condition of the property, evidence of conditions which require priority attention, including any immediate threat of collapse, demolition or inappropriate use or development, notice of code violations, and deterioration requiring stabilization;

3. Plans for the preservation of the structure, which shall involve consideration of the following:

i. Plans for use and interpretation of the historic property;

ii. Preservation and maintenance plans;

iii. Visibility of the resource and ability of project to serve as a catalyst for further preservation of historic resources; and

iv. The potential impact of project on the community;

4. Compliance with the Secretary of the Interior's Standards reflected in:

i. Project plans, specifications and any other documents for work that has not been done for which the application for a historic preservation loan has been submitted; or

ii. Work underway or completed that is part of an on-going historic preservation project for which the application for a historic preservation loan is submitted;

5. The administrative capability of applicant, which shall involve consideration of the following:

i. Completeness of the project concept;

ii. The place of the project in long-range plans of applicant;

iii. The quality of project consultants;

iv. Financial resources of applicant, including the ability of applicant to repay the loan. Letters of rejection from commercial lenders ("turndown letters") may be required as part of the evaluation of the applicant's financial need;

v. A realistic time frame for project; and

vi. The applicant's qualifications and experience in managing historic preservation projects;

6. The availability of funds to meet project budget requirements;

7. The security available for the loan, including, but not limited to, any real or personal property, personal or corporate guarantees, and financial instruments;

8. Financial plans for the continued preservation of the historic structure after the expenditure of historic preservation loan funds; and

9. The degree and kind of public access.

(b) Funds shall be distributed to achieve a geographical, racial and ethnic balance as well as a balance between sizes and types of projects, and historical or cultural period of the resources assisted by the program.

SUBCHAPTER 5. LOAN DISBURSEMENT AND REPAYMENT

7:4B-5.1 Loan disbursement and repayment

(a) After the project agreement has been fully executed, the Trust shall deposit the revolving loan payment into a separate account established by the recipient specifically for the project for which the loan is made. Payments shall be made in one or more installments, at the discretion of the Trust.

(b) Any changes in the scope of the project funded by this loan must be reviewed and approved in advance by the Trust.

(c) Any use of funds provided through this program that are not in accordance with the project agreement will constitute default of the loan agreement and the loan shall immediately become payable to the New Jersey Historic Trust Revolving Loan Fund with interest.

(d) Specific loan terms, conditions and repayment information will be provided in the project agreement:

1. An amortization or loan repayment schedule will be provided in the project agreement. The schedule will indicate installment dates and loan repayment amounts;

2. The precise terms, conditions, and repayment schedule is based on the loan recipient's ability to pay which is calculated from information obtained during the loan review process. The maximum term of the loan will not exceed 20 years from the date the first payment is made until the date the final payment is due; and

3. The recipient may prepay the loan in whole or in part at any time without penalty.

(e) The precise interest rate is based on the recipient's ability to repay the loan and the absolute value of the loan. Interest shall accrue on the amount of funds provided by the Trust at a rate of no more than four percent per annum:

1. The amount of interest due is calculated from the date of disbursement to the date the last payment of principal is due;

2. Failure to make a payment within 30 days of the scheduled payment due date will result in the assessment of a late fee; and

3. Late fees will be computed on a schedule provided in the project agreement.

(f) If a project is withdrawn or aborted, any costs incurred will remain the responsibility of the recipient. Any funds from this program which have been advanced to the recipient are payable immediately to the New Jersey Historic Trust Revolving Loan Fund with interest.

(g) If a property is sold or there is a change in use during the life of the loan, the principal balance will become immediately due and payable.

SUBCHAPTER 6. EASEMENT

7:4B-6.1 Easement on the historic property

(a) To assure the continued preservation of loan-assisted historic properties and to assure that public benefit shall continue to accrue from the use of the public funds, the Trust may require that an easement agreement be executed and recorded between all parties having an ownership interest in the historic property. The easement agreement shall include:

1. Provision for the continued preservation of the historic property; and

2. Limitations on the right to change the use, alter, demolish or convey the property.

(b) The period of the easement shall be determined by the aggregate total of loan assistance made available under this chapter, as follows:

1. From $25,000 to $50,000—10 years;

2. From $50,001 to $100,000—15 years; and

3. From $100,001 to $450,000—20 years.

(c) When the term of the loan exceeds the easement term for a particular loan value category, the loan term prevails as the period of the easement.

SUBCHAPTER 7. PROJECT SIGNS

7:4B-7.1 Project signs

(a) At the initiation of a historic preservation project funded by a historic preservation loan, a sign acknowledging that the project is being funded with assistance available through the New Jersey Historic Preservation Revolving Loan Program administered by the New Jersey Historic Trust, New Jersey Department of Environmental Protection and Energy, shall be prominently located and maintained on the project site.

(b) The project sign shall be fabricated and erected by the loan recipient in accordance with specifications contained in the project agreement.

(c) The costs of fabricating and erecting the project sign are eligible for funding under N.J.A.C. 7:4B-2.3(a)9. The costs of replacing or maintaining the project sign are not eligible for funding.

EMERGENCY ADOPTION

TRANSPORTATION

(a)

DIVISION OF REGIONAL OPERATIONS, REGION V OFFICE OF OUTDOOR ADVERTISING SERVICES

Roadside Sign Control and Outdoor Advertising on the Atlantic City Expressway

Adopted Emergency Amendments and Concurrent Proposed Amendments: N.J.A.C. 16:41C-1.1 and 8.7

Emergency Amendments Adopted and Concurrent Proposed Amendments Authorized: November 17, 1993 by Thomas M. Downs, Commissioner, Department of Transportation.

Gubernatorial Approval (see N.J.S.A. 52:14B-4(c)): November 16, 1993.

Emergency Amendment Filed: November 17, 1993 as R.1993 d.652.

Authority: N.J.S.A. 27:1A-5, 27:1A-6 and 27:5-5 et seq.

Concurrent Proposal Number: PRN 1993-678.

Emergency Amendment Effective Date: November 17, 1993.

Emergency Amendment Expiration Date: January 16, 1994.

Submit written comments by January 5, 1994 to:

Administrative Practice Officer
Department of Transportation
1035 Parkway Avenue
CN 600
Trenton, New Jersey 08625

This amendment was 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, this emergency amendment is being proposed for readoption in compliance with the normal rule making requirements of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. The readopted amendments become effective upon acceptance for filing by the Office of Administrative Law (see N.J.A.C. 1:30-4.4(d)), if filed prior to the expiration of the emergency period.

The agency emergency adoption and concurrent proposal follows:

Summary and Statement of Imminent Peril

The Department of Transportation is adopting on an emergency basis, and concurrently proposing, amendments to N.J.A.C. 16:41C which clarify and codify the intent of the Department to regulate roadside signs and outdoor advertising on the Atlantic City Expressway in accordance with the provisions of N.J.A.C. 16:41C-8.7. The "Roadside Sign Control and Outdoor Advertising Act" (N.J.S.A. 27:5-5 et seq.) made supervision and regulation of roadside signs and outdoor advertising a duty of the Commissioner of the Department of Transportation. The Department regulates the location, spacing, size, and illumination of outdoor advertising signs. Since the adoption of N.J.A.C. 16:41C in 1992, the Department has administered outdoor advertising along the Atlantic City Expressway under the provisions of N.J.A.C. 16:41C-8.7, which specifies standards and requirements for limited access highways in zoned and unzoned commercial or industrial areas. Due to the technical definition of the term "protected area" in N.J.A.C. 16:41C-1.1, it has recently been found that roadside signs and outdoor advertising along the Atlantic City Expressway could be interpreted as being subject to the provisions of N.J.A.C. 16:41C-8.9, in lieu of N.J.A.C. 16:41C-8.7.

There are substantial differences between the provisions of N.J.A.C. 16:41C-8.7 and 8.9 with significant public safety and highway beautification implications. The standards of N.J.A.C. 16:41C-8.7 are specifically intended for high speed limited access highways. The standards of N.J.A.C. 16:41C-8.9 are not intended to be applicable to limited access highways. The Atlantic City Expressway is a high speed limited access highway.

Applying the standards of N.J.A.C. 16:41C-8.9 to the Atlantic City Expressway would eliminate the 2,000 foot distance requirement for signs from scenic areas, safety rest areas, informational sites, interchanges and intersections. The separation requirement for signs would drop from 1,000 feet to 500 feet. The provisions of N.J.A.C. 16:41C-8.9 are not appropriate for high speed limited access highways and were not intended for that purpose. The higher separation standards in N.J.A.C. 16:41C-8.7 are necessary and appropriate for high speed limited access highways, such as the Atlantic City Expressway.

The amendments which are adopted and concurrently proposed add the new definition and term of "protected zone." This new term is used within N.J.A.C. 16:41C-1.1 and 8.7 and is similar to the preexisting definition of "protected area," except that it would also apply to highways not in the Interstate and Primary Systems. Lands adjacent to some limited access highways, notably the Atlantic City Expressway, may not technically be covered under the definition of "protected area" as defined in N.J.A.C. 16:41C-1.1. The term "protected zone" as defined and used in the rule will assure that any limited access highway not covered under the use of the term "protected area" or not in the Interstate or Primary Systems will be clearly subject to the limited access highway regulatory standards prescribed in N.J.A.C. 16:41C-8.7. Without this new clarifying language, it is possible to interpret N.J.A.C. 16:41C to mean that outdoor advertising signs along the Atlantic City Expressway are subject to standards established under N.J.A.C. 16:41C-8.9, and not the standards established under N.J.A.C. 16:41C-8.7. The Atlantic City Expressway is a limited access highway and should be subject to the standards of N.J.A.C. 16:41C-8.7. The use of both the terms "protected area" and "protected zone" in N.J.A.C. 16:41C-8.7 will assure that the Atlantic City Expressway is clearly subject to the standards established under N.J.A.C. 16:41C-8.7.

Outdoor advertising signs with a Department permit have certain annual renewal rights. Signs with valid permits have various grandfather rights. If a sign was given a permit and installed on the Atlantic City Expressway (a high speed limited access highway) under the less stringent standards of N.J.A.C. 16:41C-8.9, the sign permit could be renewed annually, thereby potentially causing long term safety or highway beautification problems. Since thousands of persons using the Atlantic City Expressway on a daily basis could be exposed to a sign-related safety problem for an indefinite time, it was determined that adoption of amendments on an emergency basis was necessary to protect the public safety.

The intent of the Department has always been to control outdoor advertising on the Atlantic City Expressway under the provisions of N.J.A.C. 16:41C-8.7. The amendments herein specifically clarify that intent. The amendments will not change the manner in which the Department has historically regulated outdoor advertising along the Atlantic City Expressway under N.J.A.C. 16:41C, nor abridge the rights of any sign permit holder. The amendments recognize that the Atlantic City Expressway is a high speed limited access highway subject to general standards applicable to other limited access highways. Continuation, without interruption, of these standards is necessary in the interests of both public safety and highway beautification.

Social Impact

The "Roadside Sign Control and Outdoor Advertising Act" (N.J.S.A. 27:5-5 et seq.) made supervision and regulation of roadside signs and outdoor advertising a duty of the Commissioner of Transportation. In regulating outdoor advertising, the Commissioner is required to balance the promotion of safety, convenience and enjoyment of highway travel, and recognize that roadside signs and outdoor advertising promote economic prosperity, commercial and public expression, and free speech. In conformance with applicable Federal requirements, the Department regulates the location spacing, size, and illumination of outdoor advertising signs. The Department does not regulate sign content. Outdoor advertising signs are regulated so as to control adverse public safety impacts. Examples of safety problems related to signs include signs which reduce sight distances or obscure traffic control devices, signs or sign illumination which can distract drivers or obscure their vision, and signs which are too close to interchanges and compete for the drivers attention during critical vehicle movements.

Roadside sign control and outdoor advertising regulations were developed and adopted by the Department following lengthy public deliberations and consultations with interested citizens, public officials, the regulated industry, and the Federal Highway Administration. The regula-

tions strike a balance between the promotion of safety, convenience and enjoyment of highway travel and commercial and economic development and public speech via outdoor advertising. When the Department rules were adopted in 1992, it was the intent of the Department to control signs along the Atlantic City Expressway under the provisions of N.J.A.C. 16:41C-8.7. Since the original adoption of the rules, the Department has administered outdoor advertising along the Atlantic City Expressway under the provisions of N.J.A.C. 16:41C-8.7. This section specifies standards and requirements for limited access highways in zoned and unzoned commercial or industrial areas. Due to the technical definition of the term "protected area" in N.J.A.C. 16:41C-1.1, it has been found that roadside signs and outdoor advertising along the Atlantic City Expressway could be interpreted to be subject to N.J.A.C. 16:41C-8.9, instead of N.J.A.C. 16:41C-8.7.

There are substantial differences between the provisions of N.J.A.C. 16:41C-8.7 and 8.9. The differences have significant public safety and highway beautification implications. The standards of N.J.A.C. 16:41C-8.7 are specifically intended for limited access highways. The Atlantic City Expressway is a high speed limited access highway. Applying the standards of N.J.A.C. 16:41C-8.9 in the case of the Atlantic City Expressway would eliminate the 2,000 foot distance requirement for signs from scenic areas, safety rest areas, informational sites, interchanges and intersections. Additionally, the spacing requirement for signs would go from 1,000 feet separation to 500 feet apart. The provisions of N.J.A.C. 16:41C-8.9 are not appropriate for high speed limited access highways and were not intended for that purpose. The higher separation standards in N.J.A.C. 16:41C-8.7 are necessary and appropriate for high speed limited access highways, such as the Atlantic City Expressway.

Outdoor advertising signs with a Department permit have certain annual renewal rights. A sign installed under the standards of N.J.A.C. 16:41C-8.9, on a high speed limited access highway, could be annually renewed and cause long term safety or highway beautification problems. The purpose of these amendments is to clarify that outdoor advertising along the Atlantic City Expressway is subject to the provisions of N.J.A.C. 16:41C-8.7. The proposed amendments will not alter the manner in which the Department has historically regulated outdoor advertising along the Atlantic City Expressway under N.J.A.C. 16:41C. The amendments assure continuation on the Atlantic City Expressway of the sign separation standards applicable for limited access highways of 2,000 feet from scenic areas, safety rest areas, informational sites, interchanges and intersections and 1,000 feet separation from other outdoor advertising signs. Uninterrupted continuation of these standards is necessary in the interests of public safety and highway beautification.

Economic Impact

Roadside and outdoor advertising has a significant economic impact and the Legislature has found that it has a role in promoting economic development and vitality within the State. These regulations were developed following lengthy deliberations and consultations with interested citizens, public officials, and the regulated industry. The proposed amendments do not alter the original intent of the regulations, or the implementation of any regulation or standard, as originally intended by the Department and anticipated by the regulated industry and others.

There are no existing signs on the Atlantic City Expressway that would have to be removed as a result of the amendments. Currently, there are no permit applications for signs on the Atlantic City Expressway under consideration by the Department which would be disallowed as a result of the amendments. The Department believes that it would have ultimately received sign permit applications for the Atlantic City Expressway requesting the standards of N.J.A.C. 16:41C-8.9 if the rule were not clarified to disallow this. The result would have been a further proliferation of outdoor advertising signs on the Atlantic City Expressway. It is impossible to estimate the specific scope or economic impact of such proliferation. Outdoor advertising at densities in excess of the standards of N.J.A.C. 16:41C-8.7 were not intended under the original regulations.

Outdoor advertising sign rental fees are negotiated between the applicable parties. Fees charged by outdoor advertising firms vary widely as a result of demand, sign availability, and the size and location of a sign. The availability of additional advertising space would tend to drive down the value of existing sign space. Existing signs would tend to generate less revenue, while at the same time new signs would generate added revenues to offset such declines. The pool of prospective advertisers would remain virtually unchanged. The demand for outdoor advertising services would be unchanged, but the capacity of the advertising industry to meet demand would be increased. The number of vacant unused signs not generating revenue would tend to increase if more signs were erected along any given route. Since most of the available spaces for advertising signs, under the standards of N.J.A.C. 16:41C-8.7, on the Atlantic City Expressway are already taken, continuation of that standard will limit the proliferation of new signs and tend to preserve the economic status quo for outdoor advertising on that route.

The ongoing economic impacts of roadside signs and outdoor advertising on the Atlantic City Expressway would remain unaltered under the adopted and concurrently proposed amendments. Fees authorized and collected by the Department under N.J.A.C. 16:41C are unchanged. All standards and requirements previously applicable to roadside sign control and outdoor advertising along the Atlantic City Expressway are unchanged. It is the purpose of these amendments to preserve and clarify the original intent of the Department's regulations, not to implement functional program changes.

Regulatory Flexibility Statement

N.J.A.C. 16:41C establishes various recordkeeping, reporting, and compliance requirements upon small businesses. The regulations have specific and detailed requirements applicable to initial sign permit applications, annual sign permit renewals, and outdoor advertising business licenses. Engaging in the business of outdoor advertising would result in license, zoning, or permit involvement with local government officials. This involvement would be related to, but independent of, the requirements of these rules. The amendments do not establish any new or alter any existing recordkeeping, reporting, or compliance requirements required of providers or users of outdoor advertising sign services. It is the purpose of the amendemnts to clarify the original intent of the regulations, not to change the program. The proposed amendments do not impose any new or additional recordkeeping, reporting, or compliance requirement on small businesses, as that term is defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq.

Recordkeeping, reporting and compliance requirements on small businesses engaged in roadside sign and advertising activities are imposed under general and specific provisions of N.J.A.C. 16:41C, the Roadside Sign Control and Outdoor Advertising rules. The proposed amendments do not change any existing or create any new recordkeeping, reporting or compliance requirement for small businesses under that chapter of rules.

Full text of the emergency adoption and concurrent proposal follows (additions shown in boldface **thus**):

16:41C-1.1 Definitions

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

. . .

"Protected zones" means all areas inside the boundaries of this State which are adjacent to and within 660 feet of the edge of the right-of-way of highways not in the Interstate and Primary Systems, and those areas inside the boundaries of this State which are outside urban areas and visible from the highway but beyond 660 feet of the edge of the right-of-way of highways not in the Interstate and Primary Systems.

16:41C-8.7 Off-premise advertising signs permitted within the **protected area of the** uncontrolled portion of Interstate Highways and within the protected area **and protected zone** of all other Limited Access Highways in zoned and unzoned commercial or industrial areas

(a) Off-premise advertising signs permitted within the **protected area of the** uncontrolled portion of Interstate Highways and within the protected area **and protected zone** of all other Limited Access Highways in zoned and unzoned commercial or industrial areas shall not be located within 2,000 feet of any of the following areas or sites adjacent to the highway:

1. Scenic areas designated as such by the Commissioner or other State agency authorized to make such designations;
2. Safety rest areas; or
3. Informational sites.

(b) Spacing between signs along each side of the highway shall be a minimum of 1,000 feet.

(c) No sign shall be located within 2,000 feet of an interchange or intersection at grade (measured along the Limited Access Highway or freeway from the nearest tip of the gore or comparable point).

(d) Illumination of such signs is permitted, subject to the general restrictions outlined in N.J.A.C. 16:41C-3.2.

PUBLIC NOTICES

EDUCATION

(a)

STATE BOARD OF EDUCATION

Notice of Public Testimony Session January 19, 1994

Take notice that the following agenda items are scheduled for adoption by the State Board of Education February 2, 1994. 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, January 19, 1994 from 3:00 P.M. to 6:00 P.M. in the State Board Conference Room, Department of Education, 225 East State Street, Trenton, New Jersey.

To reserve time to speak call the State Board Office at (609) 292-0739 by 12:00 noon Friday, January 14, 1994.

Rule proposal: N.J.A.C. 6:2-28, Special Education.

ENVIRONMENTAL PROTECTION AND ENERGY

(b)

NEW JERSEY LOW-LEVEL RADIOACTIVE WASTE DISPOSAL FACILITY SITING BOARD

Notice of Public Meeting on Approval of Annual Budget for Fiscal Year 1995

Take notice that pursuant to N.J.A.C. 7:60-1.4(b), the New Jersey Low-Level Radioactive Waste Disposal Facility Siting Board will hold its annual meeting to approve the budget for Fiscal Year 1995, July 1, 1994, through June 30, 1995. The **public meeting** will be on Thursday, January 6, 1993, in the Tenth Floor Conference Room at Station Plaza III, 44 South Clinton Ave., Trenton, New Jersey. The public meeting will begin at 9:30 A.M. At the public meeting, the Board will take comments on the proposed budget. **A copy of the proposed budget** may be obtained from the NJ Low-Level Radioactive Waste Disposal Facility Siting Board, CN410, Trenton, NJ 08625-0410, or call (609) 777-4247.

(c)

OFFICE OF LAND AND WATER PLANNING

Amendment to the Cape May County Water Quality Management Plan
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 Cape May County Water Quality Management (WQM) Plan. This amendment proposal has been submitted by Atlantic Electric. The proposed amendment is for both the expansion of the existing sanitary wastewater treatment facility, and the construction of a new wastewater treatment system to treat process wastewater from a proposal flue gas desulfurization scrubber system at the B.L. England Generating Station in Upper Township. A slight increase in employee population served by the sanitary wastewater treatment facility is expected in association with the flue gas desulfurization scrubber system. The sanitary wastewater treatment facility discharges to ground water and will be expanded to treat a peak flow of 16,000 gallons per day (gpd). The new wastewater treatment system for process wastewater will discharge into Great Egg Harbor Bay. Projected peak flow to this system is approximately 86,400 gpd.

This amendment represents only one part of the permit process and other issues will be addressed prior to final permit issuance. Additional issues which were not reviewed in conjunction with this amendment but which may need to be addressed may include, but are not limited to, the following: antidegradation; effluent limitations; water quality analysis; exact locations and designs of future treatment works (pump stations, interceptors, sewers, outfalls, wastewater treatment plants); and development in wetlands, flood prone areas, designated Wild and Scenic River areas, or other environmentally sensitive areas which are subject to regulation under Federal or State statutes or rules.

This notice is being given to inform the public that a plan amendment has been proposed for the Cape May County WQM Plan. All information related to the WQM Plan and the proposed amendment is located at the Cape May County Department of Health, DN 601, 4 Moore Road, Cape May Court House, New Jersey 08210, and the NJDEPE, Office of Land and Water Planning, CN423, 401 East State Street, Trenton, New Jersey 08625. It is available for inspection between 8:30 A.M. and 4:00 P.M., Monday through Friday. An appointment to inspect the documents may be arranged by calling the Cape May County Department of Health at (609) 465-1187 or the Office of Land and Water Planning at (609) 633-1179.

Interested persons may submit written comments on the amendment to Mr. Grover Webber, Cape May County Department of Health at the address cited above. A copy of the comments should be sent to Dr. Daniel J. Van Abs of the Office of Land and Water Planning, at the NJDEPE address cited above. All comments must be submitted within 30 days of the date of this public notice. All comments submitted by interested persons in response to this notice, within the time limit, shall also be considered by NJDEPE with respect to the amendment request.

Any interested persons may request in writing that the Cape May Planning Board 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 Mr. Webber at the Cape May County Department of Health address cited above with a copy sent 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.

(d)

OFFICE OF LAND AND WATER PLANNING

Notice of Extension of Deadline for Submittal of Letters of Intent to Apply for Well Head Protection Program Demonstration Grants

Take notice that the November 7, 1993 deadline for the submission of Letters of Intent to apply for Well Head Protection Program Demonstration Grants contained in the Department of Environmental Protection and Energy's "Notice of Availability of Grants, Well Head Protection Program" published at 25 N.J.R. 4333(a) (September 7, 1993) has been extended by the Department to January 7, 1994). Letters of Intent to apply for Well Head Protection Program Demonstration Grants should be submitted to:

Daniel J. Van Abs, Assistant Administrator
NJDEPE—Office of Land and Water Planning
CN 423
Trenton, New Jersey 08625

(e)

DIVISION OF PARKS AND FORESTRY

Natural Areas System
Notice of Proposed Boundary Change
Oswego River Natural Area

DEPE Docket No.: 57-93-10/321.

Take notice that in accordance with N.J.A.C. 7:5A-1.12, the Department of Environmental Protection and Energy (Department), Division

of Parks and Forestry, is accepting public comment on a proposal to change the boundary of the Oswego River Natural Area. In accordance with N.J.A.C. 7:5A-1.12(f), a proposal to change the boundary was submitted by the Department's Office of Natural Lands Management to the Natural Areas Council, the Division of Parks and Forestry and Wharton State Forest (the administering agency for the Oswego River Natural Area) for review. At its April 19, 1993 meeting, the Natural Areas Council, after considering comments from the Division and administering agency, determined that the proposed change would result in a net change of more than 25 percent of the total acreage of the natural area. Therefore, the Department is now providing the opportunity for public comment on this boundary change proposal, as required by N.J.A.C. 7:5A-1.12(i).

The Oswego River Natural Area currently encompasses 640 acres of State-owned property in Wharton State Forest along the Oswego River. This boundary proposal, if adopted, will result in an expansion in the size of the natural area from its current 640 acres to approximately 1,927 acres, by adding extensive areas of property owned by the State of New Jersey in Wharton State Forest that lie both to the north and south of the current boundary. The expansion will incorporate into the Natural Areas System (System) several populations of globally and State endangered species known to exist outside of the current boundaries of this natural area, thereby furthering the management objective for this natural area. The proposed expansion will also satisfy the requirement at N.J.A.C. 7:5A-1.12(b) that all boundaries of natural areas must conform to physical features identifiable in the field or the edge of state ownership.

The Natural Areas System was established for the purpose of protecting and preserving natural ecological resources for present and future generations of State residents. The Department's administration of State Natural Areas dates back to 1961, when the Legislature passed the Natural Areas Act, N.J.S.A. 13:1B-15.4 et seq. The Natural Areas Act authorized the Department to acquire, maintain, and preserve natural areas within the State as habitat for rare and vanishing species of plant and animal life, in order to assure the public of the right to enjoy the benefits of such areas as places of natural interest and scenic beauty, as "living illustrations" of the State's original natural heritage, and as places for scientific study. N.J.S.A. 13:1B-15.5. In addition to creating a natural areas section within the Department's Division of Parks and Forestry, the Natural Areas Act established the Natural Areas Council, a seven member advisory board, to advise the Commissioner on the administration of natural areas. N.J.S.A. 13:1B-15.8.

The System currently contains 42 natural areas totalling almost 30,000 acres and is administered by the Office of Natural Lands Management (ONLM) within the Department's Division of Parks and Forestry. The ONLM is responsible for overall administration of the Natural Areas System and its rules, the preparation of management plans, and the amendment of plans as needed. The various field offices of the Division of Parks and Forestry and the Division of Fish, Game and Wildlife are primarily responsible for implementing the Department's natural areas policies and, after consultation with other Divisions, organizations and individuals, performing hands-on management of the various natural areas under their administration. It is, therefore, the shared responsibility of the ONLM and these field offices to properly maintain and manage all natural areas.

The Oswego River Natural Area became part of the Natural Areas System in 1975. This was accomplished through passage of the Natural Areas System Act, N.J.S.A. 13:1B-15.12a et seq., which formally established the System and appointed as the initial components of the System those areas (including the Oswego River Natural Area) designated by the Department as natural areas as of January 1, 1975. The Oswego River Natural Area lies within Washington and Bass River Townships, Burlington County, and is part of Wharton State Forest, which also is responsible for administration of the natural area. The management objective for this natural area includes "preservation of hardwood swamp, pitch pine lowland, pine-oak, Atlantic white cedar, and bog communities, which serve as rare species habitat." N.J.A.C. 7:5A-1.13(a)27ii.

An analysis of the boundaries of the Oswego River Natural Area was conducted by the Department as part of the routine procedure for preparation of a draft management plan, in accordance with N.J.A.C. 7:5A-1.8(d)6. This analysis included consideration of (1) the natural resource features within the current boundary and surrounding environs, (2) the directive for management of the natural area as stated in the management objective, (3) the status of ownership of surrounding properties, and (4) the visible nature of the current boundary, which should conform to physical features identifiable in the field (N.J.A.C. 7:5A-1.12(b)).

The analysis revealed, based on information documented in the Department's Natural Heritage Database, that the primary feature of significance in the Oswego River Natural Area is the abundance of endangered plant species associated with the freshwater wetland savanna habitat adjacent to the Oswego River, and that significant populations of these and other species were documented in similar contiguous habitat both to the north and to the south of the current boundary of the natural area. (The Natural Heritage Database is a mapped and computerized data base of the State's rare plant and animal species and representative natural communities, as authorized at N.J.S.A. 13:1B-15.146 et seq.) Of particular significance is the presence of additional exemplary populations of the bog asphodel (Narthecium americanum) located both north of and south of the current natural area boundary on lands now owned by the State and administered through Wharton State Forest. The bog asphodel is (1) currently under review by the Federal government as being endangered or threatened throughout its range in the United States, (2) officially listed as endangered in New Jersey (N.J.A.C. 7:5C), and (3) is listed as endangered or threatened in the Pinelands National Reserve (N.J.A.C. 7:50-6.24(a)30).

Additional species of plants and animals documented by the Natural Heritage Database in the area proposed for addition south of the current Oswego River Natural Area boundary include: pine barren smoke grass *(Muhlenbergia torreyana)* (Pinelands listed, N.J. plant species of concern (N.J.A.C. 7:5C-3.1); curly grass fern *(Schizaea pusilla)* (Pinelands listed, plant species of concern); adder's tongue fern *(Ophioglossum vulgatum)* (plant species of concern); Pine Barrens treefrog *(Hyla andersonii)* (State endangered), and northern pine snake *(Pituophis m. melanoleucus)* (Federal review, State threatened).

Additional species of plants and animals documented by the Natural Heritage Database in the area proposed for addition north of the current Oswego River Natural Area boundary include: New Jersey rush *(Juncus caesariensis)* (Federal review, State endangered, Pinelands listed); reversed bladderwort *(Utricularia resupinata)* (State endangered, Pinelands listed); false asphodel *(Tofieldia racemosa)* (State endangered, Pinelands listed); and curly grass fern (Pinelands listed, plant species of concern).

In addition, species of lesser rarity status and additional undocumented species are believed to be present in the areas proposed for addition to the Oswego River Natural Area. This information, together with consideration of the extent of land in Wharton now under State ownership, the management objective for the natural area (which includes preservation of rare species habitat), and the physical nature of the current and proposed boundary, resulted in a staff recommendation to expand the boundary to roughly three times its current acreage. The proposed boundary change satisfies criteria specified at N.J.A.C. 7:5A-1.12(j)1 in that it conforms with physical features identifiable in the field or the limits of State ownership, and serves to further the management objective for this natural area.

The proposed boundary of the Oswego River Natural Area is generally defined as follows: Beginning at the intersection of Chatsworth Road and Route 679, proceed south on Chatsworth Road approximately 1.5 miles crossing the Oswego River at Harrisville Pond to the intersection with Old Martha Road; proceed northeast on Old Martha Road approximately 3.5 miles to the current edge of State ownership approximately one-half mile north of Buck Run; proceed west along the current edge of State ownership approximately one mile to the point of intersection with a sand road extending southwest; proceed southwest to residential development and then follow the edge of State ownership east of Chatsworth Road to the starting point at the intersection of Chatsworth Road and Route 679 and excluding any inholdings not currently under State ownership.

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

Tuesday, December 14, 1993
7:00 P.M.
Lebanon State Forest Office
Route 72 (Mile Marker 1, 1 mile east of Route 72 and Route 70 circle)
Woodland Township, New Jersey
(609) 726-1191

Submit written comments by January 5, 1994 to:
Janis E. Hoagland
Administrative Practice Officer
Department of Environmental Protection and Energy
CN 402
Trenton, New Jersey 08625-0402

Interested persons may obtain information on the boundary change proposal for the Oswego River Natural Area, including copies of the boundary change proposal, by contacting:
Robert J. Cartica
Office of Natural Lands Management
Division of Parks and Forestry
Department of Environmental Protection and Energy
Station Plaza Building 4
CN 404
Trenton, New Jersey 08625

(a)

OFFICE OF LAND AND WATER PLANNING

Amendment to the Upper Raritan Water Quality Management Plan
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 Upper Raritan Water Quality Management (WQM) Plan. This amendment proposal would modify the Clinton Township Wastewater Management Plan and has been submitted on behalf of the Mountainview Youth Correctional Facility. The proposed amendment would allow a new sewage treatment plant (STP), on Block 46, Lot 32, to be built replacing the existing Department of Correction Mountainview Youth Correctional Facility STP. The current Department of Correction Mountainview Youth Correctional Facility STP has a permitted flow of 170,000 gallons per day (GPD) and discharges to Beaver Brook [NJPDES #NJ0028487]. The new Department of Correction Mountainview Youth Correctional Facility STP would have a design capacity of 360,000 GPD of which 260,000 GPD would be discharged to surface water (Beaver Brook) and 100,000 GPD would be discharged to ground water via subsurface sewerage disposal beds located at Block 13, Lot 38. The STP expansion will serve 2,245 persons (inmates plus staff). The water quality of the discharge flows must meet requirements of the New Jersey Pollutant Discharge Elimination System (N.J.A.C. 7:14A) to ensure compliance with the existing New Jersey Surface Water Quality Standards in N.J.A.C. 7:9-4 and the Ground Water Quality Standards in N.J.A.C. 7:9-6.

This notice is being given to inform the public that a plan amendment has been proposed for the Upper Raritan WQM Plan. All information related to the WQM Plan and the proposed amendment is located at the NJDEPE, Office of Land and Water Planning, CN423, 401 East State Street, Trenton, New Jersey 08625. It is available for inspection between 8:30 A.M. and 4:00 P.M., Monday through Friday. An appointment to inspect the documents may be arranged by calling the Office of Land and Water Planning at (609) 633-1179.

Interested persons may submit written comments on the proposed amendment to Dr. Daniel J. Van Abs, Office of Land and Water Planning, at the NJDEPE address cited above with a copy sent to Charles M. Sarajian, L.P.P., P.E., Group Projects Manager, State of New Jersey, Division of Building and Construction, CN235, Trenton, New Jersey 08625-0235. All comments must be submitted within 10 working 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 person 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 ten working days of this public notice to Dr. Van Abs at the NJDEPE address cited above. If a public hearing is held, the public comment period in this notice shall be extended to close 15 days after the public hearing.

HEALTH

(b)

CERTIFICATE OF NEED

Request for Applications
Long-Term Care Beds for Adult Ventilator Patients
N.J.A.C. 8:33H

Take notice that in accordance with the provisions of N.J.A.C. 8:33-4.1(a), Bruce Siegel, M.D., M.P.H., Commissioner, New Jersey Department of Health, is inviting certificate of need applications for the following type of health care activity:

Specialized long-term care beds for ventilator care for adult patients in accordance with the provisions of N.J.A.C. 8:33H, limited to the need identified in the Local Advisory Board (LAB) region.

Geographic Area to be Served:	Need
LAB I	22
LAB II	13
LAB III	9
LAB IV	9
LAB V	7
LAB VI	11

A certificate of need application which requests beds in excess of the identified need referenced above will be determined to be unresponsive to this notice and not accepted for processing in accordance with N.J.A.C. 8:33-4.5(b).

Date application is due: January 3, 1994.

Date completeness review decision issued: March 1, 1994.

Date local advisory boards will review the applications and submit recommendations to the Commissioner and the State Health Planning Board: On or before April 15, 1994.

Date State Health Planning Board will review the applications and submit recommendations to the Commissioner: On or before June 1, 1994.

Applications may be requested from and must be filed with:
New Jersey State Department of Health
Certificate of Need Program
CN 360
Trenton, NJ 08625-0360
609-292-6552

The Policy Manual for Planning and Certificate of Need Reviews of Long-term Care Facilities and Services (N.J.A.C. 8:33H) is available from the State Health Planning Program (609-292-5960).

Please submit 12 copies of the certificate of need application to the Department.

Applications must be filed simultaneously with: Local advisory board(s) serving the region of the proposed service.

Please contact the local advisory board for the number of copies of the certificate of need application to be submitted to the LAB.

(c)

THE COMMISSIONER

Notice of Invitation for Certificate of Need Applications for Vertically Integrated Delivery Networks in the City of Camden

Take notice that in accordance with the provisions of N.J.A.C. 8:33-4.1(a), Bruce Siegel, M.D., M.P.H., Commissioner, New Jersey Department of Health, is inviting certificate of need applications for vertically integrated delivery networks in the City of Camden.

The City of Camden is the highest ranking city in New Jersey in the medically underserved index and has consistently had extraordinarily high rates of infant mortality, perinatal AIDS, low birth weight babies and teenage pregnancy. It is clear from these statistics that the current array of health care services in Camden is not adequate to address the devastating health problems suffered by Camden residents. The unchanging nature of these deeply-set health problems make it clear that a different approach is necessary.

Therefore, this call is being issued for certificate of need applications which propose new and creative integrated systems designed to provide

cost-effective, accessible and quality health care services on levels ranging from primary to tertiary care which address the significant health related problems in the City of Camden, including, but not limited to, delivery of expanded prenatal and child care services, specialty clinics, outpatient diagnostic testing, and senior citizens' programs.

Specific area to be served: City of Camden, Camden County.

Date application is due: January 1, 1994.

Date application will be deemed complete for processing: March 1, 1994.

Date local advisory boards will review the applications and submit recommendations to the Commissioner: On or before April 15, 1994.

Date State Health Planning Board will review the applications and submit recommendations to the Commissioner: On or before June 1, 1994.

Applications may be requested from and must be filed with:

New Jersey State Department of Health
Certificate of Need Program
CN 360
Trenton, NJ 08625-0360
609-292-6552

Applications must also be filed with: Local advisory board(s) serving the region of the proposed service.

(a)

CERTIFICATE OF NEED

Request for Applications Maternal and Child Health N.J.A.C. 8:33 and N.J.A.C. 8:33C

Take notice that in accordance with the provisions of N.J.A.C. 8:33-4.1(a), Bruce Siegel, M.D., M.P.H., Commissioner, New Jersey Department of Health, is inviting certificate of need applications for the following types of health care activities:

Designation of existing perinatal services and modifications to approved perinatal designations and maternal and child health consortia in accordance with the provisions of N.J.A.C. 8:33 and N.J.A.C. 8:33C.

The call is for designation only with no associated construction or capital costs. Pediatric services are not included at this time. A call for pediatric services will be issued after pediatric planning rules are adopted.

Geographic area to be served: Statewide.

Date application is due: December 1, 1993. (Letters inviting certificate of need applications were sent to all consortia and to the one potential applicant on November 12, 1993.)

Date completeness review decision issued: February 1, 1994.

Date local advisory boards will review the applications and submit recommendations to the Commissioner and the State Health Planning Board: On or before March 15, 1994.

Date State Health Planning Board will review the applications and submit recommendations to the Commissioner: On or before May 1, 1994.

Applications may be requested from and must be filed with:

Certificate of Need Program
New Jersey State Department of Health
CN 360
Trenton, NJ 08625-0360
609-292-6552

Applications must also be filed with: Local advisory board(s) serving the region of the proposed service.

HUMAN SERVICES

(b)

DIVISION OF YOUTH AND FAMILY SERVICES

Notice of Amended Personal Needs Allowance: Residential Health Care Facilities and Boarding Homes

Notice of Administrative Change N.J.A.C. 10:123-3.4

Take notice that the Division of Youth and Family Services is amending the rate of the personal needs allowance reserved by the owner or operator of each residential health care facility or boarding home for each Supplemental Security Income recipient residing therein, and the owner or operator of each residential health care facility for each General Public Assistance recipient residing therein. The amended rate is in the amount of at least $67.50 per month, provided that the rate of the total 1994 Federal Social Security cost of living increase is 2.6 percent. No owner or operator or agent thereof shall interfere with the recipient's retention, use, or control of the personal needs allowance.

This notice is being given to inform the public that the Division of Youth and Family Services shall increase the rate of the personal needs allowance from $66.50 to $67.50 effective January 1, 1994. This increase is based on the total 1994 Federal Social Security cost of living increase and is consistent with an amendment to N.J.A.C. 10:123-3.4 adopted on October 4, 1993 at 25 N.J.R. 4598(a), which authorizes the announcement of the personal needs allowance increase through public notice. Through this notice, in accordance with N.J.A.C. 1:30-2.7(c), N.J.A.C. 10:123-3.4(a) is changed to reflect this amended rate.

Full text of the changed rule follows (addition indicated in boldface **thus**; delection indicated in brackets [thus]):

10:123-3.4 Amount

(a) The owner or operator of each residential health care facility or boarding home shall reserve to each Supplemental Security Income (SSI) recipient residing therein, and the owner or operator of each residential health care facility shall reserve to each General Public Assistance recipient residing therein, a personal needs allowance in the amount of at least [$66.50] **$67.50** per month, set according to (b) below, and noticed in the New Jersey Register and otherwise publicized, in accordance with (c) below. No owner or operator or agency thereof shall interfere with the recipient's retention, use, or control of the personal needs allowance.

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

(c)

MENTAL HEALTH AND HOSPITALS

Notice of Availability of Grant Funds Title of Grant: Community Mental Health Services Block Grant (P.L. 102-321)

Take notice that, in compliance with N.J.S.A. 52:14-34.4, 34.5 and 34.6, the Department of Human Services hereby announces the availability of the following grant program funds.

A. Name of program: Community Mental Health Services Block Grant (P.L. 102-321).

B. Purpose: Funds are being made available to develop programs to divert youth from inpatient hospitalization, to provide alternatives to inpatient care and to facilitate the transition of youth from inpatient hospitalization to the community. Programs to be developed and enhanced will include emergency/screening and crisis intervention services, intensive in-home services, respite, community outreach, & family intervention.

C. Amount of available funding for the program: $964,000 annualized.

D. Organizations which may apply for funding under this program: Any non-profit agency, governmental or private, may apply.

E. Qualifications needed by an applicant to be considered for funding: Entities must have the capacity to provide the intensive community based mental health services necessary to divert youth from unnecessary

hospitalization and to assist youth transitioning from inpatient care. Entities must demonstrate a strong commitment to engaging the youth and family in all aspects of the treatment planning and service delivery process.

F. Procedure for eligible organizations to apply: Interested applicants may request an application from the appropriate Regional Office of the Division of Mental Health and Hospitals, as indicated below.

G. Address to which applications must be submitted:

Leslie Myers
DMH&H-NRO
100 Hamilton Plaza
8th Floor, Hudson United Bank Building
Paterson, NJ 07505

Judy Bretzger
DMH&H-CRO
Capital Center, CN 727
3rd Fl., Trenton, NJ 08625

Marilyn Corradetti
DMH&H-SRO
APH, Evergreen Hall
202 Spring Garden Rd.
Ancora, NJ 08037-9699

H. Deadline by which applications must be submitted: By close of business, January 15, 1994.

I. Date the applicant is to be notified of acceptance or rejection: February 15, 1994.

CORRECTIONS

(a)

THE COMMISSIONER

Notice of Action on Petition for Rulemaking
Inmate Discipline—Evidence Required
N.J.A.C. 10A:4-9.15

Petitioner: George R. Jacques, New Jersey State Prison.

Take notice that on October 7, 1993, the New Jersey Department of Corrections received a petition for rulemaking concerning N.J.A.C. 10A:4-9.15, the Department's rules on Inmate Discipline—Evidence Required. Public notice of this petition was published in the November 15, 1993, New Jersey Register at 25 N.J.R. 5365(b).

In accordance with N.J.A.C. 1:30-3.6 and after thorough review of the petition, the Department has determined that the matter will receive further deliberations.

Upon the conclusion of the Department's deliberations by January 21, 1993, the decision will be mailed to the petitioner and published in a future New Jersey Register.

A copy of this notice has been mailed to the petitioner, as required by N.J.A.C. 1:30-3.6.

TRANSPORTATION

(b)

DIVISION OF ROADWAY DESIGN
BUREAU OF UTILITIES AND RAILROAD ENGINEERING

Notice of Final Action
Designation of At-grade Crossing as an "Exempt Crossing"
Main Street, Riverton Borough, Burlington County

Take notice that the Department of Transportation, in its Public Notice which appeared at 25 N.J.R. 4339(a), September 7, 1993, scheduled a public hearing on a recommendation it received to designate the Main Street at-grade railroad crossing (AAR #501709C) in the Borough of Riverton, County of Burlington, as an "Exempt Crossing."

The "Exempt Crossing" designation exempts the driver of any omnibus, designed for carrying more than six passengers or of any school bus carrying any school child or children, or of any vehicle carrying explosive substance or flammable liquids as a cargo or part of a cargo from stopping before crossing the tracks of a railroad. Normally the above such vehicles must come to a complete stop before proceeding across the crossing.

The public hearing was held on Thursday, October 7, 1993, at the Riverton Public School, Fifth and Howard Street, Riverton Borough, Burlington County from 4:00 P.M. to 6:00 P.M. and 7:00 P.M. to 9:00 P.M., to afford full public participation and from those organizations and/or agencies desiring to comment. There was no participation or attendance from the general public.

The Diagnostic Team determined that the potential for damage and injury from accidents between motor vehicles traveling in the same direction exceeds that between a train and the vehicles required to stop by law at the Main Street Crossing. The team recommended that the Commissioner of Transportation in accordance with the authority granted at N.J.S.A. 39:4-128, designate the Main Street (AAR #501709C) grade crossing in the Borough of Riverton, County of Burlington, as an "Exempt Crossing."

Therefore, under the provisions of N.J.S.A. 39:4-128, the Commissioner of Transportation, Thomas M. Downs, hereby designates the Main Street (AAR #501709C) grade crossing in the Borough of Riverton, County of Burlington as an "Exempt Crossing." Appropriate signs shall be erected informing the motoring public.

OTHER AGENCIES

(c)

NEW JERSEY HIGHWAY AUTHORITY

Garden State Parkway
Notice of Action on Petition for Rulemaking
N.J.A.C. 19:8-9.1, Permits for Outdoor Advertising

Petitioner: Richard D. Merion, Vice President, Barnegat Bay Trading Company.

Take notice that, on October 29, 1993, the Regulations Committee of the New Jersey Highway Authority met to consider the regulation modification proposed by petitioner in his September 13, 1993 correspondence which requested that the Authority's regulations be modified "to permit placement of logos of restaurants and motels that are nearby exits in order to aid our tourist and our small businesses that need the tourist business." (See 25 N.J.R. 5367(a).) A review of N.J.A.C. 16:41C, Roadside Sign Control and Outdoor Advertising, revealed that N.J.A.C. 16:41C-3.1 and 16:41C-3.2(1) state in part, respectively:

> "Except where specifically permitted by the Department, no outdoor advertising signs shall be erected or maintained within the right-of-way of any portion of limited access or non-limited access highways within the State of New Jersey . . ."
>
> "1. No off-premise outdoor advertising shall be erected along the Garden State Parkway . . . which are not incorporated into the Federal Aid Interstate Highway System."

From the foregoing, it is clear that signage such as proposed by you is prohibited by the regulations of the New Jersey Department of Transportation. These regulations implement the dictates of State statutes contained in N.J.S.A. 27:1A-5, 27:1A-6 and N.J.S.A. 27:5-5 et seq. (P.L. 1991, c.413).

Moreover, as the petitioner is probably aware, the Authority provides food and fuel services for its patrons through its service areas which are placed at intervals along the Parkway, which adequately provide for its patrons' needs. Based upon the foregoing, the Committee decided to deny petitioner's request for amendment of the Authority's rules applicable to outdoor advertising contained in N.J.A.C. 19:8-9.

EXECUTIVE ORDER NO. 66(1978) EXPIRATION DATES

Pursuant to Executive Order No. 66(1978), an administrative rule is assigned an expiration date not to exceed five years from the date of promulgation by a State agency, unless the rule is exempt from the provisions of the order. In the Administrative Code, a single expiration date is affixed at the chapter level and applies to the entire chapter. See N.J.A.C. 1:30-4.4 for an explanation of expiration date assignment.

The following table is a complete listing of established New Jersey Administrative Code expiration dates and exemptions, by Title and Chapter. Current expiration dates may also be found in the loose-leaf volumes of the Administrative Code as a part of the Title Table of Contents for each executive department or agency, on the Subtitle Page for each group of chapters in a Title, and at the beginning of each Chapter.

This listing is published quarterly, in March, June, September and December, in the first issue of the month.

OFFICE OF ADMINISTRATIVE LAW—TITLE 1

N.J.A.C.	Expiration Date
1:1	4/21/97
1:5	9/13/96
1:6	4/21/97
1:6A	3/19/95
1:7	4/21/97
1:10	4/21/97
1:10B	9/13/96
1:11	4/21/97
1:13	4/21/97
1:13A	4/3/94
1:14	7/15/96
1:20	4/21/97
1:21	4/21/97
1:30	1/25/96
1:31	4/21/97

AGRICULTURE—TITLE 2

N.J.A.C.	Expiration Date
2:1	11/19/95
2:1-4	Exempt (28 C.F.R. Part 35)
2:2	1/17/94
2:3	8/21/94
2:5	8/21/94
2:6	EXPIRED RULES
2:9	8/19/96
2:16	1/22/96
2:17	5/31/96
2:18	8/5/96
2:19	10/1/95
2:20	10/1/95
2:21	8/5/96
2:22	6/26/97
2:23	5/28/98
2:24	4/2/95
2:32	5/13/97
2:33	3/6/94
2:34	1/2/95
2:48	10/25/95
2:50	5/1/97
2:52	5/1/95
2:53	1/10/96
2:54	Exempt (7 U.S.C. 601 et seq., 7 C.F.R. 1004)
2:68	10/29/98
2:69	11/7/93
2:70	8/20/95
2:71	7/2/98
2:72	7/2/98
2:74	7/2/98
2:76	7/31/94
2:90	6/22/95

BANKING—TITLE 3

N.J.A.C.	Expiration Date
3:1	1/4/96
3:2	4/12/95
3:3	1/11/95
3:4	8/17/97
3:6	3/1/96
3:7	9/12/95
3:11	5/1/94
3:12	6/15/97
3:13	1/21/97
3:16	6/18/95
3:17	6/13/96
3:18	12/24/97
3:19	3/15/96
3:21	1/24/97
3:22	5/12/94
3:23	7/6/97
3:24	8/18/94
3:25	7/23/97
3:26	12/31/95
3:27	9/12/95
3:28	12/12/94
3:29	8/5/96
3:32	11/1/98
3:33	9/18/94
3:38	9/11/97
3:41	10/11/95
3:42	3/10/98

PERSONNEL—TITLE 4A

N.J.A.C.	Expiration Date
4A:1	9/22/97
4A:1-5	Exempt (28 C.F.R. Part 35)
4A:2	9/22/97
4A:3	8/5/98
4A:4	5/12/98
4A:5	9/22/97
4A:6	12/22/97
4A:7	9/22/97
4A:8	1/16/95
4A:9	9/22/97
4A:10	9/22/97

COMMUNITY AFFAIRS—TITLE 5

N.J.A.C.	Expiration Date
5:1	2/5/95
5:2	4/10/94
5:3	7/30/98
5:4	9/1/97
5:5	Exempt (28 C.F.R. Part 35)
5:10	8/26/98
5:11	3/10/94
5:12	12/27/94
5:13	6/22/97
5:14	11/9/95
5:15	5/1/94
5:18	1/4/95
5:18A	1/4/95
5:18B	1/4/95
5:18C	2/5/95
5:19	1/15/98
5:20	9/3/96
5:22	2/5/95

N.J.A.C.	Expiration Date
5:23	2/3/98
5:24	7/10/95
5:25	2/19/96
5:25A	4/20/97
5:26	2/7/96
5:27	5/2/95
5:28	12/13/95
5:29	2/19/96
5:30	5/27/98
5:31	12/1/94
5:33	8/6/95
5:34	12/3/95
5:37	1/7/96
5:50	9/17/98
5:51	8/11/98
5:52	1/2/95
5:70	4/22/97
5:71	6/4/95
5:80	4/20/95
5:91	12/7/97
5:92	2/7/96
5:100	6/18/95

DEPARTMENT OF MILITARY AND VETERANS' AFFAIRS—TITLE 5A

N.J.A.C.	Expiration Date
5A:1	3/12/95
5A:2	5/17/95
5A:3	2/3/97
5A:4	2/3/97
5A:5	9/21/97
5A:7	Exempt (28 C.F.R. Part 35)

EDUCATION—TITLE 6

N.J.A.C.	Expiration Date
6:1	1/11/96
6:2	2/6/94
6:3	6/7/98
6:5	10/22/95
6:7	1/2/95
6:8	12/11/96
6:9	5/3/98
6:11	9/21/95
6:12	3/8/96
6:20	7/16/95
6:21	11/22/94
6:22	7/16/95
6:22A	10/8/98
6:24	1/11/96
6:26	8/3/97
6:28	4/10/94
6:29	2/8/95
6:30	5/11/94
6:31	11/16/94
6:39	8/14/94
6:43	8/10/95
6:46	4/10/97
6:51	8/5/96
6:53	4/10/97
6:64	9/14/97
6:68	2/26/95
6:70	10/17/94
6:78	10/8/98

ENVIRONMENTAL PROTECTION AND ENERGY—TITLE 7

N.J.A.C.	Expiration Date
7:1	8/15/95
7:1A	5/22/97
7:1C	6/15/95
7:1D	9/13/98
7:1E	9/3/96
7:1F	4/16/97
7:1G	9/29/94
7:1H	7/13/95
7:1I	5/28/98
7:1J	1/4/98
7:1K	3/1/98
7:2	10/7/96
7:3	6/21/98
7:4	8/17/97
7:4A	9/18/94
7:4B	12/6/98
7:5	11/19/95
7:5A	6/17/98
7:5B	6/24/98
7:5C	1/16/95
7:6	6/9/94
7:7	5/12/94
7:7A	3/16/97
7:7E	7/24/95
7:7F	1/19/93
7:8	2/5/98
7:9	1/18/96
7:9A	8/21/94
7:9B	1/18/96
7:10	9/1/94
7:11	5/3/98
7:12	11/24/97
7:13	7/14/94
7:14	4/27/94
7:14A	6/2/94
7:14B	11/18/97
7:15	10/2/94
7:18	7/3/96
7:19	2/26/95
7:19A	3/19/95
7:19B	3/19/95
7:20	5/2/95
7:20A	12/16/93
7:22	12/27/96
7:22A	2/5/95
7:23	6/9/94
7:24	4/22/96
7:25	2/15/96
7:25A	4/23/95
7:26	10/25/95
7:26A	11/18/96
7:26B	11/18/97
7:26C	5/17/98
7:26E	6/7/98
7:27	Exempt
7:27A	12/4/94
7:27B	Exempt
7:28	7/30/95
7:29	5/21/95
7:29B	2/1/93
7:30	11/24/97
7:31	6/18/98
7:32	7/6/98
7:36	10/29/98
7:38	9/18/95
7:45	2/6/94
7:50	Exempt
7:60	3/2/97
7:61	5/17/98

HEALTH—TITLE 8

N.J.A.C.	Expiration Date
8:2	8/16/98
8:7	9/14/95
8:8	4/12/94
8:9	2/14/96
8:13	9/8/97
8:18	11/6/94

N.J.A.C.	Expiration Date
8:19	5/11/95
8:20	3/2/95
8:21	10/23/95
8:21A	8/3/97
8:22	7/11/96
8:23	12/13/94
8:24	4/14/98
8:25	5/11/98
8:26	4/12/96
8:31	1/16/95
8:31A	2/20/95
8:31B	8/17/95
8:31C	4/20/97
8:33	7/27/95
8:33A	11/25/97
8:33B	7/27/95
8:33C	9/8/97
8:33E	EXPIRED RULES
8:33F	11/16/94
8:33H	9/8/97
8:33I	2/16/95
8:33J	4/24/94
8:33K	3/27/94
8:33L	11/16/92
8:33M	7/17/94
8:33N	5/15/94
8:33P	3/19/95
8:33Q	11/19/95
8:33R	12/11/94
8:33S	10/4/98
8:34	11/1/98
8:35A	9/8/97
8:38	4/3/94
8:39	6/14/98
8:40	12/6/96
8:41	6/21/98
8:41A	2/18/97
8:42	8/17/97
8:42A	6/19/94
8:42B	6/14/98
8:43	10/4/98
8:43A	8/16/98
8:43F	2/20/95
8:43G	2/5/95
8:43H	8/21/94
8:44	4/20/95
8:45	2/7/95
8:51	9/17/95
8:52	12/11/96
8:57	4/20/95
8:57A	4/20/95
8:59	9/29/94
8:60	5/3/95
8:61	10/4/96
8:65	6/17/96
8:66	3/5/95
8:66A	3/5/95
8:70	6/14/98
8:71	2/17/94
8:80	4/6/97
8:100	7/20/97

HIGHER EDUCATION—TITLE 9

N.J.A.C.	Expiration Date
9:1	9/30/98
9:2	5/4/95
9:3	9/27/93
9:4	9/26/96
9:5	4/1/96
9:6	4/30/95
9:6A	3/15/98
9:7	11/6/97
9:8	10/15/95
9:9	8/16/98
9:11	4/17/94
9:12	4/17/94
9:14	4/11/95
9:15	8/21/94
9:16	1/19/98

HUMAN SERVICES—TITLE 10

N.J.A.C.	Expiration Date
10:1A	5/12/98
10:2	12/11/96
10:3	10/22/98
10:4	Exempt (28 C.F.R. Part 35)
10:6	1/7/96
10:7	1/21/97
10:11	1/16/95
10:12	12/23/96
10:13	7/18/93
10:14	5/7/98
10:15	1/1/95
10:15A	1/1/95
10:15B	1/1/95
10:15C	1/1/95
10:16	12/21/97
10:31	6/5/94
10:35	9/21/97
10:36	12/29/97
10:37	11/2/95
10:38	4/29/96
10:38A	7/19/98
10:39	5/7/95
10:40	5/11/94
10:41	3/20/94
10:42	8/19/96
10:43	8/21/94
10:44A	11/8/98
10:44B	7/16/95
10:45	2/20/95
10:46	9/17/95
10:47	11/2/95
10:48	12/19/95
10:49	8/17/97
10:50	2/27/96
10:51	9/7/98
10:52	2/8/95
10:53	4/27/95
10:53A	11/2/97
10:54	2/15/96
10:55	3/8/95
10:56	8/21/96
10:57	2/13/96
10:58	2/22/96
10:59	2/15/96
10:60	2/19/96
10:61	2/15/96
10:62	12/19/93
10:63	11/28/94
10:64	2/22/96
10:65	2/19/96
10:66	12/6/98
10:67	2/19/96
10:68	6/28/96
10:69	5/14/98
10:69A	3/26/98
10:69B	10/21/98
10:70	6/7/96
10:71	12/24/95
10:72	8/24/97
10:73	7/15/96
10:80	9/27/98
10:81	8/24/94
10:82	8/24/94
10:83	11/2/97
10:85	12/20/94
10:86	9/21/97
10:87	1/27/94

N.J.A.C.	Expiration Date
10:89	5/24/95
10:90	10/14/92
10:91	9/4/95
10:95	Exempt
10:97	5/15/94
10:99	6/4/95
10:109	2/4/96
10:120	7/9/96
10:121	7/16/95
10:121A	11/25/97
10:122	5/15/94
10:122A	Exempt
10:122B	1/4/98
10:122C	1/4/98
10:122D	1/4/98
10:122E	1/4/98
10:123	7/13/95
10:123A	8/17/97
10:124	11/4/97
10:125	6/4/95
10:126	10/6/98
10:126A	5/7/95
10:127	8/16/98
10:128	2/19/96
10:129	7/13/95
10:130	7/2/95
10:131	10/7/97
10:132	10/25/96
10:133	1/4/98
10:133A	1/4/98
10:133B	1/4/98
10:133C	1/4/98
10:133D	11/1/98
10:141	2/7/94
10:150	10/22/97

CORRECTIONS—TITLE 10A

N.J.A.C.	Expiration Date
10A:1	6/1/97
10A:1-3	Exempt (28 C.F.R. Part 35)
10A:2	2/5/95
10A:3	9/16/96
10A:4	5/7/96
10A:5	6/17/96
10A:6	10/27/97
10A:8	8/19/97
10A:9	2/18/97
10A:10	7/9/97
10A:16	7/6/97
10A:17	2/3/97
10A:18	5/27/97
10A:19	8/21/94
10A:20	2/18/97
10A:21	2/4/96
10A:22	7/5/93
10A:23	7/6/97
10A:31	3/5/95
10A:32	4/16/95
10A:33	5/2/94
10A:34	4/6/97
10A:35	4/15/96
10A:70	Exempt
10A:71	2/5/95

INSURANCE—TITLE 11

N.J.A.C.	Expiration Date
11:1	1/31/96
11:1-3	Exempt (28 C.F.R. Part 35)
11:2	11/30/95
11:3	1/4/96
11:4	11/30/95
11:5	10/15/98
11:6	7/6/98
11:7	9/25/97
11:10	7/12/95
11:12	9/27/96
11:13	11/10/97
11:15	10/26/94
11:16	1/31/96
11:17	4/15/98
11:17A	1/2/95
11:17B	1/2/95
11:17C	1/2/95
11:17D	1/2/95
11:18	12/18/94
11:19	2/1/98
11:20	8/13/98
11:21	10/15/98

LABOR—TITLE 12

N.J.A.C.	Expiration Date
12:3	12/19/93
12:5	10/18/98
12:6	9/24/98
12:7	Exempt (28 C.F.R. Part 35)
12:15	7/30/95
12:16	3/23/95
12:17	1/4/96
12:18	3/5/98
12:19	7/2/95
12:20	8/14/94
12:35	7/16/95
12:40	2/5/95
12:41	1/17/94
12:45	5/2/93
12:51	11/22/96
12:55	12/16/96
12:56	9/26/95
12:57	9/26/95
12:58	9/26/95
12:60	3/19/98
12:61	12/16/96
12:90	12/15/94
12:100	9/22/94
12:102	5/21/95
12:105	1/11/96
12:110	1/8/98
12:112	8/27/98
12:120	5/3/95
12:175	11/10/98
12:190	2/1/98
12:195	6/14/98
12:196	8/6/95
12:200	8/3/95
12:210	12/16/96
12:235	5/3/96

COMMERCE AND ECONOMIC DEVELOPMENT—TITLE 12A

N.J.A.C.	Expiration Date
12A:1	Exempt (28 C.F.R. Part 35)
12A:9	5/28/98
12A:10-1	10/13/94
12A:11	4/30/98
12A:12	9/21/92
12A:31	7/16/95
12A:50	8/15/93
12A:54	8/15/93
12A:60	11/21/93
12A:80	7/2/95
12A:100	7/17/96
12A:120	7/27/98
12A:121	12/5/93

LAW AND PUBLIC SAFETY—TITLE 13

N.J.A.C.	Expiration Date
13:1	6/9/98
13:1C	Exempt (28 C.F.R. Part 35)
13:2	7/24/95
13:3	5/17/98
13:4	1/17/96
13:10	3/27/94
13:13	7/16/95
13:14	9/16/96
13:18	3/30/95
13:19	8/18/94
13:20	12/13/95
13:21	12/13/95
13:23	5/26/94
13:24	9/27/94
13:25	3/16/95
13:26	7/29/98
13:27	2/20/95
13:28	5/14/98
13:29	5/23/95
13:30	3/12/95
13:31	11/20/96
13:32	10/21/97
13:33	3/12/95
13:34	10/22/98
13:35	9/21/94
13:36	9/27/94
13:37	1/23/95
13:38	8/27/95
13:39	6/19/94
13:39A	6/21/96
13:40	8/3/95
13:40A	12/16/96
13:41	7/17/95
13:42	11/1/98
13:43	8/26/98
13:44	8/7/94
13:44B	11/2/97
13:44C	7/8/98
13:44D	8/7/94
13:44E	7/1/96
13:44F	6/15/97
13:44G	1/4/98
13:45A	11/9/95
13:45B	9/21/97
13:46	9/4/95
13:47	1/27/97
13:47A	10/2/97
13:47B	2/21/94
13:47C	6/9/94
13:47K	9/17/95
13:48	1/17/96
13:49	12/16/93
13:51	9/16/96
13:54	11/18/96
13:59	7/30/95
13:60	1/16/97
13:61	3/5/95
13:62	3/19/95
13:63	8/19/96
13:70	1/25/95
13:71	1/25/95
13:72	1/19/98
13:75	6/5/94
13:76	4/16/98
13:77	1/22/98
13:78	3/20/94
13:79	10/22/98
13:80	9/17/95
13:81	8/6/95

PUBLIC UTILITIES—TITLE 14

N.J.A.C.	Expiration Date
14:1	6/1/97
14:3	5/6/96
14:5	12/2/96
14:5A	1/4/98
14:6	9/3/96
14:9	4/1/96
14:10	9/6/96
14:11	3/1/98
14:12	11/4/96
14:17	4/24/94
14:18	7/26/95
14:25	3/5/95
14:29	3/4/96
14:30	2/19/96
14:32	1/22/96
14:38	4/1/96

ENERGY—TITLE 14A

N.J.A.C.	Expiration Date
14A:6	1/16/95
14A:8	1/16/95
14A:11	1/16/95
14A:13	EXPIRED RULES
14A:14	1/30/94

STATE—TITLE 15

N.J.A.C.	Expiration Date
15:1	Exempt (28 C.F.R. Part 35)
15:2	4/12/98
15:3	8/19/96
15:5	7/6/97
15:10	4/15/96

PUBLIC ADVOCATE—TITLE 15A

N.J.A.C.	Expiration Date
15A:2	12/27/94

TRANSPORTATION—TITLE 16

N.J.A.C.	Expiration Date
16:1	10/1/95
16:1A	6/16/94
16:1B	Exempt (28 C.F.R. Part 35)
16:4	9/16/96
16:5	11/20/94
16:6	8/7/94
16:7	3/6/94
16:20A	2/20/95
16:20B	2/20/95
16:21	8/6/95
16:21A	11/20/94
16:21B	12/3/95
16:22	12/18/95
16:24	2/5/95
16:25	8/9/98
16:25A	5/13/98
16:26	9/5/94
16:27	4/8/96
16:28	5/7/98
16:28A	5/7/98
16:29	5/7/98
16:30	5/7/98
16:31	5/7/98
16:31A	5/7/98
16:32	2/8/95
16:38	10/15/95
16:41	9/8/97
16:41B	7/2/95

N.J.A.C.	Expiration Date
16:41C	5/4/97
16:43	5/10/95
16:44	5/25/93
16:45	9/18/94
16:46	11/6/94
16:47	4/20/97
16:49	2/8/95
16:50	12/6/98
16:51	2/14/97
16:53	7/17/94
16:53B	7/3/94
16:53C	5/13/98
16:53D	5/3/94
16:54	7/6/98
16:55	5/13/98
16:56	8/7/94
16:60	5/13/98
16:61	5/13/98
16:62	2/26/95
16:72	3/20/96
16:73	5/18/97
16:74	12/16/96
16:75	5/13/93
16:76	2/6/94
16:77	3/5/95
16:78	12/17/95
16:79	9/12/96
16:80	10/5/98
16:81	10/5/98
16:82	9/5/94
16:83	1/19/98
16:84	11/1/98
16:85	11/1/98

TREASURY-GENERAL—TITLE 17

N.J.A.C.	Expiration Date
17:1	5/1/98
17:2	11/8/94
17:3	8/15/93
17:4	6/8/95
17:5	11/30/95
17:6	11/22/93
17:7	12/19/93
17:8	10/15/95
17:9	8/23/98
17:10	5/1/98
17:12	10/13/94
17:13	10/13/94
17:14	10/13/94
17:16	5/2/96
17:19	3/8/95
17:20	6/1/98
17:25	5/26/94
17:27	10/6/98
17:28	8/17/95
17:29	9/26/95
17:30	3/11/97
17:32	3/19/98
17:33	4/17/94
17:40	11/19/95
17:41	4/1/96
17:42	9/8/97

TREASURY-TAXATION—TITLE 18

N.J.A.C.	Expiration Date
18:1	7/21/94
18:2	11/1/98
18:3	3/14/94
18:5	3/14/94
18:6	3/14/94
18:7	3/14/94
18:8	2/24/94
18:9	6/4/98
18:12	10/4/98
18:12A	10/4/98
18:14	10/4/98
18:15	10/4/98
18:16	10/4/98
18:17	10/4/98
18:18	3/14/94
18:18A	2/3/97
18:19	3/14/94
18:21	2/19/96
18:22	2/24/94
18:23	2/24/94
18:23A	9/4/95
18:24	6/4/98
18:25	2/19/96
18:26	6/4/98
18:35	6/4/98
18:36	3/19/95
18:37	7/23/95
18:38	2/1/98
18:39	9/8/92

OTHER AGENCIES—TITLE 19

N.J.A.C.	Expiration Date
19:3	3/29/98
19:3A	11/4/96
19:3B	3/29/98
19:4	3/29/98
19:4A	3/29/98
19:6	5/6/96
19:8	5/17/98
19:9	9/13/98
19:10	9/5/94
19:11	8/20/95
19:12	7/17/96
19:14	8/20/95
19:16	7/17/96
19:17	6/7/98
19:18	5/21/95
19:20	2/5/95
19:25	10/1/95
19:30	7/23/95
19:31	8/20/95
19:40	8/24/94
19:40-6	Exempt (28 C.F.R. Part 35)
19:41	4/15/95
19:42	8/15/95
19:43	12/21/97
19:44	12/15/96
19:45	8/15/97
19:46	4/15/98
19:47	4/15/96
19:48	8/15/98
19:49	9/18/97
19:50	12/15/93
19:51	4/27/94
19:53	12/15/95
19:54	12/15/94
19:55	1/19/98
19:61	3/2/97
19:65	10/5/97
19:75	1/13/94

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 October 4, 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 SEPTEMBER 20, 1993

NEXT UPDATE: SUPPLEMENT OCTOBER 18, 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
24 N.J.R. 4307 and 4454	December 7, 1992
24 N.J.R. 4455 and 4606	December 21, 1992
25 N.J.R. 1 and 218	January 4, 1993
25 N.J.R. 219 and 388	January 19, 1993
25 N.J.R. 389 and 616	February 1, 1993
25 N.J.R. 619 and 736	February 16, 1993
25 N.J.R. 737 and 1030	March 1, 1993
25 N.J.R. 1031 and 1308	March 15, 1993
25 N.J.R. 1309 and 1620	April 5, 1993
25 N.J.R. 1621 and 1796	April 19, 1993
25 N.J.R. 1797 and 1912	May 3, 1993
25 N.J.R. 1913 and 2150	May 17, 1993
25 N.J.R. 2151 and 2620	June 7, 1993
25 N.J.R. 2621 and 2794	June 21, 1993
25 N.J.R. 2795 and 3050	July 6, 1993
25 N.J.R. 3051 and 3276	July 19, 1993
25 N.J.R. 3277 and 3582	August 2, 1993
25 N.J.R. 3583 and 3884	August 16, 1993
25 N.J.R. 3885 and 4360	September 7, 1993
25 N.J.R. 4361 and 4540	September 20, 1993
25 N.J.R. 4541 and 4694	October 4, 1993
25 N.J.R. 4695 and 4812	October 18, 1993
25 N.J.R. 4813 and 4980	November 1, 1993
25 N.J.R. 4981 and 5382	November 15, 1993
25 N.J.R. 5383 and 5728	December 6, 1993

N.J.A.C. CITATION		PROPOSAL NOTICE (N.J.R. CITATION)	DOCUMENT NUMBER	ADOPTION NOTICE (N.J.R. CITATION)
ADMINISTRATIVE LAW—TITLE 1				
1:10-1.1, 9.1, 9.2, 14.1, 14.2, 14.3, 18.1	Family Development hearings	25 N.J.R. 3888(a)		
Most recent update to Title 1: TRANSMITTAL 1993-2 (supplement September 20, 1993)				
AGRICULTURE—TITLE 2				
2:6	Animal health: biologics for diagnostic or therapeutic purposes	25 N.J.R. 4985(a)		
2:68	Commercial feeding stuffs	25 N.J.R. 3889(a)	R.1993 d.606	25 N.J.R. 5462(a)
2:69	Commercial fertilizers and soil conditioners	25 N.J.R. 4544(a)		
2:69-1.11	Commercial values of primary plant nutrients	25 N.J.R. 3585(a)		
2:76-5.1-5.4	Soil and water conservation project cost-sharing	25 N.J.R. 3279(a)	R.1993 d.521	25 N.J.R. 4899(a)
2:76-6.11	Farmland Preservation Program: acquisition of development easements	25 N.J.R. 3890(a)		
2:76-6.11	Farmland Preservation Program: correction to proposal and extension of comment period regarding acquisition of development easements	25 N.J.R. 4697(a)		
Most recent update to Title 2: TRANSMITTAL 1993-5 (supplement August 16, 1993)				
BANKING—TITLE 3				
3:1-13.2	Mortgage loans: fire insurance amount	25 N.J.R. 3585(b)	R.1993 d.520	25 N.J.R. 4900(a)
3:3-2.2, 2.3	Release of bank examination reports to independent auditors	25 N.J.R. 4819(a)		
3:4-1.6	Capital for interim conversion in merger or acquisition	25 N.J.R. 4545(a)		
3:4-2	Payment of stock options to directors, officers and employees of State depositories	25 N.J.R. 3586(a)	R.1993 d.565	25 N.J.R. 5145(a)
3:6-15.2	Disqualification of savings bank directors	25 N.J.R. 3586(b)		
3:11-7.11	Disqualification of bank directors	25 N.J.R. 3586(b)		
3:28-4.7, 4.12	Repair and improvement loans	25 N.J.R. 3587(a)	R.1993 d.517	25 N.J.R. 4900(b)
3:31	Repeal (see 3:28-4.7, 4.12)	25 N.J.R. 3587(a)	R.1993 d.517	25 N.J.R. 4900(b)
3:32	Conversion of associations and savings banks	25 N.J.R. 2799(a)	R.1993 d.535	25 N.J.R. 4900(c)
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)	R.1993 d.632	25 N.J.R. 5462(b)
3:41-5.1	Cemetery Board: cemetery company price lists	25 N.J.R. 4819(b)		
Most recent update to Title 3: TRANSMITTAL 1993-7 (supplement September 20, 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)	R.1993 d.614	25 N.J.R. 5464(a)
4A:3-4.10	State service: demotional pay adjustments	25 N.J.R. 4821(a)		
4A:4-2.2, 2.14	Equal employment opportunity	25 N.J.R. 4821(b)		
4A:4-2.9	Make-up examinations	25 N.J.R. 4823(a)		
4A:4-2.11	Residence requirements: administrative correction	_____	_____	25 N.J.R. 5145(b)
4A:4-7.8	Voluntary demotions	25 N.J.R. 4823(b)		

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4A:6-1.2, 1.6, 1.11, 1.12, 1.13	Leaves of absence	25 N.J.R. 4824(a)		
4A:6-1.3	Equal employment opportunity	25 N.J.R. 4821(b)		
4A:7-1.1, 2.1, 2.2, 2.3, 3.1	Equal employment opportunity	25 N.J.R. 4821(b)		
	Most recent update to Title 4A: TRANSMITTAL 1993-5 (supplement September 20, 1993)			
COMMUNITY AFFAIRS—TITLE 5				
5:10-1.12	Hotels and multiple dwellings: administrative correction	_____	_____	25 N.J.R. 4901(a)
5:18-1.4, 1.5, 2.1, 2.3, 2.5, 2.6, 2.11, 2.14, 4.1, 4.3	Uniform Fire Code	25 N.J.R. 4363(a)	R.1993 d.628	25 N.J.R. 5466(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-1.4, 2.2, 2.3, 2.5–2.11, 3.3, 3.4, 3.6, 4.2–4.6, 4.9, 4.10	Fire Code enforcement	25 N.J.R. 4363(a)	R.1993 d.628	25 N.J.R. 5466(a)
5:18B-2.8	High level alarms	25 N.J.R. 4363(a)	R.1993 d.628	25 N.J.R. 5466(a)
5:18C-1.4, 1.5, 1.7, 1.8, 1.9, 2.3	Fire service training and certification	25 N.J.R. 4363(a)	R.1993 d.628	25 N.J.R. 5466(a)
5:23-1.4, 2.7, 2.17A	Uniform Construction Code: minor work; ordinary repairs	25 N.J.R. 3692(a)	R.1993 d.580	25 N.J.R. 5145(c)
5:23-2.6, 2.14, 2.23, 3.2, 3.4, 3.8A, 3.11A, 3.14–3.18, 3.20, 3.20A, 3.21, 4.3A, 4A.8, 4A.11, 12.2	Uniform Construction Code: subcodes	25 N.J.R. 3891(a)		
5:23-2.7, 9.3	Uniform Construction Code: ordinary repairs; interpretation	25 N.J.R. 2159(a)	R.1993 d.487	25 N.J.R. 4592(a)
5:23-2.17A	Uniform Construction Code: reroofing work	25 N.J.R. 4546(a)		
5:23-2.18A, 3.11, 4.20	UCC: utility load management device permits; mausoleum plan review; Department fees	25 N.J.R. 4546(b)		
5:23-4.4, 4.5, 4.5A, 4.12, 4.14, 4.18, 4.20	Uniform Construction Code: private on-site inspection agencies	25 N.J.R. 2162(a)		
5:23-4.5	Uniform Construction Code: "Notice of Elevator Device Sealed Out of Operation"	25 N.J.R. 3693(a)	R.1993 d.581	25 N.J.R. 5146(a)
5:23-4.18	UCC: subcode training registration fee	25 N.J.R. 4548(a)		
5:25-5.5	New home warranties and builder registration: claims procedure	25 N.J.R. 4986(a)		
5:26-8.2	Meetings of community associations	25 N.J.R. 3693(b)	R.1993 d.522	25 N.J.R. 4901(b)
5:50	State Review Process for intergovernmental review of applications for Federal financial assistance and direct development activities	25 N.J.R. 3281(a)	R.1993 d.505	25 N.J.R. 4743(a)
5:80-23.9	Housing and Mortgage Finance Agency: Housing Incentive Note Purchase Program fees	25 N.J.R. 3053(a)		
5:80-24	Housing and Mortgage Finance Agency: Lease-Purchase Program	25 N.J.R. 4826(a)		
5:80-26.19	Housing and Mortgage Finance Agency: affordable housing controls	25 N.J.R. 4369(a)	R.1993 d.640	25 N.J.R. 5471(a)
5:80-29	Housing and Mortgage Finance Agency: investment of housing project funds	25 N.J.R. 4830(a)		
5:80-32	Housing and Mortgage Finance Agency: housing investment sales	25 NJ.R. 4828(a)		
5:92-1.1	Council on Affordable Housing: substantive rules	25 N.J.R. 1118(a)		
5:93	Council on Affordable Housing: substantive rules	25 N.J.R. 1118(a)		
	Most recent update to Title 5: TRANSMITTAL 1993-9 (supplement September 20, 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)	R.1993 d.615	25 N.J.R. 5472(a)
	Most recent update to Title 5A: TRANSMITTAL 1992-2 (supplement September 21, 1992)			
EDUCATION—TITLE 6				
6:1 et seq.	Title 6, New Jersey Administrative Code: opportunity for public comment	25 N.J.R. 4369(b)		
6:2	Appeals to State Board of Education	25 N.J.R. 4548(b)		
6:22A	School facility lease purchase agreements	25 N.J.R. 3588(a)	R.1993 d.544	25 N.J.R. 4901(c)

N.J.A.C. CITATION		PROPOSAL NOTICE (N.J.R. CITATION)	DOCUMENT NUMBER	ADOPTION NOTICE (N.J.R. CITATION)
6:28-4.1	Special education: administrative correction	_____	_____	25 N.J.R. 4743(b)
6:78	Marie H. Katzenbach School for the Deaf	25 N.J.R. 3592(a)	R.1993 d.543	25 N.J.R. 4904(a)
	Most recent update to Title 6: TRANSMITTAL 1993-6 (supplement August 16, 1993)			
ENVIRONMENTAL PROTECTION AND ENERGY—TITLE 7				
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)		
7:0	Site Remediation Program: analysis of strict, joint and several liability under the New Jersey Spill Compensation Act	25 N.J.R. 3694(a)		
7:1D	Allocation of water supply costs for emergency water projects	25 N.J.R. 2635(a)	R.1993 d.497	25 N.J.R. 4595(a)
7:1E	Discharges of petroleum and other hazardous substances: request for public comment on draft amendments	25 N.J.R. 2636(a)		
7:1G-1–5, 7	Worker and Community Right to Know	25 N.J.R. 1631(a)		
7:1G-2.1, 6.4	Environmental Hazardous Substances and Industrial Survey lists: copper phthalocyanine compounds; confidentiality	25 N.J.R. 2166(a)	R.1993 d.408	25 N.J.R. 3754(a)
7:1I	Sanitary Landfill Facility Closure and Contingency Fund: processing of damage claims	25 N.J.R. 5116(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)		
7:2-2.20, 3.6, 6.4, 8.4, 8.6, 10.2, 16.5, 17.1, 17.3, 17.4, 17.5	State Park Service Code	25 N.J.R. 2799(b)		
7:4B	Historic Preservation Revolving Loan Program	25 N.J.R. 748(a)	R.1993 d.637	25 N.J.R. 5694(a)
7:7A-1.4, 2.7	Freshwater Wetlands Protection Act rules: definition of project	25 N.J.R. 1642(a)		
7:7E-7.4	Coastal zone management: Outer Continental Shelf oil and gas exploration and development	25 N.J.R. 5(a)	R.1993 d.549	25 N.J.R. 5146(b)
7:9-1.1	Treatment works approval, sewer bans and sewer ban exemptions	25 N.J.R. 3282(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)	R.1993 d.610	25 N.J.R. 5569(a)
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)		
7:9-4.15	Water surface quality standards: Wallkill River	25 N.J.R. 3755(a)		
7:13-7.1	Delaware River, Pohatcong Township: flood plain redelineation	25 N.J.R. 4370(a)		
7:13-7.1	Overpeck Creek, Englewood: flood plain redelineation	25 N.J.R. 4371(a)		
7:13-7.1	Poplar Brook, Deal: flood plain redelineation	25 N.J.R. 4372(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-1.9, 3.14	Surface water quality standards	24 N.J.R. 3983(a)	R.1993 d.610	25 N.J.R. 5569(a)
7:14A-1.9, 12, 22, 23	Treatment works approval, sewer bans and exemptions	25 N.J.R. 3282(a)		
7:14A-2.5	NJPDES Program: administrative correction regarding permittee requirements	_____	_____	25 N.J.R. 4791(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)		
7:15-5.18	Treatment works approval, sewer bans and exemptions	25 N.J.R. 3282(a)		
7:20A	Water usage certifications for agricultural or horticultural purposes	25 N.J.R. 3956(a)		
7:25-6	1994-95 Fish Code	25 N.J.R. 3053(b)	R.1993 d.526	25 N.J.R. 4905(a)
7:25-7.13, 14.1, 14.2, 14.4–14.8, 14.10–14.13	Crab management	25 N.J.R. 4831(a)		
7:25-18.1, 18.14	Summer flounder permit conditions	25 N.J.R. 2167(a)		
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)		
7:26-1.9, 11.4, 12.9	Waste management: administrative corrections	_____	_____	25 N.J.R. 4595(b)

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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)	R.1993 d.508	25 N.J.R. 4763(a)
7:26-6.6	Procedure for modification of waste flows	25 N.J.R. 991(a)		
7:26-8.8, 8.12, 8.19	Handling of substances displaying the Toxicity Characteristic	25 N.J.R. 753(a)		
7:26-12.3	Hazardous waste management: interim status facilities	24 N.J.R. 4253(a)	R.1993 d.638	25 N.J.R. 5664(a)
7:26B-1.3, 1.10, 1.11, 1.12	Environmental Cleanup Responsibility Act Program fees	25 N.J.R. 1375(a)		
7:26C	Site Remediation Program: opportunity for comment on draft remedial priority system	25 N.J.R. 4551(c)		
7:27-1, 8, 18, 22	Air pollution control: facility operating permits	25 N.J.R. 3963(a)		
7:27-1, 8, 18, 21, 22	Air pollution control: extension of comment period regarding facility operating permits, emission statements, and penalties	25 N.J.R. 4836(a)		
7:27-1.4, 2.1, 8.1, 8.2, 16, 17.1, 17.3, 17.4, 23.1-23.7, 25.1, 25.7	Air pollution by volatile organic compounds: control and prohibition	25 N.J.R. 3339(a)		
7:27-1.4, 2.1, 8.1, 8.2, 16, 17.1, 17.3, 17.4, 23.1–23.7, 25.1, 25.7	Air pollution control: extension of comment period	25 N.J.R. 4551(a)		
7:27-15.1, 15.2, 15.4-15.10	Air quality management: enhanced inspection and maintenance program	25 N.J.R. 3322(a)		
7:27-15.4	Air quality management: enhanced Inspection and Maintenance program	25 N.J.R. 5130(a)		
7:27-19	Control and prohibition of air pollution from oxides of nitrogen	25 N.J.R. 631(a)		
7:27-21.1–21.5, 21.8, 21.9, 21.10	Air pollution control: facility emission statements	25 N.J.R. 4033(a)		
7:27-25.1, 25.3, 25.4, 25.9, 25.10, 25.11, 25.12	Oxygenated fuels program	25 N.J.R. 4039(a)		
7:27-26	Low Emissions Vehicle Program	25 N.J.R. 1381(a)		
7:27A-3.2, 3.5, 3.10	Air pollution control: administrative penalties and requests for adjudicatory hearings	25 N.J.R. 4045(a)		
7:27A-3.2, 3.10	Air pollution civil administrative penalties	25 N.J.R. 3339(a)		
7:27A-3.2, 3.10	Air pollution civil administrative penalties: extension of comment period	25 N.J.R. 4551(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)		
7:27A-3.10	Air pollution control: facility emission statement penalties	25 N.J.R. 4033(a)		
7:27A-3.10	Oxygenated fuels program penalties	25 N.J.R. 4039(a)		
7:27A-3.10	Air quality management: enhanced Inspection and Maintenance program	25 N.J.R. 5130(a)		
7:27B-3.1, 3.10	Air pollution sampling and analytical procedures	25 N.J.R. 3339(a)		
7:27B-3.1, 3.10	Air pollution sampling and analytical procedures: extension of comment period	25 N.J.R. 4551(a)		
7:27B-4.1, 4.5–4.10	Air quality management: enhanced inspection and maintenance program	25 N.J.R. 3322(a)		
7:27B-4.5, 4.6, 4.9	Air quality management: enhanced Inspection and Maintenance program	25 N.J.R. 5130(a)		
7:28-1.4	Radiation protection: administrative corrections	_____	_____	25 N.J.R. 5665(a)
7:28-15	Medical diagnostic X-ray installations: administrative correction	_____	_____	25 N.J.R. 5148(a)
7:28-15, 16.2, 16.8	Medical diagnostic x-ray installations; dental radiographic installations	25 N.J.R. 7(a)	R.1993 d.510	25 N.J.R. 4770(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)		
7:36	Green Acres Program: opportunity to review draft rule revisions	25 N.J.R. 1473(a)		
7:31-2.5, App. I	Toxic Catastrophe Prevention Act rules: administrative corrections	_____	_____	25 N.J.R. 4791(b)
7:36	Green Acres Grant Program	25 N.J.R. 3405(a)	R.1993 d.609	25 N.J.R. 5666(a)
7:45	Delaware and Raritan Canal State Park Review Zone	25 N.J.R. 4836(b)		

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HEALTH—TITLE 8				
8:2A-1	Access to death records	25 N.J.R. 3115(a)		
8:21-10.1, 10.2, 10.4, 10.6, 10.12	Milk and fluid milk products	25 N.J.R. 4373(a)		
8:23-6	Pilot low-cost spaying and neutering clinic surgery fees	25 N.J.R. 3116(a)	R.1993 d.568	25 N.J.R. 5148(a)

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8:24	Packing of refrigerated foods in reduced oxygen packages by retail establishments: preproposal	25 N.J.R. 660(b)		
8:25-2.1, 2.3	Youth Camp Safety Act standards: administrative corrections	———	———	25 N.J.R. 4744(a)
8:31B	Hospital financing	25 N.J.R. 3117(a)	R.1993 d.593	25 N.J.R. 5149(a)
8:31B	Hospital financing: correction to proposal	25 N.J.R. 3566(a)		
8:31B-3.41, 4.38, 4.39, 4.40, 7	Hospital reimbursement: uncompensated care	25 N.J.R. 3125(a)		
8:31B-4.41-4.41N	Hospital reimbursement: charity care audit functions	25 N.J.R. 3707(a)	R.1993 d.592	25 N.J.R. 5154(a)
8:33A-1.2, 1.16	Hospital Policy Manual: applicant preference; equity requirement	24 N.J.R. 4476(a)		
8:33A-1.10, 1.16, 1.29	Hospital Policy Manual: capital cap and review process	25 N.J.R. 3710(a)	R.1993 d.570	25 N.J.R. 5161(a)
8:33E	Cardiac diagnostic facilities and surgery centers: certificate of need	25 N.J.R. 3712(a)		
8:33H	Long-term care services: certificate of need policy	25 N.J.R. 3719(a)		
8:33S	Surgical facilities: certificate of need	25 N.J.R. 2790(a)	R.1993 d.498	25 N.J.R. 4626(a)
8:34	Nursing home administrators: standards for licensing	25 N.J.R. 3727(a)	R.1993 d.545	25 N.J.R. 4908(a)
8:36	Assisted living residences and comprehensive personal care homes: standards for licensure	25 N.J.R. 3734(a)		
8:40-1.1, 2.3, 2.7, 3.1, 4.12, 5.23, 6.26	Invalid coach and ambulance services: licensure; street EMS	25 N.J.R. 2663(a)	R.1993 d.594	25 N.J.R. 5163(a)
8:41-4.1, 10.5-10.13, 11	Mobile intensive care programs: standing orders; paramedic clinical training objectives	25 N.J.R. 2665(a)		
8:43	Licensure of residential health care facilities	25 N.J.R. 25(a)	R.1993 d.473	25 N.J.R. 4631(a)
8:43	Licensure of residential health care facilities: public hearing	25 N.J.R. 757(a)		
8:44	Operation of clinical laboratories	25 N.J.R. 3904(a)	R.1993 d.595	25 N.J.R. 5164(a)
8:44-2.1, 2.14	Clinical laboratory licensure: HIV testing	25 N.J.R. 2184(a)		
8:44-2.11	Clinical laboratories: reporting by supervisors	25 N.J.R. 3751(a)		
8:57-3.2	Physician reporting of occupational and environmental diseases and injuries	25 N.J.R. 2186(a)	R.1993 d.569	25 N.J.R. 5164(b)
8:59-5.6	Worker and Community Right to Know: exclusions from labeling requirements	25 N.J.R. 3441(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)		
8:71	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); 25 N.J.R. 583(a))	24 N.J.R. 2414(b)	R.1993 d.338	25 N.J.R. 2882(b)
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 (see 25 N.J.R. 580(b), 2883(a))	24 N.J.R. 4009(a)	R.1993 d.468	25 N.J.R. 4497(a)
8:71	Interchangeable drug products (see 25 N.J.R. 1221(a), 1969(c), 2882(a))	25 N.J.R. 55(a)	R.1993 d.467	25 N.J.R. 4496(b)
8:71	Interchangeable drug products (see 25 N.J.R. 1970(c), 2881(b))	25 N.J.R. 875(a)	R.1993 d.469	25 N.J.R. 4497(b)
8:71	Interchangeable drug products (see 25 N.J.R. 2881(a))	25 N.J.R. 1814(b)	R.1993 d.466	25 N.J.R. 4496(a)
8:71	Interchangeable drug products	25 N.J.R. 1815(a)	R.1993 d.334	25 N.J.R. 2879(c)
8:71	Interchangeable drug products	25 N.J.R. 2802(b)	R.1993 d.465	25 N.J.R. 4495(b)
8:71	Interchangeable drug products	25 N.J.R. 3906(a)		
8:71	List of Interchangeable Drug Products	25 N.J.R. 4377(a)		
8:71	Interchangeable drug products	25 N.J.R. 4844(a)		

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HIGHER EDUCATION—TITLE 9

9:1	Licensing and degree approval standards	25 N.J.R. 3057(a)	R.1993 d.523	25 N.J.R. 4915(a)
9:2-11	Disability discrimination grievance procedure regarding compliance with Americans with Disabilities Act (ADA)	25 N.J.R. 1323(a)		
9:5-2.1, 2.2, 2.3, 2.5, 2.7	Job training program: unemployed persons tuition waiver	25 N.J.R. 3593(a)		
9:7-9	Paul Douglas Teacher Scholarship Program	25 N.J.R. 3594(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)	R.1993 d.480	25 N.J.R. 4596(a)
9:11-1.4	Educational Opportunity Fund Program: financial eligibility for undergraduate grants	25 N.J.R. 4886(a)		
9:11-1.5	Educational Opportunity Fund Program: financial eligibility for undergraduate grants	25 N.J.R. 1946(a)	R.1993 d.479	25 N.J.R. 4597(a)
9:17	Implementing the Higher Education Equipment Leasing Fund	25 N.J.R. 4887(a)		

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N.J.A.C. CITATION		PROPOSAL NOTICE (N.J.R. CITATION)	DOCUMENT NUMBER	ADOPTION NOTICE (N.J.R. CITATION)
HUMAN SERVICES—TITLE 10				
10:3	Contract administration	25 N.J.R. 3694(b)	R.1993 d.597	25 N.J.R. 5165(a)
10:4	Disability discrimination grievance procedure regarding compliance with Americans with Disabilities Act (ADA)	25 N.J.R. 1323(b)	R.1993 d.616	25 N.J.R. 5526(a)
10:8	Patient advance directives; DNR orders; declaration of death	25 N.J.R. 2669(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)		
10:37-5.37–5.43	Repeal (see 10:37A)	25 N.J.R. 2672(a)		
10:37A	Community residences for mentally ill adults	25 N.J.R. 2672(a)		
10:37B	Psychiatric community residences for youth	25 N.J.R. 2197(a)		
10:37C	Community mental health clinical case management	25 N.J.R. 4845(a)		
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10:44A	Licensed community residences to developmentally disabled	25 N.J.R. 4378(a)	R.1993 d.633	25 N.J.R. 5528(a)
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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)		
10:52-1.23	Inpatient hospital services: adjustments to Medicaid payer factors	24 N.J.R. 4478(a)		
10:53-1.1	Reimbursement methodology for special hospitals	24 N.J.R. 4477(a)		
10:60-1.1–1.17, 2.2, 2.4, 2.5, 2.8, 2.9, 2.10, 2.12, 2.14, 2.15, 2.16, 3.2, 3.3, 3.6, 4.2, 6, App. A, H	Home Care Services Manual	25 N.J.R. 2803(a)	R.1993 d.588	25 N.J.R. 5167(a)
10:62	Vision care services	25 N.J.R. 3907(a)		
10:66	Independent clinic services: Medicaid program services	25 N.J.R. 4379(a)	R.1993 d.641	25 N.J.R. 5528(c)
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10:69B	Lifeline Programs	25 N.J.R. 3701(a)	R.1993 d.586	25 N.J.R. 5167(b)
10:69B-4.2	Lifeline programs: income eligibility limits	25 N.J.R. 3407(a)	R.1993 d.608	25 N.J.R. 5528(b)
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10:81-8.22	Medicaid eligibility of dependent child of adolescent parent	25 N.J.R. 2815(a)	R.1993 d.519	25 N.J.R. 4931(b)
10:81-10.7, 10.8	Refugee Resettlement Program: eligibility limitations	25 N.J.R. 3919(a)		
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10:81-11.7, 11.9	Non-AFDC child support orders	25 N.J.R. 2816(a)		
10:81-11.21	Review and adjustment of child support orders in AFDC, foster care, and Medicaid Only cases	25 N.J.R. 2818(a)	R.1993 d.627	25 N.J.R. 5567(a)
10:81-14.18A	Child care services: payment rates and co-payment fees	25 N.J.R. 1692(a)		
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10:82-5.3	Child care services: payment rates and co-payment fees	25 N.J.R. 1692(a)		
10:84	Administration of public assistance programs: agency action on public hearing	24 N.J.R. 4480(a)		
10:84-1	Administration of public assistance programs	24 N.J.R. 4480(b)		
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10:97-1.3, 3.1	Commission for the Blind and Visually Impaired: licensing procedure for Business Enterprise Program	25 N.J.R. 4551(d)		
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10:122	Manual of Requirements for Child Care Centers	25 N.J.R. 4987(a)		
10:123-3.4	Personal needs allowance for eligible residents of residential health care facilities and boarding houses	25 N.J.R. 2684(a)	R.1993 d.489	25 N.J.R. 4598(a)
10:126	Family day care registration: manual of requirements	25 N.J.R. 3703(a)	R.1993 d.533	25 N.J.R. 4932(b)
10:127-2.1, 3.7, 3.8, 5.2, 8.1, 8.4, 9.1, 9.10, 10.4, 10.13, 10.15, 10.16, 10.25	Residential child care facilities requirements: administrative correction	———	———	25 N.J.R. 4932(c)
10:133C-4	Division of Youth and Family Services: case goals	25 N.J.R. 1947(a)	R.1993 d.490	25 N.J.R. 4598(b)
10:133D-2	DYFS case management: case plan	25 N.J.R. 2209(a)	R.1993 d.534	25 N.J.R. 4934(a)

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10:133D-4	DYFS case management: in-person visits with clients and substitute care providers	25 N.J.R. 2210(a)	R.1993 d.587	25 N.J.R. 5168(b)
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10A:1-3	Disability discrimination grievance procedure regarding compliance with Americans with Disabilities Act (ADA)	25 N.J.R. 1326(b)	R.1993 d.617	25 N.J.R. 5474(a)
10A:2-2.2	Inmate accounts: transaction fees	25 N.J.R. 4849(a)		
10A:3-1.4, 2.3	Inmate keep separate status	25 N.J.R. 4702(a)		
10A:4-4.1	Inmate discipline: sexual assault	25 N.J.R. 3416(a)	R.1993 d.488	25 N.J.R. 4599(a)
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10A:9-5.5	Restoration to inmates of forfeited commutation credits	25 N.J.R. 4553(a)	R.1993 d.636	25 N.J.R. 5476(a)
10A:16-9.1	Blood donation by inmates: autologous donations	25 N.J.R. 3920(a)	R.1993 d.567	25 N.J.R. 5170(a)
10A:31-6.13	Reimbursement for copying costs	25 N.J.R. 4552(a)	R.1993 d.635	25 N.J.R. 5475(a)
10A:71-3.21	State Parole Board: future parole eligibility terms	25 N.J.R. 4703(a)		
10A:71-3.47	State Parole Board: victim input	25 N.J.R. 4705(a)		
10A:71-7.16	State Parole Board: general conditions of parole and future eligibility upon revocation	25 N.J.R. 3597(a)		
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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, 35	Insurance holding company systems	25 N.J.R. 4275(a)	R.1993 d.554	25 N.J.R. 5170(b)
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11:1-36	Examination of insurers	25 N.J.R. 4284(a)	R.1993 d.555	25 N.J.R. 5180(a)
11:2-17.11	Payment of third-party claims: written notice by insurer to claimant	25 N.J.R. 3921(a)		
11:2-27	Determination of insurers in a hazardous financial condition	25 N.J.R. 4286(a)	R.1993 d.556	25 N.J.R. 5182(a)
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11:2-34	Surplus lines: allocation of premium tax and surcharge	25 N.J.R. 1826(a)	R.1993 d.582	25 N.J.R. 5194(a)
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11:2-37	Producer-controlled insurers	25 N.J.R. 4304(a)	R.1993 d.559	25 N.J.R. 5202(a)
11:2-38	Increase in property and casualty capital and surplus requirements	25 N.J.R. 4306(a)	R.1993 d.560	25 N.J.R. 5204(a)
11:2-39	Increase in capital and surplus requirements for life and health insurers	25 N.J.R. 4309(a)	R.1993 d.561	25 N.J.R. 5208(a)
11:2-40	Life, health and annuity reinsurance agreements	25 N.J.R. 4314(a)	R.1993 d.562	25 N.J.R. 5212(a)
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11:3-3	Limited assignment distribution servicing carriers	25 N.J.R. 1327(b)		
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11:5-1.3	Real Estate Commission: broker pre-licensure requirements	25 N.J.R. 4849(b)		
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11:5-1.9	Real Estate Commission: transmittal of funds to lenders	24 N.J.R. 4268(a)	Expired	
11:5-1.10	Real Estate Commission: compensation and licensure requirement	25 N.J.R. 4851(a)		

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11:5-1.28	Real Estate Commission: licensure requirements for schools and instructors	25 N.J.R. 4855(a)		
11:5-1.31	Real Estate Commission: license transfer procedure	25 N.J.R. 4858(a)		
11:5-1.43	Real Estate Commission: licensee provision of Agency Information Statement	25 N.J.R. 1948(a)		
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11:20-2	Individual Health Coverage Program: temporary plan of operation	25 N.J.R. 4707(a)	R.1993 d.550	25 N.J.R. 5244(a)
11:20-11	Individual Health Insurance Reform Act: relief from obligations	25 N.J.R. 4559(a)		
11:21	Small Employer Health Benefits Program	25 N.J.R. 3599(a)	R.1993 d.553	25 N.J.R. 5253(a)
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11:21-2	Small Employer Health Benefits Program: Plan of Operation	25 N.J.R. 4563(a)		
11:21-2	Small Employer Health Benefits Program: public hearing on Plan of Operation	25 N.J.R. 4678(a)		
11:21-14	Small Employer Health Benefits Program: declaration and approval of reinsuring or risk-assuming carrier status	25 N.J.R. 4572(a)	R.1993 d.551	25 N.J.R. 5347(a)
11:21-15	Small Employer Health Benefits Program: relief from obligations	25 N.J.R. 4577(a)	R.1993 d.629	25 N.J.R. 5692(a)
11:21-16	Small Employer Health Benefits Program: withdrawal of carriers from plans market	25 N.J.R. 4859(a)		
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12:7	Disability discrimination grievance procedure regarding compliance with Americans with Disabilities Act (ADA)	25 N.J.R. 1334(a)	R.1993 d.619	25 N.J.R. 5476(b)
12:7	Disability discrimination grievance procedure regarding compliance with Americans with Disabilities Act (ADA): extension of comment period	25 N.J.R. 2216(a)		
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12:17-11.2	Offset of unemployment benefits by retirement and pension income	25 N.J.R. 3923(a)	R.1993 d.590	25 N.J.R. 5352(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)		
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12:23-4	Workforce Development Partnership Program: application and review process for approved training	25 N.J.R. 886(a)		
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12:45	Vocational Rehabilitation Services: waiver of sunset provision of Executive Order No. 66(1978)	25 N.J.R. 2216(b)		
12:45	Division of Vocational Rehabilitation Services	25 N.J.R. 5130(b)		
12:175	Ski lift safety	25 N.J.R. 4581(a)	R.1993 d.639	25 N.J.R. 5478(a)
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12A:11-1.2, 1.3, 1.4, 1.7	Certification of women-owned and minority-owned businesses: extension of comment period	25 N.J.R. 2216(c)		
12A:11-1.2, 1.3, 1.4, 1.7	Certification of women-owned and minority-owned businesses	25 N.J.R. 2484(a)		
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13:19-10.1	Operating motorcycle or motorized bicycle without protective helmet	25 N.J.R. 2646(a)	R.1993 d.486	25 N.J.R. 4599(b)
13:20-43	Enhanced motor vehicle inspection and maintenance program: pre-proposal	25 N.J.R. 3418(a)		
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13:29-1.13	Board of Accountancy: biennial renewal fee for inactive or retired licensees	25 N.J.R. 1665(b)	R.1993 d.585	25 N.J.R. 5352(c)
13:30-1.1	Board of Dentistry: qualifications of applicants for licensure to practice	25 N.J.R. 2216(d)		
13:30-8.1	Board of Dentistry: fee schedules	25 N.J.R. 3927(a)	R.1993 d.598	25 N.J.R. 5352(d)
13:30-8.6	Board of Dentistry: professional advertising	25 N.J.R. 2823(a)		
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13:34	Board of Marriage Counselor Examiners rules	25 N.J.R. 3060(a)	R.1993 d.599	25 N.J.R. 5485(a)
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13:37-7	Certification of nurse practitioners/clinical nurse specialists	25 N.J.R. 2829(a)		
13:37-12.1	Board of Nursing: fee schedule	25 N.J.R. 3928(a)		
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13:41-2.1	Board of Professional Planners: professional misconduct	24 N.J.R. 3221(a)	R.1993 d.506	25 N.J.R. 4748(c)
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13:44E-1.1	Board of Chiropractic Examiners: scope of chiropractic practice	25 N.J.R. 3931(b)		
13:44E-2.1	Board of Chiropractic Examiners: licensee advertising	25 N.J.R. 3932(a)		
13:44E-2.6	Board of Chiropractic Examiners: practice identification educational requirements	25 N.J.R. 3934(a)		
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13:44E-2.9	Board of Chiropractic Examiners: notification of change of address; service of process	25 N.J.R. 3936(a)		
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13:44E-2.14	Board of Chiropractic Examiners: referral of patients to physical therapists	25 N.J.R. 3938(a)	R.1993 d.642	25 N.J.R. 5488(a)
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13:45A-21, 22	Kosher Enforcement Bureau: sale of food represented as kosher	25 N.J.R. 3086(a)		
13:45A-26	Automotive dispute resolution	25 N.J.R. 3939(a)		
13:46-2	Athletic Control Board: participant health and safety in boxing and combative sports events	25 N.J.R. 4717(a)		
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