

NEW JERSEY REGISTER



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(Includes adopted rules filed through November 30, 1987)

MOST RECENT UPDATE TO NEW JERSEY ADMINISTRATIVE CODE: OCTOBER 19, 1987.

See the Register Index for Subsequent Rulemaking Activity.

NEXT UPDATE WILL BE DATED NOVEMBER 16, 1987.

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EDUCATION, DEPARTMENT OF
DIV. LIBRARY, ARCHIVES, & HISTO
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TRENTON NJ 08625
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NEW JERSEY PROPOSED
DEC. 8 1987
185 W. STATE ST.
TRENTON, NJ 08646

INTERESTED PERSONS

Interested persons may submit, in writing, information or arguments concerning any of the rule proposals in this issue until **January 20, 1988**. Submissions and any inquiries about submissions should be addressed to the agency officer specified for a particular proposal or group of proposals. On occasion, a proposing agency may extend the 30-day comment period to accommodate public hearings or to elicit greater public response to a proposed new rule or amendment. An extended comment deadline will be noted in the heading of a proposal or appear in a subsequent notice in the Register.

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

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NEW JERSEY REGISTER

The official publication containing notices of proposed rules and rules adopted by State agencies pursuant to the New Jersey Constitution, Art. V, Sec. IV, Para. 6 and the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. Issued monthly since September 1969, and twice-monthly since November 1981.

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RULE PROPOSALS

ADMINISTRATIVE LAW

(a)

OFFICE OF ADMINISTRATIVE LAW

Uniform Administrative Procedure Rules

Interlocutory Review; Decision by Agency Head

Withdrawal of Proposed Amendment: N.J.A.C.

1:1-14.10.

As a result of comments received in response to the proposed amendment of N.J.A.C. 1:1-14.10 (see, 19 N.J.R. 1591(c)), the Office of Administrative Law has decided to withdraw the proposal. The proposed change involved requests for interlocutory review of ALJ rulings; such requests are made to an agency head and within 10 days the agency head must decide whether to review the ruling. The proposed amendment would have allowed agency heads which consist of more than one individual (such as boards or commissions) to designate an individual to make this decision when it was impossible for the entire multi-member agency head to meet the 10-day deadline.

The OAL now believes that the proposed solution would not have accomplished what was intended. Both the Attorney General's Office and the Department of the Public Advocate, Division of Rate Counsel, questioned whether this type of decision could be delegated by agency heads in the absence of statutory authority. After receiving these comments, the OAL did further research. The OAL still questions whether this type of decision would in all cases constitute discretionary action that cannot be delegated. It is true, however, that most multi-member agency heads do not have statutory delegation authority and that, in most cases, this decision would be discretionary. Therefore, even if the OAL adopted the proposed amendment, agency heads in most instances may be precluded from delegating this decision.

Besides the Attorney General's office and the Department of the Public Advocate, Division of Rate Counsel, the OAL received comments from the Department of Personnel and Atlantic Electric. Atlantic Electric commented that the individual designated to decide requests for interlocutory review should be the chairperson of the multi-member agency head rather than a member of the staff of the agency because staff could be involved as a party in the proceeding. The Department of Personnel supported the amendment. While the OAL agrees with both Atlantic Electric and the Department of Personnel, in view of the legal conclusions explained above, the OAL has elected to continue the status quo.

The withdrawal of this proposed amendment means the OAL will be unable at this time to make it more convenient for multi-member agency heads to decide whether to interlocutorily review ALJ rulings. Fortunately, this problem has not occurred frequently. When it does, multi-member agency heads will have to continue utilizing methods, like telephone conferencing, they have previously used to make this decision in a timely fashion.

AGRICULTURE

(b)

DIVISION OF REGULATORY SERVICES

Jersey Fresh Quality Grading Program Products and Manner of Use

Proposed Amendments: N.J.A.C. 2:71-2.4, 2.5, 2.6

Authorized By: State Board of Agriculture and Arthur R. Brown, Jr., Secretary, Department of Agriculture.

Authority: N.J.S.A. 4:10-3, 4:10-13 and 4:10-20.

Proposal Number: PRN 1987-526.

Submit comments by January 20, 1988 to:

Robert C. Fringer, Director
Division of Regulatory Services
New Jersey Department of Agriculture
CN 330
Trenton, New Jersey 08625

The agency proposal follows:

Summary

The proposed amendments to the rules for the voluntary "Jersey Fresh Logo" program were developed to add sweet anise (fennel), apples, asparagus, cabbage, cucumbers (pickling type), endive, escarole, nectarines, okra, parsley, and romaine, to allow growers of these products to participate in the Jersey Fresh program. A uniform high grade product has greater acceptance by the consumer and increases the demand for the superior quality of these New Jersey grown products.

These rules also describe the additional commodities to be marketed under the "Jersey Fresh Logo" program, commodity grades, packing requirements, and packer identification of terms.

Social Impact

The people affected by these rules will be the newly eligible packers using the logo and the consumers. Products packed under the logo will enhance the promotion of uniformly packed high quality New Jersey farm products to the benefit of the packers and consumers. Packers will gain new markets for their products, while consumers will have more quality products and an identifiable larger supply of quality products available. The program so far has been shown to be well received by the growers, buyers and consumers.

Economic Impact

The proposed amendments enlarge the field of potential voluntary packers to include those who produce the added commodities. The economic impact on voluntary logo packers will be very minimal. Packers' costs will be \$.01 per label, per container or \$1.00 for 1,000 imprinted containers. This cost has been proven to be offset by increases in the price received by the packers through the sale of high quality produce.

Regulatory Flexibility Statement

The proposed amendments primarily affect farmers, most of which are small businesses; however, the proposal does not impose any reporting, recordkeeping, or other compliance requirements on farmers, unless they voluntarily elect to participate in the Jersey Fresh Quality Grading Program. Should a farmer choose to participate, the costs of participating should be offset by prices received for the produce. To assure consistency throughout the market, it is necessary that the rules be uniformly applied to all the voluntary participants.

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

2:71-2.4 Agricultural commodities intended to be marketed under the Jersey Fresh Quality Grading Program

(a) Only **sweet anise (fennel)**, **apples**, **asparagus**, blueberries, cabbage, green corn, cucumbers, **cucumbers (pickling type)**, eggplants, **endive**, **escarole**, iceberg lettuce, **nectarines**, **okra**, common green onions, **parsley**, peaches, sweet peppers, sweet potatoes, white potatoes, raspberries, **romaine**, summer squash, fall and winter type squash and tomatoes (fresh market), may be identified by the "logo".

(b) (No change.)

2:71-2.5 Commodity grades, packing requirements, packer identification and containers

(a) (No change.)

(b) **Commodities shall be graded, packed, identified and contained as follows:**

Apples shall be combination U.S. Extra Fancy and U.S. Fancy grade for tray or cell packs and U.S. Fancy grade for apples packed in bags. Color requirements are those for specified U.S. Grades of Apples by variety. Apples of the Red Delicious, Red Rome, Granny Smith and Paul Red varieties may be packed bearing the "logo". Size requirements are as follows: Bags—apples shall be a minimum of two and one-quarter inches and up in diameter. Tray or cell packs—maximum count of 125 apples per container. Tray or cell packs shall be packed fairly tight or be packed for a 40 pound minimum net weight for the above listed varieties. All containers shall be new. Paper pad required over top layer of apples in tray or cell packs. Certified controlled atmosphere storage apples are eligible to be packed bearing the "logo" provided the fruit meets the above requirements.

Asparagus shall be U.S. No. 1 grade with not less than two-thirds of the stalk length green color. Stalks shall be of the following diameter classifications. Small—five-sixteenth inch to less than eight-sixteenth inch in diameter. Medium—eight-sixteenth inch to less than eleven-sixteenths in diameter. Large—eleven-sixteenths inch to less than four-teen-sixteenths in diameter. Stalks shall be well trimmed. All containers shall be new.

[(b)] Blueberries shall be U.S. No. 1 grade. Size shall meet the requirements of at least Large with a maximum of 129 berries per standard two gill cup. All packaging materials shall be new.

[(c)] Cabbage, Domestic type, shall be U.S. No. 1 or U.S. No. 1, Green grade, with the heads being of [two and one-half] two pound minimum weight to [four] five pound maximum weight. [Each head shall be fairly well trimmed.] **The U.S. No. 1 grade requires that the heads be well trimmed. The U.S. No. 1, Green grade requires that the heads be fairly well trimmed.** [Containers shall be marked "U.S. No. 1, green."] All containers shall be new.

[(d)] Green Corn shall be U.S. Fancy, grade with a minimum count of 54 ears per container and when packed in crates the pack shall be tight. All containers shall be new. All green corn shall be hydrocooled. All containers shall be marked "hydrocooled."

[(e)] Cucumbers shall be U.S. No. 1 grade, or better, with 2 and 3/8 inch maximum diameter and six inch minimum length. All containers shall be at least fairly well filled. All containers shall be new.

Cucumbers (pickling type) shall be U.S. No. 1 grade with two inches maximum diameter and five inches maximum length. All containers shall be at least fairly well filled. All containers shall be new.

[(f)] Eggplants shall be U.S. No. 1 grade, or better, and reasonably uniform in size. All containers must have at least a fairly tight pack. All containers shall be new.

Endive shall be U.S. No. 1 grade. Plants shall be well trimmed and fairly uniform. All containers shall be new.

Escarole shall be U.S. No. 1 grade. Plants shall be well trimmed and fairly uniform. All containers shall be new.

Fennel (Sweet Anise) shall be U.S. No. 1 grade. Stalks shall be well trimmed. The minimum diameter of each bulb shall be not less than two inches. All containers shall be new.

[(g)] Iceberg lettuce shall be U.S. No. 1 grade, or better. The pack shall be of 24 or 30 heads per container. The heads shall be fairly uniform in size. The containers shall have a tight pack. All containers shall be new. All lettuce shall be vacuum cooled. The containers shall be marked "vacuum cooled."

Nectarines shall be U.S. Extra No. 1 grade with a two and one-quarter inch minimum diameter. When packed in closed containers, the size shall be indicated by marking the container with the numerical count, the pack arrangement, or the minimum diameter or minimum and maximum diameters in terms of inches and not less than one-eighth fractions of inches. Fruit shall be fairly uniform in size. All nectarines shall be hydrocooled. All containers shall be marked "hydrocooled." All containers shall be new.

Okra shall be U.S. No. 1 grade. All containers shall be new.

[(h)] Common Green Onions shall be U.S. No. 1 grade. The overall length (roots excepted) of the onions shall be not more than 24 inches nor less than eight inches and the onions shall not be less than one-quarter inch or more than one inch in diameter. All containers shall be new.

Parsley shall be U.S. No. 1 grade. All containers shall be new.

[(i)] Peaches shall be U.S. Extra No. 1 grade, or better, with a 2 and 1/4 inch minimum diameter. Containers shall be marked to denote variety and minimum size or count. All containers shall be new. All containers shall be at least fairly well filled. All peaches shall be hydrocooled. All containers shall be marked "hydrocooled."

[(j)] Sweet peppers shall be U.S. No. 1 grade, or better. [Containers shall be marked with either "Extra Large" or "Large" or "Medium" in accordance with the following size specifications: "Extra Large" shall have three inch minimum diameter and a three and one-half inch minimum length; "Large" shall have a three inch minimum diameter and a two and one-half inch minimum length; "Medium" shall have a two and one-half inch minimum diameter and a two and one-half inch minimum length.] **Minimum size shall be two and one-half inch minimum diameter and two and one-half inch minimum length. Containers shall be packed to a maximum average**

of no more than 90 peppers per container. Large—Average no more than 75 peppers per container. Extra Large—Average no more than 65 peppers per container. All containers shall be at least fairly well filled. All containers shall be new.

[(k)] Sweet Potatoes shall be U.S. Extra No. 1 grade. Maximum diameter shall not be more than 3 and 1/4 inches. Maximum weight shall not be more than 18 ounces. Length shall not be less than three or more than nine inches. Minimum diameter shall not be less than 1 and 3/4 inches. All containers shall be at least fairly well filled. All containers shall be new.

[(l)] White potatoes shall be U.S. No. 1 grade and packed to meet the requirements of Size A or Large. "Size A" means that the minimum diameter shall be not less than 1 and 7/8 inches and that the lot shall contain at least 40 percent of potatoes which are 2 and 1/2 inches in diameter or larger or six ounces in weight or larger. "Large" means that the minimum diameter shall be not less than three inches or the minimum weight shall be not less than 10 ounces and the maximum diameter shall be not more than 4 and 1/4 inches or the maximum weight shall be not more than sixteen ounces. All potatoes shall be washed. All containers shall be new.

Raspberries shall be U.S. No. 1 grade. Berries shall be well colored. Individual cups shall be well filled. All containers shall be new.

Romaine shall be U.S. No. 1 grade with eight inches minimum length. Plants shall be well trimmed and well developed. All containers shall be new.

[(m)] Squash, Fall and Winter (acorn and butternut) shall be U.S. No. 1 grade and shall meet the following size specifications: Acorn shall be a minimum of [1 and 1/2] 1 pound[s] and a maximum of [2 and 1/2] 3 pounds in weight. Butternut shall be a minimum of 1 and 1/2 pounds and a maximum of [3 and 1/2] 4 pounds in weight. All containers shall be new.

[(n)] Squash, Summer (yellow and green) shall be U.S. No. 1 grade and shall meet the following size specifications: green type shall be a maximum of [eight] nine inches in length and a maximum of 2 and 1/4 inches in diameter; yellow type shall be a maximum of [eight] nine inches in length and a maximum of 2 and 1/2 inches in diameter at the bulb. All containers shall be at least fairly well filled. All containers shall be new.

[(o)] Tomatoes (fresh market) shall be U.S. No. 1 grade "Mixed Colors." Containers shall be marked with either "Maximum Large" or "Extra Large" or "Large" in accordance with the following size specifications: "Maximum Large" shall have a 3 and 15/32 inch minimum diameter; "Extra Large" shall have a 2 and 28/32 inch minimum diameter and 3 and 15/32 inch maximum diameter; "Large" shall have a 2 and 17/32 inch minimum diameter and 2 and 28/32 inch maximum diameter. Containers shall also be marked as follows, in accordance with the facts, "Large to Extra Large" or "Extra Large and larger." Containers shall be at least fairly well filled. All containers shall be new.

2:71-2.6 Definitions

For the purposes of this subchapter, the following words and terms shall have the following meanings unless the context clearly indicates otherwise:

"Fairly tight" means, in the case of eggplants, that the package is sufficiently filled to prevent any appreciable movement of the eggplants and that they are in contact with the lid or cover. **In the case of apples, that the apples are of the proper size for molds or cell compartments in which they are packed, and that the molds or cells are filled in such a way that no more than slight movement of apples within molds or cells is possible. The pad over the top layer of apples shall be not more than three-quarter inch below the top edge of the carton.**

"Well developed" means, in the case of romaine, that the plant shows normal growth and shape.

"Well trimmed" means, in the case of asparagus, that at least two-thirds of the butt of the stalk is smoothly trimmed in a plane approximately parallel to the bottom of the container and that the butt is not stringy or frayed. **In the case of endive and escarole, that the roots are neatly cut near the point of attachment of the outer leaf stems. In the**

case of romaine, that the stem is trimmed off close to the point of attachment of the outer leaves. In the case of cabbage, that the head shall not have more than four wrapper leaves. In the case of Sweet Anise (Fennel), that not more than one coarse outer branch is left on each side of the bulb to protect the tender inside portion, and the portion of the root remaining is not more than one-half inch in length. Tops may be either full length or cut back to not less than ten inches except that not more than five of the outer branches may be cut back to less than ten inches if necessary to facilitate proper packing, but not more than three of these may be on the same side of the bulb.

EDUCATION

(a)

STATE BOARD OF EDUCATION

Tuition Public Schools Determining Tuition Rates

Re-Proposed Amendment: N.J.A.C. 6:20-3.1.

Authorized By: Saul Cooperman, Commissioner, Department of Education.

Authority: N.J.S.A. 18A:1-1, 4-15 and 38-19.

Proposal Number: PRN 1987-535.

Submit comments by January 20, 1988 to:

Patricia Joseph
Rules Analyst
New Jersey Department of Education
225 West State Street
CN 500
Trenton, New Jersey 08625

The agency proposal follows:

Summary

The proposed amendments were previously published in the September 8, 1987 New Jersey Register at 19 N.J.R. 1598(a). However, the State Board of Education approved substantive changes at the November 4, 1987 board meeting which include the determination of tuition rates for each program and not for each school, and the calculation of the building use charge for all buildings in which a program could be located rather than for the building in which tuition students are located. This was the original intention of the proposal, however, it was not clear. Therefore, the amendments are being repropose.

The amendments to the rule concerning the method of determining tuition rates are being presented to eliminate the following inequities in the current rule: the exclusion of attendance officer salary and expenses from the tuition rate; the inclusion of the principal component of the rental payment on a lease purchase agreement for a site or school building in the tuition rate; the calculation of the building use charge on a district-wide basis; the possibility that a district board of education can change yearly from an "actual cost per pupil" basis to a pro rata basis calculation, and the non-existence of a special building use charge for a receiving district board of education with more than 50 percent of its average daily enrollment from sending district boards of education. The amendments were developed by a tuition study committee which included representatives of both sending and receiving district boards of education.

The proposed amendments permit attendance officer salary and expenses to be included in tuition rates; permit only the interest component of the rental payment on a lease purchase agreement for a site or school building to be included in the tuition rate; require the building use charge to be calculated on debt for all buildings in which a tuition program could be located; prohibit a receiving district board of education from changing from an "actual cost per pupil" calculation to a pro rata basis calculation for tuition rates without the commissioner's approval; and establish a special building use charge when a receiving district board of education has more than 50 percent of its average daily enrollment from sending district boards of education.

The proposed amendments will improve the method of determining tuition rates by establishing a more equitable calculation process for both sending and receiving district boards of education by eliminating the current inequities.

Social Impact

The proposed amendments will impact nearly all district boards of education in the State, since almost every school district sends or receives some pupils. Except for the consultation process required by the special building use charge amendment, the amendments will not have any significant social impact, since the amendments only make improvements to the current tuition rate calculation process for public school districts. The consultation process required by the special building use charge amendment will enable sending and receiving district boards of education for which this amendment is applicable to jointly plan for major repairs and major renewals of furniture, equipment and apparatus in school buildings.

Economic Impact

The proposed amendments have an overall positive fiscal impact on district boards of education since the amendments improve the tuition rate calculation process. The amendment concerning attendance officer salary and expenses will increase a tuition rate; the amendment concerning rental payments on lease purchase agreements will decrease a tuition rate; the amendment of the method for determining the building use charge will decrease some tuition rates and increase others; prohibiting a district board of education from changing from one method of calculation to another will decrease tuition rates and establishing a special building use charge will increase tuition rates for a few districts. By removing inequities in the current rule, the amendments ensure that sending district boards of education pay a more equitable tuition rate and receiving district boards of education recover a fair amount for the educational services provided.

Regulatory Flexibility Statement

The proposed amendments will have no reporting, recording or compliance requirements for small businesses. All requirements of the amendments impact upon New Jersey public school districts.

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

6:20-3.1 Method of determining tuition rates

(a) The term "actual cost per pupil" for determining the tuition rate or rates for a given year referred to in N.J.S.A. 18A:38-19 shall mean the cost per pupil in average daily enrollment, based upon audited expenditures for that year for the [purpose] **program** for which the tuition rate is being determined, that is, four year high school, senior high school, junior high school, elementary school, and special education classes.

1. All expenditures for each [purpose] **program** except Federal and State special project expenditures shall be included, regardless of the sources of revenue;

2. "Average daily enrollment" for the purpose of determining the "actual cost per pupil[.]" shall be the sum of the days present and absent of all pupils enrolled in the register(s) [or registers] of the program for which the rate is being determined during the year divided by the number of days school was actually in session.

(b) Whenever practicable, the actual amounts expended for each applicable item in the program for which the tuition rate is required, according to the prescribed bookkeeping and accounting system, shall be recorded and used in determining the "actual cost per pupil[.]". **Once having determined to use the actual amount expended for any applicable line item in the program to determine the "actual cost per pupil", a district board of education must request the approval of the Commissioner to change to the pro rata basis described in (c) below. The Commissioner may approve such requests for a change in method if it is apparent from documentation submitted that accounting or recordkeeping problems are the basis of the request.**

(c) Whenever it shall be impracticable to charge the actual amount expended for a particular item in the program for which the tuition rate is being determined, [then] the share of such expenditure for each program shall be determined on a pro rata basis in accordance with the following ratios:

1. Administration: Ratio of number of teachers in each program to total number of teachers of the system.

2. Instruction:

i. Principals' salaries: Ratio of number of teachers in each program to total number of teachers of the system;

- ii. Supervisors of instruction: Ratio of number of teachers in each program to total number of teachers of the system;
- iii. Teachers' salaries shall be on an actual basis;
- iv. Other instructional staff, secretarial and clerical assistants, and other salaries for instruction: Ratio of average daily enrollment in each program;
- v. Textbooks, school library and audio-visual materials, teaching supplies, and other expenses: Ratio of average daily enrollment in each program.
- 3. Attendance and health services: Ratio of average daily enrollment in each program. [Attendance officer salary and expenses shall be excluded.]
- 4. Transportation curricular activities: Ratio of average daily enrollment in each program. Transportation salaries and other expenses shall be excluded.
- 5. Operation; salaries and all other costs: Ratio of square feet of floor space used by each program. Such floor space shall not include[:] offices, boiler rooms, corridors[,] or other rooms not used by pupils. Whenever a room shall be used for two or more programs, such square footage shall be prorated as to time devoted to each program.
- 6. Maintenance; salaries and all other costs: Ratio of square feet of floor space used by each program.
- 7. Fixed charges: Ratio of average daily enrollment in each program. **Rental on a site or school building acquired by a lease purchase agreement pursuant to N.J.S.A. 18A:20-4.2, except for the portion of the rental which is interest, shall be excluded.**
- 8. Tuition shall be excluded.
- 9. Food services; salaries and expenses: Ratio of average daily enrollment in each program.
- 10. Student body activities; salaries and expenses shall be on an actual basis.
- 11. Community services shall be excluded.
- 12. Building use charge: Ratio of square feet of floor space used by each program multiplied by the amount which remains after the following calculation:
 - i. Divide the amount of debt service State support received by the debt service paid for the school year to determine the ratio of State support;
 - ii. Multiply the debt service interest charges paid **on debt for all buildings in which the program could be located** by the ratio of State support obtained in (c)12i above;
 - iii. Subtract the amount obtained in (c)12ii above from the debt service interest charges paid **on debt for all buildings in which the program could be located.**
- 13. **Special building use charge:**
 - i. **Whenever a receiving district receives more than 50 percent of the average daily enrollment in a program for which a tuition rate is being determined, except for special education programs, the receiving district may include the actual amount expended for principal and interest on major repairs and major renewals of furniture, equipment and apparatus for all buildings in which the program could be located, provided that:**
 - (1) Such major repairs or major renewals were funded by the issuance of bonds as provided in N.J.S.A. 18A:21-1;
 - (2) The receiving district consulted with each sending district having more than 10 percent of the average daily enrollment in the program for which the tuition rate is being determined prior to taking any action in accordance with N.J.S.A. 18A:24-10 to authorize the issuance of such bonds; and
 - (3) The majority of districts with more than 10 percent of the enrollment in the program has passed a resolution in support of the receiving district's determination to issue such bonds or the Commissioner, after a conference, has approved the proposal for the issuance of such bonds.
 - ii. Receiving districts for which this section is applicable may include the entire rental on a site or school building acquired by a lease purchase agreement pursuant to N.J.S.A. 18A:20-4.2 provided that:
 - (1) The receiving district consulted with each sending district having more than 10 percent of the average daily enrollment in the program for which the tuition rate is being determined prior to entering into the lease purchase agreement; and
 - (2) Each sending district with more than 10 percent of the enrollment in the program has passed a resolution in support of the receiving

district's determination to enter into a lease purchase agreement or the Commissioner, after a conference, has approved the proposal to enter into a lease purchase agreement.
(d)-(f) (No change.)

ENVIRONMENTAL PROTECTION

The following proposals are authorized by Richard T. Dewling, Commissioner, Department of Environmental Protection.

(a)

DIVISION OF COASTAL RESOURCES

Freshwater Wetlands Protection Act Rules

Proposed New Rules: N.J.A.C. 7:7A

Authority: N.J.S.A. 13:1D-9, 58:10A-1 et seq., specifically 58:10A-4, 58:10A-6 and 13:9B-1 et seq. (P.L. 1987, c.156), specifically 13:9B-25 (section 25 of P.L. 1987, c.156).
DEP Docket Number: 063-87-11.
Proposal Number: PRN 1987-533.

Public hearings concerning these proposed new rules will be held on:

January 12, 1988 at 10:00 A.M. at:
The Environmental Education Center
190 Lord Sterling Road
Basking Ridge, New Jersey
January 13, 1988 at 10:00 A.M. at:
Colonial Volunteer Fire Company
Kuser Road (1 mile from 295)
Hamilton Township, New Jersey
January 14, 1988 at 10:00 A.M. at:
Rutgers-Camden Campus Center
326 Penn Street
Camden, New Jersey

Submit comments by February 20, 1988 to:
Suzanne F. Dice, Esq.
Office of Regulatory Services
Department of Environmental Protection
CN 402
Trenton, NJ 08625

The agency proposal follows:

Summary

The proposed new rules implement the Freshwater Wetlands Protection Act (The Act), N.J.S.A. 13:9B-1 et seq., signed into law on July 1, 1987. The Act requires strict regulation of activities in freshwater wetlands, the discontinuation of the grant of discretion to the Department of Environmental Protection (Department) to exempt the discharge of dredged or fill material into waters of the State from the requirement of a New Jersey Pollutant Discharge Elimination System permit, and the application within one year by the Department for assumption of the Federal 404 program.

The principal feature of the proposed new rules is the establishment of two new permit programs, one to strictly curtail activities in freshwater wetlands, and one for the regulation of the discharge of dredged or fill material into the open waters of the State.

The freshwater wetlands permit program will regulate a large variety of activities which are destructive of freshwater wetlands, including placement of fill, removal of vegetation, and alteration of drainage patterns. The freshwater wetlands program uses the permit review standards laid out by the legislature in the Act, including a careful examination of possible alternatives to regulated activities. Procedures for the freshwater wetlands permit program are taken from the Act and from existing Department permit programs authorized by the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq. Freshwater wetlands in the Pinelands and Hackensack Meadowlands, and wetlands governed by the Wetlands Act of 1970, N.J.S.A. 13:9A-1 et seq., are exempt from regulation under the freshwater wetlands permit program.

The open water fill permit program will regulate the discharge of dredged or fill material into those non-freshwater wetlands waters over which the State will eventually assume jurisdiction under the Federal 404 program. Again, procedures derive from the Act and from existing De-

partment permit programs under the Water Pollution Control Act. However, the criteria for the grant or denial of an open water fill permit are the same as those used by the United States Army Corps of Engineers to grant Federal 404 permits.

Subchapters 1 and 2 of the proposed new rules apply to both of the new permit programs and include general information and applicability information, including jurisdiction, activities regulated, designation and classification of freshwater wetlands, and activities and areas exempted from the permit requirement. Subchapter 2 sets out the methods the Department will use to map and delineate wetlands, and to classify them according to their resource value. Subchapter 2 also delineates the relationship of the Act to local freshwater wetlands protection laws, and procedures to be followed when the new permit programs overlap with other State regulatory programs.

Subchapter 3 applies only to the freshwater wetlands permit program, and contains the general standards for granting freshwater wetlands permits, and provisions for the granting of emergency permits. This subchapter establishes review criteria for both water-dependent and nonwater-dependent activities, including the requirement that alternatives be carefully considered.

Subchapter 4 applies only to the open water fill permit program, and establishes review criteria for open water fill permit applications by incorporating by reference the provisions of the Federal 404 program.

Subchapters 5 and 6 apply only to the freshwater wetlands permit program, and are reserved for future use to implement the transition area requirements of the Act, which will not be operative until July 1, 1989.

Subchapter 7 provides for letters of interpretation for prospective applicants for a freshwater wetlands permit. The letter of interpretation provides a determination as to whether a parcel of land contains freshwater wetlands. This subchapter also includes provisions for local and United States Environmental Protection Agency (USEPA) review and input on letters of interpretation, and provisions for Department inspection of the site if necessary. Effects of issuance and non-issuance of a letter of interpretation are also set out.

Subchapter 8 applies to both freshwater wetlands and waters covered by the open fill permit program and deals with the creation of Statewide General permits, some of which are adoptions or modifications of the Federal 404 program Nationwide permits currently used by the United States Army Corps of Engineers. As required by the Act, the Nationwide permits have been considered in light of the standards and intent of the Act.

Nationwide Permits number one, two, five, eight, nine, 10, 11, 19, 21, and 24 pertain only to navigable waters of the United States or, as in the case of number 21, only to coal mines and, therefore, are not appropriate or applicable for adoption in these rules. Activities covered by Nationwide Permits number four and six have been exempted from regulation because they have minimal impact on freshwater wetlands. Nationwide Permits number seven, 13, 17, 18, 23, 25, and 26 are not being proposed for adoption under these rules, except that parts of number 26 are being adopted as a Statewide General permit under the standards set by the Act. Nationwide Permits number 14, 15, and 24 are currently under review by the Department for their individual and cumulative environmental impacts and may be adopted at some point in the future. Nationwide Permits number three, 12, 16, 20, and 22 are being adopted as modified as Statewide General Permits number one, two, three, four and five. In addition to these General Permits, the Department is attempting to develop appropriate language for a possible Statewide General Permit governing mosquito control practices in freshwater wetlands and State regulated waters.

The Department invites comments from interested individuals on the appropriateness of adopting the proposed Statewide General Permits, as well as any of the Nationwide permits. A decision on all existing Nationwide Permits will be finalized in the adoption of this rule as required by the Act.

Subchapter 9 contains provisions applicable to both permit programs regarding pre-application conferences, whereby applicants for permits may obtain Department guidance during their project planning.

Subchapter 10 describes the procedure for applying for both freshwater wetlands and open water fill permits including application contents, recordkeeping requirements, and signatory requirements for applications and reports required by permits.

Subchapter 11 explains the Department's procedures and deadlines for reviewing applications under both new permit programs, including provisions for USEPA review, for obtaining public input on applications

through public hearings and written comments, for withdrawal, resubmission, and amendment of applications, for Department final decisions, and for hearings and appeals on permit decisions.

Subchapter 12 sets out the minimum required contents for all permits issued by the Department under either new permit program. Provisions cover conditions applicable to all permits, establishing permit conditions, duration and effect of permits, transfer, modification or revocation and reissuance of permits, and causes and procedures for minor modification of permits.

Subchapter 13 concerns the mitigation program created by the Act. In special situations, persons may be allowed or required to undertake mitigation projects for the creation or restoration of freshwater wetlands or other waters. This subchapter, which applies only to the freshwater wetlands permit program, details the goals of the mitigation program, different types of mitigation options, requirements of mitigation proposals, and standards for the review of those proposals. In addition, this subchapter explains the functions of the Wetlands Mitigation Council which was established under the Act.

Subchapter 14 contains enforcement provisions applicable to both permit programs, including burdens of proof, sharing of information with USEPA, and the remedies available to the Department, including administrative orders, civil and criminal actions and monetary penalties. Provisions in this subchapter also address the placement of a notice of violation on the deed to the property involved in the violation, termination of permits, and "after the fact" permits for irreparable violations.

Social Impact

The proposed new rules will have a positive social impact in that the rules will preserve a resource with important social benefits—New Jersey's remaining freshwater wetlands. Freshwater wetlands are an important and diminishing environmental and economic resource to the people of New Jersey. They are an important element in protecting and purifying ground and surface water supplies and in the retention of floodwaters as well as providing habitat for a unique variety of plants and animals.

One of the most important services provided by freshwater wetlands is flood moderation. Without any capital expenditure by residents, businesses, or other taxpayers, freshwater wetlands both detain and retain large volumes of potentially dangerous floodwaters. The filling and development of freshwater wetlands aggravates flooding by increasing runoff, decreasing absorbent soil surface and by reducing the area available for storing floodwaters. The proposed new rules, by preserving freshwater wetlands, will prevent the unnecessary aggravation of the danger and damage caused by floods.

Freshwater wetlands also provide an important natural resource service by supporting many unique and varied species of flora and fauna. The biggest threat to New Jersey's wildlife resources is the steady loss of habitat caused by demand for housing and commercial development. These wildlife resources are of an immense recreational and ecological value to the citizens of New Jersey. Many of New Jersey's threatened and endangered species are dependent upon freshwater wetlands during part or all of their life cycle. By preventing unplanned and uncontrolled development in these wetlands, an important component of the species' life requirements has been protected.

Among other services provided by freshwater wetlands is the removal of some water pollutants through physical, chemical, and biological processes, aquifer recharge and maintenance of base stream flows.

Of New Jersey's approximately 900,000 acres of wetlands, one-third are coastal and are regulated under the Wetlands Act of 1970. The other 600,000 acres are inland or freshwater wetlands, half of which are regulated by the Pinelands Protection Act. The proposed new rules address the remaining 300,000 acres of freshwater wetlands and provide a level of protection commensurate with that provided for other wetland resources.

The proposed new rules also provide for Departmental regulation of the discharge of dredged and fill materials into "Waters of the State" which are delegable under the Federal Water Pollution Control Act Amendments of 1972, as amended. The proposed new rules consolidate State and Federal freshwater wetland regulation programs, specifically addressing the water pollution control aspects of these programs and recognizing the habitat value of open waters and also recognizing alternatives to filling this important recreational and natural resource.

Economic Impact

The proposed new rules provide for the systematic review of activities in and around freshwater wetlands. The review standards, as required by the Act, are more stringent than under present Federal law. The

effective result is that the proposed new rules will have both positive public economic impacts and negative property owner-land development economic impacts.

The proposed new rules will have a significant positive impact on New Jersey's recreation and tourism industry by preserving open space and habitat for commercially and recreationally valuable fish and wildlife. They will also minimize future flood damage and preserve drinking water supplies.

The public economic benefits notwithstanding, the new program established by the proposed new rules will dramatically limit future development in and around New Jersey's wetlands. For major development, the proposed new rules will require environmentally sensitive project design, serious consideration of practicable alternatives and avoidance of unnecessary wetlands disturbance. For smaller projects or sites consisting largely of wetlands, the proposed new rules impose a major development constraint and limit the range of acceptable uses for individual property owners. An effect of the law already being realized by the development community is an increase in the number of land purchase contracts contingent upon a finding that the land does not contain freshwater wetlands.

In addition to the stringent regulatory objectives of the Act, a second major goal was to secure the assumption of the permit jurisdiction exercised by the United States Army Corps of Engineers (USCOE) pursuant to Section 404 of the Federal Water Pollution Control Act Amendments of 1972 as amended by the Clean Water Act of 1977 (33 U.S.C. §1344) and the regulations adopted pursuant thereto. The proposed new rules lay the foundation for that delegation process to occur. This transfer of regulatory responsibility, coupled with legislative preemption of local and county freshwater wetlands regulations as of the Act's effective date(s), will result in a single program for regulation of this resource in the State. This "single point of contact" for freshwater wetland decision-making in the State provides predictability in the protection of freshwater wetlands and greatly facilitates the site plan and development process. The systematic, predictable review provided by the proposed new rules will promote environmentally sensitive project design and offset, to a degree, the negative economic impact of the land development constraints imposed by the proposal.

Environmental Impact

The proposed new rules will have a strong positive environmental impact. The nation's wetlands are disappearing at an alarming rate. United States Fish and Wildlife Service data indicate that between the mid-1950's and mid-1970's, the United States lost nine million acres of wetlands, an area twice the size of New Jersey. The loss of wetlands in this State has not been accurately determined, but in a report titled "Wetlands of New Jersey", the United States Fish and Wildlife Service estimates that as much as 65 percent of Passaic County's freshwater wetlands have disappeared.

New Jersey, as the nation's most densely populated State, has a high demand for residential, commercial, office and industrial development. In addition, highway and utility development and agricultural and forestry operations also affect freshwater wetlands. The proposed new rules implement the statutorily mandated comprehensive program for stringently guarding this resource. The proposed new rules also extend beyond the wetlands proper to encompass a transition area of variable width. By requiring careful Department review of planned projects in freshwater wetlands, the proposed new rules will prevent environmentally destructive, uncoordinated private and public actions which in the past have damaged ecologically important wetland areas and aggravated existing flooding problems.

Regulatory Flexibility Statement

In accordance with the New Jersey Regulatory Flexibility Act (P.L. 1986, c.169), the Department has determined that the proposed new rules will apply to virtually any freshwater wetlands disturbance, including placement of fill, removal of vegetation and alteration of drainage patterns. It is estimated that freshwater wetlands subject to these proposed new rules comprise approximately six percent of the gross land area of the State. To the extent that small businesses will seek locations in freshwater wetlands or seek to expand existing sections to encroach on freshwater wetlands, they will have to comply with the requirements of these proposed new rules as briefly set forth in the Summary, above. In so doing, it is likely that small businesses will need to engage the services of environmental consultants and professionals familiar with the application process. In developing these proposed new rules, the Department has balanced the need to protect the environment against the economic

impact of the proposed new rules and has determined that to minimize the impact of the proposed new rules would endanger the environment, public health and public safety and, therefore, no exemption for small businesses is provided. Further, among the explicit findings of the Act, it is stated that the public benefits arising from the natural functions of freshwater wetlands, and the public harm from freshwater wetland losses, are distinct from and may exceed the private value of wetland areas.

Full text of the proposed new rules follows.

CHAPTER 7A

FRESHWATER WETLANDS PROTECTION ACT RULES

SUBCHAPTER 1. GENERAL INFORMATION

7:7A-1.1 Scope and authority

This chapter constitutes the rules governing the implementation of the Freshwater Wetlands Protection Act, P.L. 1987, c.156. The provisions of any law, rule or regulation to the contrary notwithstanding, the alteration or disturbance in and around freshwater wetland areas in the State, and the discharge of dredged or fill material into State regulated waters are subject to this chapter and the Act.

7:7A-1.2 Construction

This chapter shall be liberally construed to allow the Department to implement fully its statutory functions pursuant to the Act.

7:7A-1.3 Forms and information

Any forms, fees or other information required to be submitted by this chapter shall be obtained from and returned to the Division of Coastal Resources, New Jersey Department of Environmental Protection, CN 401, Trenton, New Jersey, 08625. Courier and hand deliveries may be delivered to 5 Station Plaza, 501 East State Street, Trenton, New Jersey.

7:7A-1.4 Definitions

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

"Act" means the Freshwater Wetlands Protection Act, P.L. 1987, c.156.

"Aquatic ecosystem" means waters of the United States, including wetlands that serve as habitat for interrelated and interacting communities and populations of plants and animals.

"Bank" means the Wetlands Mitigation Bank established pursuant to section 14 of the Act.

"Best Management Practices" (BMPs) means methods, measures, designs, performance standards, maintenance procedures, and other management practices which prevent or reduce adverse impacts upon or pollution of freshwater wetlands, State regulated waters, and adjacent aquatic habitats, which facilitate compliance with the Federal Section 404(b)(1) guidelines (40 C.F.R. Part 230), New Jersey Department of Environmental Protection Flood Hazard Area Regulations (N.J.A.C. 7:13), 1982 Standards for Soil Erosion and Sediment Control in New Jersey, Storm Water Management Regulations (N.J.A.C. 7:8), and effluent limitations or prohibitions under Section 307(a) of the Federal Act and New Jersey Department of Environmental Protection Surface Water Quality Standards (N.J.A.C. 7:9-4).

"Clean Water Act" (CWA) means the Federal Clean Water Act (33 U.S.C. §125 et seq.)

"Commissioner" means the Commissioner of the Department of Environmental Protection.

"Compelling public need" means that based on specific facts, the proposed regulated activity will serve an essential health or safety need of the municipality in which the proposed regulated activity is located, that the public health and safety benefit from the proposed use and that the proposed use is required to serve existing needs of the residents of the State, and that there is no alternative available to meet the established public need.

"Council" means the Wetlands Mitigation Council established pursuant to section 14 of the Act.

"Cultivating" means physical methods of soil treatment employed within established farming, ranching and silviculture lands upon

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planted farm, ranch or forest crops to aid and improve their growth, quality or yield.

"Degraded wetland" means a wetland in which there is impaired surface water flow or groundwater hydrology, or excessive drainage; a wetland which has been partially filled or excavated, contaminated with hazardous substances, or which does not have an ecological value equal to that of undisturbed wetlands in the region.

"Department" means the Department of Environmental Protection.

"Destruction of plant life which would alter the character of a freshwater wetland including the cutting of trees" means:

1. The physical removal of the existing wetland vegetation; or
2. Causing the loss of life of vegetation by the application of herbicides or by other means which cause mortality to the established vegetative community.

"Director" means the Director of the Division of Coastal Resources.

"Discharge of dredged material" means any addition from any point source of "dredged material" into State regulated waters. The term includes the addition of dredged material into State regulated waters and the runoff or overflow from a contained land or water dredge material disposal area. Discharges of pollutants into State regulated waters resulting from the subsequent onshore processing of dredged material are not included within this term and are subject to the New Jersey Pollutant Discharge Elimination System, N.J.S.A. 58:10A-1 et seq., program even though the extraction and deposit of such material may also require an open water fill permit or a 404 permit from the U.S. Army Corps of Engineers or the State section 404 program.

"Discharge of fill material" means the addition from any point source of "fill material" into State regulated waters. The term includes the following activities in State regulated waters: placement of fill that is necessary for the construction of any structure; the building of any structure or impoundment requiring rock, sand, dirt, or other materials for its construction; site-development fill for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection or reclamation devices, or both, such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs.

"Disturbance of the water level or water table" means the alteration of the existing elevation of groundwater or surface water, regardless of duration of such alteration, by:

1. Adding or impounding a sufficient quantity of stormwater or water from other sources to modify the existing vegetation, values or functions of the wetland; or
2. Draining, ditching or otherwise causing the depletion of the existing groundwater or surface water levels such that the activity would modify the existing vegetation, values or functions of the wetland.

"Ditch or swale" means a linear topographic depression of human construction which conveys water to or from a site.

"Division" means the Division of Coastal Resources, or its successor in name, in the Department.

"Drainage" means active or passive methods for changing wetlands hydrologic conditions, such as lowering groundwater levels through pumping ditching or otherwise altering water flow patterns.

"Dredging" means the active removal of wetlands soils or sediments through use of mechanical, hydraulic, or pneumatic tools or other means.

"Dredged material" means material that is excavated or dredged from waters of the United States.

"Dumping" means the discharge, placement or abandonment of solid, semi-solid or liquid materials.

"Environmental commission" means a municipal advisory body created pursuant to P.L. 1968, c.245 (N.J.S.A. 40:56A-1 et seq.).

"EPA priority wetlands" means wetlands which are:

1. Unique habitat for vegetation and wildlife;
2. Unusual or regionally rare wetland types;

3. Ecologically important and under direct threat of development;
4. Important to surface water systems;
5. Critical to protect water supplies; and
6. Valuable for and provide critical flood storage capacity.

"Equal ecological value" means functional equivalency, similar vegetative species coverage and density, and equivalent flood water storage capacity.

"Excavation" means to dig or remove soil, rocks, etc., resulting in a change in site elevation.

"Federal Act" means the Federal Water Pollution Control Act Amendments of 1972 as amended by the Clean Water Act of 1977 (33 U.S.C. §§125 et seq.) and any amendments and supplements thereto, and the regulations adopted pursuant thereto.

"Federal 404 program" means the program regulating the discharge of dredged or fill materials pursuant to Section 404 of the Federal Act.

"Fill" means the deposition of material (for example, soil, sand, earth rock, solid waste, etc.) into an area which changes the resultant surface elevation in relation to surface or groundwater level.

"Fresh water(s)" means all tidal and nontidal waters having a salinity, due to natural sources, of less than or equal to 3.5 parts per thousand.

"FW" means the general surface water classification applied to fresh waters in the Department's Surface Water Quality Standards, N.J.A.C. 7:9-4.

"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 wastewater discharges of human origin), as designated in the Department's Surface Water Quality Standards, N.J.A.C. 7:9-4.

"FW2" means the general surface water classification applied in the Department's Surface Water Quality Standards, N.J.A.C. 7:9-4, to those fresh waters that are not designated as FW1 or Pinelands Waters.

"Freshwater wetland" means an area that is inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions, commonly known as hydrophytic vegetation; provided, however, that the Department, in designating a wetland, shall use the three-parameter approach (that is, hydrology, soils and vegetation) enumerated in the April 1, 1987 interim-final draft "Wetland Identification and Delineation Manual" developed by the United States Environmental Protection Agency, and any subsequent amendments thereto.

"Freshwater wetlands permit" means a permit to engage in a regulated activity issued pursuant to the Act and this chapter.

"Harvesting" means physical measures employed directly upon farm, forest, or ranch crops within established agricultural and silvicultural lands to bring about their removal from farm, forest, or ranch land, but does not include the construction of farm, forest, or ranch roads or other engineering practices such as drainage which would alter the existing character of the farm, forest or ranch.

"Head waters" means the point on a non-tidal stream above which the average annual flow is less than five cubic feet per second. The Department may estimate this point from available data by using area annual precipitation, area drainage basin maps, and the average annual runoff coefficient or by similar means. For streams that are dry for long periods of the year, the Department may establish headwaters as that point of the stream where flow of five cubic feet per second is exceeded 50 percent of the time.

"Historic, documented habitats for endangered or threatened species" means freshwater wetland habitats which recorded data on past inhabitation by endangered and threatened species.

"Hydric soils" means a soil that in its undrained condition is saturated, flooded, or ponded long enough during the growing season to develop anaerobic conditions that favor the growth and regeneration of hydrophytic vegetation. These soils may be on New Jersey's Official List of Hydric Soils developed by the United States Department Agriculture Soil Conservation Service and the United States

Fish and Wildlife Service National Wetlands Inventory, in "The Wetlands of New Jersey" 1985, published by the United States Fish and Wildlife Service, or in the USEPA Wetlands Delineation manual. Alluvial land, as mapped by soil surveys, may also be considered a hydric soil for the purposes of wetland classification. Also, wet phases of somewhat poorly drained soils not on New Jersey's Official List of Hydric Soils may also, on occasion, be associated with a wetland and therefore for the purposes of this Act shall be considered a hydric soil.

"Hydrophyte" means plant life adapted to growth and reproduction under periodically saturated root zone conditions during at least a portion of the growing season. A listing of these plants can be found in "Wetlands Plants: Northeast Region", 1986, compiled by the United States Fish and Wildlife Service, United States Army Corps of Engineers, United States Environmental Protection Agency and the United States Soil Conservation Service.

"Isolated wetlands" means a wetland which is not associated with a surface water tributary system discharging into a lake, pond, river, stream or other surface water feature.

"Lake, pond, or reservoir" means any impoundment, whether naturally occurring or created in whole or in part by the building of structures, for the retention of surface water.

"Letters of interpretation" are letters issued by the Department of the purpose of indicating the presence or absence of wetlands (see N.J.A.C. 7:7A-6).

"Linear development" means land uses such as roads, drives, railroads, sewerage and stormwater management pipes, gas and water pipelines, electric, telephone and other transmission lines and the rights-of-way therefor, the basic function of which is to connect two points. Linear development shall not mean residential, commercial, office, or industrial buildings.

"Maximum extent practicable" means to the maximum extent after weighing, evaluating and interpreting alternatives to protect the ecological integrity of a wetland without imposing a substantial hardship upon an applicant.

"Minor drainage" means:

1. The discharge of material incidental to connecting upland drainage facilities to adjacent wetlands, adequate to effect the removal of excess soil moisture from upland croplands;

2. The discharge of material for the purpose of installing ditching or other such water control facilities incidental to planting, cultivating, protecting, or harvesting of rice, cranberries or other wetland crop species, where these activities and the discharge occur in waters which are in established use for such agricultural and silvicultural wetlands crop production;

3. The discharge of material for the purpose of manipulating the water levels of, or regulating the flow or distribution of water within, existing impoundments which have been constructed in accordance with applicable requirements of the Federal Act and which are in established use for the production of rice, cranberries, or other wetland crop species; or

4. The discharge of material incidental to the emergency removal of sandbars, gravel bars, or other similar blockages which are formed during flood flows or other events, where such blockages close or constrict previously existing drainageways and, if not promptly removed, would result in damage to or loss of existing crops on land in established use for crop production. Such removal does not include enlarging or extending the dimensions of, or changing the bottom elevations of, the affected drainageway as it existed prior to the formation of the blockage. Removal must be accomplished within one year of formation of such blockages in order to be eligible for exemption under N.J.A.C. 7:7A-2.5.

5. Minor drainage in wetlands is limited to drainage within areas that are part of an established farming or silvicultural operation. It does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland (for example, wetlands species to upland species not typically adapted to life in saturated soil conditions), or conversion from one wetland to another (for example, silviculture to farming). In addition, minor drainage does not include the construction of any canal, ditch, dike or other waterway or structure which drains or otherwise significantly modifies a

stream, lake, swamp, bog or any other wetland or aquatic area. Any discharge of material into the wetlands or on floodplains incidental to the construction of any such structure or waterway requires a freshwater wetlands permit, and will not be considered minor drainage under the farming exemption in N.J.A.C. 7:7A-2.5.

"Mitigation" means and includes the physical restoration of a wetlands area following a permitted temporary disturbance; the physical restoration of a wetland area as partial resolution for an unauthorized disturbance; the physical creation of a replacement wetland on a non-wetland site; and physical actions taken to enhance or restore biological or hydrological resources currently degraded on an existing freshwater wetland. It also encompasses contribution of moneys, or moneys and lands, to the Wetlands Mitigation Bank.

"Offsite" means located on a parcel of land which is not the site of permit application or violation at the time of application or violation of N.J.S.A. 13:9B-1 et seq.

"Onsite" means located within a parcel of land under single or continuous ownership at the time of permit application or violation of N.J.S.A. 13:9B-1 et seq.

"Open water fill permit" means the type of New Jersey Pollution Discharge Elimination Systems permit issued pursuant to this chapter which governs the discharge of dredged or fill material into State regulated waters that are not freshwater wetlands.

"Person" means an individual, corporation, partnership, association, the State, municipality, commission or political subdivision of the State or any interstate body.

"Pilings" means timber, metal, concrete or other similar structures driven into the ground to support a vertical load.

"Placing of obstructions" means to deposit, construct, install or otherwise situate any obstacle which will affect the values or functions of a wetland and the associated flood plain.

"Plowing" means all forms of primary tillage, including moldboard, chisel, or wide-blade, plowing, discing, harrowing, and similar physical means utilized on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. The term does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of wetlands to dry land. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing. Rock crushing activities which result in the loss of natural drainage characteristics, the reduction of water storage and recharge capabilities, or the overburden of natural water filtration capacities do not constitute plowing. Plowing will never involve a discharge of material.

"Practicable alternative" means other choices available and capable of being carried out after taking into consideration cost, existing technology, and logistics in light of overall project purposes, and may require an area not owned by the applicant which could reasonably have been or be obtained, utilized, expanded, or managed in order to fulfill the basic purpose of the proposed activity.

"Public hearing" means an administrative non-adversarial type hearing before a representative or representatives of the Department providing the opportunity for public comment, but does not include cross-examination.

"Seeding" means the sowing of seed and placement of seedlings to produce farm, ranch, or forest crops and includes the placement of soil beds for seeds or seedlings on established farm and forest lands.

"Significant adverse environmental consequence" or "significant adverse impact" shall be deemed to exist where it is determined that one or more of the following modifications of a wetland will negatively affect the ecological integrity of the wetland and its biotic components:

1. An increase in surface water runoff discharging into a wetland;
2. A change in the normal seasonal flow patterns in the wetland;
3. An alteration of the water table or hydrologic patterns in the wetland or its subwatershed;
4. An increase in erosion resulting in increased sedimentation in the wetland;
5. A change in the natural chemistry of the ground or surface water in the wetland;
6. A loss of wetland habitat;

7. A reduction in wetland habitat diversity;
8. A change in wetlands species composition; or
9. A significant disturbance of areas used by indigenous and migratory wildlife for breeding, nesting, or feeding.

"Special aquatic site" means a site as defined by the 404(b)(1) guidelines (40 C.F.R. §§230 et seq.), except that for the purposes of this chapter any freshwater wetland covered by this chapter shall not be considered a special aquatic site.

"State Forester" means the chief forester employed by the Department.

"State regulated waters" means those waters of the United States in New Jersey for which the Army Corps of Engineers can suspend the issuance of section 404 permits upon approval of New Jersey's section 404 permit program by the Administrator (see section 404(h) of the Federal Act). These waters shall be specifically identified by the Secretary of the Army. State regulated waters shall not include:

1. Waters which are subject to the ebb and flow of the tide;
2. Waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement, as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark;
3. Wetlands adjacent to waters in paragraphs (1) and (2) of this definition; or
4. Freshwater wetlands as defined by this chapter.

"Substantial hardship" or "extraordinary hardship" means the subject property is not capable of yielding a reasonable return if used for its present use or developed as authorized by the provisions of the Act, that this inability to yield a reasonable return results from unique circumstances peculiar to the subject property which:

1. Do not apply to or affect other property in the immediate vicinity; and
2. Relate to or arise out of the subject property rather than the personal situation of the applicant, and are not the result of any action or inaction by the applicant or the owner or the owner's predecessors in title.

"Threatened or endangered species" shall be those species identified pursuant to The Endangered and Nongame Species Conservation Act, N.J.S.A. 23:2A-1 et seq., or which are listed on the Federal endangered species list.

"Tidal waters" means fresh or saline waters under tidal influence, up to the head of the tide.

"Transition area" means an area of land adjacent to a freshwater wetland which minimizes adverse impacts on the wetland or serves as an integral component of the wetlands ecosystem.

"Trout production waters" (TP) means water designated in the Department's Surface Water Quality Standards, N.J.A.C. 7:9-4, for use by trout for spawning or nursery purposes during their first summer.

"USEPA" (EPA) means the United States Environmental Protection Agency.

"USGS" means the United States Geologic Survey.

"Water-dependent uses" means development that cannot physically function without direct access to the body of water along which it is proposed. Uses, or portions of uses, that can function on sites not adjacent to the water are not considered water dependent regardless of the economic advantages that may be gained from a waterfront location.

"Waters of the United States" means:

1. All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
2. All interstate waters;
3. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), wetlands, mudflats, sandflats, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
 - i. Which are or could be used by interstate or foreign travelers for recreational or other purposes;
 - ii. From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

- iii. Which are used or could be used for industrial purposes by industries in interstate commerce.

7:7A-1.5 Severability

If any subchapter, section, subsection, provision, clause, or portion of this chapter, or the application thereof to any person, is adjudged unconstitutional or invalid by a court of competent jurisdiction, such judgment shall be confined in its operation to the subchapter, section, subsection, provision, clause, portion, or application directly involved in the controversy in which such judgment shall have been rendered and it shall not affect or impair the remainder of this chapter or the application thereof to other persons.

7:7A-1.6 Other statutes and regulations

(a) The powers, duties and functions vested in the Department under the provisions of the Act or this chapter shall not be construed to limit in any manner the powers, duties and functions vested therein under any other provisions of law except as specifically set forth in this chapter.

(b) It is the intent of the Legislature that the program established by the Act for the regulation of freshwater wetlands constitutes the only program for this regulation in the State except to the extent that these areas are regulated by the Hackensack Meadowlands Development Commission or the Pinelands Commission pursuant to section 6 of the Act (N.J.S.A. 13:9B-6). With the exception of political subdivisions under the jurisdiction of the Pinelands Commission, no municipality, county, or political subdivision thereof, shall enact, subsequent to July 1, 1988, any law, ordinance, or rules or regulations regulating freshwater wetlands.

(c) The Act, on and subsequent to July 1, 1988, shall supersede any law or ordinance regulating freshwater wetlands enacted prior to July 1, 1988, except to the extent that a law or ordinance regulates or requires a transition area. State and local laws governing transition areas shall remain in effect until July 1, 1989, at which time the transition area provisions of the Act shall supersede such State and local laws.

(d) This section shall not, however, preclude municipal advice to the Department concerning letters of interpretation pursuant to N.J.A.C. 7:7A-7.4.

(e) This section shall not preempt pre-existing State regulatory programs which affect regulated activities in freshwater wetlands, including but not limited to Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19-1 et seq., and State approved municipal water quality management plans.

(f) If a determination is made that a proposed project does not involve a freshwater wetland or State regulated water, does not constitute a regulated activity, or is otherwise exempt from the provisions of the Act and this chapter, the final decision on the application shall be based solely on the requirements of other applicable permit programs.

SUBCHAPTER 2. APPLICABILITY

7:7A-2.1 Jurisdiction and operative date

(a) This chapter shall apply to all regulated activities within the State of New Jersey, except as specifically provided in this chapter. This chapter shall also apply to any discharge of dredged or fill material into State regulated waters which are not freshwater wetlands.

(b) Except when an activity is authorized by the Department pursuant to a Statewide general permit as set forth in this chapter, a person proposing to engage in a regulated activity shall apply to the Department for a freshwater wetlands permit, and a person proposing to discharge dredged or fill material into State regulated waters shall apply to the Department for an open water fill permit.

(c) An agency of the State proposing to engage in a regulated activity shall apply to the Department for a freshwater wetlands permit but shall not be required to pay a fee therefor. An agency of the State proposing to discharge dredged or fill material into State regulated waters shall apply for an open water fill permit, but shall not be required to pay a fee therefor.

(d) When a proposed project requires more than one permit from the Division, the Division will require the submittal of only one application, but that application shall comply with the requirements of each applicable permit program. This provision does not preclude an applicant from submitting separate applications if the timing or magnitude of a project requires it.

(e) Where a proposed project requires more than one permit from the Division, decisions on the acceptability of the proposed location, use or design shall be made first in accordance with the applicability and permitting standards of this chapter, and then, as appropriate, with the rules of any other applicable permit programs (see N.J.A.C. 7:13; N.J.A.C. 7:7E; and N.J.A.C. 7:7). Any project requiring both a permit under this chapter (freshwater wetlands or open water fill permit), and a permit governed by what is commonly known as the 90-day construction law, N.J.S.A. 13:1D-19 et seq., shall acquire a permit under this chapter first. Thus, approval under this chapter shall be a required part of the permit application for the permit under the 90-day construction law.

(f) This chapter shall become operative on July 1, 1988.

7:7A-2.2 Subchapters which apply to freshwater wetlands permits or open water fill permits

(a) Any person proposing to engage in a regulated activity in a freshwater wetlands shall comply with the provisions of subchapters 1 (General information), 2 (Applicability), 3 (General standards for granting freshwater wetlands permits), 5 (Transition areas), 6 (Transition area waivers), 7 (Letters of interpretation), 8 (General permits), 9 (Pre-application conferences), 10 (Application procedure), 11 (Review of applications), 12 (Permit contents), 13 (Mitigation), and 14 (Enforcement) of this chapter.

(b) Any person proposing to discharge dredged or fill materials into State regulated waters shall comply with the provisions of subchapters 1 (General information), 2 (Applicability), 4 (General standards for granting open water fill permits), 8 (General permits), 9 (Pre-application conferences), 10 (Application procedure), 11 (Review of applications), 12 (Permit contents), and 14 (Enforcement) of this chapter.

7:7A-2.3 Regulated activities defined

(a) The term "regulated activity" means any of the following activities or any act or omission proximately causing the following activities in a freshwater wetland:

1. The removal, excavation, disturbance or dredging of soil, sand, gravel, or aggregate material of any kind;
2. The drainage or disturbance of the water level or water table;
3. The dumping, discharging or filling with any materials;
4. The driving of pilings;
5. The placing of obstructions; or
6. The destruction of plant life which would alter the character of a freshwater wetland, including the cutting of trees except the approved harvesting of forest products pursuant to N.J.A.C. 7:7A-2.5(a)2.

(b) The term "regulated activity" shall also mean the discharge of dredged or fill material into State regulated waters.

7:7A-2.4 Designation of freshwater wetlands

(a) The designation of freshwater wetlands shall be based upon the three-parameter approach (that is, hydrology, soils and vegetation) enumerated in the April 1, 1987 interim-final draft "Wetland Identification and Delineation manual" developed by the USEPA, and any subsequent amendments thereto.

(b) The three-parameter approach is a jurisdictional methodology for determining, in a consistent and repeatable manner, the presence of wetlands and the boundaries of wetlands. It requires careful consideration of such factors as vegetative species composition, saturated soil conditions, depth to seasonal high water table and the presence or absence of hydrologic indicators.

(c) To aid in determining the presence or absence of freshwater wetlands, the Department may refer to any of the following sources of information:

1. United States Department of Agriculture Soil Surveys;
2. United States Fish and Wildlife Service National Wetlands Inventory (NWI) Maps;

i. NWI maps shall be used to indicate the approximate location of some freshwater wetlands;

ii. NWI maps have been determined to be unreliable for the purposes of locating the actual wetlands boundary;

3. United States Geological Survey topographic maps;

4. Letters submitted by applicants containing site specific data;

5. Comments filed by municipal and county governments and interested citizens; and

6. Comments filed by State or Federal agencies.

(d) Vegetative species classified as hydrophytes and indicative of freshwater wetlands shall be those plants listed in "Wetlands Plants: Northeast Region" (1986) compiled by the United States Fish and Wildlife Service in cooperation with the United States Army Corps of Engineers, USEPA, and the United States Soil Conservation Service, and any subsequent amendments thereto.

(e) The Department will develop a functional, complete, and up-to-date composite freshwater wetlands map and inventory using the most recent available data, which shall include, but need not be limited to, aerial photographs and soils inventories at a scale suitable for freshwater wetlands regulatory purposes. The Department will make appropriate sections of this map and inventory available on a periodic basis to the county clerk or register of deeds and mortgages in each county, as appropriate, and to the clerk of each municipality.

(f) When available, the up-to-date composite freshwater wetlands map and inventory shall be used to locate wetlands as definitively as is practicable, as an informational tool in advising the public of the approximate extent and location of wetlands, and in preparing some letters of interpretation. However, when exact delineation of wetlands boundaries is required, measurements shall be made in accordance with the three-parameter approach.

7:7A-2.5 Classification of freshwater wetlands by resource value

(a) Freshwater wetlands shall be divided into three classifications based on resource value. The classification of a particular wetland shall be used in considering alternatives to the proposed regulated activity, in determining the size of the transition area, and in assessing mitigation.

(b) Freshwater wetlands of exceptional resource value shall be freshwater wetlands which exhibit any of the following characteristics:

1. Those which discharge into FW-1 waters and FW-2 trout production (TP) waters and their tributaries; or

2. Those which are present habitats for threatened or endangered species, or those which are historically documented habitats for threatened or endangered species, and which remain suitable for breeding, resting, or feeding by these species during the normal period these species would use the habitat. A habitat shall be considered a documented habitat if the Department makes a finding that the habitat remains suitable for use by the specific documented threatened and endangered species, based upon information available to it, including, but not limited to, information submitted by an applicant for a freshwater wetlands permit.

i. For the purposes of this subsection, "resting" means non-mobile behavior appropriate to a particular species on a routine basis or as necessary to the life cycle of the appropriate species, such as sleeping, hibernating, preening, bathing and sunbathing, roosting, or hiding.

(c) An applicant shall have the opportunity to request of the Department that a documented habitat not result in the classification of a freshwater wetland as a freshwater wetland of exceptional value if the applicant can demonstrate the long-term loss of one or more habitat requirements of the specific documented threatened or endangered species, including, but not limited to, wetlands size or overall habitat size, water quality, or vegetation density or diversity.

(d) Freshwater wetlands of ordinary value shall be freshwater wetlands which do not exhibit the characteristics enumerated in (b) above, and which are certain isolated wetlands, ditches, swales, or detention facilities of human construction.

(e) Freshwater wetlands of intermediate resource value shall be all freshwater wetlands not defined as exceptional or ordinary.

(f) The classification system established under this section shall not restrict the Department's authority to require the creation or resto-

ration of freshwater wetlands pursuant to the provisions of N.J.A.C. 7:7A-13.

7:7A-2.6 Designation of State regulated waters

(a) State regulated waters means those waters of the United States in New Jersey for which the United States Army Corps of Engineers can suspend the issuance of section 404 permits upon approval of New Jersey's section 404 permit program by the USEPA Administrator (see subsection 404(h) of the Federal Act).

(b) A specific identification of State regulated waters in New Jersey will be obtained from the Secretary of the Army prior to July 1, 1988.

7:7A-2.7 Activities exempted from permit requirement

(a) The following are exempt from the requirement of a freshwater wetlands permit or an open water fill permit unless the USEPA's regulations providing for the delegation to the State of the Federal wetlands program conducted pursuant to the Federal Act require a permit for any of those activities, in which case the Department shall require a permit for those activities so identified by the USEPA:

1. On properties which have received or are eligible for a farmland assessment, normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food and fiber, or upland soil and water conservation practices; construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches; construction or maintenance of farm roads or forest roads constructed and maintained in accordance with best management practices to assure that flow and circulation patterns and chemical and biological characteristics of freshwater wetlands are not impaired and that any adverse effect on the aquatic environment will be minimized;

2. Normal harvesting of forest products in accordance with a forest management plan approved by the State Forester;

3. The exemptions in (a)1 and 2 above shall not allow any discharge of dredged or fill material into a freshwater wetland or State regulated water incidental to any activity which involves bringing an area of freshwater wetlands or State regulated water into a use to which it was not previously subject, where the flow or circulation patterns of the wetlands or waters may be impaired, or the reach of wetland or water areas is reduced;

4. Projects for which:

- i. Preliminary site plan or subdivision applications have received formal preliminary approvals from local authorities pursuant to the "Municipal Land Use Law", N.J.S.A. 40:55D-1 et seq., prior to July 1, 1988. This excludes approvals which were given prior to the effective date of the Municipal Land Use Law. Projects not initiated within five years of enactment of the Act shall apply for a freshwater wetlands permit or open water fill permit.

- ii. Preliminary site plan or subdivision applications which have been submitted to and remain under active consideration by the local authorities prior to June 8, 1987; or

- iii. Permit applications which have been approved by the United States Army Corps of Engineers prior to July 1, 1988, for projects which would otherwise be subject to State regulation on or after July 1, 1988. Such projects shall be governed only by the Federal Act, and shall not be subject to any additional or inconsistent substantive requirements of the Act; provided, however, that upon the expiration of a permit issued pursuant to the Federal Act any application for a renewal thereof shall be made to the appropriate regulatory agency. The Department shall not require the establishment of a transition area as a condition of any renewal of a permit issued pursuant to the Federal Act prior to July 1, 1988;

5. Surveying activities such as soil borings and cutting of narrow survey lines which do not alter the character of the wetland;

6. Fish and wildlife harvesting activities such as traps and duck blinds; and

7. Water level recording devices, water quality monitoring and testing devices and similar scientific devices.

(b) The activities listed in (a)4i, ii, and iii above shall no longer be exempt from the requirement of a freshwater wetlands permit or 404 permit if significant changes are made to the approved site plan which result in a change in the use of the site, an increase in the

amount of wetland or waters to be disturbed, or an increase in the intensity of the planned use.

(c) Projects not subject to the jurisdiction of the United States Army Corps of Engineers and for which preliminary site or subdivision applications have been approved prior to July 1, 1988 shall not require transition areas.

(d) Activities authorized under United States Army Corps of Engineers Nationwide Permits prior to July 1, 1988 shall not require a freshwater wetlands permit from the Department provided the property owner can demonstrate that a Nationwide Permit was issued for a particular site and use prior to July 1, 1988. To demonstrate that a Nationwide Permit was approved for a particular site and activity, a copy of the approval letter must be submitted or a copy of all the information submitted to the United States Corps of Engineers which requested approval under an effective Nationwide Permit must be submitted to the Department. The approval letter must be dated no later than June 30, 1988. The information submitted to the Corps of Engineers must be certified as being submitted no later than 20 days prior to June 30, 1988.

7:7A-2.8 Geographic areas exempted from freshwater wetlands permit requirement

(a) Regulated activities in the following geographic areas shall not require a freshwater wetlands permit, but may require an open water fill permit.

1. Areas regulated as a coastal wetland pursuant to N.J.S.A. 13:9A-1 et seq.;

2. Activities in areas under the jurisdiction of the Hackensack Meadowlands Development Commission pursuant to N.J.S.A. 13:17-1 et seq. shall not require a freshwater wetlands permit except that the discharge of dredged or fill material shall require a permit issued under the provisions of the Federal Act, or under an individual and general permit program administered by the State under the provisions of the Federal Act and applicable State laws; and

3. Activities in areas under the jurisdiction of the Pinelands Commission pursuant to N.J.S.A. 13:18A-1 et seq. shall not require a freshwater wetlands permit, except that the discharge of dredged or fill material shall require a permit issued under the provisions of the Federal Act, or under an individual and general permit program administered by the State under the provisions of the Federal Act and applicable State laws, provided that the Pinelands Commission may provide for more stringent regulation of activities in and around freshwater wetland areas within its jurisdiction.

SUBCHAPTER 3. GENERAL STANDARDS FOR GRANTING FRESHWATER WETLANDS PERMITS

7:7A-3.1 Requirements for water-dependent activities

(a) The Department shall issue a freshwater wetlands permit only if it finds that the regulated activity:

1. Is water-dependent or requires access to freshwater wetlands as a central element of its basic function, and has no practicable alternative which would:

- i. Not involve a freshwater wetland; or
- ii. Involve a freshwater wetland, but would have a less adverse impact on the aquatic ecosystem; and
- iii. Not have other significant adverse environmental consequences, that is, would not merely substitute other significant environmental consequences for those attendant on the original proposal.

7:7A-3.2 Requirements for non-water dependent activities

(a) The Department shall issue a freshwater wetlands permit for a non-water dependent activity only if it finds that the regulated activity:

1. Is nonwater-dependent and has no practicable alternative which would:

- i. Not involve a freshwater wetland; or
- ii. Involve a freshwater wetland but would have a less adverse impact on the aquatic ecosystem; and

iii. Not have other significant adverse environmental consequences, that is, would not merely substitute other significant environmental consequences for those attendant on the original proposal.

(b) It shall be a rebuttable presumption that there is a practicable alternative to any nonwater-dependent regulated activity, which alternative does not involve a freshwater wetland, and that such an alternative to any regulated activity would have less of an impact on the aquatic ecosystem.

1. An alternative shall be practicable if it is available and capable of being carried out after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

2. An alternative shall not be excluded from consideration under this provision merely because it includes or requires an area not owned by the applicant which could reasonably have been or be obtained, utilized, expanded, or managed in order to fulfill the basic purpose of the proposed activity.

(c) In order to rebut the presumption established in (b) above, an applicant for a freshwater wetlands permit must demonstrate all of the following:

1. That the basic project purpose cannot reasonably be accomplished utilizing one or more other sites in the general region that would avoid, or reduce, the adverse impact on an aquatic ecosystem;

2. That the basic project purpose cannot reasonably be accomplished if there is a reduction in the size, scope, configuration, or density of the project as proposed;

3. That the basic project purpose cannot reasonably be accomplished by any alternative designs that would avoid, or result in less, adverse impact on an aquatic ecosystem;

4. That in cases where the applicant has rejected alternatives to the project as proposed due to constraints such as inadequate zoning, infrastructure, or parcel size, the applicant has made reasonable attempts to remove or accommodate such constraints; and

5. That other uses for the site are not available for which the applicant could obtain some reasonable return.

7:7A-3.3 Non-water dependent activities in freshwater wetlands of exceptional resource value

(a) In order to rebut the presumption established for non-water dependent activities (see N.J.A.C. 7:7A-3.2) when the activity will take place in wetlands of exceptional resource value, an applicant, in addition to complying with the provisions of N.J.A.C. 7:7A-3.2, shall also demonstrate either:

1. That there is a compelling public need for the proposed activity greater than the need to protect the freshwater wetland, and that the need cannot be met by essentially similar projects in the region which are under construction or expansion, or which have received the necessary governmental permits and approvals; or

2. That denial of the permit would impose an extraordinary hardship on the applicant brought about by circumstances peculiar to the subject property.

7:7A-3.4 Requirements for all regulated activities

(a) In addition to the other requirements set forth in this subchapter, the Department shall issue a permit for a regulated activity only if the activity:

1. Will result in a minimum feasible alteration or impairment of the aquatic ecosystem including existing contour, vegetation, fish and wildlife resources, and aquatic circulation of the freshwater wetland and hydrologic patterns of the watershed;

2. Will not jeopardize historic or documented habitat or the continued existence of a local population of species listed pursuant to "The Endangered and Nongame Species Conservation Act", N.J.S.A. 23:2A-1 et seq., or which are listed on the Federal endangered species list;

3. Will not result in the likelihood of the destruction or adverse modification of a habitat which is determined by the Secretary of the United States Department of the Interior or the Secretary of the United States Department of Commerce, as appropriate, to be a critical habitat under the "Endangered Species Act of 1973", (16 U.S.C. §§1531 et seq.);

4. Will not cause or contribute to a violation of any applicable State water quality standard;

5. Will not cause or contribute to a violation of any applicable toxic effluent standard or prohibition imposed pursuant to New Jersey's "Water Pollution Control Act", N.J.S.A. 58:10A-1 et seq.;

6. Will not violate any requirement imposed by the United States government to protect any marine sanctuary designated pursuant to the "Marine Protection, Research and Sanctuaries Act of 1972", (33 U.S.C. §§1401 et seq.);

7. Will not cause or contribute to a significant degradation of ground or surface waters;

8. Is in the public interest as determined pursuant to N.J.A.C. 7:7A-3.5;

9. Is necessary to realize the benefits derived from the proposed activity; and

10. Is otherwise lawful.

7:7A-3.5 Determination of whether activity is in the public interest

(a) In determining whether a proposed activity in any freshwater wetland is in the public interest, the Department shall consider the following:

1. The public interest in preservation of natural resources and the interest of the property owners in reasonable economic development;

2. The relative extent of the public and private need for the proposed regulated activity;

3. Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods, to accomplish the purpose of the proposed regulated activity;

4. The extent and permanence of the beneficial or detrimental effects which the proposed regulated activity may have on the public and private uses for which the property is suited;

5. The quality of the wetland which may be affected and the amount of freshwater wetlands to be disturbed;

6. The economic value, both public and private, of the proposed regulated activity to the general area; and

7. The ecological value of the freshwater wetlands and probable impact on public health and fish and wildlife.

7:7A-3.6 Emergency permits

(a) The Department may issue a temporary emergency freshwater wetlands or open water fill permit for a regulated activity only if:

1. An unacceptable threat to life or severe loss of property will occur if an emergency permit is not granted; and

2. The anticipated threat or loss may occur before a permit can be issued or modified under the procedures otherwise required by the Act, this chapter, and other applicable State laws.

(b) The emergency permit shall incorporate, to the greatest extent practicable and feasible but not inconsistent with the emergency situation, the standards and criteria required for non-emergency regulated activities and shall:

1. Be limited in duration to the time required to complete the authorized emergency activity, not to exceed 90 days; and

2. Require the restoration of the freshwater wetland or State regulated waters within this 90 day period, except that if more than the 90 days from the issuance of the emergency permit is required to complete restoration, the emergency permit may be extended to complete this restoration only.

(c) The emergency permit may be issued orally or in writing, except that if it is issued orally, a written emergency permit shall be issued within five days thereof.

(d) Notice of the issuance of the emergency permit shall be published and public comments received, in accordance with the provisions of the Federal Act and applicable State law, provided that this notification shall be sent no later than 10 days after issuance of the emergency permit.

(e) The emergency permit may be terminated at any time without prior hearing upon a determination by the Department that this action is appropriate to protect human health or the environment.

7:7A-3.7 Obtaining an emergency permit

(a) A person in need of an emergency permit shall inform the Department by telephone as to the extent of work to be performed, the reason for the emergency, and the location of the project. This

information shall be presented to the Department in writing within two days following the telephone request.

(b) If verbal approval is given by the Director the emergency work may be started. The verbal approval shall be verified by the Department in writing within three working days. Department staff shall be kept informed by telephone (at least once per week) regarding the situation at the site. The Department will offer guidance and instructions in performing the work.

(c) If verbal approval is not given, the Department may issue a written emergency permit at any time within 15 days of the initial request.

(d) Within 15 days of the granting of an emergency permit which has been obtained and complied with in accordance with the Department's instructions, a complete freshwater wetlands or open water fill permit application with appropriate fees and "as built" drawings shall be submitted to the Department for review. A permit shall then be issued by the Department authorizing the activities covered by the emergency permit. This permit may contain conditions necessary to compensate for any adverse impacts to the freshwater wetlands or open waters resulting from the emergency permit or the activity.

SUBCHAPTER 4. GENERAL STANDARDS FOR GRANTING AN OPEN WATER FILL PERMIT

7:7A-4.1 General standards

The standards for granting or denying an open water fill permit shall be the same as those followed by the Army Corps of Engineers under section 404 of the Federal Act. These standards can be found at 40 C.F.R. §§230 et seq. commonly known as the "404(b)(1) Guidelines".

SUBCHAPTER 5. TRANSITION AREAS (RESERVED)

AGENCY NOTE: The Department plans to amend this chapter prior to July 1, 1989, the effective date of the transition area provisions of the Act, to define a method for determining the size of the transition area, and to list activities to be prohibited in transition areas.

SUBCHAPTER 6. TRANSITION AREA WAIVERS (RESERVED)

AGENCY NOTE: The Department plans to amend this chapter prior to July 1, 1989, the effective date of the transition area provisions of the Act, to define conditions and procedures for obtaining a transition area waiver.

SUBCHAPTER 7. LETTERS OF INTERPRETATION

7:7A-7.1 Purpose

A person proposing to engage in a regulated activity in a freshwater wetland may, prior to applying for a freshwater wetlands permit, request from the Department a letter of interpretation to establish whether the site of a proposed activity is located in a freshwater wetland.

7:7A-7.2 Application for letters of interpretation

(a) Individual property owners or their agents may request in writing a letter of interpretation to determine the presence or absence of wetlands for a property less than one acre in size, by submitting the following information:

1. Name of owner(s) of property, municipality, county, lot and block number(s), name of watershed and subwatershed;
2. On an out-bound survey of the property, the topography and soil types (from United States Department of Agriculture, Soil Conservation Service County Soil Survey);
3. A map of the region locating the property;
4. Photographs of the property;
5. A list of vegetative species established on the area suspected to be wetlands; and
6. Verification that a registered notice and a complete copy of the application has been forwarded to the clerk of the municipality and that a registered notice has been forwarded to the environmental

commission if any, and planning board, if any, of the municipality in which the determination is to be made, the planning board of the county in which the determination is to be made, and landowners within 200 feet of the site.

(b) A request for a letter of interpretation for properties other than those discussed in (a) above must be in writing and contain the following information:

1. Name of owner(s) of property, municipality, county, lot and block number(s), and project name, if any, name of the watershed and subwatershed;

2. On an out-bound survey of the property, the topography and soil types (from United States Department of Agriculture, Soil Conservation Service County Soil Survey). The locations of all soil pits or borings, if applicable, shall be indicated on the survey and numbered. Soil logs shall be presented with an indication of the depth to the seasonal high water table. Soil borings must be to a depth of three to four feet, on transects perpendicular to the wetlands boundary, starting in the definite wetlands area and moving towards the uplands;

3. Verification that registered notice has been forwarded to the environmental commission (if any), and planning board of the municipality in which the proposed regulated activity will occur, the planning board of the county in which the proposed regulated activity will occur, landowners within 200 feet of the site of the proposed regulated activity, which notice may be filed concurrently with notices required pursuant to N.J.S.A. 40:55D-1 et seq., describing the proposed regulated activity and advising these parties of their opportunity to submit comments thereon to the Department;

4. Verification that a complete copy of the request for a letter of interpretation, including all materials required by this subsection, has been submitted to the clerk of the municipality in which the proposed regulated activity will take place;

5. Vegetative species, recorded at soil boring locations, and classified using United States Fish and Wildlife Service categories (P. Reed, 1986) as listed under "R/IND" and "NAT-IND" (Regional and National Indicators) columns;

6. The proposed wetlands boundary, clearly indicated and labeled on the out-bound survey. An explanation must be provided on how this line was delineated;

7. The wetlands boundary line shall be visibly flagged and/or staked in the field with numbered flags and referenced by matching numbers on the out-bound survey. The flags and/or stakes are to be set in relation to known points and landmarks so that the boundary can be re-established;

8. Pictures of the wetland area;

9. Name(s) and qualifications of these person(s) who prepared the proposed wetland boundary;

10. Written consent by the applicant to allow access to the subject site by representatives or agents of the Department for the purpose of conducting a site inspection or survey of the wetlands thereon; and

11. A fee as indicated on the printed fee schedule which is available from the Department.

(c) Within 20 days after receipt of a request for a letter of interpretation, the Department may require the submission of any additional information necessary to issue the letter of interpretation.

(d) If no additional information is requested, the Department shall issue a letter of interpretation within 30 days after receiving the request.

(e) If additional information is requested by the Department in order to issue a letter of interpretation, the Department shall issue a letter of interpretation within 45 days after receipt of the information sufficient to declare the application complete.

(f) If a person requesting the letter has not made a reasonable good faith effort to provide the Department with information sufficient to make a determination, the Department shall issue a letter of interpretation requiring the application for a freshwater wetlands permit or transition area waiver.

(g) An agency of the State requesting a letter of interpretation shall provide all necessary information required to make a determination but shall not be required to pay a fee therefor.

7:7A-7.3 Onsite inspections

(a) The Department may require an applicant for a letter of interpretation to perform and submit to the Department an onsite survey of the wetlands to determine or verify the general location of the freshwater wetland boundary. The surveyed line shall be subject to approval and verification by the Department.

(b) If the Department determines that onsite inspection by the Department is necessary, the Department shall conduct an inspection, and the time specified in this subchapter for issuance of the letter of interpretation shall be extended by 45 days.

(c) A person applying for a letter of interpretation may also submit a report of an onsite freshwater wetlands delineation prepared by a qualified professional using the three-parameter approach and receive within the time specified in this subchapter a letter of interpretation verifying the actual freshwater wetlands area boundaries.

(d) Depending upon the specific project location and proximity to documented hydrologic indicators, and other documentation, the Department may issue a letter of interpretation without conducting a site inspection. The Department may also issue a letter of interpretation without a site inspection pursuant to N.J.A.C. 7:7A-7.2(h).

7:7A-7.4 Local review

The Department, in determining the presence or absence of freshwater wetlands and the location of wetlands boundaries, shall consider comments filed by municipal and county governments and interested citizens. Comments filed by the clerk, environmental commission and planning board of a municipality will be actively considered as part of all determinations, provided comments are filed with the Department within 15 days after the Department's receipt of a request for a letter of interpretation.

7:7A-7.5 USEPA review

(a) The Department shall transmit to the USEPA a copy of any letter of interpretation determining that the site of a proposed regulated activity is not in a freshwater wetland.

(b) Any letter of interpretation which determines that the site of a proposed regulated activity is not in a freshwater wetlands shall be subject to review, modification, or revocation by the United States Environmental Protection Agency.

7:7A-7.6 Effect of a letter of interpretation

A person who receives a letter of interpretation pursuant to this subchapter shall be entitled to rely on the determination of the Department, except as provided in N.J.A.C. 7:7A-7.5 (USEPA Review), for a period of three years.

7:7A-7.7 Effect of non-issuance of a letter of interpretation within time allotted

(a) Any person who requests a letter of interpretation pursuant to the provisions of the Act and this chapter, and does not receive a response from the Department within the deadlines imposed in this subchapter, shall not be entitled to assume that the site of the proposed activity which was the subject of the request for a letter of interpretation is not in a freshwater wetland.

(b) A person who requests a letter of interpretation and does not receive a response within the above deadlines may directly apply for a freshwater wetlands permit.

SUBCHAPTER 8. GENERAL PERMITS

7:7A-8.1 Nationwide Permits adopted as Statewide General Permits

(a) All 26 United States Army Corps of Engineers Nationwide Permits which were approved under the Federal Act as of November 13, 1986 have been considered by the Department. Nationwide Permits numbers one, two, five, eight, nine, 10, 11, 19, 21, and 24 pertain only to navigable waters of the United States or, in the case of number 21, only to coal mines, and therefore, are not appropriate or applicable for adoption in this chapter. Nationwide Permits numbers four and six have been exempted from regulation under the Act as discussed at N.J.A.C. 7:7A-2.7. Nationwide Permit numbers seven, 13, 17, 18, 23, 25 and 26 have not been adopted in this chapter except that parts of 26 have been adopted as required by the Act at N.J.A.C. 7:7A-8.2. Nationwide Permit numbers three, 12, 16, 21 and 22 have been proposed for adoption in N.J.A.C. 7:7A-8.2, as

modified, as Statewide Permits numbers one to five respectively. The following activities followed in freshwater wetlands and State regulated waters under Nationwide Permits are hereby allowed under Statewide General Permits:

1. The repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure or fill, provided such repair, rehabilitation, or replacement does not result in a deviation from the plans of the original structure or fill, and further provided that the structure or fill has not been put to uses differing from uses specified for it in any permit authorizing its original construction. Minor deviations due to changes in materials or construction techniques and which are necessary to make repair, rehabilitation, or replacement are allowed;

2. Discharge of material for backfill or bedding for utility lines, provided there is no change in preconstruction elevation and bottom contours. Excess material must be removed to an upland disposal area. A "utility line" is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquifiable, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone and telegraph messages, and radio and television communication. The activities allowed by the Statewide General Permit shall comply with the following conditions:

i. The activity encompasses no more than one acre of wetlands;
ii. The right-of-way for the project is no more than 20 feet wide;
iii. The project is not located in a wetland of exceptional quality;
iv. The activity is not located in a wetland designated as a Priority Wetland by EPA;

v. Any excavation is backfilled with the original soil material to the preexisting elevation;

vi. The area above the excavation is revegetated with native, indigenous species; and

vii. The activity is designed so as not to interfere with the natural hydraulic characteristics of the wetland and subwatershed.

3. Discharge of return water from an upland, contained dredged material disposal area provided the State has issued a site specific or generic certification (Water Quality Certificate) under section 401 of the Federal Act. The dredging itself may also require State and Federal permits;

4. Structures, work and discharges for the containment and clean up of oil and hazardous substances which are subject to the National Oil and Hazardous Substances Pollution Contingency Plan (Plan), (40 C.F.R. Part 300), provided the Regional Response Team which is activated under the Plan concurs with the proposed containment and cleanup action;

5. Minor work or temporary structures repaired for the removal for non-historic wrecked, abandoned, or disabled vessels, or the removal of man-made obstructions to navigation. This Statewide General Permit does not authorize maintenance dredging, stream cleaning, shoal removal, or river bank snagging.

7:7A-8.2 New Jersey Statewide General Permits

(a) In addition to those activities set forth in N.J.A.C. 7:7A-8.1, the activities set forth in this section are allowed under Statewide General Permits.

(b) Regulated activities are permitted in a freshwater wetland or in State regulated waters which are not a surface water tributary system discharging into an inland lake, pond, river or stream, provided:

1. The activity would not result in the loss or substantial modification of more than one acre of freshwater wetland or State regulated waters;

2. The activity will not take place in a wetland of exceptional resource value as defined in N.J.A.C. 7:7A-2.5(a)1 nor in State regulated waters defined as a special aquatic site in 40 C.F.R. §230.1;

3. The activity will not take place in wetlands designated as priority wetlands by the USEPA;

4. The activity is consistent with the standard conditions for all Statewide General Permits listed in N.J.A.C. 7:7A-8.3; and

5. The Department is notified in accordance with N.J.A.C. 7:7A-8.4, and the applicant receives a written notification from the

Department that the activity is covered by a Statewide General Permit.

(c) The removal, excavation, disturbance or dredging of soil, filling with suitable non toxic material, destruction of plant life and placing of obstructions is permitted in ditches and swales of human construction provided the ditches or swales:

1. Are located in headwater areas;
2. Are not located in exceptional quality wetlands;
3. Are not designated as priority wetlands by the USEPA; and
4. Are undertaken in conformance with the standard conditions for Statewide General Permits listed in N.J.A.C. 7:7A-8.3.

(d) Only one of the Statewide General Permits in (b) and (c) above may be applied to any single property, parcel or development project. Use of multiple Statewide General Permits on a single property, parcel or development project shall not be allowed. For parcels of land subdivided on or after the effective date of the Act, or for subdivision applications submitted after June 8, 1987, only one of each Statewide General Permit in (b) and (c) above may be approved or applied to a project or to the pre-existing subdivision.

(e) The following activities are permitted subject to the standard conditions for all Statewide General Permits in N.J.A.C. 7:7A-8.3 and provided the activities are in conformance with the Federal Act:

1. Maintenance, reconstruction, or repair of roads or public utilities lawfully existing prior to July 1, 1988 or permitted under the Act and this chapter, provided that such activities do not result in disturbance of additional freshwater wetlands or State regulated waters upon completion of the activity;

2. Maintenance or repair of active irrigation or drainage ditches lawfully existing prior to July 1, 1988 or permitted under the Act and this chapter, provided that such activities do not result in disturbance of additional freshwater wetlands or State regulated waters upon completion of the activity;

3. Appurtenant improvements or additions to residential dwellings lawfully existing prior to July 1, 1988, provided that the improvements or additions require less than a cumulative surface area of 750 square feet of fill and will not result in new alterations to a freshwater wetland or State regulated waters outside of the fill area;

4. State or Federally funded roads which:

i. Were planned and developed in accordance with the "National Environmental Policy Act of 1969", the Federal Act, and Executive Order Number 53 (approved October 5, 1983); and

ii. Were the subject of an application made prior to July 1, 1988 to the United States Army Corps of Engineers for an individual or general permit under the Federal Act, provided that:

(1) Upon expiration of a permit, any application for a renewal or modification thereof shall be made to the Department; and

(2) The Department shall not require transition areas as a condition of the renewal or modification of the permit;

5. Maintenance and repair of stormwater management facilities lawfully constructed prior to July 1, 1988 or permitted under the Act and this chapter, provided that these activities do not result in disturbance of additional freshwater wetlands or State regulated waters upon completion of the activity; and

6. Maintenance, reconstruction, or repair of buildings or structures lawfully existing prior to July 1, 1988 or permitted under the Act and this chapter, provided that these activities do not result in disturbance of additional freshwater wetlands or State regulated waters upon completion of the activity.

7:7A-8.3 Standard conditions for all Statewide General Permits

(a) All regulated activities authorized under Statewide General Permits listed in N.J.A.C. 7:7A-8.1 and 8.2 are subject to the specific conditions listed under each permit. Permittees wishing to conduct activities under these general permits must comply with these conditions as well as with the conditions below. In order to apply for a Statewide General Permit, the procedures in N.J.A.C. 7:7A-8.4 must be followed.

(b) The following standard conditions must be met in order for regulated activity to be authorized under the Statewide General Permits identified in this subchapter:

1. The regulated activity shall not occur in the proximity of a public water supply intake;

2. The regulated activity shall not jeopardize a threatened or endangered species which has been identified pursuant to "The Endangered and Nongame Species Conservation Act", N.J.S.A. 23:2A-1 et seq., or which appear on the Federal endangered species list, and the activity shall not destroy, jeopardize, or adversely modify the historic or documented habitat of such species;

3. Any discharge of dredged or fill material shall consist of suitable material free from toxic pollutants (see section 307 of the Federal Act) in toxic amounts;

4. Any structure or fill authorized shall be properly maintained;

5. The activity will not occur in a component of either the Federal or State Wild and Scenic River System; nor in a river officially designated by Congress or the State Legislature as a "study river" for possible inclusion in either system while the river is in an official study status; and

6. The activity shall not adversely affect properties which are listed or are eligible for listing on the National Register of Historic Places. If the permittee, before or during the course of work authorized, encounters a historic property that has not been listed or determined eligible for listing on the National Register, but which may be eligible for listing in the National Register, the permittee shall immediately notify the Department and proceed as directed by the Department.

7:7A-8.4 Application for activities under Statewide General Permits

(a) A person proposing to engage in an activity covered by a Statewide General Permit shall provide written, certified notice to the Department and to municipal and county governments (pursuant to the Municipal Land Use Law) at least 30 working days prior to commencement of work.

(b) The notice shall contain:

1. A description of the proposed activity; and

2. A description of the location of the activity including county, municipality, lot(s), block(s), and a plan of the site detailing existing structures, wetlands boundaries and proposed structures or activities, or both.

(c) The Department, within 30 working days of receipt of this notification, shall notify in writing the person proposing to engage in the activity covered by a general permit as to whether they are covered by the Statewide General Permit, or whether an individual permit is required for the activity. Activities began or carried out without this written notification shall be a violation of the Statewide General Permit, the Act and this chapter.

7:7A-8.5 Modification and review of Statewide General Permits

(a) The Department may modify a Statewide General Permit issued pursuant to this subchapter by adding special conditions.

(b) The Department may rescind a Statewide General Permit and require an application for an individual permit if the Department finds that additional permit conditions would not be sufficient and that special circumstances make this action necessary to insure compliance with the Act, this chapter, any permit or order issued pursuant thereto, or the Federal Act.

(c) The Department shall review the Statewide General Permits adopted or authorized by this subchapter every five years, which review shall include public notice and opportunity for public hearing. Upon this review the Department shall either modify, reissue or revoke any or all Statewide General Permits.

(d) If a Statewide General Permit is not modified or reissued within five years of publication in the New Jersey Register, it shall automatically expire.

SUBCHAPTER 9. PRE-APPLICATION CONFERENCES

7:7A-9.1 Purpose

A pre-application conference is optional, but highly recommended. It allows the Department to inform potential applicants of the various procedures and policies which apply to the freshwater wetlands and open water fill permitting process. Department staff will candidly discuss the apparent strengths and weaknesses of the proposed permit application at this conference, but the Department shall in no way commit itself to approval or rejection of a proposed project as a result of these discussions.

7:7A-9.2 Request for a pre-application conference

(a) Potential applicants are encouraged to request a pre-application conference with the Department at the earliest opportunity following the issuance of a letter of interpretation. A request for a pre-application conference shall be made in writing and shall include a project description, a tax lot and block designation of the site, the location of freshwater wetlands and State regulated waters, a copy of the appropriate United States Soil Conservation Service map(s) locating the project, a list of dominant vegetation types, a United States Geological Survey quadrangle map showing the site, and evidence that the municipality has been notified of the request.

(b) The Department shall, within 15 days of receipt of such request, schedule a pre-application conference.

7:7A-9.3 Discussion of information requirements

The Department shall candidly discuss the level of detail and areas of emphasis which will be necessary to allow the Department to review the application if one is submitted.

7:7A-9.4 Memorandum of record

(a) After the pre-application conference, the Department shall prepare a written memorandum of record summarizing the discussion of the apparent strengths and weaknesses of the proposed project, the apparent sensitivity of the land and water features of its site, and the level of detail and areas of emphasis necessary in the materials that the potential applicant may be required to submit as part of the application.

(b) The memorandum of record shall be mailed to the potential applicant or his agent, if designated in writing, after the pre-application conference. If the potential applicant submits an application, a copy of the memorandum of record shall be included with the application, and shall be included in the Department's file on the application.

(c) The memorandum of record shall not be construed as a decision of the Department. The Department is in no way bound by any information or statement recorded in the memorandum of record.

SUBCHAPTER 10. APPLICATION PROCEDURE**7:7A-10.1 Application contents**

(a) The application for a freshwater wetland permit or open water fill permit shall include 10 copies of the following information:

1. A completed freshwater wetlands permit or open water fill permit application form including the names and addresses of all owners of property adjacent to the proposed project;

2. A preliminary site plan or subdivision map of the proposed regulated activities, or other map of the site if no preliminary site plan or subdivision map exists;

3. A written description of the proposed regulated activity, the total area to be modified, the total area of the freshwater wetland or State regulated waters potentially affected, identification of the watershed and subwatershed in which the project is located, and the relationship of the area affected to the area of the entire freshwater wetland or State regulated waters complex, for example, one-half acre to be filled of a 15 acre freshwater wetland.

4. A description of the source of any fill material and method of dredging used, if any; a description of the type, composition and quantity of the material; the proposed method of transportation and disposal of the material, including the type of equipment to be used;

5. The purpose and intended use of the proposed activity, including whether it is water-dependent; a description of the uses of any structures to be erected; and a schedule for the progress and completion of the proposed activity;

6. A list of the approvals required by other Federal, interstate, State and local agencies for the activity, including all approvals or denials received;

7. A vicinity map identifying the proposed activity site;

8. Verification that a registered notice has been forwarded to the clerk, environmental commission (if any), and planning board of the municipality in which the proposed regulated activity will occur, the planning board, environmental commission and mosquito commission of the county in which the proposed regulated activity will

occur, landowners within 200 feet of the site of the proposed regulated activity, and all persons who requested to be notified of proposed regulated activities, which notice may be filed concurrently with notices required pursuant to N.J.S.A. 40:55D-1 et seq., describing the proposed regulated activity and advising these parties of their opportunity to submit comments thereon to the Department;

9. Verification that notice of the proposed activity has been published in a newspaper of local circulation. For projects proposing more than 10 acres of fill, notification shall also be published in a newspaper of regional circulation;

10. A statement detailing any potential adverse environmental effects of the regulated activity and any measures necessary to mitigate those effects, and any information necessary for the Department to make the findings pursuant to N.J.A.C. 7:7A-3 and 4. Applicants should review N.J.A.C. 7:7A-3 and 4 in great detail and provide all the listed information to avoid unnecessary delays in permit processing;

11. A fee not to exceed the cost of reviewing and processing the application, as set forth in the fee schedule published by the Department;

12. A description of any special aquatic sites, public use areas, wildlife refuges, and public water supply intakes in the affected or adjacent areas that may require special protection or preservation;

13. A list of plants and/or wildlife in the proposed development or discharge site which may be dependent on water quality and quantity;

14. Uses of the proposed development or discharge site which might affect human health and welfare; and

15. A description of technologies or management practices by which the applicant proposes to minimize adverse environmental effects of the project.

(Note: The Department shall provide permit applicants with guidance, either through the application form or on an individual basis, regarding the level of detail of information and documentation required under this paragraph. The level of detail shall be reasonably commensurate with the type and size of the proposed project, proximity to critical areas, and degree of environmental degradation.)

(b) The application shall also include 10 copies (including one of reproducible quality) of a site plan, on 8½ inch by 11 inch paper (if larger than 8½ inch by 11 inch, all copies shall be folded) indicating the following:

1. All existing structures on the lot and immediately adjacent lots;

2. Distances and dimensions of areas, structures and lots, including freshwater wetlands and State regulated waters and mean high water line (if appropriate), upland property, roads and utility lines;

3. The proposed work area;

4. The general site location in relation to development in the region;

5. The scale of the plan and a north arrow;

6. The name of the person who prepared the plan and the date of preparation; and

7. The name of the applicant and municipal lot and block number of the project site.

(c) The application shall also include photographs showing the project site including:

i. Location of known freshwater wetlands and State regulated waters; and

ii. Proposed location of the regulated activity.

7:7A-10.2 Recordkeeping

Applicants shall keep records of all data used to complete permit applications and any supplemental information submitted under N.J.A.C. 7:7A-10.1 for a period of at least three years from the date the application is submitted to DEP.

7:7A-10.3 Signatories to permit applications and reports

(a) All permit applications shall be signed as follows:

1. For a corporation, by a principal executive officer of at least the level of vice president;

2. For a partnership or sole proprietorship, by a general partner or the proprietor, respectively;

3. For a municipality, State, Federal, or other public agency, by either a principal executive officer or ranking elected official; or

4. By individual owners of record.

(b) All reports required by permits and other information requested by the Department shall be signed by a person described in (a) above, or by a duly authorized representative of that person. A person is a duly authorized representative only if:

1. The authorization is made in writing by a person described in (a) above;

2. The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of plant manager, operator of a well or a well field, superintendent, or position of equivalent responsibility. A duly authorized representative may, thus, be either a named individual or any individual occupying a named position; and

3. The written authorization is submitted with the application to the Department.

(c) If an authorization under (b) above is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of (b) above must be submitted to the Department prior to or together with any reports, information, or applications to be signed by an authorized representative.

(d) Any person signing a document under (a) or (b) above shall make the following certification:

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment.

SUBCHAPTER 11. REVIEW OF APPLICATIONS

7:7A-11.1 Initial Department action

(a) Upon receipt of an application, the Department shall transmit copies to the USEPA and other reviewing agencies and publish notice of the application in the DEP Bulletin.

(b) Within 30 days of receipt of the application, the Department shall review the application for completeness and make any necessary requests for information, or declare the application complete. However, this deadline shall not apply if requests for more information are made by the Department on the basis of comments received from the USEPA.

(c) If additional information is required of an applicant, the Department shall have 15 days after receipt of that information to request further clarification or information, or to declare the application complete. In such cases, the application shall not be considered complete until all the additional information is received by the Department.

1. Copies of information submitted in response to deficiency letters shall, at the discretion of the Department, be distributed to the same persons to whom copies of the initial application were distributed and to reviewing agencies who have requested such information or who will require it in order to complete their review.

(d) If an application is not complete for final review within 60 days of a request for additional information, the Department may, 30 days after providing written notice by certified mail to the applicant, cancel and return the application, unless the applicant can demonstrate good cause for the delay in completing the application. If good cause is demonstrated, a 60 day extension in which to submit the information shall be granted.

1. All fees submitted with an application subsequently cancelled shall be non-refundable.

2. A re-submission of a previously cancelled application shall be accompanied by a new fee.

7:7A-11.2 USEPA review

(a) The Federal Act requires that the USEPA be notified of and have the opportunity to comment on certain applications for a freshwater wetlands permit or open water fill permit within "Waters of the State". Permits for the following categories of activities will require USEPA review:

1. Discharges which may affect freshwater wetlands or State regulated waters other than the one in which the discharge originates;

2. Major discharges;

3. Discharges into critical areas established under State or Federal law including fish and wildlife sanctuaries or refuges, national and historical monuments, wilderness areas and preserves, national and State parks, components of State and Federal Wild and Scenic River systems, the designated critical habitat of threatened or endangered species, and sites identified or proposed under the National Historic Preservation Act of 1966, 16 U.S.C. §§470 et seq.;

4. General permits; and

5. Discharges known or suspected to contain toxic pollutants in toxic amounts under Section 307(a)(1) of the Federal Act, or hazardous substances in reportable quantities under section 311 of the Federal Act.

(b) Some categories of permits may not require USEPA review. A list of categories of permit applications for which USEPA will require an opportunity for review will be established in a memorandum of agreement as part of the State's application for assumption of the Federal 404 program.

(c) The Department shall provide copies of all appropriate applications to USEPA for review and comment.

(d) Within 60 days after the Department receives comment on a complete application from USEPA, or upon receipt of notice that comments will not be forthcoming, the Department may hold a public hearing.

(e) The Department shall issue or deny a permit application within 90 days of receipt of comments or notice that comments will not be forthcoming from the USEPA or within 180 days of submittal of the application, whichever is later.

(f) The Department shall consider and give great weight to comments provided by USEPA.

7:7A-11.3 Soliciting public comment

(a) The Department shall provide notice of application for a freshwater wetlands or open water fill permit, in addition to the notice requirements for submission of the application in N.J.A.C. 7:7A-10.1(a), in the DEP Bulletin upon receipt of the application.

(b) Copies of all freshwater wetlands or open water fill permit applications will be available for public scrutiny by interested persons in the offices of the Department in Trenton during normal business hours. Local agencies to whom copies of permit applications were submitted (see N.J.A.C. 7:7-10.1(a)) are encouraged to make a copy of the application available for public scrutiny by interested persons during normal work hours.

(c) The status of all permit applications shall be published in the DEP Bulletin, and shall constitute notice to all interested persons except those specifically provided with notice in this chapter.

7:7A-11.4 Hearings on applications

(a) Within 20 days of publication of the notice of application in the DEP Bulletin, interested persons may request in writing that the Department hold a public hearing on a particular application.

(b) Within 60 days after the Department receives comment on a complete application for a permit from USEPA, or upon receipt of notice from USEPA that no comment will be forthcoming, the Department may hold a non-adversarial public hearing on the application for a permit.

(c) The Department may issue or deny a permit without a public hearing, unless there is a significant degree of public interest in the application as manifested by written requests for a hearing within 20 days after the publication of notice of the permit application in the Bulletin of the Department.

(d) If a hearing is to take place, the Department shall, within 15 days of declaring the application complete, set a date, place, and time for the public hearing and shall so notify the applicant, in accordance with the following:

1. The date for the hearing shall be not later than 60 days after the Department receives comment from USEPA on the complete application; and

2. The hearing shall be in the county wherein the freshwater wetland or State regulated waters is located whenever practicable.

(e) The Department shall publish a notice announcing the date, place, and time of the public hearing in the DEP Bulletin.

(f) The applicant shall give public notice of the public hearing, pursuant to section 7.1 of the Municipal Land Use Law (N.J.S.A. 40:55D-12), in accordance with the following:

1. Such notice shall describe the proposed regulated activity, identify its agency project number, announce the date, place, and time of the public hearing on the application, and indicate that written comments may be submitted to the Division of Coastal Resources (or its successor), New Jersey Department of Environmental Protection, CN 401, Trenton, New Jersey 08625, at or within 15 days after the public hearing;

2. If the regulated activity involves a linear facility such as a pipeline or road, the applicant shall also give public notice by publication of a display advertisement of at least four column inches in a newspaper of general circulation in the municipality, and to owners of all real property within 200 feet of any above surface structure related to the linear facility, such as a pumping station or treatment plant; and

3. Proof of notice shall be submitted to the Department at least three days prior to the public hearing. In cases where proof of publication is unavailable three days prior to the hearing, the applicant may submit a notarized affidavit stating that notice of the hearing has been published, and specifying the date and newspaper in which such notice was published.

(g) The Department shall maintain a copy of the hearing transcript for public inspection in its Trenton Office.

(h) The applicant shall bear the cost of the hearing.

(i) The presiding official at the non-adversarial public hearing shall have broad discretion with respect to oral and written presentations by interested persons. This discretion shall be exercised to allow every person the opportunity to speak, to reasonably limit the length of individual testimony, and to ensure the maintenance of an orderly forum. At the conclusion of statements by interested persons, the applicant shall be afforded the opportunity to speak on the statements offered by interested persons.

(j) Any interested person may submit information and comments, in writing, concerning the application at or within 15 days after the hearing.

7:7A-11.5 Final decisions

(a) The Department shall issue or deny a permit within 90 days of receipt of comments, or notice that comments will not be forthcoming, from USEPA, or within 180 days of submittal of a complete application, whichever is later.

(b) When the State assumes the implementation of the Federal Act, the Department shall issue or deny a permit within 180 days of submittal of a complete application, except as may otherwise be provided by the Federal Act.

(c) If the Department issues, denies or requests modification of a permit, the Department shall send notice thereof to the applicant.

(d) The Department may issue a permit imposing conditions necessary for compliance with the Act, this chapter, the Federal Act and the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq.

(e) Decisions by the Department shall be published in the DEP Bulletin.

(f) The permit application review process may be extended by mutual agreement between the applicant and the Department.

7:7A-11.6 Withdrawal, resubmission and amendment of applications

(a) An applicant may withdraw an application at any time in the application review process. All fees submitted with such applications are non-returnable subsequent to the application being declared complete.

(b) If an application is denied or withdrawn, the applicant may resubmit an application for a revised project on the same site. The resubmitted application will be treated as a new application, although references may be made to the previously submitted application. A new fee will not be required provided the application is resubmitted within one year of the date of denial or withdrawal.

(c) Permit applications may be amended at any time as part of the permit review process. Copies of amendments and amended information shall be distributed by the applicant to the same persons to whom copies of the initial application were distributed. All amendments to pending applications shall constitute a new submission and may require reinitiation of the entire review process.

7:7A-11.7 Hearings and appeal

(a) An applicant for a freshwater wetlands or open water fill permit or other affected party may request of the Commissioner an administrative hearing on any decision to issue or deny a permit made by the Department pursuant to the Act and this chapter. Such request shall be submitted in writing within 30 days of the contested decision.

1. Upon receipt of such a request, the Commissioner shall refer the matter to the Office of Administrative Law, which shall assign an administrative law judge to conduct a hearing on the matter in the form of a contested case hearing pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1 et seq.

2. Within 45 days of receipt of the administrative law judge's decision, the Commissioner shall affirm, reject, or modify the decision.

3. The Commissioner's action shall be considered final agency action for the purposes of the Administrative Procedure Act, and shall be subject only to judicial review as provided in the Rules of Court.

SUBCHAPTER 12. PERMIT CONTENTS

7:7A-12.1 Conditions applicable to all permits

(a) The following conditions apply to all freshwater wetlands and open water fill permits. All such conditions shall be incorporated into the permits.

1. Duty to comply: The permittee shall comply with all conditions of the permit. Any permit noncompliance constitutes a violation of the Act and this chapter, and is grounds for enforcement action, for permit termination, revocation and reissuance, or modification, or for denial of a permit renewal application.

2. Duty to reapply: If the permittee wishes to continue an activity regulated by the permit after the expiration date of the permit, the permittee must apply for and obtain a new permit.

3. Duty to halt or reduce activity: It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of the permit.

4. Duty to mitigate: The permittee shall take all reasonable steps to minimize or correct any adverse impact on the environment resulting from noncompliance with the permit. Compliance may require mitigation as set forth in N.J.A.C. 7:7A-13.

5. Proper operation and maintenance: The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of the permit. Proper operation and maintenance includes effective performance, adequate funding, adequate operator staffing and training, and adequate laboratory and process controls, including appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems only when necessary to achieve compliance with the conditions of the permit.

6. Permit actions: The permit may be modified, revoked and reissued, or terminated for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance does not stay any permit conditions.

7. Property rights: The permit does not convey any property rights of any sort, or any exclusive privilege.

8. Duty to provide information: The permittee shall furnish to the Department within a reasonable time, any information which the Department requests to determine whether cause exists for modifying, revoking and reissuing, or terminating the permit, or to de-

termine compliance with the permit. The permittee shall also furnish to the Department, upon request, copies of records required to be kept by the permit.

9. Inspection and entry: The permittee shall allow the Department, or an authorized representative, upon the presentation of credentials and other documents as may be required by law, to:

- i. Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of the permit;
- ii. Have access to and copy, at reasonable times, any records that must be kept under the conditions of the permit;
- iii. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under the permit; and
- iv. Sample or monitor at reasonable times, for the purposes of assuring permit compliance or as otherwise authorized by the Federal Act, by the Act, or by any rule or order issued pursuant thereto, any substances or parameters at any location.

10. Monitoring and records requirements are as follows:

- i. Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.
- ii. The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by the permit, and records of all data used to complete the application for the permit, for a period of at least three years from the date of the sample, measurement, report or application. This period may be extended by request of the Commissioner at any time.
- iii. Records of monitoring information shall include:
 - (1) The date, exact place, and time of sampling or measurements;
 - (2) The individual(s) who performed the sampling or measurements;
 - (3) The date(s) analyses were performed;
 - (4) The individual(s) who performed the analyses;
 - (5) The analytical techniques or methods used; and
 - (6) The results of such analyses.

11. Signatory requirement: All applications, reports, or information submitted to the Department shall be signed and certified as required in N.J.A.C. 7:7A-10.3.

12. Reporting requirements are as follows:

- i. Planned changes: The permittee shall give notice to the Department as soon as possible of any planned physical alterations or additions to the permitted facility.
- ii. Anticipated noncompliance: The permittee shall give advance notice to the Department of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements.
- iii. Transfers: The permit is not transferable to any person except after notice to the Department. The Department may require modification or revocation and reissuance of the permit to change the name of the permittee and incorporate such other requirements as may be necessary under the Act (see N.J.A.C. 7:7A-12). In some cases, modification or revocation and reissuance is mandatory.
- iv. Monitoring reports: Monitoring results shall be reported at the intervals specified elsewhere in the permit.
- v. Compliance schedules: Reports of compliance or noncompliance with, or any progress reports on, interim and final requirements contained in any compliance schedule shall be submitted no later than 14 days following each schedule date.
- vi. Twelve hour reporting: The permittee shall report any noncompliance which may endanger health or the environment. Any information shall be provided orally within 12 hours from the time the permittee becomes aware of the potentially dangerous circumstances. A written submission shall also be provided within five days of the time the permittee becomes aware of the circumstances. The written submission shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times, and, if the noncompliance has not been corrected, the anticipated length of time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent recurrence of the noncompliance.

vii. Other noncompliance: The permittee shall report all instances of noncompliance not reported pursuant to (a)12 i, iv, v, and vi above, at the time monitoring reports are submitted. The reports shall contain the information listed in (a)12 vi above.

viii. Other information: Where the permittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application or in any report to the Department, it shall promptly submit such facts or information.

13. The permittee need not comply with the conditions of the permit to the extent and for the duration that such noncompliance is authorized in an emergency permit.

14. Activities are not conducted under the authority of the permit if they are not specifically identified and authorized in the permit.

15. The permittee shall maintain the authorized work areas in good condition and in accordance with the requirements contained in the permit.

16. If any applicable water quality standards are revised or modified, or if a toxic effluent standard or prohibition under section 307(a) of the Federal Act is established for a pollutant present in the permittee's discharge and is more stringent than any limitation in the permit, the permit shall be promptly modified, pursuant to N.J.A.C. 7:7A-12, to conform to the standard, limitation or prohibition.

7:7A-12.2 Establishing permit conditions

(a) In addition to conditions required in all permits (N.J.A.C. 7:7A-12.1), the Department shall establish conditions in permits, as required on a case-by-case basis, under N.J.A.C. 7:7A-12.3 (duration of permits) and N.J.A.C. 7:7A-12.1(a) 10 (monitoring).

(b) The Department shall also establish conditions in permits, as required on a case-by-case basis, to provide for and assure compliance with all applicable requirements of the Federal Act, the Act, the Water Pollution Control Act, this chapter and other appropriate rules or regulations.

1. For the purposes of this subsection, an applicable requirement is a State statutory or regulatory requirement which takes effect prior to final administrative disposition of a permit, or prior to the modification or revocation and reissuance of a permit, to the extent allowed in N.J.A.C. 7:7A-12.

2. New or reissued permits, and to the extent allowed under N.J.A.C. 7:7A-12, modified or revoked and reissued permits, shall incorporate each of the applicable requirements referenced in N.J.A.C. 7:7A-12.1.

(c) In addition to the requirements in N.J.A.C. 7:7A-12.1, each permit shall include conditions meeting the following requirements, when applicable:

1. A specific identification and description of the authorized activity, including:
 - i. The name and address of the permittee and the permit application identification number;
 - ii. The use or purpose of the regulated activity;
 - iii. The type and quantity of the materials to be discharged or used as fill;
 - iv. Any structures proposed to be erected; and
 - v. The location and boundaries of the activity site(s), including a detailed sketch and the name and description of affected freshwater wetland and State regulated waters, identification of the major watershed and subwatershed;
2. Provisions ensuring that the regulated activity will be conducted in compliance with the environmental guidelines issued under section 404(b) (1) of the Federal Act (40 C.F.R. Part 230), the Act, and this chapter, including conditions to ensure that the regulated activity shall be conducted in a manner which minimizes adverse impacts upon the physical, chemical, and biological integrity of the waters of the United States, such as requirements for restoration or mitigation;
3. Any requirements necessary to comply with water quality standards established under applicable Federal or State law. If an applicable water quality standard is promulgated after the permit is issued, it shall be modified as provided in N.J.A.C. 7:7A-12.6;

4. Requirements necessary to comply with any applicable toxic effluent standard or prohibition under section 307(a) of the Federal Act or applicable State or local law. If an applicable toxic effluent standard or prohibition is promulgated after the permit is issued, it shall be modified as provided in N.J.A.C. 7:7A-12.6;

5. Applicable best management practices (BMPs) as provided in the memorandum of agreements included in the State application for assumption of the Federal permit program in section 404 of the Federal Act;

6. Any conditions necessary for general permits as required under N.J.A.C. 7:7A-8;

7. A specific date on which the permit shall automatically expire, unless previously revoked and reissued or modified or continued, if the authorized work has not been commenced; and

8. Reporting of monitoring results. All permits shall specify:

1. Requirements concerning the proper use, maintenance, and installation, when appropriate, of monitoring equipment or methods (including biological monitoring methods when appropriate);

2. Required monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity including, when appropriate, continuous monitoring; and

3. Applicable reporting requirements based upon the impact of the regulated activity.

(d) All permit conditions shall be incorporated either expressly or by reference. If incorporated by reference, a specific citation to the applicable rules or regulations or requirements shall be given in the permit.

7:7A-12.3 Duration of permits

(a) Freshwater wetlands and open water fill permits shall be effective for a fixed term not to exceed five years.

(b) The term of a permit shall not be extended beyond the maximum duration specified in this section.

7:7A-12.4 Effect of a permit

(a) Compliance with a permit during its term constitutes compliance, for purpose of enforcement, with sections 301, 307, and 403 of the Federal Act, with the Act, and with this chapter. However, a permit may be modified, revoked and reissued, or terminated during its term for cause as set forth in this subchapter.

(b) The issuance of a permit does not convey property rights of any sort, or any exclusive privilege.

7:7A-12.5 Transfer of permits

A permit may be transferred by the permittee to a new owner or operator only if the permit has been modified or revoked and reissued under this subchapter, or a minor modification made under N.J.A.C. 7:7A-12.9 to identify the new permittee and incorporate such other requirements as may be necessary under the Federal Act, this chapter, or any permit or order issued pursuant thereto.

7:7A-12.6 Modification or revocation and reissuance of permits

(a) When the Department receives any information (for example, through a site inspection, through submission of information by the permittee as required by a permit, through a request for modification or revocation and reissuance, or through a review of the permit file), the Department may determine whether one or more of the causes for modification or revocation and reissuance listed in N.J.A.C. 7:7A-12.7 and 12.8 exist. If cause exists, the Department may modify or revoke and reissue the permit accordingly, subject to the limitations of (d) below, and may request an updated application, if necessary.

(b) If cause does not exist under this subchapter, the Department shall not modify or revoke and reissue the permit.

(c) If a permit modification satisfies the criteria in N.J.A.C. 7:7A-12.9 for "minor modifications", the permit may be modified.

(d) When a permit is modified, only the conditions subject to modification are reopened. If a permit is revoked and reissued, the entire permit is reopened and subject to revision, and public hearings and comments, and the permit may be reissued for a new term.

7:7A-12.7 Causes for modification, but not revocation and reissuance

(a) The following are causes for modification, but not for revocation and reissuance of permits. The following may only be causes for revocation and reissuance as well as modification when the permittee requests or agrees.

1. Material and substantial alterations or additions proposed to the permitted facility or activity after permit issuance which justify the application of permit conditions that are different or absent from the existing permit.

2. Permits may be modified during their terms if the Department receives information which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) which would have justified the application of different permit conditions at the time of issuance. (For general permits, see N.J.A.C. 7:7A-8.5.) This cause shall include any information indicating that cumulative effects on the environment are unacceptable.

3. The standards or regulations on which the permit was based have been changed by promulgation of amended standards or regulations, or by judicial decision after the permit was issued. Permits may be modified during their terms for this cause only as follows:

i. For promulgation of amended standards or regulations, when:

(1) The permit condition requested to be modified was based on a USEPA or Department approved or promulgated water quality standard; and

(2) The Department or USEPA has revised, withdrawn, or modified that portion of the rule or regulation on which the permit condition was based, or has approved a State action with regard to a water quality standard on which the permit condition was based; and

(3) A permittee requests modification in accordance with this chapter within 90 days after Federal Register or New Jersey Register notice of the action on which the request is based.

ii. For judicial decisions, a court of competent jurisdiction has remanded and stayed USEPA or the Department promulgated standards, if the remand and stay concern that portion of the standards on which the permit condition was based, and a request is filed by the permittee in accordance with this chapter within 90 days of judicial remand.

7:7A-12.8 Causes for modification or revocation and reissuance

(a) Cause exists to modify or, alternatively, revoke and reissue a permit when:

1. Cause exists for termination under N.J.A.C. 7:7A-14.10 (termination of permits), and the Department determines that modification or revocation and reissuance is more appropriate under the circumstances; or

2. The Department has received notification, as required under N.J.A.C. 7:7A-12.5, of a proposed transfer of the permit.

7:7A-12.9 Minor modifications of permits

(a) Upon the consent of the permittee, the Department may modify a permit to make the minor corrections or allowances for changes in the permitted activity listed in this section, without following the procedures of N.J.A.C. 7:7A-12.6. Any permit modification not processed as a minor modification under this section must be made for cause and must follow the modification procedures in N.J.A.C. 7:7A-12.6.

(b) Minor modifications may only:

1. Correct typographical errors;

2. Require more frequent monitoring or reporting by the permittee;

3. Change an interim compliance date in a schedule of compliance, provided the new date is not more than 120 after the date specified in the existing permit and does not interfere with attainment of the final compliance date requirement;

4. Allow for a change in ownership or operational control of a facility where the Department determines that no other change in the permit is necessary, provided that a written agreement containing a date for transfer of permit responsibility, coverage, and liability between the current and new permittees has been submitted to the Department; and

5. Extend the term of a permit, so long as the modification does not extend the term of the permit beyond five years from its original effective date.

SUBCHAPTER 13. MITIGATION

7:7A-13.1 Mitigation goals

(a) The Department shall require as a condition of a freshwater wetlands permit that all appropriate measures have been carried out to mitigate adverse environmental impacts, restore vegetation, habitats, and land and water features, prevent sedimentation and erosion, minimize the area of freshwater wetland disturbance and insure compliance with the Federal Act and implementing regulations.

(b) The Department shall require the creation or restoration of an area of freshwater wetlands of equal ecological value to those which will be lost as a result of a violation of the Act and this chapter or as a result of the granting of a permit pursuant to the Act and this chapter, and shall determine whether the creation or restoration of freshwater wetlands is conducted onsite or offsite.

(c) The Department shall not consider a mitigation proposal in determining whether a project should be awarded a permit but shall require mitigation as a condition of any permit found to be acceptable under the criteria listed in N.J.A.C. 7:7A-3.

(d) The Department's evaluation of a proposal to create or restore an area of freshwater wetlands shall be conducted as appropriate, in consultation with USEPA.

(e) If the Department determines that the creation or restoration of freshwater wetlands onsite is not feasible, the Department, in consultation with USEPA, may consider approving the creation of freshwater wetlands or the restoration of degraded freshwater wetlands offsite within the same watershed, on private property, with the restriction that no future development be permitted on these wetlands, or that a contribution to the Wetlands Mitigation Bank be made.

(f) The applicant may also donate land as part or all of the contribution to the Wetlands Mitigation Bank if the Wetlands Mitigation Council determines that the donated land has potential to be a valuable component of the freshwater wetlands ecosystem. The Department shall permit the donation of land as part or all of the contribution to the Wetlands Mitigation Bank only after determining that all alternatives to the donation are not practicable or feasible or would be of less long-term environmental benefit.

7:7A-13.2 Wetland mitigation options

(a) When a permit allows the disturbance or loss of wetlands by filling or other means, or when mitigation is required as a result of a violation, this disturbance or loss must be compensated for by the creation or restoration of an area of wetlands at least twice the size of the surface area disturbed, or as specified below at (d), (e), and (f), unless the applicant can prove through the use of productivity models or other similar studies, that by restoring or creating a lesser area, there will be a replacement of wetlands of equal ecological value. Mitigation must be performed prior to or concurrent with activities that will permanently disturb wetlands and immediately after activities that will temporarily disturb wetlands. The intent of this section is to assure that mitigation projects are carried out to create an area of equal ecological value and function in the same watershed of the wetland which is destroyed.

(b) Where the Department permits mitigation on less than a 2:1 basis, frequent monitoring will be required by the permittee. In such cases, the Department will require additional mitigation or further remedial action when a net loss of equal ecological value is indicated. Under no circumstances shall the mitigation area be smaller than the disturbed area. Creation of wetlands from other existing climax habitats is discouraged.

(c) The Department distinguishes between four categories of mitigation as follows:

1. Restoration, which means physical actions taken to recreate wetland characteristics, functions, and habitat previously existing on a wetland site which have been disturbed by activity which is temporary in nature, that is, less than six months.

2. Creation, which means physical actions taken to establish wetland characteristics, habitat and functions on a non-wetland site

or on a site which has been filled or otherwise disturbed for more than six months.

3. Enhancement, which means physical actions taken to improve the characteristics, habitat and functions of an existing degraded wetland area such that the enhanced wetland will function similarly to a natural and undisturbed wetland.

4. Contributions to the Wetland Mitigation Bank, which means the contribution of moneys in an amount equivalent to:

i. The cost of purchasing an area which was historically a freshwater wetland but which has been legally filled, and restoring that area to a functional freshwater wetland, resulting in preservation of freshwater wetlands of equal ecological value to those which are being lost;

ii. The cost of purchasing an area which was historically an upland, and creating freshwater wetlands of equal ecological value to those which are being lost, and preserving the created wetland; or

iii. In lieu of moneys, donating land as part or all of the contribution if the Wetlands Mitigation Council determines that the donated land has potential to be a valuable component of the freshwater wetlands ecosystem. The Department in consultation with USEPA shall permit the donation of land as part or all of the contribution to the Wetlands Mitigation Bank only after determining that all alternatives to the donation are not practicable or feasible.

(e) Wetland creation shall be considered under the following circumstances:

i. When a permit is approved pursuant to N.J.A.C. 7:7A-11, creation shall be at a ratio of 2:1; and

ii. As a resolution of a violation pursuant to N.J.A.C. 7:7A-14, creation shall be at a ratio of 2:1.

(f) Wetland enhancement shall be considered under the following circumstances:

i. When a permit is approved pursuant to N.J.A.C. 7:7A-11, wetland enhancement shall be at a ratio of 7:1.

(d) Wetland restoration shall be considered as an acceptable mitigation technique under the following circumstances:

i. As resolution of a violation when a penalty is paid pursuant to N.J.A.C. 7:7A-14, and the extent of the wetland disturbance is less than one acre, restoration shall be at a ratio of 1:1;

ii. When a permit has been approved pursuant to N.J.A.C. 7:7A-11, restoration shall be at a ratio of 2:1;

iii. As resolution of a violation, when a penalty is paid pursuant to N.J.A.C. 7:7A-14, and the extent of the wetland disturbance is more than one acre, restoration shall be at a ratio of 2:1; and

iv. When a permit has been approved for a linear development pursuant to N.J.A.C. 7:7A-11, restoration shall be at a ratio of 1:1.

7:7A-13.3 Location of mitigation sites

(a) All mitigation projects shall be carried out on-site to the maximum extent practicable.

(b) If on-site mitigation is found to be impracticable, the mitigation shall be carried out within the same watershed (subwatershed if possible) and as close to the disturbed wetland as possible.

(c) If all options within (a) and (b) above are found by the Department to be impracticable, mitigation may be acceptable outside the original watershed.

(d) Contributions to the Wetlands Mitigation Bank or donations of land to the Wetlands Mitigation Bank shall be permitted only after a permittee or violator under the Act or this chapter has demonstrated to the Department that mitigation pursuant to (a), (b), and (c) above is impracticable.

7:7A-13.4 Wetland mitigation proposal requirements

(a) A proposal for mitigation shall include the following information, as appropriate:

1. A description of the size and type of mitigation project proposed, including any proposed transition area, and how the proposal satisfies the requirement for creation of wetlands of equal ecological value within the same watershed;

2. Current and proposed owner(s) of the mitigation project site;

3. The language of a proposed conservation easement or deed restriction which provides for the maintenance of the mitigation site as a wetland in perpetuity;

4. A maintenance plan to ensure an 85 percent survival rate of the mitigation plantings for at least three years after planting;

5. A description of the existing and proposed vegetation on the mitigation site including scientific names. Spacing of all plantings must be shown along with the stock type, that is, bare root, potted, seed, and source of the plant material;

6. A description of the existing and proposed hydrology of the site including the elevation of adjacent surface water and the depth to the seasonally high water table;

7. Existing soil types and proposed soil characteristics;

8. A schedule from initiation to completion of the project including dates of excavation, planting, fertilizing (rates and type), etc.;

9. A metes and bounds description of the proposed mitigation site; and

10. Five copies of a site plan for the mitigation project which includes:

- i. Project location within the region and in relation to adjacent development;
- ii. Lot and block number and name and address of property owner;
- iii. Existing and proposed elevations and grades of the project shown in one foot intervals; and
- iv. Plan views and cross sectional views.

7:7A-13.5 Acceptability of wetlands mitigation proposals

(a) Wetlands mitigation proposals shall be reviewed by the Department for acceptability. The Department will base the acceptability determination upon the following criteria:

1. Location of the mitigation site as described under N.J.A.C. 7:7A-13.3 and in relation to adjacent development;

2. Size of the proposed mitigation project as described under N.J.A.C. 7:7A-13.2;

3. Suitability of the selected vegetative species to survive in the proposed environment;

4. Suitability of the monitoring program to ensure an 85 percent survival rate of the mitigation plantings for at least three years following initiation of the planting;

5. Suitability of the proposed substrate (soil) to support the selected vegetative species;

6. Success of other mitigation projects within the area;

7. Proposed elevations and hydrology; and

8. Other criteria specific to the selected mitigation site.

7:7A-13.6 Wetlands Mitigation Council

(a) The Wetlands Mitigation Council shall have oversight of the creation and implementation of the Wetlands Mitigation Bank. The Council shall also:

1. Determine if land to be donated has the potential to be a valuable component of the freshwater wetlands ecosystem;

2. Be responsible for the disbursements of funds from the Wetlands Mitigation Bank to finance mitigation projects; and

3. Purchase land to provide areas for restoration of degraded freshwater wetlands and to preserve freshwater wetlands and transition areas determined to be of critical importance.

(b) Donation of lands or moneys to the Wetlands Mitigation Bank shall serve as an alternative to the creation, restoration or enhancement of on-site or off-site wetlands when these alternatives are determined by the Department not to be feasible.

(c) The Wetlands Mitigation Council shall not engage in restoration of degraded wetlands on public lands, except those acquired by the Bank.

(d) The Council may transfer any funds or lands restricted by deed, easement or other appropriate means to mitigation and freshwater wetlands conservation purposes, to a State or Federal conservation agency that consents to the transfer, to expand or provide for:

1. Freshwater wetlands preserves;
2. Transition areas around existing freshwater wetlands to preserve freshwater wetland quality;
3. Future mitigation sites for freshwater wetlands restoration; or
4. Research to enhance the practice of mitigation.

SUBCHAPTER 14. ENFORCEMENT

7:7A-14.1 Burden of proof

The burden of proof and degrees of knowledge or intent required to establish a violation of the Act or of any permit, order, rule or regulation promulgated pursuant thereto shall be no greater than the burden of proof or degree of knowledge or intent which USEPA must meet in establishing a violation of the Federal Act or implementing regulations.

7:7A-14.2 USEPA review

The Department shall make available without restriction any information obtained or used in the implementation of the Act to USEPA upon a request therefor.

7:7A-14.3 Administrative order

(a) Whenever, on the basis of available information, the Commissioner finds a person in violation of any provision of the Act, or of any permit, order, rule or regulation issued pursuant thereto the Commissioner may issue an order:

1. Specifying the provision or provisions of the Act, rule, regulation, permit or order which has been, or is being violated;
2. Citing the action which constituted the violation;
3. Requiring compliance with the provision or provisions violated;
4. Requiring the restoration of the freshwater wetland, State regulated waters or transition area which is the site of the violation; and
5. Providing notice of the right to a hearing on the matters contained in the order.

7:7A-14.4 Civil action

(a) Whenever, on the basis of available information, the Commissioner finds a person in violation of any provision of the Act, or of any rule or regulation adopted, or permit or order issued, pursuant to the Act, the Commissioner is authorized to institute a civil action in Superior Court for appropriate relief. Such relief may include, singly or in combination:

1. A temporary or permanent injunction;
2. Assessment of the violator for the costs of any investigation, inspection, or monitoring survey which led to the establishment of the violation, and for the reasonable costs of preparing and bringing legal action under this section;
3. Assessment of the violator for any costs incurred by the State in removing, correcting, or terminating the adverse effects upon the freshwater wetland or State regulated waters resulting from any unauthorized regulated activity for which legal action under this section may have been brought;
4. Assessment against the violator for compensatory damages for any loss or destruction of wildlife, fish or aquatic life, and for any other actual damages caused by an unauthorized regulated activity. Assessments under this section shall be paid to the State Treasurer except that compensatory damages shall be paid by specific order of the court to any persons who have been aggrieved by the unauthorized regulated activity;
5. A requirement that the violator restore the site of the violation to the maximum extent practicable and feasible as defined in N.J.A.C. 7:7A-1.4. If the violator does not do so, the State may take corrective action, and will assess the violator pursuant to this chapter.

7:7A-14.5 Civil administrative penalty

(a) Whenever, on the basis of available information, the Commissioner finds a person in violation of any provision of the Act, or of any rule or regulation adopted, or permit or order issued, pursuant to the Act, the Commissioner is authorized to assess a civil administrative penalty of not more than \$10,000.00 for each violation. Each day during which each violation continues shall constitute an additional, separate, and distinct offense.

1. Any amount assessed under this section shall fall within a range established by regulation by the Commissioner for violations of similar type, seriousness, and duration.

2. No assessment shall be levied pursuant to this section until after the party has been notified by certified mail or personal service. The notice shall:

- i. Identify the section of the statute, regulation, or order or permit condition violated;

- ii. Recite the facts alleged to constitute a violation;
- iii. State the amount of the civil penalties to be imposed; and
- iv. Affirm the right of the alleged violator to a hearing.

3. The ordered party shall have 20 days from receipt of the notice within which to deliver to the Commissioner a written request for a hearing. Such hearing shall be conducted 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. 1:1-1 et seq.

4. If no hearing is requested, the notice shall become a final order after the expiration of the 20-day period.

5. After the hearing and upon finding that a violation has occurred, the Commissioner may issue a final order assessing the amount of the fine specified in the notice.

6. Payment of the assessment is due when a final order is issued or the notice becomes a final order.

7. The authority to levy an administrative order is in addition to all other enforcement powers. The payment of any assessment shall not be deemed to affect the availability of any other enforcement powers in connection with the violation for which the assessment is levied.

8. Any civil administrative penalty assessed under this section may be compromised by the Commissioner upon the posting of a performance bond by the violator, or upon such terms and conditions as the Commissioner may establish by regulation.

7:7A-14.6 Civil penalty

(a) A person who violates the Act or an administrative order or a court order issued pursuant to the Act, who fails to pay a civil administrative assessment in full pursuant to N.J.A.C. 7:7A-14.5, shall be subject, upon order of a court, to a civil penalty not to exceed \$10,000.00 per day of such violation. Each day during which the violation continues shall constitute an additional, separate, and distinct offense.

(b) Any civil penalty imposed pursuant to this section may be collected with costs in a summary proceeding pursuant to the penalty enforcement law, N.J.S.A. 2A:58-1 et seq. The Superior Court shall have jurisdiction to enforce the penalty enforcement law in conjunction with the Act and this chapter.

7:7A-14.7 Criminal action

(a) A person who willfully or negligently violates the Act, or any regulation or order issued pursuant thereto, shall be guilty, upon conviction, of a crime of the fourth degree and shall be subject to a fine of not less than \$2,500.00 nor more than \$25,000.00 per day of violation.

(b) A second offense under this subsection shall subject the violator to a fine of not less than \$5,000.00 nor more than \$50,000.00 per day of violation.

(c) A person who knowingly makes a false statement, representation, or certification in any application, record, or other document filed or required to be maintained under the Act, or under any permit, order or rule issued pursuant to the Act, or who falsifies, tampers with or knowingly renders inaccurate, any monitoring device or method required to be maintained pursuant to the Act or any order or rule issued pursuant thereto, shall, upon conviction, be subject to a fine of not more than \$10,000.00.

7:7A-14.8 Notice of violation recorded on deed to property

In addition to the penalties prescribed in this subchapter, a notice of violation of the Act shall be recorded on the deed of the property wherein the violation occurred, on order of the Commissioner, by the clerk or register of deeds and mortgages of the county wherein the affected property is located and with the clerk of the Superior Court and shall remain attached thereto until such time as the violation has been remedied and the Commissioner orders the notice of violation removed.

7:7A-14.9 "After the fact" permit

(a) If the violation is one in which the Department has determined that the restoration of the site to its previolation condition would increase the harm to the freshwater wetland or State regulated waters or its ecology, the Department may issue an "after the fact" permit for the regulated activity that has already occurred.

(b) An "after the fact" permit shall only be issued when:

1. Assessment against the violator for costs or damages enumerated in N.J.A.C. 7:7A-14.4 has made;

2. The creation or restoration of freshwater wetlands or State regulated waters resources at another site has been required of the violator;

3. An opportunity has been afforded for public hearing and comment; and

4. The reasons for the issuance of the "after the fact" permit are published in the New Jersey Register and in a newspaper of general circulation in the geographic area of the violation.

(c) Any person violating an "after the fact" permit issued pursuant to this section shall be subject to the provisions of this subchapter.

7:7A-14.10 Termination of permits

(a) The following are causes for terminating a permit during its term, or for denying a permit renewal application:

1. Noncompliance by the permittee with any condition of the permit; or

2. The permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee's misrepresentation of any relevant facts at any time.

(b) Prior to the termination, the Department shall furnish written notice to the permittee by certified mail. The notice shall provide 10 days within which the permittee shall either remedy the violations, or offer a plan as to how, within 90 days, the violations will be remedied.

(c) If the above requirements have not been met, the permit shall be terminated. The regulated activity shall then cease and the violations shall be remedied. Once the violations are remedied, the permittee may apply for a new permit, following the application procedures in this chapter.

3. Should a permit be terminated, the permittee shall restore the site to its pre-activity condition to the maximum extent practicable and feasible and otherwise compensate for any loss in resource value through mitigation. This restoration shall be accomplished within 90 days unless the Department authorizes in writing a longer period of time.

(d) A permittee may appeal termination of a permit according to the provisions of N.J.A.C. 7:7A-11.7 only if the regulated activity has ceased.

(e) To appeal termination of a permit, the permittee shall cease the regulated activity and follow the appeals procedure in N.J.A.C. 7:7A-11.7.

7:7A-14.11 Remedies not exclusive

Recourse to any of the remedies available in this subchapter shall not preclude recourse to any of the other remedies therein.

(a)

DIVISION OF HAZARDOUS WASTE MANAGEMENT

Hazardous Waste Management:

Financial Assurance for Closure and Post-Closure

Proposed Amendments: N.J.A.C. 7:14A-5.12 and 7:26-1.4, 9.8, 9.9, 9.10, 9.11, 9.13, Appendix A, and 12.3

Authority: N.J.S.A. 13:1E-6.

DEP Docket Number: 064-87-11.

Proposal Number: PRN 1987-534.

Submit comments by January 20, 1988 to:

Marlen Dooley

New Jersey Department of Environmental Protection

Office of Regulatory Services

CN 402

Trenton, New Jersey 08625

The agency proposal follows:

Summary

The New Jersey Department of Environmental Protection ("Department") proposes several amendments to the New Jersey Hazardous Waste Management Regulations, N.J.A.C. 7:26. The proposed amendments make the State's hazardous waste management rules equivalent to the corresponding Federal regulations. The proposed amendments to N.J.A.C. 7:26-9.8, 9.9, 9.10, 9.11, 9.13, Appendix A, 12.3 and N.J.A.C. 7:14A-5.12 reflect revisions to regulations promulgated pursuant to the Resource Conservation and Recovery Act, 40 CFR Parts 264 and 265, which were published as a final rule by the United States Environmental Protection Agency (USEPA) on May 2, 1986 (see 51 Federal Register 16422).

The proposed amendment to N.J.A.C. 7:14A-5.12 will define the terms "plugging and abandonment plan" and "current plugging cost estimate". This proposed amendment will also require owners or operators to provide a written cost estimate for plugging and abandonment of hazardous waste injection wells.

The proposed amendment to N.J.A.C. 7:26-1.4 will add the definitions of "active life", "final closure", "hazardous waste management unit" and "partial closure" to the existing list of definitions.

The proposed amendment to N.J.A.C. 7:26-9.8 addresses additional closure requirements, incorporates specific technical closure requirements, and makes explicit the level of detail that must go into the closure plan. For example, the owner or operator must include in the plan an estimate of the maximum inventory of wastes in storage or being treated at any given time during the active life of the facility and a detailed description of the activities necessary during partial and final closures, such as ground water monitoring, leachate collection and run-on and run-off control, to ensure that closure requirements are satisfied. This proposed amendment will establish timeframes during which owners and operators are required to complete closure activities. Certification of closure from the owner or operator and an independent registered professional engineer is also required.

The proposed amendment to N.J.A.C. 7:26-9.9 requires owners and operators of hazardous waste management units to have post-closure plans. Owners and operators with approved post-closure plans must submit a written request to the Department to authorize a change to the approved post-closure plan. In addition, the owner or operator of a surface impoundment who is not presently required to prepare a contingent post-closure plan shall submit a post-closure plan to the Department for approval within 90 days of the determination that the unit must be closed as if it were a landfill. The owner or operator shall also submit a modified post-closure plan no later than 60 days after the Department's request, or no later than 90 days if the unit is a surface impoundment and the owner was not previously required to prepare a contingent post-closure plan.

The Department also proposes to require owners and operators to estimate the year of closure. Owners and operators will be given deadlines for filing records pertaining to closure after closure of each hazardous waste management unit. In addition, owners, operators, or subsequent owners wishing to remove waste and residues, the liner and all contaminated underlying and surrounding soil, will be required to request a modification of the post-closure plan.

The proposed amendments to N.J.A.C. 7:26-9.10 and 9.11, will require owners or operators to prepare a detailed written cost estimate of closure and post-closure costs. The closure and post-closure cost estimates must be based on the costs to the owner or operator of hiring a third party to perform closure or post-closure activities. This will ensure that adequate funds are available to cover the costs of closure and post-closure in the event that the owner or operator fails to perform and closure and post-closure must be performed by a third party. The closure cost estimate may not incorporate any salvage value for wastes, equipment, structures, or land. It should not be assumed that the hazardous waste will be saleable or that a third party will take the hazardous waste at no charge at closure. Therefore, an owner or operator may not incorporate into the closure cost estimate a zero cost for handling hazardous wastes with potential value. The Department also proposes to require owners or operators to revise their cost estimates for closure and post-closure within 60 days prior to the anniversary date of preparation of the first cost estimate. This will ensure an accurate cost estimate. Furthermore, the owner or operator must revise the closure and post-closure cost estimates if a change in the closure or post-closure plan increases the cost of closure. The revised closure and post-closure cost estimate must be submitted within 30 days after the amended closure and post-closure plan. The proposed amendments to N.J.A.C. 7:26-9.10 and 9.11 will also allow an owner or operator to request reimbursements for partial or final closure

only if the remaining balance of the trust fund or face amount of the insurance policy is sufficient to cover the maximum costs of closing the facility over its remaining operating life. The Department will instruct the trustee to make reimbursements for partial or final closure in those amounts as specified in writing if the closure is in accordance with the approved closure plan. The Department will withhold reimbursements if the maximum cost of closure over the remaining life of the facility will be greater than the value of the trust fund or face amount of the insurance policy. In addition, if the reimbursement request is denied, the Department will provide the owner or operator with a detailed written statement of reasons for the denial.

The Department also proposes to amend the financial assurance requirements for closure and post-closure. The surety becomes liable in the event the owner or operator fails to fund the standby trust fund after an order to begin closure or post-closure issued by the Department becomes final or within 15 days after a court of competent jurisdiction issues an order to begin final closure. In addition, a surety will become liable on a bond and the Department may draw on a letter of credit when an order to begin closure or post-closure issued by the Department becomes final or within 15 days after a court of competent jurisdiction issues an order to begin final closure. The proposed amendment will clarify that judicial review of a final administrative action is not required before the surety becomes liable or the Department can draw on the letter of credit.

Within 60 days after receiving certifications from the owner or operator and an independent registered professional engineer that closure or post-closure has been completed in accordance with the approved closure or post-closure plan, the Department will notify the owner or operator that they are no longer required to maintain financial assurance for closure or post-closure for that unit. However, the owner or operator must maintain financial assurance if the Department has reason to believe that post-closure care has not been in accordance with the approved plan. The Department shall provide the owner or operator with a detailed written statement of any reasons it has to believe that closure or post-closure care has not been performed in accordance with the approved plans.

The proposed amendment to N.J.A.C. 7:26-9.13 will require the owner or operator to provide liability coverage as required until the certification of final closure is received by the Department and the owner or operator is notified in writing that they are released from this obligation.

The proposed amendment to N.J.A.C. 7:26-9 Appendix A(b) "Wording of Instruments" will provide that the bond contain a paragraph stating that the Principal is responsible for funding the standby trust fund within 15 days after an order to begin closure and/or post-closure issued by the Department becomes final or within 15 days after a court of competent jurisdiction issues an order. The proposed amendment to N.J.A.C. 7:26-9 Appendix A(c) will provide that the surety bond guaranteeing performance of closure or post-closure will include language stating that the Principal will perform final closure and/or post-closure or fund the standby trust within 15 days after an administrative order becomes final or within 15 days after a court issues an order. In addition, the proposed amendment to N.J.A.C. 7:26-9 Appendix A(f) will require a certification that the firm is the owner or operator of an underground injection control (UIC) facility for which plugging and abandonment are required. A current closure cost estimate for each UIC facility is also required.

The proposed amendment to N.J.A.C. 7:26-12.3 will require new owners or operators of hazardous waste facilities to demonstrate compliance with N.J.A.C. 7:26-9.10 through 9.14 within six months of the date of change of ownership or operational control. This proposed amendment to this rule supersedes that published in the November 2, 1987 New Jersey Register at 19 N.J.R. 1936(a).

Social Impact

The proposed amendment to N.J.A.C. 7:26-1.4 will improve communication between the Department and the regulated community by identifying and defining additional terms. The proposed amendment to N.J.A.C. 7:26-9.8 will require specific technical closure requirements and will ensure that owners and operators of hazardous waste facilities comply with general closure requirements. The proposed amendment to N.J.A.C. 7:26-9.9 will require the submission of information needed to identify the activities being carried on after closure of each hazardous waste management unit. Modifications to the post-closure plan must be in writing to the Department and are subject to the approval of the Department. This proposed amendment is expected to ensure any change in the facility design or routine operation will be consistent with the post-closure plan.

The proposed amendments will also require the owner or operator to clarify that closure and post-closure was performed in accordance with the closure and post-closure plan.

The proposed amendments to N.J.A.C. 7:26-9.8, 9.10, 9.11, 12.3 and N.J.A.C. 7:14A-5.12 will make the State rules consistent with the Federal regulations. The proposed amendments will require detailed cost estimates to support the detailed activities in the closure and post-closure plans. In addition, these proposed amendments will ensure that adequate funds are available to cover the costs of closure and post-closure in the event the owner or operator fails to perform.

Economic Impact

The proposed amendments will not have a significant economic impact. The proposed amendments to N.J.A.C. 7:26-9.8, 9.9, 9.10, 9.11, 12.3 and N.J.A.C. 7:14A-5.12 will clarify existing requirements that pertain to closure and post-closure. There will be a slight increase in administrative costs for the regulated community. The proposed amendments will require more detailed and more frequent estimates of closure and post-closure costs. This may result in a positive economic impact because owners or operators can use the detailed cost estimate as a budget during closure.

Environmental Impact

The proposed amendments at N.J.A.C. 7:26-9.8, 9.9, 9.10, 9.11, 9.13, Appendix A, 12.3 and N.J.A.C. 7:14A-5.12 will promote the intent of the regulatory requirements for safe closure and post-closure and will ensure that closure and post-closure will be performed in a manner that will protect human health and the environment. The added requirements will ensure that hazardous waste is adequately handled at closure and post-closure and that sufficient funds will be available to cover the costs.

Regulatory Flexibility Statement

In accordance with the New Jersey Regulatory Flexibility Act, P.L. 1986, c.169, the Department has determined that the proposed amendments will have a minimal impact on small businesses. The State must adopt these rules in order to retain authorization of its hazardous waste program. These rules are equivalent to existing Federal regulations. The proposed amendments are intended to clarify the Department's existing requirements pertaining to closure and post-closure. The regulated community should already be in compliance with those Federal regulations.

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

7:14A-5.12 Requirements for wells injecting hazardous waste

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

(d) When used in this section "plugging and abandonment plan" shall mean the plan for plugging and abandonment prepared in accordance with the requirements of (e) below.

(e) A cost estimate for plugging and abandonment shall be prepared as follows:

1. The owner or operator shall prepare a written cost estimate, in current dollars, of the cost of plugging the injection well in accordance with the plugging and abandonment plan as specified in N.J.A.C. 7:14A-5.10(a)6. The plugging and abandonment cost estimate shall equal the cost of plugging and abandonment at the point in the facility's operating life when the extent and manner of its operation would make plugging and abandonment the most expensive, as indicated by its plugging and abandonment plan.

2. The owner or operator shall adjust the plugging and abandonment cost estimate for inflation within 30 days after each anniversary of the date on which the first plugging and abandonment cost estimate was prepared. The adjustment shall be made as specified in (e)2i and ii below, using an inflation factor derived from the annual Oil and Gas Field Equipment Cost Index, which appears in the Survey of Current Business, issued monthly by the United States Department of Commerce, Bureau of Economic Analysis. The inflation factor is the result of dividing the latest published annual Index by the Index for the previous year.

i. The first adjustment is made by multiplying the plugging and abandonment cost estimate by the inflation factor. The result is the adjusted plugging and abandonment cost estimate.

ii. Subsequent adjustments are made by multiplying the latest adjusted plugging and abandonment cost estimate by the latest inflation factor.

3. The owner or operator shall revise the plugging and abandonment plan when the cost of plugging and abandonment increases. The revised plugging and abandonment cost estimate shall be adjusted for inflation as specified in (e)2 above.

4. During the operating life of the facility, the owner or operator shall keep at the facility the latest plugging and abandonment cost estimate prepared in accordance with (e)1 and 3 above, and, when this estimate has been adjusted in accordance with (e)2 above, the latest adjusted plugging and abandonment cost estimate.

7:26-1.4 Definitions

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

... "Active life" means the period from the initial receipt of hazardous waste at a hazardous waste facility until the Department receives certification of final closure.

... "Final closure" means the closure of all hazardous waste management units at a hazardous waste facility in accordance with all applicable closure requirements so that hazardous waste management activities under N.J.A.C. 7:26-9.1 through 9.13 are no longer conducted at the facility.

... "Hazardous waste management unit" means a contiguous area of land on or in which hazardous waste is placed, or the largest area in which there is a significant likelihood of mixing hazardous waste constituents in the same area. Examples of hazardous waste management units include a surface impoundment, a land treatment area, a landfill cell, an incinerator, a tank and its associated piping and underlying containment system, and a container storage area. A container alone does not constitute a unit; the unit includes the containers and the land or pad upon which they are placed.

... "Partial closure" means the closure of a hazardous waste management unit in accordance with the applicable closure requirements of N.J.A.C. 7:26-9.1 through 9.13 at a hazardous waste facility that contains other active hazardous waste management units. For example, partial closure of a hazardous waste facility may include the closure of a tank (including its associated piping and underlying containment systems), landfill cell, surface impoundment, or other hazardous waste management unit, while other units of the same hazardous waste facility continue to operate.

7:26-9.8 General closure requirements

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

(c) The owner or operator shall have a written closure plan. The owner or operator shall keep a copy of the closure plan and all revisions to the plan at the facility until closure is completed in accordance with [subsection 9.8(l)](m) below.

(d) (No change.)

(e) The closure plan shall identify the steps necessary to completely or partially close the facility at any point during and at the end of its intended operating life. The closure plan shall include at least:

1. A description of:

i. How and when each hazardous waste management unit at the facility will be partially closed, if applicable, and ultimately closed in accordance with (b) above;

ii.-iii. (No change.)

2. An estimate of the maximum inventory of wastes in storage or [in treatment] being treated at any given time during the active life of the facility, and a detailed description of the method to be used during partial and final closure including, but not limited to, methods for removing, transporting, treating, storing, or disposing of all hazardous wastes, and identification of the type(s) of off-site hazardous waste management units to be used, if applicable;

3. A detailed description of the steps needed to decontaminate or remove all residues and facility equipment during final or partial closure [; and] including, but not limited to, procedures for cleaning

equipment and removing contaminated soils, methods for sampling and testing surrounding soils, and criteria for determining the extent of decontamination required to satisfy closure requirements;

4. A detailed description of other activities necessary during the final or partial closure period to ensure that all closure requirements are satisfied, including, but not limited to, groundwater monitoring, leachate collection, run-on and run-off control; and

[4.]5. A schedule for final closure of each hazardous waste management unit and for final closure. [which shall include, as a minimum, the anticipated date when wastes will no longer be received, the date when completion of final closure is anticipated, and intervening milestone dates which will allow tracking of progress of closure.] The schedule must include, at a minimum, the total time required to close each hazardous waste management unit and the time required for intervening closure activities which will allow tracking of the progress of partial and final closure. [(For example, the expected date for completing treatment or disposal of waste inventory shall be included, as well as the planned date for storage facilities and treatment processes.)]

(f) The owner or operator may amend the plan any time during the active life of the facility. [(The active life of the facility is that period during which wastes are periodically received.)]

1. The owner or operator shall amend the plan any time changes in operating plans or facility design affect the closure plan or whenever there is a change in the expected year of closure of the facility. The plan must be amended within 60 days of the changes. **If an unexpected event occurs during closure, the owner or operator shall amend the closure plan within 30 days following the unexpected event.**

2. (No change.)

(g)-(j) (No change.)

(k) The demonstrations referred to in (i) and (j) above shall be made as follows:

1. The demonstrations in (i) above shall be made at least 30 days prior to the expiration of the 90 day period in subsection (i); and

2. The demonstration in (j) above shall be made at least 30 days prior to the expiration of the 180-day period in subsection (j).

[(k)](l) (No change in text.)

[(l)] When closure is completed, the owner or operator shall submit to the Department certification both by the owner or operator and by an independent registered professional engineer that the facility has been closed in accordance with the specifications in the approved closure plan.]

(m) Within 60 days of completion of closure of each hazardous waste management unit or facility, as applicable, the owner or operator shall submit to the Department by registered mail the following two part certification. If the owner or operator are not the same person, both parties shall separately submit a certification.

1. "I certify under penalty of law that the hazardous waste management unit/facility has been closed in accordance with the specifications in the closure plan approved by the Department on (date) and as subsequently amended (date and number). I am aware that there are significant civil and criminal penalties for submitting false information, including fines and imprisonment."

i. The certification required by (m)1 above shall be signed by the highest ranking corporate, partnership, proprietor or governmental official at the facility responsible for closure.

2. "I certify under penalty of law that I have personally examined and am familiar with the closure plan, and that based upon my inquiry of those individuals immediately responsible for drafting and implementing the plan, I believe that the hazardous waste management unit/facility has been closed in accordance with the specifications in the closure plan, approved by the Department on (date) as subsequently amended, (date and number). I am aware that there are significant civil and criminal penalties for submitting false information, including the possibility of fine and/or imprisonment.

i. The certification required by (m)2 above shall be signed as follows:

(1) For a corporation, by a principal executive officer of at least the level of vice president;

(2) For a partnership or sole proprietorship, by a general partner or the proprietor, respectively; or

(3) For a municipality, State, Federal or other public agency, by either a principal executive officer or ranking elected official.

(n) Within 60 days of completion of closure of each hazardous waste management unit or facility, as applicable, the owner or operator shall submit to the Department by registered mail a certification by an independent registered professional engineer stating:

1. That he or she has reviewed the approved closure plan and all approved amendments thereto (identified by date and number) and performed a field investigation of the closed site to verify whether the unit or facility has been closed in accordance therewith; and

2. That in connection with the review at (n)1 above, no matters have come to his or her attention to cause him or her to believe that the hazardous waste management unit/facility was not closed in accordance with the specifications in the approved closure plan and any approved amendments thereto.

i. Documentation supporting the independent registered professional engineer's certification shall be furnished to the Department upon request until the Department releases the owner or operator from the financial assurance requirements for closure under N.J.A.C. 7:26-9.10(f)8.

7:26-9.9 General post-closure care requirements

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

(g) The owner or operator of a [facility subject to this section] **hazardous waste management unit** [must] shall have a written post-closure plan. The owner or operator shall keep a copy of the post-closure plan and all revisions to the plan at the facility until the post-closure care period begins.

(h) (No change.)

(i) **For each hazardous waste management unit subject to the requirements of this section, [T]he post-closure plan shall identify the activities which will be carried on after closure of each disposal unit and the frequency of these activities and include at least:**

1.-2. (No change.)

3. The name, address, and phone number of the person or office to contact about the hazardous waste disposal unit or facility during the post-closure period. This person or office shall keep an updated post-closure plan during the post-closure period.

(j) The owner or operator may submit a written request to the Department to seek approval to amend the post-closure plan at any time during the active life of the disposal facility and, in the case of a facility operating under a permit issued pursuant to N.J.A.C. 7:26-12.1 et seq., during the post-closure care period as well.

1.-2. (No change.)

3. If at any time the owner or operator or any subsequent owner of land upon which a hazardous waste facility is located wishes to remove the waste residues, the liner, if any, and all contaminated underlying and surrounding soil, the owner or operator shall request a modification to the post-closure plan in accordance with the applicable requirements in N.J.A.C. 7:26-12.1 et seq. The owner or operator shall demonstrate that the removal of hazardous waste will satisfy the criteria of (e) above. If the owner or operator is granted a post-closure plan modification or otherwise granted approval to conduct such removal activities, the owner or operator may add a notification to the deed or instrument, in accordance with (n) below, indicating removal of the waste.

4. Owners or operators of surface impoundments not otherwise required to prepare contingent post-closure plans under N.J.A.C. 7:26-10.6(h)4i and ii shall submit a post-closure plan to the Department within 90 days from the date that the owner or operator or Department determines that the hazardous waste management unit shall be closed as a landfill, subject to the requirements of N.J.A.C. 7:26-10.8(i). The Department will approve, disapprove or modify this plan in accordance with the procedures of N.J.A.C. 7:26-10.1 et seq.

5. The Department may request modifications to the plan under the conditions described in (j)2 above. The owner or operator shall submit the modified plan no later than 60 days after the Department's request or no later than 90 days if the unit is a surface impoundment not previously required to prepare a contingent post-closure plan. Any modifications requested by the Department will be approved, disapproved, or modified in accordance with the procedures of N.J.A.C. 7:26-10.1 et seq.

(k) If an owner or operator is operating a hazardous waste facility prior to the final disposition of a permit application pursuant to N.J.A.C. 7:26-12.1 et seq., the owner or operator shall submit the post-closure plan to the Department at least 180 days before the owner or operator expects to begin closure.

1.-2. (No change.)

3. The date the owner or operator expects to begin closure of the facility shall be:

i. Within 30 days after receiving the final volume of hazardous waste; or

ii. No later than one year after the date on which the facility received the most recent volume of hazardous waste.

(l) (No change.)

(m) Within [90] 60 days after **partial or final** closure is completed, the owner or operator of a disposal facility shall submit to the local land authority and to the Department a survey plat indicating the location and dimensions of landfill cells or other disposal areas with respect to permanently surveyed benchmarks. This plat shall be prepared and certified by a professional land surveyor.

1.-3. (No change.)

(n) Requirements for notice in the deed to the property include the following:

1. Within 60 days of certification of partial or final closure of the hazardous waste disposal facility, [T]he owner [of the property on which a disposal facility is located] shall record, in accordance with State law, a notation on the deed to the facility property, or on some other instrument which is normally examined during title search, that will in perpetuity notify any potential purchaser of the property that:

i.-iii. (No change.)

[2. If at any time the owner or operator or any subsequent owner of land upon which a hazardous waste facility is located removes the waste and waste residues, the liner, if any, and all contaminated underlying and surrounding soil, the owner or operator may add a notification to the deed or instrument indicating the removal of the waste.]

2. The owner shall submit to the Department a certification, signed by the owner, that he has recorded the notation specified in (n)1 above, including a copy of the document in which the notation has been placed.

(o) Within 60 days of completion of post-closure of each hazardous waste management unit or facility, as applicable, the owner or operator shall submit to the Department by registered mail the following two part certification. If the owner or operator are not the same person, then both parties shall separately submit a certification.

1. "I certify under penalty of law that the hazardous waste management unit/facility has been closed in accordance with the specifications in the post-closure plan approved by the Department on (date) and as subsequently amended (date and number). I am aware that there are significant civil and criminal penalties for submitting false information, including fines and imprisonment."

i. The certification required by (o)1 above shall be signed by the highest ranking corporate, partnership, proprietor or governmental officer or official of the facility responsible for post-closure.

2. "I certify under penalty of law that I have personally examined and am familiar with the post-closure plan, and that based upon my inquiry of those individuals immediately responsible for drafting and implementing the plan, I believe that the hazardous waste management unit/facility has been closed in accordance with the specifications in the post-closure plan, approved by the Department on (date) subsequently amended, (date and number). I am aware that there are significant civil and criminal penalties for submitting false information, including the possibility of fine and imprisonment."

i. The certification required by (o)2 above shall be signed as follows:

(1) For a corporation, by a principal executive officer of at least the level of vice president;

(2) For a partnership or sole proprietorship, by a general partner or the proprietor, respectively; or

(3) For a municipality, State, Federal or other public agency, by either a principal executive officer or ranking elected official.

(p) Within 60 days of completion of closure of each hazardous waste management unit or facility, as applicable, the owner or operator shall submit to the Department by registered mail, a certification by an independent registered professional engineer stating:

1. That he or she has reviewed the approved post-closure plan and all appropriate amendments thereto (identified by date and number) and performed a field investigation of the closed site to verify that the unit or facility has been closed in accordance therewith; and

2. That in connection with a comparison at (p)1 above, no matters have come to his or her attention to cause him or her to believe that the hazardous waste management unit/facility was not closed in accordance with the specifications in the approved post-closure plan and any approved amendment thereto.

i. Documentation supporting the independent registered professional engineer's certification shall be furnished to the Department upon request until the Department releases the owner or operator from the financial assurance requirements for post-closure under N.J.A.C. 7:26-9.11(d)8.

7:26-9.10 Financial requirements for facility closure

(a) (No change.)

(b) When used in this section, the following terms have the meanings given below:

1.-3. (No change.)

4. "Current plugging and abandonment cost estimate" means the most recent estimates prepared in accordance with N.J.A.C. 7:14A-5.12(e).

[4.-6.]5.-7. (No change in text.)

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

(e) The owner or operator shall comply with the provisions concerning the cost estimate for facility closure:

1. The owner or operator [must] shall have a detailed written cost estimate, in current dollars, of the cost of closing the facility in accordance with the requirements in N.J.A.C. 7:26-9.8 [and applicable closure requirements in N.J.A.C. 7:26-9.8] and applicable closure requirements in N.J.A.C. 7:26-10 and 11. The estimate [must] shall equal the cost of closure at the point in the facility's operating life when the extent and manner of its operation would make closure the most expensive, as indicated by its closure plan[,] (see N.J.A.C. 7:26-9.8).

2. The closure cost estimate shall be based on the costs to the owner or operator of hiring a third party who is neither a parent nor a subsidiary of the owner or operator. The owner or operator may use costs for on-site disposal if it can be demonstrated to the Department's satisfaction that on-site disposal capacity will exist at all times over the active life of the facility.

i. The closure cost estimate based on hiring a third party to close the facility shall reflect, but not be limited to:

(1) Labor costs that are calculated as specified by the New Jersey Department of Labor at N.J.S.A. 34:11-56.25;

(2) Contingency costs to cover any unanticipated discharges or adverse weather conditions; and

(3) Administrative costs to cover the costs of bookkeeping and taxes.

3. The closure cost estimate shall not incorporate any salvage value that may be realized with the sale of hazardous waste, facility structures, or equipment, land, or other assets associated with the facility at the time of partial or final closure.

4. The owner or operator shall not incorporate a zero cost for hazardous wastes that might have economic value.

[2.]5. During the active life of the facility, [T]he owner or operator [must] shall adjust the closure cost estimate for inflation within [30] 60 days [after each] prior to the anniversary [of the] date [on which] the first closure cost estimate was prepared. The adjustment [must] shall be made, as specified in [(e)2i and ii] (e)5i and ii below, using an inflation factor derived from the most recent [annual] Implicit Price Deflator for Gross National Product, as published by the U.S. Department of Commerce in its Survey of Current Business. The inflation factor is the result of dividing the latest published annual Deflator by the Deflator for the previous year.

i.-ii. (No change.)

[3.]6. The owner or operator [must] shall revise the closure cost estimate whenever a change in the closure plan increases the cost of closure. The revised closure cost estimate [must] shall be submitted within 30 days after the Department has approved the request to amend the closure plan and shall be adjusted for inflation, as specified in (e)[2]5 above.

[4.]7. The owner or operator [must] **shall** keep the following at the facility during the [operating] **active** life of the facility: the latest closure cost estimate prepared in accordance with (e)1 and [3]6 above, and when this estimate has been adjusted in accordance with (e)[2]5 above, the latest adjusted closure cost estimate.

(f) The owner or operator of each facility [must] **shall** establish financial assurance for closure of the facility. [He must] **The owner or operator shall** choose from the options, as specified in (f)1 through 5 below, except the option in (f)3 is not available to owners or operators of existing facilities until they have received a permit:

1. Closure trust fund requirements are as follows:

i.-ix. (No change.)

x. After beginning **partial** or final closure, an owner or operator or [any other] another person authorized to [perform] **conduct partial or final** closure may request reimbursement for **partial or final** closure expenditures by submitting itemized bills to the Department. **The owner or operator or other person authorized to conduct closure may request reimbursements for partial or final closure costs only if sufficient funds are remaining in the trust fund to cover the maximum costs of closing the facility over its remaining active life.**

(1) Within 60 days after receiving bills for **partial or final** closure activities, the Department will **instruct the trustee to make reimbursements in those amounts as the Department specifies in writing, if the Department determines [whether] that the partial or final** closure expenditures are in accordance with the **approved** closure plan, or otherwise justified[, and if so, will instruct the trustee to make reimbursement in such amounts as the Department specifies in writing].

(2) If the Department has reason to believe that the **maximum** cost of closure **over the remaining active life of the facility** will be significantly greater than the value of the trust fund, [he] **the Department** may withhold reimbursements of such amounts as [he] **the Department** deems prudent until [he] **the Department** determines, in accordance with (f)8 below, that the owner or operator is no longer required to maintain financial assurance for final closure of the facility. **If the Department does not instruct the trustee to make such reimbursements, the Department will provide the owner or operator with a detailed written statement of reasons.**

xi. (No change.)

2. Requirements for the surety bond guaranteeing payment into a closure trust fund are as follows:

i.-iii. (No change.)

iv. The bond [must] **shall** guarantee that the owner or operator will:

(1) (No change.)

(2) Fund the standby trust fund in an amount equal to the penal sum within 15 days after an **administrative** order to begin **final** closure [is] issued by the Department[,] **becomes final, or within 15 days after an order to begin final closure is issued by a State or Federal court or other court of competent jurisdiction; or**

(3) (No change.)

v.-ix. (No change.)

3. Requirements for the surety bond guaranteeing performance of closure requirements are as follows:

i.-iv. (No change.)

v. Under the terms of the bond, the surety will become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond. [Following a determination that the owner or operator has failed to perform final closure in accordance with the approved closure plan and other permit requirements when required to do so, under the terms of the bond,] **Within 15 days after an administrative order to begin final closure issued by the Department becomes final or within 15 days after an order to begin final closure is issued by a State or Federal court or other court of competent jurisdiction,** the surety will perform final closure as guaranteed by the bond, or will deposit the amount of the penal sum into the standby trust fund.

vi.-x. (No change.)

4. The [C]losure letter of credit requirements are as follows:

i.-vii. (No change.)

viii. [Following a determination that the owner or operator has failed to perform final closure in accordance with the closure plan and other permit requirements when required to do so,] **Within 15**

days after an administrative order to begin final closure issued by the Department becomes final or within 15 days after an order to begin final closure is issued by a State or Federal court or other court of competent jurisdiction, the Department may draw on the letter of credit.

ix.-x. (No change.)

5. Closure insurance requirements are as follows:

i.-iv. (No change.)

v. After beginning **partial** or final closure, an owner or operator or any other person authorized to [perform] **conduct** closure may request reimbursement for closure expenditures by submitting itemized bills to the Department. **The owner or operator or any other person authorized to conduct closure may request reimbursement for partial closure only if the remaining value of the policy is sufficient to cover the maximum costs of closing the facility over its remaining active life.**

(1) Within 60 days after receiving bills for closure activities, the Department will **instruct the insurer to make reimbursements in such amounts as the Department specifies in writing, if the Department determines [whether] that the partial or final** closure expenditures are in accordance with the **approved** closure plan or otherwise justified. [, and if so, will instruct the trustee to make reimbursement in such amounts as the Department specifies in writing.]

(2) If the Department has reason to believe that the maximum cost of closure **over the remaining active life of the facility** will be significantly greater than the face amount of the policy, it may withhold reimbursements of such amounts as the Department deems prudent until the Department determines, in accordance with (f)8 below, that the owner or operator is no longer required to maintain financial assurance for final closure of the facility. **If the Department does not instruct the insurer to make such reimbursement, the Department will provide the owner or operator with a detailed written statement of reasons.**

vi.-x. (No change.)

6.-7. (No change.)

8. Release of the owner or operator from the requirements of [(f) of] this subsection shall be governed by the following requirements:

i. Within 60 days after receiving certifications from the owner or operator and an independent registered professional engineer that **final** closure has been [accomplished] **completed** in accordance with the **approved** closure plan, the Department will notify the owner or operator in writing that he is no longer required by this section to maintain financial assurance for **final** closure of the [particular] facility, unless the Department has reason to believe that **final** closure has not been in accordance with the **approved** closure plan. **The Department shall provide the owner or operator with a detailed written statement of any such reason to believe that closure has not been in accordance with the approved closure plan.**

7:26-9.11 Financial requirements for facility post-closure care

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

(c) The owner or operator shall comply with the following provisions concerning the cost estimate for facility post-closure care:

1. The owner or operator of a facility subject to post-closure monitoring or maintenance requirements [must] **shall** have a **detailed** written estimate, in current dollars, of the annual cost of post-closure monitoring and maintenance of the facility in accordance with the applicable post-closure [regulations] **rules** in N.J.A.C. 7:26-10.1 and 11.1. **The post-closure estimate shall be based on the costs to the owner or operator of hiring a third party to conduct post-closure activities, who is neither a parent nor a subsidiary of the owner or operator.** The post-closure cost estimate is calculated by multiplying the annual post-closure cost estimate by the number of years of post-closure care required under N.J.A.C. 7:26-9.9.

2. During the [operating] **active** life of a facility, the owner or operator must adjust the post-closure cost estimate for inflation within [30 days after each] **60 days prior** to the anniversary [of the] date [on which] the first post-closure cost estimate was prepared. The adjustment [must] **shall** be made as specified in (c)2i and 2ii below, using an inflation factor derived from the **most recent** [annual] Implicit Price Deflator for Gross National Product, as published by the

U.S. Department of Commerce in its Survey of Current Business. The inflation factor is the result of dividing the latest published annual Deflator by the Deflator for the previous year.

i.-ii. (No change.)

3. The owner or operator [must] **shall** revise the post-closure cost estimate during the **active** life of the facility whenever a change in the post-closure plan increases the cost of post-closure care. The revised post-closure cost estimate [must] **shall be submitted within 30 days after the Department has approved the request to amend the post-closure plan, and shall** be adjusted for inflation, as specified in (c)2 above.

4. (No change.)

(d) The owner or operator of a facility subject to post-closure monitoring or maintenance requirements [must] **shall** establish financial assurance for post-closure care in accordance with the approved post-closure plan for the facility **60 days prior to the initial receipt of hazardous waste or the effective date of these amendments, whichever is later.** [He] The owner or operator [must] **shall** choose from the following options except that the option in (d)3 is not available to owners or operators of existing facilities until they have received a permit:

1. Post-closure trust fund requirements are as follows:

i.-x. (No change.)

xi. An owner or operator or any other person authorized to perform post-closure care may request reimbursement for post-closure expenditures by submitting itemized bills to the Department. Within 60 days after receiving bills for post-closure care activities, the Department will **instruct the trustee to make reimbursements in those amounts as the Department specifies in writing, if the Department determines [whether] that the post-closure care expenditures are in accordance with the approved post-closure plan or otherwise justified. [, and if so, will] If the Department does not** instruct the trustee to make **such** reimbursements, [in such amounts as the Department specifies in writing.] **the Department will provide the owner or operator with a detailed written statement of reasons.**

xii. (No change.)

2. Requirements for the surety bond guaranteeing payment into a post-closure trust fund are as follows:

i.-iii. (No change.)

iv. The bond [must] **shall** guarantee that the owner or operator will:

(1) (No change.)

(2) Fund the standby trust fund in an amount equal to the penal sum within [25] **15 days after an administrative order to begin final closure [is] issued by the Department[,]** **becomes final or within 15 days after an order to begin final closure is issued by the State or Federal court or other court of competent jurisdiction;** or

(3) (No change.)

v.-ix. (No change.)

3. Requirements for the surety bond guaranteeing performance of post-closure care are as follows:

i.-iv. (No change.)

v. Under the terms of the bond, the surety will become liable on the bond obligations when the owner or operator fails to perform[,] as guaranteed by the bond. [Following a determination that the owner or operator has failed to perform post-closure care in accordance with the post-closure plan and other permit requirements under the terms of the bond.] **Within 15 days after an administrative order to begin final closure issued by the Department becomes final or within 15 days after an order to begin final closure is issued by the State or Federal court or other court of competent jurisdiction,** the surety will perform post-closure care in accordance with the post-closure plan and other permit requirements or will deposit the amount of the penal sum into the standby trust fund.

vi.-xi. (No change.)

4. The [P]post-closure letter of credit requirements are as follows:

i.-viii. (No change.)

ix. [Following a determination that the owner or operator has failed to perform post-closure care in accordance with the post-closure plan and other permit requirements,] **Within 15 days after an administrative order to begin final closure issued by the Department**

becomes final or within 15 days after an order to begin final closure is issued by the State or Federal court or other court of competent jurisdiction, the Department may draw on the letter of credit.

x.-xi. (No change.)

5. Post-closure insurance requirements are as follows:

i.-iv. (No change.)

v. An owner or operator or any other person authorized to [perform] **conduct** post-closure care may request reimbursement for post-closure expenditures by submitting itemized bills to the Department. Within 60 days after receiving bills for post-closure care activities, the Department will **instruct the insurer to make reimbursements in those amounts as the Department specifies in writing, if the Department determines [whether that] the post-closure expenditures are in accordance with the approved post-closure plan or otherwise justified. [, and if so,] If the Department does not [will] instruct the insurer to make such reimbursements, [in such amounts as the Department specifies in writing.] the Department will provide the owner or operator with a detailed written statement of reasons.**

vi.-xi. (No change.)

6.-7. (No change.)

8. Release of the owner or operator from the requirements of [(d) of] this subsection is governed by the following requirements:

i. [When an] **Within 60 days after receiving certifications from the owner or operator and an independent registered professional engineer that the post-closure care period for a hazardous waste disposal unit has been completed[,] to the satisfaction of the Department[, all post-closure care requirements] in accordance with the approved post-closure plan, the Department will[, at the request of the owner or operator,] notify [him] the owner or operator [in writing] that he is no longer required [by this section] to maintain financial assurance for post-closure care of [the particular facility.] that unit, unless the Department has reason to believe that post-closure care has not been in accordance with the approved post-closure plan. The Department shall provide the owner or operator with a detailed written statement of any such reason to believe that post-closure care has not been in accordance with the approved post-closure plan.**

7:26-9.13 Liability requirements

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

(e) An owner or operator [must] **shall** continuously provide liability coverage for a facility, as required by this section, [and] until certifications of closure of the facility, as specified in N.J.A.C. 7:26-9.8[(l)](m), are received by the Department. **Within 60 days after receiving certifications from the owner or operator and an independent registered professional engineer that final closure has been completed in accordance with the approved closure plan, the Department will notify the owner or operator in writing that the owner or operator is no longer required by this section to maintain liability coverage for that facility, unless the Department has reason to believe that closure has not been in accordance with the approved closure plan.**

(f) (No change.)

7:26 Appendix A: Wording of the Instruments (See 40 Code of Federal Regulations 264.151)

(a) (No change.)

(b) A surety bond guaranteeing payment into a trust fund, as specified in this subchapter [must] **shall** be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Financial Guarantee Bond

Date bond executed:

Effective date:

Principal: (legal name and business address of owner or operator)

Type of organization (Insert "individual," "joint venture," "partnership," or "corporation")

State of incorporation:

Surety(ies): (name(s) and business address(es))

EPA Identification Number, name, address, and closure and/or post-closure amount(s) for each facility guaranteed by this bond (indicate closure and post-closure amounts separately:)

Total penal sum of bond:

Surety's bond number:

Know All Persons By These Presents, That we, the Principal and Surety(ies) hereto are firmly bound to the New Jersey Department of Environmental Protection (hereinafter called NJDEP), in the above penal sum for the payment of which we bind ourselves, our heirs, executors, administrators, successors and assigns jointly and severally; provided that, where the Surety(ies) are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes, each Surety binds itself, jointly and severally with the Principal, for the payment of such sum only as is set forth opposite the name of such Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sum.

Whereas said Principal is required, under the Solid Waste Management Act to have a permit or existing facility status in order to own or operate each hazardous waste management facility identified above, and

Whereas said [p]Principal is required to provide financial assurance for closure or closure and post-closure care, as a condition of the permit or existing facility status, and

Whereas said Principal shall establish a standby trust fund as is required when a surety bond is used to provide such financial assurance;

Now, Therefore, the conditions of the obligation are such that if the Principal shall faithfully, before the beginning of final closure of each facility identified above, fund the standby trust fund in the amount(s) identified above for the facility[.],

Or, if the Principal shall fund the standby trust fund in such amount(s) within 15 days after an **administrative** order to begin closure [is] issued by the NJDEP[.], **becomes final or within 15 days after an order to begin final closure is issued** by a state or federal court or other court of competent jurisdiction[.],

Or, if the Principal shall provide alternate financial assurance, as specified in N.J.A.C. 7:26-9.1 et seq. as applicable, and obtain the written approval of the NJDEP of such assurance, within 90 days after the date notice of cancellation is received by both the Principal and the NJDEP from the Surety(ies), then this obligation shall be null and void, otherwise it is to remain in full force and effect.

The Surety(ies) shall become liable on this bond obligation only when the Principal has failed to fulfill the conditions described above. Upon notification by the NJDEP that the Principal has failed to perform as guaranteed by this bond, the Surety(ies) shall place funds in the amount guaranteed for the facility(ies) into the standby trust fund as directed by the NJDEP.

The liability of the Surety(ies) shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall amount in the aggregate to the penal sum of the bond, but in no event shall the obligation of the Surety(ies) hereunder exceed the amount of said penal sum.

The Surety(ies) may cancel the bond by sending notice of cancellation by certified mail to the Principal and to the NJDEP, provided however, that cancellation shall not occur during the 120 days beginning on the date of receipt of the notice of cancellation by both the Principal and the NJDEP, as evidenced by the return receipts, nor shall cancellation occur while a compliance procedure is pending, as defined in N.J.A.C. 7:26-9.10(b)2.

The Principal may terminate this bond by sending written notice to the Surety(ies), provided, however, that no such notice shall become effective until the Surety(ies) receive(s) written authorization for termination of the bond by the NJDEP.

(The following paragraph is an optional rider that may be included but is not required.)

Principal and Surety(ies) hereby agreed to adjust the penal sum of the bond yearly so that it guarantees a new closure and/or post-closure amount, provided that the penal sum does not increase by more than 20 percent in any one year, and no decrease in the penal sum takes place without the written permission of the NJDEP.

In Witness Whereof, the Principal and Surety(ies) have executed this Financial Guarantee Bond and have affixed their seals on the date set forth above.

The persons whose signatures appear below hereby certify they are authorized to execute this surety bond on behalf of the Principal and Surety(ies) and that the wording of this surety bond is identical to the wording specified in N.J.A.C. 7:26-9 (Appendix A) as such regulations were constituted on the date the bond was executed.

Principal
(Signature(s)[])
(Name(s))
(Title(s))
(Corporate seal)
Corporate Surety(ies)
(Name and address)
State of incorporation:
Liability limit:
(Signature(s))
(Name(s) and title(s))
(Corporate seal)

(For every co-surety, provide signature(s), corporate seal, and other information in the same manner as for Surety above.)

Bond premium:

(c) A surety bond guaranteeing performance of closure and/or post-closure care, as specified in this subchapter [must] **shall** be worded as follows, except that the instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Performance Bond

Date bond executed:

Effective date:

Principal: (legal name and business address of owner or operator)

Type of organization: (insert "individual," "joint venture," "partnership," or "corporation")

State of incorporation:

Surety(ies): (name(s) and business address(es))

EPA Identification Number, name, address, and closure and/or post-closure amount(s) for each facility guaranteed by this bond (indicate closure and post-closure amounts separately):

Total penal sum of bond:

Surety's bond number

Know All Persons By These Presents, That we, the Principal and Surety(ies) hereto are firmly bound to the New Jersey Department of Environmental Protection (hereinafter called NJDEP), in the above penal sum for the payment of which we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally; provided that, where the Surety(ies) are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the Principal, for the payment of such sum only as is set forth opposite the name of such Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of penal sum.

Whereas said Principal is required, under the New Jersey Solid Waste Management Act, to have a permit in order to own or operate each hazardous waste management facility identified above, and

Whereas said Principal is required to provide financial assurance for closure and post-closure care, as a condition of the permit or existing facility status.

Whereas said Principal shall establish a standby trust fund as is required when a surety bond is used to provide such financial assurance;

Now, Therefore, the conditions of this obligation are such that, if the Principal shall faithfully perform closure, whenever required to do so, of each facility for which this bond guarantees closure, in accordance with the closure plan and other requirements of the permit as such plan and permit may be amended, pursuant to all applicable laws, statutes, rules, and regulations, as such laws, statutes, rules and regulations may be amended.

And, if the Principal shall faithfully perform post-closure of each facility for which this bond guarantees post-closure care, in accordance with the post-closure plan and other requirements of the permit, as such plan and permit may be amended, pursuant to all applicable laws, statutes, rules and regulations, as such laws, statutes, rules and regulations may be amended,

Or, if the principal shall perform final closure as guaranteed by the bond, or will deposit the amount of the penal sum into the standby trust fund within 15 days after an administrative order to begin final closure issued by the Department becomes final or within 15 days after an order to begin final closure is issued by a State, Federal court or other court of competent jurisdiction,

Or, if the Principal shall provide alternate financial assurance as specified in N.J.A.C. 7:26-9.1 et seq., and obtain the written approval of the NJDEP of such assurance, within 90 days after the date notice of cancellation is received by both the Principal and the NJDEP for the Surety(ies), then this obligation shall be null and void, otherwise it is to remain in full force and effect.

The Surety(ies) shall become liable on this bond obligation only when the Principal has failed to fulfill the conditions described above.

Upon notification by the NJDEP that the Principal has been found in violation of the closure requirements of N.J.A.C. 7:26-9.1 et seq., for a facility for which this bond guarantees performances of closure, the Surety(ies) shall either perform closure in accordance with the closure plan and other permit requirements or place the closure amount guaranteed for the facility into the standby trust fund as directed by the NJDEP.

Upon notification by the NJDEP that the Principal has been found in violation of the post-closure requirements of N.J.A.C. 7:26-9.1 et seq., for a facility for which this bond guarantees performance of post-closure, the Surety(ies) shall either perform post-closure care in accordance with the post-closure plan and other permit requirements or place the post-closure amount guaranteed for the facility into the standby trust fund, as directed by the NJDEP.

Upon notification by the NJDEP that the Principal has failed to provide alternate financial assurance as specified in N.J.A.C. 7:26-9.1 et seq. and obtain written approval of such assurance from the NJDEP during the 90 days following receipt by both the Principal and the NJDEP of a notice of cancellation of the bond, the Surety(ies) shall place funds in the amount guaranteed for the facility(ies) into the standby trust fund as directed by the NJDEP.

The Surety(ies) hereby waive(s) notification of amendments to closure plans, permits, applicable laws, statutes, rules and regulations and agrees that no such amendment shall in any way alleviate its (their) obligations of this bond.

The liability of the Surety(ies) shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall amount in the aggregate to the penal sum of the bond, but in no event shall the obligation of the Surety(ies) hereunder exceed the amount of said penal sum.

The Surety(ies) may cancel the bond by sending notice of cancellation by certified mail to the owner or operator and to the NJDEP, provided, however, that cancellation shall not occur during the 120 days beginning on the date of receipt of the notice of cancellation by both the Principal and the NJDEP as evidenced by the return receipts, nor shall cancellation occur while a compliance procedure is pending, as defined in N.J.A.C. 7:26-9.10(b)2.

The Principal may terminate this bond by sending written notice to the Surety(ies), provided, however, that no such notice shall become effective until the Surety(ies) receive(s) written authorization for termination of the bond by the NJDEP.

(The following paragraph is an optional rider that may be included but is not required.)

Principal and Surety(ies) hereby agree to adjust the penal sum of the bond yearly so that it guarantees a new closure and/or post-closure amount, provided that the penal sum does not increase by more than 20 percent in any one year, and no decrease in the penal sum takes place without the written permission of the NJDEP.

In Witness Whereof, The Principal and Surety(ies) have executed this Performance Bond and have affixed their seals on the date set forth above.

The persons whose signatures appear below hereby certify that they are authorized to execute this surety bond on behalf of the Principal and Surety(ies) and that the wording of this surety bond is identical to the wording specified in N.J.A.C. 7:26-9 (Appendix A) as such regulation was constituted on the date this bond was executed.

Principal
(Signature(s))

(Name(s))
(Title(s))
(Corporate Seal)
Corporate Surety(ies)
(Name and address)
State of incorporation: _____
Liability limit: _____

(Signature(s))
(Name(s) and title(s))

Corporate seal:

(For every co-surety, provide signature(s), corporate seal and other information in the same manner as for Surety above.)

Bond premium: _____

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

(f) A letter from the chief financial officer, as specified in N.J.A.C. 7:26-9.13 [must] **shall** be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Letter from Chief Financial Officer (to demonstrate liability coverage or to demonstrate both liability coverage and assurance of closure or post-closure care).

(Address to the New Jersey Department of Environmental Protection.)

I am the chief financial officer of (owner's or operator's name and address). This letter is in support of the use of the financial test to demonstrate financial responsibility for liability coverage, as specified in N.J.A.C. 7:26-9.1 et seq.

(Fill out the following paragraph regarding facilities and liability coverage. For each facility, include its EPA Identification Number, name, and address.)

The owner or operator identified above is the owner or operator of the following facilities for which liability coverage is being demonstrated through the financial test specified in N.J.A.C. 7:26-9.1 et seq.

This owner or operator (insert "is required" or "is not required") to file a Form 10K with the Securities and Exchange Commission (SEC) for the latest fiscal year.

The fiscal year of this owner or operator ends on (month, day). The figures for the following items marked with an asterisk are derived from this owner's or operator's [independently] **independently** audited, year-end financial statements for the latest completed fiscal year, ended (date).

ALTERNATIVE I

1.-11. (No change.)

ALTERNATIVE II

1.-10. (No change.)

I hereby certify that the wording of this letter is identical to the wording specified in N.J.A.C. 7:26-9 (Appendix A), as such regulations were constituted on the date shown immediately below:

(Signature)
(Name)
(Title)
(Date)

This firm is the owner or operator of the following Underground Injection Control facilities for which financial assurance for plugging and abandonment is required under N.J.A.C. 7:14A-5.10(a)7. The current closure cost estimates as required by N.J.A.C. 7:14A-5.12(d) are shown for each facility:

[(f)](g) (No change in text.)
[(j)](h) (No change in text.)

7:26-12.3 Existing facilities

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

(c) Owners or operators making changes during operation prior to final [deposition] **disposition** of permit application shall comply with the requirements of this section.

1.-3. (No change.)

4. Changes in the ownership or operational control of a facility must be approved in advance by the Department.

i.-ii. (No change.)

iii. When a transfer of ownership or operational control of a facility occurs, the [old] **former owner or operator** shall comply with the hazardous waste facility financial requirements of N.J.A.C. 7:26-9.10 [and N.J.A.C. 7:26-9.11] **through 9.14**, until the new owner or operator has demonstrated to the Department that he is complying with those sections. All other duties are transferred effective immediately upon the date of the change of ownership or operational control of the facility. **The new owner or operator shall demonstrate compliance with N.J.A.C. 7:26-9.10 through 9.14 within six months of the date of change of ownership or operational control of the facility.** Upon demonstration of compliance to the Department by the new owner or operator of compliance with N.J.A.C. 7:26-9.10 [and N.J.A.C. 7:26-9.11] **through 9.14**, the Department shall notify the [old] former owner or operator in writing that it no longer needs to comply with those sections [as of the date of demonstration].

5. (No change.)

(d)-(h) (No change.)

(a)

DIVISION OF FISH, GAME AND WILDLIFE Lease and License Fees, Shellfish License Revocation, and Penalties

Proposed New Rules: N.J.A.C. 7:25-1

Authority: N.J.S.A. 13:1B-23 et seq., 13:1D-9, 23:1-1 et seq., specifically 23:2B-6 and 23:2B-14, and 50:1-5 et seq.

DEP Docket Number: 062-87-11.

Proposal Number: PRN 1987-527.

Submit written comments by January 20, 1988 to:

Suzanne F. Dice, Esq.
Office of Regulatory Services
New Jersey Department of Environmental Protection
CN 402
Trenton, New Jersey 08625

The agency proposal follows:

Summary

Pursuant to Executive Order No. 66(1978), N.J.A.C. 7:25-1 expired on September 17, 1985. N.J.A.C. 7:25-1 establishes the scope and construction for the entire chapter, defines terms within existing statutes, sets lease fees for shellfishing grounds under the tidal waters of the State and establishes certain shellfishing license fees, as well as the shellfishing license revocation schedule and the penalty schedule for specific shellfishing violations. The Department has reviewed these rules and has determined that they are necessary, reasonable, and proper for the purposes for which they were originally intended. The text of the proposal is identical to that of the expired rules at N.J.A.C. 7:25-1, with the exception of a correction of typographical error found in N.J.A.C. 7:25-1.7(d) and a change in a statutory citation found in N.J.A.C. 7:25-1.7(e).

Social Impact

The proposed new rules will allow the Department of Environmental Protection to continue its successful shellfishing license program. Through the penalty and revocation provisions, the proposed new rules will continue to deter unlicensed shellfishing. The license fees specified in the proposed new rules will provide revenue for administering the licensing program. No additional social impact will result beyond that of the previous expired licensing rules.

Economic Impact

The proposed new rules will have only a minor economic impact. They reinstate the expired revenue-neutral shellfish fee schedule, with fees ranging from \$1.00 per acre for a Maurice River Cove lease to \$100.00 for a shucking house (surf clams) license. The monetary penalty provisions are the minimum allowed by statute. The proposed new rules represent no fee or penalty increase over the expired rules.

Environmental Impact

The proposed new rules will have a positive environmental impact by continuing the shellfishing license program, which helps protect and manage an important marine resource.

Regulatory Flexibility Statement

The proposed new rules will apply to all persons who harvest shellfish for personal or business use. Most of those affected by the proposed new rules will be either small businesses, as that term is defined in the Regulatory Flexibility Act, P.L. 1986, c.169, or individuals. To comply with the proposed new rules, small businesses will be required to apply for and obtain a license, pay nominal license and/or lease fees, and, if in violation of the proposed new rules, pay minor penalties. Compliance with the proposed new rules will demand a very small amount of paperwork on the part of small businesses. The requirements of the proposed new rules are the same as those contained in the previously operative license program.

Full text of the proposed new rules appears in the New Jersey Administrative Code at N.J.A.C. 7:25-1, except for N.J.A.C. 7:25-1.7 which is proposed as follows (additions indicated in boldface thus; deletions shown in brackets [thus]).

7:25-1.7 Penalties

(a) Pursuant to N.J.S.A. 50:2-1, no person shall take or catch any clams without either a recreational or commercial license. Any person violating this provision shall be liable to a penalty of \$20.00 for the first offense and \$40.00 for each subsequent offense.

(b) Pursuant to N.J.S.A. 50:2-2, no person shall take or catch more than 150 clams a day with only a recreational license or no license. Any person violating this provision shall be liable to a penalty of \$40.00 for the first offense and \$100.00 for each subsequent offense.

(c) Pursuant to N.J.S.A. 50:2-5, each licensee, while at all times engaged in operating under his license who fails to have his clamming license in his possession or who fails to exhibit his clamming license for inspection upon proper request, shall be liable to a penalty of \$10.00 for the first offense and \$20.00 for each subsequent offense.

(d) Pursuant to N.J.S.A. 50:3-15.1 and 16.18, no person shall take or possess undersized oysters. Any person violating this provision shall [byliable] **be liable** to a penalty of \$10.00 for the first offense and not for each oyster and \$20.00 for each subsequent offense and not for each oyster.

(e) Pursuant to N.J.S.A. [50:3-17] **23:5-35.2**, no person shall take or attempt to take crabs without a license. Any person violating this provision shall be liable to a penalty of \$10.00 for the first offense and \$20.00 for each subsequent offense.

(b)

OFFICE OF GREEN ACRES Green Acres Program

Proposed Repeals and New Rules: N.J.A.C. 7:36-1, 4 and 7

Proposed New Rules: N.J.A.C. 7:36-2, 3, 5 and 6

Authority: N.J.S.A. 13:8A-1, 13:8A-20, 13:8A-35 et seq. and P.L. 1983, c.354.

DEP Docket Number: 061-87-11.

Proposal Number: PRN 1987-528.

Submit written comments by January 20, 1988 to:

Michael P. Marotta, Esq.
Office of Regulatory Services
New Jersey Department of Environmental Protection
CN 402
Trenton, N.J. 08625

The agency proposal follows:

Summary

The New Jersey Green Acres Recreational Opportunities Program provides funds for the acquisition and development of outdoor recreational areas by State and local governments. Local assistance grants have been made available under Green Acres bond issues passed in 1961, 1971, 1974 and 1978. The New Jersey Green Acres Bond Act of 1983 (P.L. 1983, c.354) also authorizes the provision of low interest Green Trust loans, urban aid grants and environmental incentive grants to local governments.

The proposed new rules establish criteria and funding levels for the selection of projects to be funded and procedures to be followed when applying for such funding. The program had been administered in accordance with the rules currently appearing at N.J.A.C. 7:36. Subchapters 2, 3, 5 and 6 expired on January 9, 1986 pursuant to Executive Order 66(1978) and are being repropose at this time with certain modifications. Subchapters 1, 4 and 7 are being repealed and new rules proposed in their stead.

Subchapter 1 establishes the priorities and objectives of the program. Certain terms used in the rules are defined and the general criteria for eligibility and application procedures are set forth.

Subchapter 2 addresses funding given in conjunction with any funding from the Federal parks program.

Subchapter 3 provides criteria by which specific cost allowances will be made. It also establishes standards to determine acceptable uses of the subject property.

Subchapter 4 imposes project design standards.

Subchapters 5 and 6 provide specific criteria which will govern the acquisition of property by an applicant.

The applicant is required, pursuant to Subchapter 7, to retain the property and assure its use for recreational purposes.

Social Impact

The proposed new rules will help to maintain the availability of assistance loans and grants to local governments. They will provide and make available more types of funding such as Green Trust loans, urban aid packages and environmental incentive packages. The public at large will benefit from the proposed new rules since it will be able to enjoy an increased amount and variety of recreational land.

Economic Impact

The proposed new rules will facilitate the distribution of funds for and provide the means by which funds are made available for Green Acres projects. The rules also outline the criteria used to determine eligibility of acquisition costs. The types of eligible acquisitions which will be reimbursed are enumerated.

Environmental Impact

The proposed new rules will result in a positive environmental effect because they will help to provide financial assistance for the development and preservation of outdoor recreation facilities within the State of New Jersey. The development of lands in such a manner will result in a greater conservation and availability of natural resources.

Regulatory Flexibility Statement

The purpose of the rules is to provide a procedure by which grants and loans are given to local units for Green Acres projects. Accordingly, the Department has determined, pursuant to the Regulatory Flexibility Act (P.L. 1986, c.169), that the proposed new rules will impose no reporting, recordkeeping or other compliance requirements upon small businesses. Therefore, no regulatory flexibility analysis is required.

Full text of the proposed new rules follows:

SUBCHAPTER 1. PRIORITIES AND OBJECTIVES

7:36-1.1 Introduction

(a) The purpose of the New Jersey Green Acres and Recreational Opportunities Program administered by the Department of Environmental Protection is to increase and preserve permanent outdoor recreational areas for the public's use and enjoyment.

(b) The Local Assistance provisions of P.L. 1974, c.102, P.L. 1978, c.118 and P.L. 1983, c.354 make State funds available for the development of outdoor recreation facilities and for the acquisition of open space lands.

7:36-1.2 Definitions

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

"Acquisition project" means a single parcel of land or several parcels of land that form a contiguous public recreation or conservation open space area.

"Commissioner" means the Commissioner of the Department of Environmental Protection.

"Department" means the Department of Environmental Protection.

"Development project" means outdoor recreation development, renovation or redevelopment on one site, several types of recreation development, renovation or redevelopment on one site, or development of several sites for similar activities.

"Diversion" means the use of public parkland contrary to restrictions or encumbrances placed upon such land which limit its use to public recreation and conservation in accordance with applicable law and with this chapter. This definition includes, but is not limited to, permanent easements, rights-of-way, leases or sales of such land granted or made for other than public recreation or conservation uses.

"Local unit" means a municipality or county within the State of New Jersey.

"Permanent" means the use of lands for public outdoor recreation and/or conservation in perpetuity.

"Project" means the acquisition or development activity for which Green Acres financial assistance is being sought.

"Recreation and conservation purposes" means use of lands for parks, natural areas, historic areas, forests, camping, fishing, water reserves, wildlife, reservoirs, hunting, boating, winter sports, and similar uses for either public outdoor recreation or conservation of natural resources, or both. (See P.L. 1975, c.155, Section 3, N.J.S.A. 13:8A-37)

"Statewide Comprehensive Outdoor Recreation Plan" (SCORP) means that document, developed by the Department, which sets forth the policies for recreation and the use of open space in the State. The plan provides the guidelines for the coordination of outdoor recreation projects throughout the State.

"State House Commission" means that entity created by N.J.S.A. 52:20-1 et seq.

"Urban aid area" is an urban area as defined in P.L. 1978, c.14 (N.J.S.A. 52:27D-178).

7:36-1.3 Eligible applicants

(a) Any local unit authorized to acquire, administer, protect, develop and maintain lands for recreation and conservation purposes is eligible to make application under the program.

(b) School boards, parking authorities, housing authorities, and similar public agencies without primary recreation or conservation responsibilities are not eligible for Green Acres assistance.

(c) An open space project that complements a non-eligible agency's program may be approved under the Green Acres program if such open space project is sponsored by an eligible local unit.

(d) A Green Acres application shall be prepared with the assistance of various local agencies such as the park and recreation commission, the planning board, and/or the environmental commission.

7:36-1.4 Green Acres loans and grants

(a) To the extent that funds are available pursuant to the Green Acres bond issues enacted in 1961, 1971, 1974 and 1978 (P.L. 1961, c.46; P.L. 1971, c.165; P.L. 1974, c.102; and P.L. 1978, c.118), local assistance grants will be made, in accordance with the provisions of this Chapter, to eligible local units in amounts of up to 50 percent of the total allowable cost of the project.

1. In the event that the sums available pursuant to P.L. 1961, c.46; P.L. 1971, c.165; P.L. 1974, c.102 and P.L. 1978, c.118 have been appropriated and obligated, the Department will make grants to local units for eligible urban aid and environmental incentive projects from funds available pursuant to P.L. 1983, c.354 in amounts not to exceed 25 percent of the total allowable cost of the project.

(b) Loans in amounts of up to 100 percent of the total allowable costs are available to eligible local units pursuant to the Green Acres Bond Act of 1983 (P.L. 1983, c.354).

(c) All Green Trust loans shall bear an interest rate of two percent and shall be repaid within a 20 year period, as provided by P.L. 1983, c.354.

1. Initial development project limits are established at the time of the funding offering and are based on the cost estimate of a New Jersey licensed professional engineer, landscape architect, or architect.

2. Initial acquisition project limits are established at the time of funding offering and are based on the estimated fair market value of the land to be acquired.

(d) Pursuant to the Green Acres bond issues passed in 1961, 1971, 1974 and 1978 (P.L. 1961, c.46; P.L. 1971, c.165; P.L. 1974, c.102; and P.L. 1978, c.118), a local unit may use as its matching share any other source of funding which may be available from a private agency, group or foundation, or from a Federal program, as well as local capital funds, bond revenues, surpluses or specific appropriations.

(e) When submitting an application for development or acquisition funding under the Green Acres bond programs, a local unit shall consider the financial burden it will incur to operate, maintain, police and protect the site.

(f) The following categories of funding are available pursuant to the 1983 Green Acres Bond program:

1. Green Trust loans covering 100 percent of the project cost are available in the following funding categories:

i. The development of county parks and major municipal facilities. Available funds will be based on yearly appropriations;

ii. Acquisition or development projects not to exceed \$100,000 in total project cost; or

iii. The acquisition of small projects, inholdings, and neighborhood parks. Generally, no maximum dollar amount is set. However, available funds are based on yearly appropriations.

2. The "urban aid" category for urban aid areas as defined in P.L. 1978, c.14, consisting of a Green Trust loan covering up to 75 percent of the cost of an acquisition or development project, together with a Green Acres grant of up to 25 percent of the total eligible cost for the remaining cost. Generally, no maximum dollar amount is set. Available funds will be based on yearly appropriations and will, in no event, exceed 100 percent of the total project cost.

3. "Environmental incentive" assistance consisting of both a Green Trust loan covering up to 75 percent of the cost of an acquisition project and Green Acres grant covering up to 25 percent of the total eligible project cost. Generally, no maximum dollar amount is set. However, available funds are based on yearly appropriations and will, in no event, exceed 100 percent of the total project cost.

7:36-1.5 Application procedures

(a) For both the acquisition and development programs, the following three basic steps are required as part of the loan and grant funding application procedures:

1. The local unit shall submit a written application package for a project and shall meet with the Department concerning the specifics of the particular loan or grant application.

2. Upon approval of the application, funds will be distributed in accordance with an agreement between the State and the local unit which addresses, among other items, the following:

- i. The loan and/or grant amount;
- ii. The time period; and
- iii. The project scope.

3. A notice of receipt of applications shall be sent by the Department to State, county and municipal officials.

(b) State funds will be disbursed in accordance with a schedule established by the Department, subject to availability and appropriations.

(c) The Department will accept applications on an annual basis from local units according to the following schedule:

1. June: The Department will request the submission of applications from county and municipal governments.

2. October: Local units must submit applications no later than October 31.

3. January: Priority lists and funding offerings will be made by the Department.

(d) In the case of acquisitions, schedule requirements set forth in (c) above may be modified by the Department for good cause provided that funds are available.

(e) All applications shall be submitted on a form provided by the Department.

7:36-1.6 Distribution of funds

The Department will distribute funds according to a priority ranking established by the Department. When more than one eligible funding request is submitted by the local unit, the Department reserves the right to limit funding to less than all project applications submitted.

7:36-1.7 General program criteria

(a) Decisions on applications reflect the extent to which applications meet the criteria established by the Department on the basis of the New Jersey Statewide Comprehensive Outdoor Recreation Plan (SCORP). The Department will determine the extent to which the project:

1. Serves multiple recreation and conservation purposes;
2. Serves recreation needs of a wide variety of citizens and provides for the special needs of groups such as the handicapped, elderly, disadvantaged, and/or low-income families and individuals;
3. Provides public access by economical and energy conserving means including public transit (existing or to be established), pedestrian or bicycle access;
4. Meets the most critical and under-supplied recreation needs as defined in the Statewide Comprehensive Outdoor Recreation Plan;
5. Combines with other public facilities;
6. Represents a regional program of joint municipal or county/municipal efforts;
7. Includes active public participation in the planning phase;
8. Evidences construction readiness;
9. Enhances, preserves or restores unique natural areas or land types; and
10. Has acquired development rights, life estates, remainder interests, conservation easements, or other interests not amounting to fee simple interest.

(b) No minimum or maximum acreage restrictions are placed on lands to be acquired or developed.

(c) No established minimum or maximum dollar grants are required by the Department except as provided in N.J.A.C. 7:36-1.4.

(d) No project shall receive financial assistance unless it:

1. Is a recreation and/or conservation unit;
2. Can be accomplished within a specific time; and
3. Provides a net increase in outdoor recreation conservation activity.

7:36-1.8 General provisions

(a) Green Acres loan or grant approval is contingent upon the local unit's compliance with all Federal, State and local laws, codes, and ordinances, including, but not limited to, the local unit's obtaining all necessary permits, licenses and grants.

(b) Prior to the final payment of a loan or grant by the Department, the local unit shall:

1. Adopt a comprehensive park ordinance which governs conduct and use of the public park facility; and
2. Have submitted and obtained Department approval of a mapped inventory of environmental, recreational and open space resource related information and submitted a concise concept plan or strategy for the provision of open space, recreation and natural resource protection.

(c) A local unit receiving any Green Acres funding shall recognize, evaluate, and protect water quality and the historic, cultural and natural features of the site.

(d) Once Green Acres assistance has been approved for a project, no development or change in use shall occur on the project site or on any other lands within the local unit that are used for recreation or conservation purposes at the time of the funding approval without prior approval of the Department.

1. Prior to the submission of a request for the Department's approval of a change in use, the local unit shall conduct a local public hearing pursuant to Section 7.1 of the Municipal Land Use Law (N.J.S.A. 40:55D-12) so that all interested parties may present comments concerning the proposed change. A record of the public hearing shall be submitted to the Department along with the request for approval.

(e) Any fees charged by a local unit for the use of Green Acres funded facilities shall be established in accordance with the following requirements:

1. The local unit may charge a fee for the use of a recreation facility;
2. All fees shall be reasonable and non-restrictive;
3. Any conditions for registration, scheduling or membership shall be clearly posted at the site;
4. Provisions shall be made for use fees, on a daily basis, without the requirement of seasonal or yearly membership fees;
5. Differential fee rates based on family and seasonal registrations are permitted;
6. No fee over \$2.00 per person shall be charged without prior approval of the Department. A fee schedule may include the following categories:
 - i. Yearly, seasonal, monthly, weekly, daily;
 - ii. Individual, group, family;
 - iii. Resident, non-resident (when any per person fee exceeds \$2.00, non-resident fees shall not exceed double the rate charged to a resident); and/or
 - iv. Handicapped, senior citizen, disadvantaged.
7. Fees may be developed for each individual project and will be considered on an individual case basis.
8. Fees collected shall be used only for the operation, maintenance and/or for capital expenses related to the recreation facility or program as a whole provided, however, that priority shall be given to the facility for which the fee revenues were taken. A trust account shall be established by the local unit for this purpose.
 - i. Fees collected or revenues from facilities leased for an approved temporary use (see N.J.A.C. 7:36-6.9) shall be used only for the operation, maintenance, and/or for capital expenses related to the recreation facility or program as a whole.

9. No change in the approved fee schedule shall be made without prior approval of the Department.

(f) Facilities may be operated through a concession awarded by competitive bidding in accordance with applicable law. Any payments, fees or rentals shall be charged and collected directly by the local unit and shall be used to offset the operating cost of the recreation program as a whole in accordance with N.J.A.C. 7:36-1.8(e)8 above.

(g) Use of the Green Acres funded facilities shall not be restricted on the basis of residency, race, creed, color, sex, or national origin and local units shall comply with the Law Against Discrimination (N.J.S.A. 10:5-1 et seq.).

(h) Any liabilities incurred as a result of ownership, construction or operation of a facility shall be the responsibility of the local unit.

(i) Scheduling the use of a facility to accommodate organized sports, recreation or conservation activities is permitted and is the responsibility of the local unit.

1. Exclusive use agreements or discriminatory programming based on residency or upon factors which are in violation of the Law Against Discrimination (N.J.S.A. 10:5-1) are prohibited.

2. Facilities shall not be programmed for the sole use of a particular conservation group, sporting association or athletic club.

(j) Pursuant to N.J.S.A. 13:8A-1 et seq., lands acquired and/or developed with Green Acres funds may not be diverted to non-recreation or non-conservation uses or disposed of without the prior approval of the Commissioner and the State House Commission. (See N.J.A.C. 7:36-7.)

(k) Upon receipt of an acquisition or development loan or grant, all lands owned, dedicated or maintained for public recreation or conservation purposes by the local unit shall not be diverted or disposed of for uses other than those of public recreation or conservation without the prior approval of the Commissioner and the State House Commission. (See N.J.A.C. 7:36-7.)

1. A local unit sponsoring a new public recreation facility on open space and recreation lands not funded with Green Acres assistance may adopt fees and schedules for that recreation facility without being considered to have diverted its lands as described above provided that the facility is operated by the local unit itself or an agent or agency thereof having primary recreation responsibilities.

2. Development and operation of any new activities, such as a private club facility which would limit use of lands or facilities exclusively to members thereof and which restricts public use and enjoyment of a public recreation or conservation area is considered a diversion and requires Commissioner and State House Commission approval.

3. Change of any public recreation or conservation facility to a non-recreation/non-conservation use although remaining a public facility is a diversion and requires Commissioner and State House Commission approval.

(1) Rules concerning signs are as follows:

1. A sign available from the Department shall be posted in a prominent place indicating that the site was acquired and/or developed with State of New Jersey Green Acres financial assistance.

2. Where appropriate, signs indicating the accessibility of the facility to the handicapped shall be posted.

3. The local unit shall be responsible for the erection, maintenance and replacement of all project signs.

4. Permanent commercial billboards or any other type of displayed advertising or promotion of products or services is prohibited.

5. Posting of political campaign signs on the site is prohibited.

6. Posting of signs that restrict public access or use shall be approved by the Department in advance of posting.

(m) Rules concerning reservoir/flood control project are as follows:

1. A Green Acres loan or grant may be used for the acquisition or development of the recreation portion of a reservoir, flood detention area or storm water retention basin.

2. Recreation provided at Green Acres funded portion of the reservoir/flood control facilities shall be available for public use and enjoyment.

7:36-1.9 Public access to files

(a) Access to development files is permitted pursuant to N.J.S.A. 47:1A-1 et seq.

(b) Acquisition project files are public records under N.J.S.A. 47:1A-1 et seq., and public access is allowed except to those items concerning appraisal, fair market value, or other matters involving price.

(c) Any application materials or project information will, upon written request, be provided for a fee as set forth in N.J.S.A. 47:1A-1 et seq.

7:36-1.10 Contract compliance

(a) The Department will determine contract compliance at the time of loan or grant reservation by evaluating the following items:

1. For development projects, the local unit shall conform to the specific time limitations of the loan or grant contract by:

i. Completing a standard development project in 24 months;

ii. Completing an extraordinary development project in accordance with a schedule agreed upon at the time of project approval.

2. For acquisition projects, the local unit shall conform to the specific time limitations of the loan or grant contract by:

i. Completing a standard acquisition project within 12 months after the fair market value certificate acceptance date.

ii. Completing an extraordinary acquisition project in accordance with a schedule agreed upon at the time of project approval.

3. For development projects under normal circumstances, the local unit shall:

i. Have plans and specifications certified by a licensed professional engineer, landscape architect or architect within 150 days after the date of funding offering;

ii. Advertise for bids within 180 days after the date of funding offering; and

iii. Award all contracts within 210 days after the date of the funding offering.

4. For an acquisition project, the local unit shall enter into a purchase agreement or institute condemnation proceeding within 150 days after the Fair Market Value Certificate acceptance date.

5. In the event that the local unit fails to meet the established time limits, the Department may cancel the reservation of loan or grant funds established for a specific project. Any financial obligations

incurred by the local unit prior to and as of the date of cancellation are the sole responsibility of the local unit.

6. Upon the request of the local unit, a loan or grant reservation of funds for a specific project involved in a court action will be maintained by the Department until the completion of such court actions.

7. The loan or grant reservation period may be extended by the approval of the Commissioner based on a review of extenuating circumstances on a project by project basis.

(b) The Department will conduct on site inspections and the local unit shall allow access to do so to insure compliance with the chapter.

(c) Upon the local unit's acceptance of a loan or grant the Department may conduct inspections of all other recreation/conservation lands in the open space inventory.

(d) The local unit shall submit additional information as may be required by the Department during its on-going compliance review.

(e) If the local unit refuses or fails to comply with this chapter, the Department may institute a suit to enjoin such violation, ex parte, by temporary and/or permanent injunction. The Department is not precluded from taking any other legal action as may be necessary to insure compliance by the local unit with this chapter.

SUBCHAPTER 2. FUNDING ALLOCATIONS IN COORDINATION WITH UNITED STATES DEPARTMENT OF INTERIOR

7:36-2.1 Eligibility

Subject to the availability of resources, the Department may combine Green Acres funding with available United States Department of the Interior Land and Water Conservation Funds.

SUBCHAPTER 3. BASIS FOR ASSISTANCE: DEVELOPMENT OF LAND FOR RECREATION AND CONSERVATION PURPOSES

7:36-3.1 Terms of loan or grant

(a) No commitment of funds shall be made by the local unit prior to the Departmental funding offering. Costs incurred before the funding offering will not be eligible except as provided by (a)1 below.

1. If a project is approved, costs incurred for preliminary planning and engineering which are directly related to the project site may be reimbursed.

(b) Pursuant to the Green Acres bond issues passed in 1961, 1971, 1974 and 1978 (P.L. 1961, C.46; P.L. 1971, C.165; P.L. 1974, C.102; and P.L. 1978, C.118), the Department may reimburse the local unit only after the project has been completed and all outstanding obligations paid by the local unit. Reimbursement shall be based on amounts up to 50 percent of the lowest qualified bid or up to 50 percent of the actual cost, whichever is lower; however, interim reimbursements based on costs incurred may be made by the Department for up to 90 percent of the grant amount prior to audit by the Department.

(c) Pursuant to the Green Acres bond issue passed in 1983 (P.L. 1983, C.354), financial assistance disbursed pursuant to that law shall be maintained in a separate bank account established at the time the funding offering is accepted, and shall be used only for the purpose of administering the project for which the financial assistance was made. This account shall be subject to audit by the Department.

7:36-3.2 Allowable costs

(a) Construction project contracts shall be awarded in accordance with N.J.S.A. 40A:11-1 et seq.

(b) The following costs are eligible for funding in the manner provided by this chapter:

1. Construction costs included in an accepted bid;
2. Engineering plans and specifications, and supervision and inspection costs not to exceed 13 percent of the total cost of actual construction of the project. Incidental costs, individually itemized, such as legal fees and advertising fees which are directly related to the project may be eligible for funding, but shall not be included in the total actual construction cost; and
3. Equipment required to make a facility initially operational.

(c) Force account labor (employees of the local unit) expenses are not allowable costs and will not be approved by the Department except under extraordinary circumstances. Each request will be reviewed on a project-by-project basis.

7:36-3.3 Control of land

(a) Projects shall be:

1. Located on land which is owned in fee simple by the local unit; or
2. Leased by the local unit for a minimum of 25 years of an irrevocable lease or easement agreement.

7:36-3.4 Development project elements

Development projects shall increase outdoor recreational opportunities and may include necessary support elements.

7:36-3.5 Renovation or rehabilitation projects

(a) Renovation or redevelopment of an existing facility is eligible for a Green Acres grant or loan.

(b) If insurance compensation covers a portion of the cost of the renovation or redevelopment, loan and grants will be reduced by the amount of the insurance payment.

7:36-3.6 Park/school development

The development of facilities on leased public school grounds for school as well as general public use is eligible for a Green Acres grant or loan provided that the facilities so developed are not exclusively used for the normal and usual activities of the educational institution.

7:36-3.7 Non-eligible projects

Assistance shall not be provided for amusement parks, employee residences, lodges, luxury cabins, or wholly indoor recreational facilities.

SUBCHAPTER 4. DESIGN CRITERIA

7:36-4.1 Structures

(a) Structures necessary and directly related to an outdoor recreation activity to be constructed within the project area will be eligible.

(b) Structures required for the proper administration and maintenance of project facilities will be eligible.

(c) Except as provided by (c)1 below, structures which are primarily intended for a recreational activity to be conducted wholly within the structure are not eligible.

1. Exceptions may be made for structures which partially enclose an outdoor recreation facility for the purpose of extending the season of use. Requests will be reviewed on a project-by-project basis.

(d) The local unit shall maintain a standard insurance policy. The policy shall cover structural damage and other losses due to fire and lightning, resultant damages caused by smoke and water, windstorm, hail, riot attending a strike or damages from falling aircraft. The face amount shall be adequate to cover the cost of replacing the structure and shall be periodically adjusted to reflect changing costs. The Department shall be named additional insured in the policy or policies to the extent of its matching grant, or for the amount of the loan balance for the term of the loan, whichever is applicable.

7:36-4.2 Vandalism

Design criteria shall consider elements that will help to prevent or will reduce the effects of vandalism.

7:36-4.3 Underground utility service

(a) The local unit shall, to the extent practicable, place all new utility lines underground in the general area of developed recreation facilities.

(b) The burial, relocation, or screening of existing overhead utility lines may be eligible for loan or grant assistance.

7:36-4.4 Stormwater runoff

(a) To the greatest extent practicable, every project shall be designed to provide a system whereby all stormwater runoff created by the development will be retained on site for a period of time equal to the natural site runoff and absorption time. This plan shall comply with the guidelines set forth in the Stormwater Management Rules, N.J.A.C. 7:8.

(b) A stormwater runoff plan which includes both drawings and a narrative shall be prepared by a licensed professional engineer, architect or landscape architect and submitted to the Department for approval prior to the commencement of construction and shall be coordinated with the local soil conservation district.

7:36-4.5 Dredging of lakes and ponds

(a) Green Acres funds for dredging and the rehabilitation of lakes and ponds will be considered only if:

1. The lake or pond is owned by the local unit;
2. Substantial public access to the water area is provided;
3. A clear outdoor recreational benefit is shown in addition to any flood control advantages;
4. It is a first time Green Acres dredging project, and once funded, maintenance will be the responsibility of the local unit;
5. The project incorporates long-term corrective features including, but not limited to, sedimentation basins and other methods of maintaining the depth of the dredged areas;
6. The entire watershed has been taken into account, considering upstream and downstream conditions, particularly stormwater management and sediment/erosion control practices;
7. The activities of upstream and downstream governments and/or projects have been coordinated;
8. Project design includes equipment and procedures for sedimentation and siltation controls; and
9. The project is planned in consultation with the applicable State Soil Conservation Service District.

(b) Any dredging and spoils disposal shall be done in conformance with all State laws, rules and regulations and those of the United States Army Corps of Engineers, where applicable.

SUBCHAPTER 5. BASIS FOR ASSISTANCE: ACQUISITION OF LAND FOR RECREATION AND CONSERVATION PURPOSES

7:36-5.1 Terms of funding award

Lands to be acquired shall be consistent with a comprehensive master plan program for the municipality, county or region as a whole.

7:36-5.2 Eligible and ineligible acquisition costs

- (a) The following costs are eligible:
1. Cash amounts expended to acquire title or permanent interest in the land based on approved amount of loan or grant;
 2. Reasonable relocation payments for persons, families or businesses displaced by the acquisition are eligible, subject to the availability of funding. Evidence of an approved Workable Relocation Assistance Plan (WRAP) from the New Jersey Department of Community Affairs shall be provided;
 3. Appraisal costs prepared under the direction of Department of Environmental Protection and the Department of Transportation for initial Fair Market Value Certifications and any Departmentally approved updates; and
 4. Survey costs incurred for the actual field determination of acquired acreage.
- (b) The following costs will not be eligible:
1. Administrative and operating costs related to acquisition;
 2. Real property taxes; and
 3. Increases in land costs in excess of the approved fair market value as a result of negotiations.
- (c) Increases resulting from condemnation may be eligible for a supplemental or loan. (See N.J.A.C. 7:36-5.5).

7:36-5.3 Eligible acquisitions

- (a) Acquisition may include the purchase of title, development rights, life estates, remainder interests, conservation easements, or other interests in real property suitable for open space purposes.
- (b) Areas of historic significance, areas having unique natural features (such as ravines, outstanding overlook sites, etc.) or areas for recreational use or future development to enhance civic, community or recreation centers may be acquired.
- (c) Sites with existing buildings or structures that will be utilized or renovated for the support of outdoor recreation are eligible if there

is evidence that the sites will be properly maintained and operated by the local unit.

(d) Sites with existing buildings or structures that will be demolished to provide an open space area are eligible.

(e) Acquisition of an open space area that includes, but is not substantially occupied by, a library, an art gallery, or a museum is eligible. Such facility, if included, would be subject to all of the rules governing a standard recreational facility as described in N.J.A.C. 7:36-1.8 (General provisions).

(f) The funding of loans and grants for the acquisition of perpetual conservation easements that are in conformance with a comprehensive local master plan may be eligible when a clear public use or benefit is demonstrated, only if the easement:

1. Is contiguous and beneficial to significant public lands; or
2. Provides for public pedestrian or vehicular use; or
3. Provides for the acquisition of those rights necessary to serve as a buffer or protective area to existing permanent open space or to a unique natural or wildlife habitat.

(g) Environmental incentive assistance consisting of grants and loans as provided in N.J.A.C. 7:36-1.4(f)3 will be limited to projects predominantly in and which shall remain in a natural state, except for areas suitable for development such as waterfront recreation areas.

1. Future development of projects having received environmental incentive assistance consisting of grants and loans as provided in N.J.A.C. 7:36-1.4(f)3 is prohibited unless specifically approved by the Department in advance.

7:36-5.4 Non-eligible acquisitions

(a) Non-eligible acquisitions are sites which will remain predominantly covered by buildings or structures.

(b) The acquisition and development of former landfill sites is ineligible.

7:36-5.5 Supplemental loan or grant payments

(a) A supplemental loan or grant may be approved, if funds are available, to help reduce the financial impact of condemnation awards providing that the following criteria are met:

1. The local unit has demonstrated significant progress and efficient use of the time between loan or grant approval and the initiation of a condemnation action. (See N.J.A.C. 7:36-1.10(a)4).
2. The final price paid is the result of a condemnation action.
3. Appeals from condemnation awards or court judgments shall be taken whenever either the State or local unit deems it necessary or advisable.
4. All updates or revisions of appraisals necessitated by the court action or condemnation award shall be completed in accordance with procedures outlined in the New Jersey Department of Transportation (DOT) and Department of Environmental Protection Memorandum of Agreement entered into July 12, 1976 and amended August 27, 1985. (See Appendix A of this chapter).

SUBCHAPTER 6. ACQUISITION REQUIREMENTS

7:36-6.1 Appraisal procedures

(a) The local unit shall follow the New Jersey Department of Transportation (DOT) appraisal procedures as outlined in the Department of Transportation and Department of Environmental Protection Memorandum of Agreement entered into July 12, 1976 and amended August 27, 1985. (See Appendix A of this chapter).

(b) When advisable, the Department at its discretion, will review project appraisals.

7:36-6.2 Acquisition procedures

(a) After issuance of a fair market value certificate by DOT, negotiations are the responsibility of the local unit. The local unit should make every reasonable effort to acquire real property expeditiously by negotiation.

(b) If the property is acquired for more than the established appraised value, a statement of justification shall be submitted to the Department by local unit.

(c) All pertinent records documenting conformance to the provisions of this chapter shall be accurately and permanently kept

on file by the local unit and shall be available for audit and review by the Department for a period of at least three years.

(d) The local unit must show the full cost of the acquisition as a local purchase expenditure. The loan or grant and any other grant contributions, gifts or donations must be noted and shown on all accounting records.

7:36-6.3 Relocation procedures

(a) Any relocation procedures, if applicable, shall be the administrative responsibility of the local unit.

(b) All pertinent records documenting conformance to N.J.S.A. 20:4-1 et seq. (Relocation) shall be kept on file by the local unit for a period of at least three years.

7:36-6.4 Eminent domain

(a) Condemnation proceedings shall be the responsibility of the local unit.

(b) The local unit shall notify the Department prior to initiating court action for condemnation.

(c) All pertinent records documenting conformance to N.J.S.A. 20:3-1 et seq. (Eminent Domain) shall be kept on file by the local unit for a period of at least three years.

(d) The Department will not disburse Green Acres assistance until the local unit has taken title to the subject property.

7:36-6.5 Closings

Closings and all real estate acquisition procedures related to the subject property shall be the sole responsibility of the local unit.

7:36-6.6 (Reserved)

7:36-6.7 Purchase concessions

(a) Purchase concessions such as temporary leasebacks, life rights, life estates, remainder interests and similar techniques may be allowed if approved by the Department on a project-by-project basis.

1. Prior to any final settlement, any final arrangement on life rights, life estates, remainder interests or any other purchase concession shall be submitted to the Department for review, comment and approval.

7:36-6.8 Donations

(a) Pursuant to the 1983 Green Acres Bond issue (P.L. 1983, c.354), donations of land received by a local unit may be used as a credit, on a dollar for dollar basis, towards a grant up to 25 percent of a specific project cost.

(b) Pursuant to the Green Acres Bond issues passed in 1961, 1971, 1974 and 1978 (P.L. 1961, c.46; P.L. 1971, c.165; P.L. 1974, c.102; P.L. 1978, c.118), the Department will accept lands acquired by the local unit through donation or gift as an in kind credit to be used as all or part of the local share of a specifically designated approved acquisition project.

7:36-6.9 Temporary use

(a) Lands, buildings or structures that have been acquired as part of a local Green Acres acquisition or other municipally owned lands and facilities used for public recreation and conservation purposes (see N.J.S.A. 13:8A-47) may be used or leased for non-recreational uses on a temporary basis to a private individual or public agency when there is a clear public benefit and when the public use does not conflict with the park master plan for the development of the site. Terms of lease will be negotiated at the time of contract on a project-by-project basis.

1. Fees collected or revenues from leased facilities shall be in conformance with N.J.A.C. 7:36-1.8(e)8i.

(b) Before leasing any land, building or structure on Green Acres regulated lands, the local unit shall file with the Department, for review and approval, a copy of each of the following:

1. A statement as to the purpose and need for the lease;
2. The proposed lease agreement identifying the lessee and the use to which the building, structure or land will be put;
3. The park master plan; and
4. A park capital improvement program for the next five years indicating when the park will be developed.

7:36-6.10 Acquisition of a developed recreational facility

(a) A loan or grant for the acquisition of a developed outdoor recreation facility including but not limited to a marina, ski area or golf course is eligible under the Green Acres Program only when the local unit agrees to maintain and preserve the land and its physical improvements in a condition equal to or better than that which existed at the time of funding. This condition is to be determined by a qualified, unbiased third party on an annual basis. For example, in the case of a golf course, the United States Golfing Association.

(b) Specific provisions to assure compliance with this chapter will be included in the Green Trust Project Agreement or Green Acres Grant Contract.

(c) Any acquired developed facility shall be operated under the same provisions, rules and regulations governing a similar facility developed with Green Acres funds.

7:36-6.11 Waterfront acquisitions

In addition to private land above the high waterline, waterfront acquisitions shall include all private lands and interests below the current mean high waterline and continue to where the public interest begins.

7:36-6.12 Loan and grant payments

Loan and grant payments shall be made only to the local unit.

SUBCHAPTER 7. STATE HOUSE COMMISSION: BASIS FOR REVIEW

7:36-7.1 Retention and use

(a) Upon receipt of a loan or grant, all municipal or county lands and facilities used for public recreation and conservation purposes shall remain as public park, recreation, conservation and/or open spaces.

(b) The property described in (a) above and all lands and facilities developed or acquired with Green Acres assistance shall not be converted in whole or part for other than public recreation and conservation purposes without the approval of the Commissioner and the State House Commission.

(c) Approval as required in (b) above may be granted by the Commissioner and State House Commission only when, singularly or combined, the local unit has agree to:

1. Substitution of other outdoor properties of at least equal fair market value and of reasonably equivalent public recreation or conservation usefulness, size, quality, and location;
2. Cash repayment based on at least the current appraised fair market value in accordance with N.J.A.C. 7:36-6.1; and
3. In cases dealing with permanent easements, even though individual cases may appear to be insignificant, the perpetual nature of public lands and the cumulative effect over a long period of time is significant. In an effort to discourage this type of diversion, a minimum cash value of \$10,000.00 will be placed on any consideration for easements on such property, when the request is made on behalf of a non-public agency. Charges above this minimum will be determined by the Department on an individual project basis.

(a)

DIVISION OF SOLID WASTE MANAGEMENT

Solid Waste Facilities: Records

Comment Period Extension

Take notice that the Department of Environmental Protection is extending until January 6, 1988, the period for submission of written comments on the proposed amendment of rules concerning recordkeeping at solid waste facilities, N.J.A.C. 7:26-2.13. The original proposal was published on January 20, 1987 in the New Jersey Register at 19 N.J.R. 171(a). Please refer to it for further information.

Interested persons may submit written comments on the proposed amendment to:

Roger S. Haase, Esq.
Office of Regulatory Services
Department of Environmental Protection
CN 402
Trenton, New Jersey 08625

HEALTH

(a)

HOSPITAL REIMBURSEMENT

Financial Elements and Reporting

Proposal Amendment: N.J.A.C. 8:31B-4.62

Authorized By: Molly Joel Coye, M.D., M.P.H., Commissioner,
Department of Health.

Authority: N.J.S.A. 26:2H-1 et seq., specifically 26:2H-5b and 26:2H-18d.

Proposal Number: PRN 1987-525.

Submit comments by January 20, 1988 to:

Pamela S. Dickson, Director
Hospital Reimbursement
State Department of Health
CN 360, Room 601
Trenton, NJ 08625-0360

The agency proposal follows:

Summary

The proposed amendment to the Financial Elements and Reporting regulations excludes from Chapter 83 restrictions two components of HealthStart, the new program designed to provide comprehensive health care for Medicaid-eligible pregnant women (HealthStart Maternal Care) and children up to the age of 24 months (HealthStart Pediatric Care).

HealthStart Maternal Care consists of two parts, Medical Services and Health Support Services, each reimbursed by Medicaid through different mechanisms. Medical Services provided by hospital clinics will be treated as outpatients services; and Health Support Services, composed of basic nutrition, social-psychological services, health education, and case coordination, will be reimbursed on a non-institutional capitated basis. Accounting for revenue and expenses associated with the Maternal Health Support Services will be treated as "Case C" excluded health care services. Thus, revenues and expenses from this component will not enter into the Preliminary Cost Base of hospitals certified as HealthStart providers.

HealthStart Pediatric Care provided by hospital clinics will be reimbursed by Medicaid. These revenues and associated expenses will be treated as outpatient services. For hospitals in which pediatricians are salaried rather than fee for service, an additional non-institutional capitated fee will be reimbursed by Medicaid. This fee will cover Pediatric Continuity of Care Services, including case coordination, outreach, and continuity of care. Revenues and expenses associated with this capitated fee will be treated as "Case C" and will not enter into the Preliminary Cost base of hospitals certified as HealthStart providers.

Social Impact

The proposed amendment will reduce health risks in New Jersey infants by promoting participation in outpatient HealthStart Maternal Care. Over time, infant mortality and morbidity, including low birthweight, should decline.

Economic Impact

The proposed amendment will have minimal direct impact on Chapter 83 hospitals. Because Medicaid will reimburse hospital outpatient clinics certified as HealthStart Providers, revenues and expenses associated with these services will not affect rates. Long term economic benefit should result from a decrease in the incidence of low birthweights and other poor health outcomes, with ensuing reduction in the health care costs needed to treat such infants. Moreover, the improved access to coordinated care should increase utilization of appropriate health services, and decrease use of resource-intensive emergency rooms for routine care.

Regulatory Flexibility Statement

The proposed amendment applies only to the 89 hospitals that have rates established by the Hospital Rate Setting Commission. With one

exception, each hospital employs more than 100 full-time employees. Therefore, such hospitals do not fall into the category of small businesses as defined in Section 2 of the New Jersey Regulatory Flexibility Act (P.L. 1986, c.169). The one hospital with less than 100 employees is not a licensed maternity hospital, has neither maternity nor pediatric clinics, and is not affected by the proposed amendment.

Full text of the proposal follows (additions indicated in boldface thus).

8:31B-4.62 Excluded Health Care Services

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

(g) **Excluded Ambulatory Services: HealthStart Maternal Care Health Support Services. The revenues and expenses associated with the provision of these services shall be treated as Case C, netted against each other, with neither gains nor losses added to the Preliminary Cost Base.**

(h) **Excluded Ambulatory Services: HealthStart Pediatric Continuity of Care. In Hospitals with salaried pediatricians, revenues and expenses associated with the non-institutional Medicaid capitated fee shall be treated as Case C and netted against each other. Gains and losses shall be excluded from the Preliminary Cost Base.**

(b)

DIVISION OF HEALTH PLANNING AND RESOURCES DEVELOPMENT

Certificate of Need: Hospital Policy Manual

Proposed Repeal: N.J.A.C. 8:43E-1.1 through 1.37

Proposed Repeal: N.J.A.C. 8:43G-1.1 through 1.11

Proposed New Rule: N.J.A.C. 8:43I-1.1 through 1.26

Authorized By: Molly Joel Coye, M.D., M.P.H., Commissioner,
Department of Health (with approval of the Health Care Administration Board).

Authority: N.J.S.A. 26:2H-1 et seq., specifically, 26:2H-5.

Proposed Number: PRN 1987-524.

Submit comments by January 20, 1988 to:

John A. Calabria, Chief
Health Planning Services
New Jersey Department of Health
Room 604
CN 360
Trenton, New Jersey 08625

The agency proposal follows:

Summary

The 1971 Health Care Facilities Planning Act (N.J.S.A. 26:2H-1 et seq., as amended) requires the Department to assure that New Jersey's hospital and related health care services are of the highest quality, of demonstrated need, efficiently provided and properly utilized at a reasonable cost. To implement this public policy, Chapter 136 gave the Department of Health broad responsibilities in regulating the health care system through authorization of the Certificate of Need program.

The Department initially adopted The Policy Manual for Planning and Certificate of Need Reviews of Health Care Facilities and Services within the State of New Jersey (the Hospital Policy Manual—N.J.A.C. 8:43E-1.1 et seq.) on April 21, 1977. These rules have not been amended since that time.

In view of the significant changes that have occurred in the health care system since 1977, the Department proposed the first major revisions to the existing rules in April 1985. In developing those proposed changes, the Commissioner obtained the recommendations and approval of the Statewide Health Coordinating Council (SHCC).

Following approval by the Health Care Administration Board, the proposed amendments to the Hospital Policy Manual were published for public comment purposes in the New Jersey Register on May 20, 1985. The Department did not submit these proposed amendments to the Health Care Administration Board for final adoption, pending further study of proposed federal limitations on reimbursement of hospital capital expenditures. This study led to the development and adoption of interim rules to govern a single hospital construction batch. The Capital Policy Rules (N.J.A.C. 8:43G-1.1 et seq.) were approved by the HCAB in August 1986 and contained many elements of the Hospital Policy

Manual. The Department accepted and processed 12 applications for major hospital capital expenditures during 1986 under these rules, which eliminated any future hospital capital construction batches until 60 days subsequent to adoption of a new Hospital Policy Manual. The proposed new rules, therefore, will permit hospitals who are in need of major renovation and/or construction programs to proceed with a Certificate of Need application.

When the Capital Policy Rules (N.J.A.C. 8:43G-1.1 et seq.) were proposed in 1986, it was announced that they would be repealed upon the adoption of a new Hospital Policy Manual. Therefore, as part of this adoption process of the new Hospital Policy Manual, the Department is concurrently proposing the repeal of N.J.A.C. 8:43G-1.1 et seq.

The overall purpose of the proposed new rules is to identify policies, standards and criteria which shall be used by the Department of Health, the Statewide Health Coordinating Council, and the local health planning agencies to guide the planning and review of all Certificate of Need applications submitted by hospitals in the State of New Jersey, for capital expenditures and bed additions. The rules will not govern Certificate of Need applications for projects in which separate and specific regulations have been adopted, such as Intermediate Psychiatric Beds (N.J.A.C. 8:43E-5.1 et seq.) or Regional End-Stage Renal Disease Services (N.J.A.C. 8:33F). However, the rules do establish policies, standards and criteria pertaining to major hospital projects such as bed additions, modernization and/or renovation programs, acquisition of major moveable equipment, and mergers or relocations. The criteria includes sections that specifically address issues of accessibility, planning, cost effectiveness, capital financing, and the minimum size of facilities.

The rules have been found since 1977 to generally be effective in their ability to insure the quality of care, regional accessibility, and adequate utilization of hospital services in New Jersey. The rapidly escalating costs of the health care system evidenced nationally have not been experienced to the same extent in this state. This can in part be attributed to the authority afforded to the Department of Health by these rules to regulate the rate of growth in hospital services and beds.

Social Impact

N.J.S.A. 26:2H-1 (as amended) recognizes as "public policy of the State that hospitals and related health care services of the highest quality, of demonstrated need, efficiently provided and properly utilized at a reasonable cost are of vital concern to the public health. In order to provide for the protection and promotion of the health of inhabitants of the State, promote the financial solvency of hospitals and similar health care facilities and contain the rising cost of health care services, the State Department of Health . . . shall have the central, comprehensive responsibility for the development and administration of the State's policy with respect to health planning, hospital and health care services, and health facility cost containment programs . . ."

The New Jersey State Health Plan recognizes the underutilization of inpatient beds, specialty services, and expensive equipment as an important factor contributing to the rapidly escalating costs of health care. Regionalization of specialty services and equipment is viewed as an important mechanism for promoting health by improving the capabilities of services and quality of care offered, by improving the solvency of hospitals offering these expensive services, and by containing the rising costs of health care services.

The Department of Health has, through the Hospital Policy Manual, implemented public policy that has been directed towards both improving the health of residents and towards increasing the accessibility, acceptability, continuity, and quality of services provided to them. Through these rules, hospitals and related health care facilities submitting Certificate of Need applications must meet established standards and criteria addressing all of these concerns. Through adoption of the proposed new rules, the Department will update these standards to reflect changes both in the health care system and in public policy that have been evidenced since initial adoption in 1977. New standards are established addressing current practices in measuring efficiency, hospital mergers, and new equipment categories. Access to health care in particular is broadened considerably by rules in which Certificate of Need applicants must demonstrate the availability and accessibility of clinics and all existing and proposed services to medically indigent and medically underserved populations.

New Jersey's 97 general hospitals experienced almost 1.1 million admissions in 1985, resulting in a total of over 8.0 million patient days. The structure and design of the health care system as promoted by these rules thus has a significant impact on the lives and well-being of New Jersey's residents.

Economic Impact

Total annual capital reimbursement to New Jersey general acute care hospitals (the Capital Facilities Allowance under Chapter 83 DRG regulations) increased from \$226 million in 1984 to \$304 million in 1986, an increase of 34 percent. Based on already approved capital projects, the total CFA is expected to increase to approximately \$365.8 million, a further increase of \$61.5 million or about 62 percent over 1984. This does not include the October 15, 1986 batch which totals approximately \$439.5 million and will result in about \$42.7 million in annual reimbursement. With the approval of all of these projects, the total CFA will increase to \$408.5 million or about 80 percent over 1984. Through application of the Hospital Policy Manual and other health planning rules, a number of proposed capital projects have either been denied Certificates of Need by the Commissioner of Health; or have reduced the cost and scope of their applications. In concert with proposed modifications to capital reimbursement procedures for hospitals, the Certificate of Need review process serves to reduce the actual and projected levels of capital reimbursement levels in hospitals. The Hospital Policy Manual, therefore, provides the Department with an essential means to objectively assess and evaluate the need for proposed new capital projects as well as their impact on capital and operating expenditures.

Maintaining an affordable health care system that addresses the real needs of New Jersey's residents for access to health care is essential. The proposed new rules are critical to the Department's efforts to design a health delivery system that provides care that is of sound quality, of demonstrated need, and both efficiently provided and properly utilized.

Regulatory Flexibility Statement

The Department has determined that the proposed new rules potentially affect only the 89 acute care hospitals and three hospitals with Special Hospital licenses. All but one of these hospitals employ more than 100 full-time employees and do not fall into the category of small businesses as defined in Section 2 of the New Jersey Regulatory Flexibility Act (P.L. 1986, c.169). The one hospital covered by the rules will not be affected by the proposed change.

The proposed new rules do not add reporting, recordkeeping or other compliance requirements. N.J.A.C. 8:31B-3.27 requires annual subscription of written documents to the Department which the proposed revision does not modify.

The rules are necessary to preserve the public health by ensuring that capital expenditures are made only for needed health care facilities and resources.

Full text of the proposed repeals can be found in the New Jersey Administrative Code at N.J.A.C. 8:43E-1.1 through 1.37 and N.J.A.C. 8:43G-1.1 through 1.11.

Full text of the proposed new rule follows:

CHAPTER 43I

CERTIFICATE OF NEED: HOSPITAL POLICY MANUAL

SUBCHAPTER 1. GENERAL PROVISIONS

8:43I-1.1 Purpose

(a) The 1971 Health Care Facilities Planning Act (N.J.S.A. 26:2H-1 et seq. as amended) established as public policy of the State of New Jersey "that hospital and related health care services of the highest quality, of demonstrated need, efficiently provided and properly utilized at a reasonable cost are of vital concern to the public health." (N.J.S.A. 26:2H-1)

(b) To implement this policy, P.L. 1971 Ch. 136 (N.J.S.A. 26:2H-1 et seq.) has given the State Department of Health "the central, comprehensive responsibility for the development and administration of the State's policy with respect to health planning, hospital and related health care services, and all public and private institutions, whether State, county, municipal, incorporated and not incorporated, serving principally as boarding, nursing or maternity homes or other homes for the sheltered care of adult persons or as facilities for the prevention, diagnosis or treatment of human disease, pain, injury, deformity, or physical condition(s). (N.J.S.A. 26:2H-1 as amended)

(c) No health care facility shall be constructed or expanded, and no new health care services shall be instituted except upon application for and receipt of a Certificate of Need. (N.J.S.A. 26:2H-7 as amended)

(d) The Department of Health has a major responsibility for the promotion of quality health services rendered in an efficient and

economical manner and available to all residents of the State. To ensure significant progress toward the achievement of this policy goal, planning and Certificate of Need activities will be directed toward the provision of facilities and services which:

1. Improve the health of residents of a health service area;
2. Increase the accessibility (including overcoming geographic, architectural and transportation barriers), acceptability, continuity and quality of health services provided them;
3. Restrain increases in the cost of providing health services;
4. Prevent unnecessary duplication of health resources and encourage the development of cost effective alternative delivery modes (P.L. 93-641, Section 1513(a)), and
5. Reduce financial barriers to care.

(e) The general policies, standards and guidelines set forth in the chapter are intended to provide substantive criteria for the regulation, planning, review and implementation of health care facilities and services within the State of New Jersey.

(f) The general policies presented in the chapter apply to all facility and service planning within the State. In addition to these general policies, specific planning and review standards and guidelines are presented in this chapter for broad categories of health care facilities and services, as well as for specialized types of health care which shall be made available on a regionalized basis.

(g) This chapter is to be distinguished from the "Guidelines and Criteria for Submission of Applications for Certificate of Need" published by the New Jersey State Department of Health (N.J.A.C. 8:33-1 et seq.) which identifies the procedures, rules, and regulations which carry out the Certificate of Need program pursuant to N.J.S.A. 26:2H-1 et seq. (1971 Health Facilities Planning Act), Public Law 92-603 (Section 1122 of the Social Security Act).

(h) This chapter presents substantive criteria for the planning of health care facilities and services as provided by hospitals within the State. These policies, standards and guidelines shall be applied in the review of proposed actions requiring Certificate of Need authorization.

8:43I-1.2 General policies

(a) The general policies identified in this chapter shall apply to all facilities licensed and regulated under N.J.S.A. 26:2H-1 et seq. and amendments thereto.

(b) No certificate of need shall be issued unless the action proposed in the application for such certificate is necessary to provide required health care in the area to be served, can be economically accomplished and maintained, and will contribute to the orderly development of adequate and effective health care services (N.J.S.A. 26:2H-8).

(c) Each Certificate of Need shall comply with the State Health Plan and all appropriate health planning and rate setting regulations adopted by the Department of Health (with approval of The Health Care Administrative Board) and should also be in compliance with the adopted plan(s) of the local health planning agency in which the action is proposed.

(d) In reviewing Certificate of Need applications, the Department will consider the following as capital policy goals:

1. The reduction of duplicative services and excess bed capacity and the development of cost effective alternatives to inpatient care.
2. Accessibility to all inpatient and outpatient services by medically indigent residents of State.
3. The efficient operation of licensed hospitals in the State.
4. The achievement of operational cost savings or cost avoidances as a result of proposed new capital expenditures.
5. Maintenance of a level of capital debt as appropriate to a cost efficient health care delivery system.
6. The orderly development of health care services.

(e) Any applicant for a Certificate of Need must agree in writing at the time of filing its Certificate of Need application to unconditionally accept the following conditions of approval. These conditions will be a part of any and all Certificate of Need approvals which are issued:

1. In order to assure access to patient care services, under no circumstances may any patient be denied admission to the applicant institution or, once admitted, transferred to another institution due

to inability to pay for services. This condition shall remain in effect for the life of the approved project.

2. The applicant will not practice discrimination on the basis of medical diagnosis if it has the ability to treat that medical diagnosis.

3. The applicant will assure that indigents and Medicaid patients have access to all services offered by the facility.

(f) Each applicant must demonstrate a historical commitment to caring for the medically indigent (that is, provision of uncompensated charity care, excluding bad debt accounts) and that it has taken steps to develop services for this population; for example, primary care programs followed-up with appropriate specialty referral; and the applicant submits evidence from its medical staff that staff physician with admitting privileges will accept indigent and Medicaid patients.

(g) The Department of Health encourages planning by hospitals which promotes:

1. Actions consistent with the New Jersey State Health Plan and State Department of Health policies and regulations;

2. Actions consistent with the goals and objectives of the plan of the local health planning agency within the service area in which the action is proposed.

3. Prevention of disease through early intervention and the provision of primary care services, and encourages the continued development of alternative service modalities to substitute for inpatient hospital care and alternative facilities to substitute for hospital inpatient construction as appropriate.

4. Regionalization of medical resources to achieve cost efficiencies and to enhance the quality of care as appropriate.

5. Accessibility to and the availability of services to those persons unable to pay for services (in whole or in part).

6. Reductions in environmental and occupational illness and disease.

(h) Institutions which engage in cooperative regional planning and which demonstrate that they are sharing their resources on a regional basis shall be given special consideration in the awarding of certificate of need.

(i) In making determinations on applications for Certificate of Need approval, there shall be taken into consideration the availability of facilities or services which may serve as alternatives or substitutes, the need for special equipment and services in the area, the possible economies and improvement in services to be anticipated from the operation of joint central services, the adequacy of financial resources and sources of present and future revenues, the availability of sufficient manpower in the several professional disciplines, and such other factors as may be established by regulation. (see N.J.S.A. 26:2H-8)

(j) The Department of Health shall give preference to applicants which:

1. Document existing working relationships with other area hospitals and health care facilities providing primary care services, including, but not limited to, referral arrangements for regionalized services;

2. Document the accessibility of services to persons who are unable to pay; and

3. Propose mergers, consolidations, or other joint arrangements, or closure of underutilized and unneeded inpatient services and document quantifiable cost savings in future years resulting from such actions.

(k) The applicant shall identify alternative approaches to the project which were considered and demonstrate in specific terms how the option selected, relative to all other alternatives, most effectively benefits the health care system through achieving capital and operational savings, increasing access, and/or improving quality of care.

(l) If a hospital has closed, ceased or not maintained operation of any of its beds, facilities, or services for a period of eighteen months or more, these beds will be removed from the inventory of the facilities and a Certificate of Need shall be required to reopen such beds, facilities, or services.

(m) All hospitals must report any transfer of funds from the general hospital to affiliated or subsidiary corporations on an annual basis to the Department.

8:43I-1.3 Definitions

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

"Acquisition" means the obtainment of a health care facility or service through purchase, lease, donation or other means which requires a Certificate of Need.

"Adjusted admission" as defined at N.J.A.C. 8:31B-3.24 (as amended), the **Uniform Bill-Patient Summary (Inpatient) Regulation**, means inpatient admissions multiplied by total gross divided by inpatient gross revenue.

"Admissions" means all inpatients admitted to the hospital, including Same Day Medical Admissions and excluding Same Day Surgery, Outpatient Surgery, and internal transfers within the hospital.

"Commissioner" means the Commissioner of the Department of Health.

"Construction" means the erection, building, alteration, reconstruction, improvement, renovation, extension or modification of a health care facility, including its equipment, the inspection and supervision thereof; and the studies, surveys, designs, plans, working drawings, specifications, procedures, and other actions necessary thereto.

"Debt service" means those funds allocated to the repayment of principal, depreciation, and interest as a result of the financing of a capital expenditure.

"Department" means the New Jersey Department of Health.

"Equity" means a voluntary non-operating asset contribution which will reduce the total size of the debt.

"Fixed equipment" means equipment which is attached to the physical plant of a facility.

"Guidelines" means those general factors to be considered in applying a given standard, or to guide decision-making in areas for which specific standards are not available or would not be appropriate.

"Hospital Service Area" means those municipalities in an area that can be determined through the most recent patient origin/market share data collected by the Department to meet one or more of the following criteria:

1. The hospital derives five percent or more of total admissions from the municipality; or
2. Greater than 20 percent of residents of the municipality who are hospitalized utilize the subject hospital; or
3. It is the municipality in which the hospital is located.

"Inpatient" means either a patient appropriately admitted to a licensed acute care hospital bed for an overnight stay and/or a patient appropriately admitted to a licensed acute care bed following a same day medical procedure.

"Local health planning agency" means an agency which performs planning pertaining to health care facilities and services which are located in or serving a specific geographical area designated by the Commissioner.

"Major movable equipment" means equipment which generally is not attached to the physical plant of a facility and has, for depreciation purposes, a predetermined life.

"Medically underserved groups" means all population groups including racial, ethnic, and sexual minorities, migrant workers, the handicapped, Medicaid recipients, individuals and families with incomes below 80 percent of the median income for either the state or the Standard Metropolitan Statistical Area in which they reside, and other identifiable segments of the population which currently fail to use health care services in numbers approximately proportionate to their presence in the population as adjusted to account for their need for such services.

"Modernization" means the alteration, expansion, major repair (to the extent permitted by rules), remodeling, replacement, and renovation of existing buildings (including initial equipment thereof), and the replacement of obsolete equipment of existing buildings.

"Outpatient surgery" means a very minor surgical procedure appropriately performed in private practice settings, or in hospital outpatient departments, on patients who do not require a licensed

free standing ambulatory surgery facility or same-day surgery (SDS) status in a hospital. Anesthesia is generally of a local type. In a hospital setting, outpatient surgery is counted as an outpatient visit.

"Proposed capital expenditure" means the sum total of expenditures anticipated by the facility at the conclusion of a project, which includes expenditures by a facility acting as its own contractor, which under generally accepted accounting principles is not properly chargeable as an expense of operation and maintenance.

"Replacement funding" means the amount of reimbursement as determined under Chapter 83 Rate Setting Regulations (N.J.A.C. 8:31 B-3 and 4 which provides for replacement of capital facilities and fixed equipment.

"Same day medical admissions" means those patients who were provided elective treatment (diagnostic and nonsurgical procedures as defined ICD-9-CM Codes) and were discharged in a routine status before midnight of the day of admission.

"Same day surgery" means a surgical procedure performed on patients who:

1. Have these procedures performed in a licensed health care facility, but do not stay overnight.

2. Require a licensed health care facility as a setting for these procedures and generally require some form of anesthesia (typically general or regional in nature) and a facility-based post surgery recovery period of at least one hour.

"Standards" means the specific requirements that applicants must satisfy in developing applications for Certificate of Need approval. To the extent practicable, standards shall address measurable characteristics that such applications must meet.

"Total project cost" means all costs associated with the proposed project, including all capital costs, carrying and financing costs, interest on borrowings during construction, and lease/rental agreements. Total project cost excludes any contingency amounts.

8:43I-1.4 Scope

This chapter shall apply to all hospitals licensed and regulated under N.J.S.A. 26:2H-1 et seq. and amendments thereto.

8:43I-1.5 Standards regarding minimum size; acute general hospitals

(a) The minimum size for an acute general hospital shall be 200 beds. This standard shall not apply to:

1. Facilities licensed for fewer than 200 beds at the time of adoption of this chapter;
2. Facilities of less than 200 beds proposing to expand to at least 200 beds, where the need for expansion is justified;
3. Facilities with less than 200 beds which are operated by or have submitted a Certificate of Need to merge with a full-service general acute hospital with over a 200-bed capacity and which provide or will provide only those services which are necessary to meet the community's need without duplication of service.

8:43I-1.6 Minimum size of obstetrics units

The minimum size of an obstetric service shall be 20 beds, unless waivers are granted pursuant to N.J.A.C. 8:33C-1.1 et seq. "Certificate of Need Designation of Perinatal Services", which applies to Level I units only in those instances dictated by severe geographic isolation of a population, demonstrated medical necessity, or cost effectiveness. In no case shall the minimum for obstetric beds fall below ten beds.

8:43I-1.7 Standards regarding minimum size; pediatric services

(a) The minimum size of a pediatric unit shall be 20 beds. Exceptions will be considered where it is documented that:

1. The distance to an alternate pediatric unit exceeds 20 miles; or,
2. At the proposed lower capacity, occupancy will exceed minimum occupancy standards identified at N.J.A.C. 8:43I-1.11, and the applicant demonstrates an appropriate level of care will be provided in a cost-effective manner.

8:43I-1.8 Limitations on approvals

Certificate of Need approval for construction, renovation, or purchase of a facility is limited to the project as contained in the Certificate of Need application. No implicit approval for additional

beds, services, or equipment can be inferred from the approval unless specifically defined in the application.

8:43I-1.9 Standards regarding shelled space

Shelled space (any area of a facility built without the intent for immediate use) has generally not been proven to be cost effective. Projects proposing shelled space shall not be approved unless the applicant can demonstrate significant cost savings using present value analysis to both the institution and the health care system as well as the future need for the space. The Department will not recognize the capital costs of shell space within the cost base of the hospital while it remains shell space.

8:43I-1.10 Bed need

(a) Any application for establishment of or expansion of licensed beds must demonstrate need for these beds in the proposed service area based upon needs assessment methodology identified in:

1. Adopted Department of Health planning regulations governing regionalization of the service(s); or
2. The State Health Plan, and amendments thereto; or
3. Planning documents as developed by the Department and the Statewide Health Coordinated Council.

(b) Where the applicant is proposing beds to support specialized services for which there are no methodologies referenced in the documents cited at N.J.A.C. 8:43I-1.10(a), the need for beds shall be documented by an analysis of empirical evidence which demonstrates that beds for a new service are cost effective, beneficial to patients, accessible, of high quality, and could not be provided in a less costly setting. In addition, an applicant shall provide evidence establishing the need for beds by documenting estimates of:

1. Referrals from major referral sources, as reflected in letters of support; and
2. Projected admissions, patient days, and average length of stay (the bases for these projections must be specifically identified in the application); and
3. Utilization based upon methodologies established by federal, regional, or other health planning or financing authorities; and
4. Occupancy level projections which shall be demonstrated to have achieved a minimum of 80 percent (for the beds proposed in the application) within two complete calendar years from initial licensure.

8:43I-1.11 Standards regarding occupancy rates

(a) For purposes of review of Certificate of Need applications, the minimum and optimal occupancy rates based upon licensed beds for an acute general hospital, by service category, shall be:

	Minimum	Optimal
Medical/Surgical	75%	90%
Obstetrics	60%	85%
Pediatrics		
Units of less than 40 beds	60%	85%
Units of 40 and above	65%	90%
ICU/CCU	60%	85%
Psychiatric	70%	90%

(b) The level of excess beds within a hospital shall be that number of licensed beds, which, when deleted from a service, will allow a hospital to achieve minimum occupancy levels as identified in (a) above, for a period two years beyond the projected completion date of the project, defined as the "target year". Utilization levels for the target year shall be based on a projection method defined at N.J.A.C. 8:43I-1.15(b), applied forward to the target year.

(c) For purpose of review of Certificate of Need applications for modernization/renovation, new construction or changes in licensed bed capacity, where occupancy falls below minimums within services identified above for the two most recent consecutive calendar years, the hospital must file a plan with the Department of Health that identifies an appropriate bed reduction or services closure. This plan must have hospital board approval and be filed within six months of the end of the second calendar year that occupancy falls below minimum. In addition, the plan and its implementation schedule must be acceptable to the Department.

8:43I-1.12 Standards regarding addition or replacement of beds

(a) Certificate of Need applications may be approved for the replacement or addition of licensed bed capacity where the applicant has demonstrated compliance with all of the following:

1. In the previous 18 months, the applicant hospital must exceed both minimum occupancy rates for all existing services as well as optimal occupancy rates for the service(s) being proposed for expansion and demonstrate that it will achieve an occupancy rate for the service(s) being expanded of no less than 10 percentage points higher than the minimum occupancy rates established for that service identified at N.J.A.C. 8:43I-1.11(a) for the year which is two years beyond project completion.

2. For projects proposing the replacement of existing acute care beds the applicant hospital must exceed minimal occupancy rates identified at N.J.A.C. 8:43I-1.11(a) in all existing services, and demonstrate that it will achieve an occupancy rate in service(s) being replaced of no less than 10 percentage points higher than the minimum occupancy rates identified at N.J.A.C. 8:43I-1.11(a) for two years beyond project completion.

3. The hospital must demonstrate an appropriate average length of stay in the service for which beds are being renovated or expanded.

4. For bed additions, where there are acute care hospitals within the applicant's service area which, during the 18 months preceeding the filing of the Certificate of Need application failed to meet the minimum occupancy levels identified at N.J.A.C. 8:43I-1.11 within the service type(s) for which expansion is being requested, the applicant must provide written evidence that the Board of Directors have undertaken good faith efforts to develop mergers, joint ventures, or other shared service arrangements with the underutilized facility(ies). The applicant must document these efforts, identify the status of these negotiations at the time the application is filed, describe the impact of agreements made between the boards of hospitals on the proposed project, and, where agreements have not been reached, describe in detail the obstacles preventing the formalization of agreements. Moreover, where an applicant has failed to enter into good faith efforts to achieve agreements of the type referred to in this chapter, a detailed explanation authorized by the board of the applicant institution must accompany the application.

(b) Exceptions to (a)1 and (a)2 above may be considered where:

1. The applicant is proposing to reduce licensed beds through conversion or decertification, thereby demonstrating that occupancy levels will be in compliance with minimum standards at the completion of the project; or

2. The applicant can demonstrate that there will be a net bed reduction in its County resulting from cooperative planning with neighboring hospitals; or

3. The applicant can demonstrate additional bed need by documenting rapid changes in demographics or casemix, as well as having evidenced appropriate increases in utilization over the previous 18 months.

4. The applicant demonstrates to the satisfaction of the Department of Health that a reduction in beds in order to meet minimum occupancy standards will produce no capital or operating cost savings.

8:43I-1.13 Community need standards

(a) A hospital may be approved for necessary capital renovation projects except where it fails to demonstrate that it meets the following standards:

1. Utilization Standards:

- i. Overall occupancy rates of greater than 75 percent at the conclusion of the project.

- ii. Trends in volume (admissions, ALOS, and/or patient days) which indicate occupancy will continue to be above 75 percent of total remaining licensed beds for a period of at least two years beyond completion of the project.

2. Efficient size: A hospital must maintain at least 200 beds at the conclusion of the project while maintaining overall occupancy rate of at least 75 percent. Where it fails to meet this standard, capital projects may only be approved where the hospital is efficiently oper-

ated, and geographically isolated, or merged into a multi-hospital system in its area. These criteria are further defined in N.J.A.C. 8:43I-1.13(b).

3. Hospital efficiency: The applicant must demonstrate that it is operated in an economically efficient manner through generally accepted industry efficiency standards. Exceptions may be considered if the applicant meets criteria defined in (b) below.

4. Excess bed areas: Where the total number of excess beds as determined under N.J.A.C. 8:43I-1.11(b) in an area exceeds 75 percent of the licensed bed capacity of an applicant hospital at the time of application no approval may be granted unless the applicant qualifies under one or more of the exception conditions outlined in (b) below. As an example, in County A, the Department determined that there is an excess of 300 beds. Hospital A with 200 beds does not meet the standard, as 75 percent of 200 is 150, and the excess of 300 is greater than 150. Hospital B, with 400 beds, meets the standard as 75 percent of 440 is 330, which exceeds the county bed excess. The intent is to examine need for the institution as a whole in areas of substantial bed excess prior to investment of major new capital obligation.

(b) The following criteria will be utilized in determining exceptions to N.J.A.C. 8:43I-1.13(a)2 through 4:

1. The hospital is geographically isolated, when each of the following apply:

i. There is a lack of another acute care hospital within a 15 mile radius of an applicant hospital; and

ii. Where at least 50 percent of the residents of the service area utilize the hospital; or

2. The hospital is efficient, where its occupancy rates are above 80 percent overall for the last four quarters reported to the Department; or

3. Where a multi-hospital system application is being proposed in one of two forms:

i. Joint Community Application: An application submitted jointly by all hospitals (or a combination of hospitals constituting a majority of needed beds) within a 15 mile radius of the applicant hospital or in a service area as approved by the Department, that accomplishes the following objectives:

(1) Consolidation and regionalization of services in the area, accomplishing the significant reduction of duplicative inpatient, outpatient, therapeutic and diagnostic services and of ancillary and administrative functions between institutions; and,

(2) Creation of specific operational cost savings which will be incorporated into the rates upon completion of the project; and

(3) Establishment of a joint planning committee for the area which includes all hospitals identified in the application, as well as community participants.

ii. Hospital Merger Applications: An application for transfer of ownership between two or more institutions within a 15 mile radius or in a service area as approved by the Department in which all assets are merged under a single corporate entity operated by a single board of trustees, which accomplishes the following objectives:

(1) Reduction of an appropriate level of excess beds within the merged institutions and conversion, closure, or consolidation of unnecessary physical plant areas in a manner achieving cost savings to the system;

(2) Consolidation of duplicative inpatient, outpatient, therapeutic and diagnostic services and ancillary and administrative functions where appropriate to the overall health care needs of the health service area.

(3) Compliance with accessibility standards identified at N.J.A.C. 8:33-2.1.

4. An exception to N.J.A.C. 8:43I-1.13 may be considered by the Commissioner where the project scope is limited to correction of conditions constituting an imminent hazard to the health and safety of patients and staff, as determined by the Department.

(c) Planning Alternatives: Hospitals not meeting the criteria for community need identified in (a) above may apply for a one time rate adjustment under Chapter 83 Hospital Reimbursement regulations (N.J.A.C. 8:31B) for each of the following types of studies:

i. Conversion of Acute-Care Beds Study: A hospital will analyze all available options in converting all or a portion of its acute care

beds to non-acute care use. The study must determine the capital and operating costs associated with each option, and assess reimbursement implications.

ii. Closure Study: A closure study will address the impact on medically underserved populations, the ambulatory-care needs of the community, an employee retraining or job relocation plan, and a financial analysis of both short-term and long-term debt. To be eligible for a closure study, the hospital must not be in default or in bankruptcy.

8:43I-1.14 Project component need

(a) In addition to demonstrating continued community need, as defined in N.J.A.C. 8:43I-1.13, all hospitals must demonstrate the need for each component part of the proposed project. A component means any element of the overall project that is associated with the modernization or renovation, expansion, or new construction of an identifiable physical plant area, such as a nursing unit, ancillary department, administrative area, or any structural element of the facility.

(b) Approval of components proposing to address modernization/renovation or construction of physical plant areas for needed services and departments may be made where capital expenditures are necessary for:

1. Correcting functional or structural obsolescence;
2. Correcting life-safety code A and B violations; or
3. Achieving demonstrable and proportionate improvements in patient care as determined by the Department.

(c) Where a component is the subject of an approved planning regulation, that component must satisfy all applicable criteria of the specific regulation(s).

(d) The applicant must demonstrate the need for the expansion of total square footage to the hospital's physical plant within any component(s) of the proposed project.

(e) The applicant must demonstrate that the proposed costs for the modernization/renovation or new constructions are reasonable in relation to accepted industry standards for its area.

(f) Any component(s) of a Certificate of Need project not demonstrated to be needed as determined by the Department, based on the criteria in this chapter may be denied. (see N.J.A.C. 8:33-3.6(g).)

8:43I-1.15 Volume projections

(a) All applications must contain historical volume data and projections of inpatient and outpatient volume for purposes of Certificate of Need review. These must be submitted in a form prescribed by the Department.

1. All data must be consistent with the hospital statistics as reported to the Center For Health Statistics for the New Jersey General Hospital Inpatient Utilization Reports on official SHARE reporting forms, unless the application can demonstrate to the Department with verifiable evidence that there are inaccuracies in the statistical information which was reported.

(b) Historical hospital volume data must incorporate the last complete three calendar years preceding the date of filing the Certificate of Need application, as well as year-to-date data for the current year, and at a minimum include the following data components:

1. Inpatient admissions by licensed bed category and total hospital;
2. Adjusted admissions by total hospital;
3. Patient days by licensed bed category and total hospital;
4. Outpatient visits by department or service;
5. Emergency room visits;
6. Outpatient surgical procedures;
7. Same day surgery;
8. Same day medical admissions;
9. Births.

(c) Each application must provide an estimate of projected volume in all categories as listed in (b) above for each year inclusive from the time of application to that year which is two complete calendar years beyond estimated project completion. This estimate must be based on historical data defined in (b) above, using at a minimum, a straight-line projection and one or more of the following methodologies:

1. Linear regression modeling;

2. Constant volume;
3. Official county-based-volume projections and market share statistics published by the Department, if available;
4. A methodology chosen by the applicant but in each instance the assumptions utilized in making the projections must be clearly substantiated in the application.

(d) The volume projections must be deemed acceptable to the Department based on conformance to the results of one or more of the methodologies listed in (c) above. While these projections will be evaluated as an element in the review of the application for Certificate of Need purposes, the Department reserves the right to identify specific methodologies (separate and distinct from those referenced in (c) above) for purposes of establishing reimbursement standards that may be applied to the Certificate of Need application as approved.

8:43I-1.16 Standards regarding equity contributions and financing

(a) Financing of hospital construction, modernization/renovation, or major moveable equipment projects requires a minimum equity contribution from the hospital of at least 15 percent of total project costs, including all financing and carrying charges. Where a hospital demonstrates financial hardship to the satisfaction of the Department, this equity requirement may be reduced by one half of one percent for each full percentage point the hospital uncompensated care percentage exceeds the statewide average uncompensated care percentage for acute care hospitals.

(b) All projects involving long-term financing of capital construction costs shall demonstrate use of the least-cost financing reasonably available.

(c) Financing arrangements for construction, expansion, renovation, or purchase of facilities shall not entail debt obligations of greater duration than the expected useful life of the assets financed.

(d) All applicants must demonstrate the financial feasibility of their projects. An appropriate financial feasibility study must be submitted for projects in excess of the hospital construction/modernization project batching threshold identified at N.J.A.C. 8:33-1.5(d) at the time of application. The study must test the feasibility of the project under reimbursement rules in effect at the time of the application. A project will be determined financially feasible where the applicant can demonstrate a net positive income for the calendar or fiscal years which are two and five years beyond project completion.

(e) Capital costs associated with approved Certificate of Need applications will not be guaranteed full future reimbursement.

8:43I-1.17 Standards regarding the transfer of services from an acute care hospital

(a) The transfer of a service from one corporation to another, regardless of their relationship, requires a Certificate of Need application through procedures identified at N.J.A.C. 8:33-1.1 et seq.

(b) The facility or corporation transferring out the service must comply with the following criteria and conditions:

1. Implementation of the proposed transfer of service will not violate any bond, covenant or any loan and security agreement between itself and the New Jersey Health Care Facility Financing Authority or any other financing agency.

2. The applicant must assure within the application that:

- i. No portion of the operating or capital costs incurred by or related to the proposed service will be incorporated into rates approved for the acute care hospital transferring out the service.

- ii. Any losses generated by this proposed service will not be used as a justification for increases in the rates of the acute care hospital transferring out the service.

3. The hospital must guarantee that services which are corporately and/or physically transferred from hospitals to other areas are accessible and available to all persons, independent of their ability to pay, with special attention given to medically underserved groups in the existing hospital service area. The hospital must document that public transportation is available to the aforementioned groups, and if it is not, the hospital must make arrangements to guarantee that transportation will be made available to those individuals.

(c) The facility or corporation receiving the new service must comply with the following criteria and conditions:

1. Any service transferred in whole must provide indigent care at the same level as provided for that same service in the two calendar years preceding the application or at a level commensurate with other hospitals in the area over the preceding two calendar years, whichever is greater.

2. Any service transferred in part must, together with the applicant hospital, provide in the aggregate the same level of indigent care as provided for the same service in the two years preceding the application or at a level commensurate with other hospitals in the area over the preceding two years, whichever is greater.

3. A quality assurance and review program for the health services must be provided and it must be documented that such a program will be implemented at the proposed service.

4. The hospital must guarantee that services which are corporately and/or physically transferred from hospitals to other areas are accessible and available to all persons, independent of their ability to pay, with special attention given to medically underserved groups in the existing hospital service area. The hospital must document that public transportation is available to the aforementioned groups, and if it is not, the hospital must make arrangements to guarantee that transportation will be made available to those individuals.

8:43I-1.18 Standards regarding acquisition or replacement of major moveable equipment

(a) Where a Certificate of Need is required for the acquisition or replacement of major moveable equipment, it will not be awarded unless the applicant has demonstrated compliance with all applicable Departmental regulations for the proposed service. For equipment categories not governed by existing Departmental regulations, the following criteria shall apply:

1. Projects involving addition of new equipment shall demonstrate need through:

- i. Documenting improved patient care as a result of such equipment; and

- ii. Documenting adequate patient volume for cost-effectiveness and, if appropriate, operational cost savings.

- iii. Where appropriate, documenting cooperative arrangements with area hospitals and other providers that will avoid duplication of services and ensure access to residents of the service area; and

- iv. Documenting access to new equipment by persons who are unable to pay.

2. Projects involving the replacement of existing major movable equipment shall demonstrate need through:

- i. Documenting historical operating volumes to warrant continued use of such equipment; and

- ii. Documenting that the existing equipment has surpassed its estimated useful life expectancy; and

- iii. Documenting operational inefficiencies of existing equipment through excessive downtime; and

- iv. Documenting access to existing equipment by persons who are unable to pay;

- v. Documenting compliance with Department regulations in effect at the time the application is accepted for processing.

(b) Where a Certificate of Need is required for the acquisition or replacement of major movable equipment it will not be awarded unless the applicant has:

1. Documented use of least-cost financing;

2. Documented efficient operation of the area in which the proposed equipment is utilized through maintaining documentation (through most recently available financial reports submitted to the Department) that the costs for patients on whom the equipment is predominantly utilized are not above statewide standards.

3. Where method of acquisition is through lease arrangement, it must be demonstrated that the proposed lease arrangement is more cost-effective than purchase, giving consideration to maintenance costs, warranties, and other related costs, as well as to the imputed value of a 15 percent equity contribution.

(c) Exceptions to (b)2 above can be made where the applicant submits an acceptable plan which demonstrates that efficiencies will result in costs which are consistent with statewide standards or will enable the hospital to maintain an overall and specific cost center incentive position.

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(d) Equity contributions to the financing of the project must meet minimum requirements identified at N.J.A.C. 8:33I-1.16(a). In projects proposing both acquisition of major moveable equipment and modernization/renovation, equity contributions must be pro-rated equally between equipment costs and costs of the remainder of the project.

8:43I-1.19 Single-bedded rooms

No Certificate of Need proposing the construction, modernization, renovation, or change in licensed bed capacity of acute care beds shall be approved where the total number of single-bedded rooms at the completion of the project exceeds 15 percent of the total complement of licensed medical/surgical, pediatric, and obstetric/gynecological beds. In calculating the percentage of single-bedded rooms, isolation rooms as determined necessary by Departmental licensure standards, will not be included. An exception may be permitted where the hospital can demonstrate clinical necessity or that no additional operational or capital costs will be incurred as a result.

8:43I-1.20 Outpatient clinics

(a) Applicants for any bed-related Certificate of Need must demonstrate the availability of follow-up care for all discharged patients and all residents of the service area either through direct provision of such services by the hospital or its physicians, or through formal written linkages with other health care providers in the area.

(b) An applicant for expanded outpatient clinic services shall demonstrate competitive pricing with all other providers of similar services in the area, and shall demonstrate that there will not be a negative economic impact on the health care system.

8:43I-1.21 Standards regarding energy conservation projects

(a) Where a Certificate of Need is required for a proposed energy conservation project, the following items must be addressed in the application and will be considered indicators of the cost effectiveness of the project:

1. Description of measures to be undertaken and why these measures were chosen over possible alternatives;
2. Cost of design, acquisition, and installation;
3. Useful life of the measure to be undertaken;
4. Effect of this measure on operating and maintenance costs;
5. Salvage value at the end of useful life of the measure to be undertaken;
6. Annual energy consumption by appropriate category for the three previous years;
7. Estimated energy consumption and energy savings at least three years into the future or until the pay-back year, whichever is longer.

8:43I-1.22 Standards regarding location of hospitals

(a) Any Certificate of Need application proposing the relocation, major new construction at an existing hospital by a new corporate entity, or new construction of an acute care hospital must meet all criteria in this chapter and must specifically address the following:

1. No Certificate of Need shall be awarded to a hospital proposing to relocate, unless it demonstrates compliance with the following criteria:
 - i. There must be a bed need in the area of proposed location for all services to be relocated;
 - ii. The applicant must demonstrate that there are sufficient resources in the former area to ensure access to care to the former patient population;
 - iii. The proposed site must be accessible to patients of the newly-defined service area both economically and in terms of driving time and public transportation, where available;
 - iv. All alternatives have been considered and the proposed project is responsive to identified health needs and represents the most cost-effective course of action to meet those needs;
 - v. The applicant must at a minimum demonstrate long term reductions in total health system costs.
2. Applicants proposing construction of a new hospital must demonstrate compliance with all of the following:
 - i. Bed need in the area has been documented for each proposed service;
 - ii. The hospital at its proposed location must be physically and economically accessible to patients of the defined services area;

iii. All hospitals located within a 25-mile radius of the proposed location shall have occupancy levels which exceed optimal levels as defined in N.J.A.C. 8:43I-1.11 for the previous two calendar years;

iv. The applicant must demonstrate that the proposed project represents the most cost-effective approach to meeting identified health care needs of the area.

8:43I-1.23 Standards regarding costs of parking garages and medical arts buildings

(a) No Certificate of Need is required for a parking garage or a medical arts building.

(b) The costs of purchase, construction, renovation, expansion and operation of the proposed parking garage shall be fully underwritten by charges to users, as the costs will not be financed, directly or indirectly, in whole or in part, by charges to patients. An exception may be made for components of cost which are reasonable and necessary and conform to the reimbursement definitions and procedures for employee benefits related to patient care set forth at N.J.A.C. 8:31B-4.64(h).

(c) The costs of the purchase, construction, renovation, expansion and operation of a proposed medical arts building shall be wholly underwritten by charges to users. An exception can be made when documentation is provided and the Department determines that it is cost effective to locate hospital services in the building.

8:43I-1.24 Standards regarding accessibility

The applicant must demonstrate compliance with all accessibility criteria as identified in N.J.A.C. 8:33-2.1, "Certificate of Need Application and Review Process."

8:43I-1.25 Multi-hospital arrangements

(a) Hospitals which propose the merger, acquisition, or joint establishment of corporate structures with any other licensed hospital(s) for the purpose of providing a health care service, or where a change in ownership Certificate of Need application is filed by a licensed hospital, it shall demonstrate in the Certificate of Need that:

1. Cost efficiencies will be affected and will result in significant net operational savings to the participating hospitals and to the health care system as a whole; and
2. Where the project is related to inpatient services, a reduction of all excess bed capacity, as determined under standard N.J.A.C. 8:43I-1.11, will result for all participating hospitals through de-certification or conversion of acute care beds; and
3. Duplication of services will be eliminated where appropriate through the proposed merger, acquisition or corporate restructuring.

8:43I-1.26 Standards regarding relocation or closure of services

A Certificate of Need may be awarded for the relocation or closure of a service except where the applicant fails to demonstrate compliance with N.J.A.C. 8:33-2.1(a)5, Access Criteria for submission of Certificate of Need applications, and other applicable requirements of these rules.

HIGHER EDUCATION

For the following proposals, submit comments by January 20, 1988 to:

Grey J. Dimenna, Esq.
Administrative Practice Officer
Department of Higher Education
225 West State Street
CN 542
Trenton, New Jersey 08625

(a)

BOARD OF HIGHER EDUCATION Dependent/Independent Student Defined Proposed Amendment: N.J.A.C. 9:5-1.1.

Authorized By: Board of Higher Education,
T. Edward Hollander, Chancellor and Secretary.
Authority: N.J.S.A. 18A:71-26.8 and 18A:62-4.
Proposal Number: PRN 1987-518.

The agency proposal follows:

Summary

The Higher Education Technical Amendments Act of 1987, signed into law by President Reagan on June 3, 1987, revised the definition of independent student. The revision expands the source of funds which may be utilized to meet the minimum income level necessary to qualify as an independent student. This proposal amends the definition of independent student found within State rules to match the federal definition.

Social Impact

The proposed amendment provides greater flexibility for those students under 24 years of age to meet the definition for independent student status in qualifying for State financial aid based on their own income and assets. This amendment also conforms with changes in federal regulations, thus allowing institutions and students to focus on a uniform set of criteria relative to eligibility for both State and federal aid.

Economic Impact

In November 1986, there were approximately 600 first-time freshmen New Jersey Financial Aid Form filers and 1,000 upperclassmen receiving financial assistance who would no longer qualify as independent primarily as a result of the \$4,000 "income" requirement. The proposed amendment will permit many of the estimated 1,600 students to qualify for independent status who would have been unable to establish independent status under the original \$4,000 income provision.

Regulatory Flexibility Statement

The proposed amendment does not require a regulatory flexibility analysis since it does not impose any requirements on small businesses.

The proposed amendment will permit students who would have otherwise been unable to establish independent status to now qualify as independent students for state financial assistance.

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

9:5-1.1 Dependent/independent student defined

(a) (No change.)

(b) Except as provided in (c) below, an individual meets the requirements of this subsection if such individual:

1.-3. (No change.)

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

5. (No change.)

6. Is a single undergraduate student with no dependents who was not claimed as a dependent by his or her parents (or guardian) for income tax purposes for the two calendar years preceding the award year and demonstrates to the student financial aid administrator total self-sufficiency during the two calendar years preceding the award year in which the initial award will be granted by demonstrating [an] annual total [income] **resources (including all sources of resources other than parents)** of at least \$4,000; or

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

i. (No change.)

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

iii. The student is from a foreign country but has established permanent residency in the United States, is a refugee or has received political asylum, and complies with the provisions of (b)6 above except for the [income] **resource** requirement set forth therein. For the purposes of eligibility under this subparagraph, the student's parents must reside outside of the United States.

iv. The student has been separated from his or her parents and comes from a documented background of historical poverty as set forth in N.J.A.C. 9:11-1.5, or as attested to by a social service agency or respected member of the student's community and acceptable to the director of the applicable student assistance program within the

Department of Higher Education, is living with a relative who is providing support to the student, and complies with the provisions of (b)6 above except for the [income] **resource** requirement set forth therein.

v. The student was considered as an independent student for the purposes of New Jersey state student assistance programs during the 1986-87 academic year, and complies with the provisions of (b)6 above except for the [income] **resource** requirement set forth therein. This provision will be effective for the 1987-88 academic year only.

vi. (No change.)

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

(a)

BOARD OF DIRECTORS OF EDUCATIONAL OPPORTUNITY FUND

Part-Time Grant Awards

Proposed Amendments: N.J.A.C. 9:11-1.1, 1.7, 1.8, 1.22.

Proposed New Rules: N.J.A.C. 9:11-1.23.

Authorized By: Board of Directors of Educational Opportunity Fund, T. Edward Hollander, Chairman.

Authority: N.J.S.A. 18A:71-33.

Proposal Number: PRN 1987-531.

The agency proposal follows:

Summary

The Board of Directors of EOF is responsible for the administration of the EOF program which provides financial and other assistance to educationally and economically deprived students. Currently, EOF grants are only available for students attending on a full-time basis. This proposal provides for students who commenced their collegiate education on a full-time basis in the EOF program to continue to receive grants if they drop down to part-time attendance. The proposal sets forth requirements for eligibility, need, grant amounts, refunds and other areas.

Social Impact

The proposal will allow full-time EOF students who must cease attending college on a full-time basis to continue their education on a part-time basis and continue to receive financial aid. Previously, because no part-time aid was available, such students often had to discontinue their education because they were unable to pay for their part-time attendance. This proposal will allow the students to continue their education and hopefully to eventually complete their programs of study. The proposal, by increasing grant amounts, will also provide greater opportunity for economically and educationally disadvantaged students to attend graduate school at the State colleges.

Economic Impact

The proposal will provide financial aid awards to part-time EOF students. Such financial aid was previously unavailable thus causing potential part-time students who wished to remain in the program to leave school because they could not afford to pay for their education. These awards will allow such students to continue their education on a part-time basis. The proposed amendment will also, by increasing grant amounts, provide increased financial aid to Educational Opportunity Fund graduate students attending State colleges.

Regulatory Flexibility Statement

The proposal does not require a small business regulatory flexibility analysis since it does not apply to or impact on small businesses as contemplated by the Act.

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

9:11-1.1 Student eligibility

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

(c) To be **initially** eligible for an Educational Opportunity Fund grant, a student must have demonstrated that he or she:

1.-7. (No change.)

HIGHER EDUCATION

9:11-1.7 Grant amounts

(a) The dollar amount of each EOF grant will be based on [two] **three** factors:

1. Full or approved part-time enrollment;

[1.] **2.** The financial need of the student; and

[2.] **3.** The type of institution which the student will be attending.

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

(d) The EOF Board of Directors shall annually review the State grant amounts of EOF students and make adjustments if necessary. The minimum and maximum awards **range** for **adjustments to full-time** Graduate and **full-time** Undergraduate EOF grants for each type of institution follows:

Undergraduate	Minimum	Maximum
Community Colleges:		
Freshman/Sophomore	\$200	\$650
State College:		
Commuter:		
Freshman/Sophomore	200	750
Junior/Senior	200	550
Residential:		
Freshman/Sophomore	200	1,000
Junior/Senior	200	800
Rutgers, NJIT:		
Commuter:		
Freshman/Sophomore	200	750
Junior/Senior	200	550
Residential:		
Freshman/Sophomore	200	1,000
Junior/Senior	200	800
Independent Colleges:		
Freshman/Sophomore	200	1,950
Junior/Senior	200	1,700
Graduate	Minimum	Maximum
State Colleges	\$200	[\$1,500] \$2,000
4-year Independent Colleges	200	2,500
Rutgers, NJIT	200	2,500
UMDNJ/FDU Dental School	200	4,000

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

9:11-1.8 Duration of Student Eligibility

(a) Students deemed eligible at the time of initial enrollment shall retain eligibility for program support services throughout the duration of the initial degree study as long as he or she maintains full-time enrollment **or has been approved in writing for a part-time EOF grant by the campus EOF Program Director. Part-time grant eligibility will be available only at those institutions approved to award part-time EOF grants by the EOF Board of Directors.** In addition, students shall retain eligibility for an EOF grant as long as the student has demonstrated financial need as determined by the institution through submission of a New Jersey Financial Aid Form, in accordance with annually established deadline dates. The information on the Financial Aid Form will be evaluated by employing the National Uniform Methodology, as represented in the College Scholarship Service System or by approaches modified to meet the purpose of New Jersey student assistance programs.

(b) Students are eligible for a maximum of 12 semesters or its equivalent of undergraduate study. Students in an established five year undergraduate course of study shall be eligible for an additional two semesters beyond the 12 semesters **as stipulated in (c), (d) and (e) below.**

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

9:11-1.22 Refunds and repayments of disbursements made to students

(a) (No change.)

PROPOSALS

(b) The payment period is the time between the **first** day [a student registers] **of classes** for an academic term and the end of that term according to the institutional calendar.

(c) The [enrollment] **refund** period is the time between the **first** day [a student registers] **of classes** for an academic term and the date the student officially or unofficially withdraws from an institution, is expelled by an institution, or reduces his **or her** academic course load such that he or **she** is no longer eligible for State assistance.

(d) The above formula should be applied if a **full-time** student reduces his **or her** academic course load to less than full-time, **or a part-time student reduces the number of credits for which he or she is enrolled** prior to the date full tuition liability is required by the institution. However, if the student reduces his **or her** academic course or load to less than full-time, **or reduces the number of credits for which the student is enrolled on less than a full-time basis**, after the date full tuition liability is [due] **required by** the institution, [and the student budget for the payment period is not reduced by the institution,] a refund to the State is not necessarily required.

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

(h) If a student utilizes any portion of [an] **a full-time or part-time** award, it will be treated the same as a full semester **or half semester** payment **respectively** in calculating the number of semesters of eligibility. Thus, the institution shall afford the student the opportunity to decline and repay the State award for that payment period.

9:11-1.23 Part-time students

(a) **Eligibility for EOF grants will be extended on an annual basis to part-time students upon the approval of the Board of Directors of EOF and the Board of Higher Education depending on the level of appropriated funds.**

(b) **Part-time grant eligibility shall only be available to EOF students attending those institutions approved by the Board of Directors of EOF to award part-time EOF grants and who change from full-time to part-time students pursuant to the provisions of N.J.A.C. 9:11-1.8(a).**

(c) **Eligible students must be enrolled for at least six credits, matriculated in a degree or certificate program, and maintain minimum standards of academic progress as determined by the institution.**

(d) **Part-time EOF grant awards shall be prorated against full-time grant award for the applicable institutional sector attended and shall take into consideration any aid received from PELL and/or TAG. For the purposes of this section, full-time shall be considered to be 12 credit hours (part-time enrollment for nine credit hours shall equal 75 percent of a full-time grant award, six credit hours shall equal 50 percent, etc.) and determinations for such awards at Rutgers, NJIT and the state colleges shall be based upon full-time commuter award levels.**

(e) **The minimum part-time EOF grant shall not be less than \$200.00.**

(f) **Any residential student at the state colleges, Rutgers, or NJIT receiving a part-time EOF grant, shall have \$250.00 added to his or her award as determined by this section.**

(g) **Each part-time semester of attendance for which an EOF part-time grant is awarded shall be counted as one-half a semester of grant eligibility. The part-time EOF grant may be awarded to students only three times in the pursuit of an associates degree and four times in the pursuit of a baccalaureate degree.**

(a)

BOARD OF DIRECTORS OF EDUCATIONAL OPPORTUNITY FUND

Martin Luther King Physician-Dentist Scholarship Program

Proposed New Rules: N.J.A.C. 9:11-2.

Authorized By: Board of Directors of Educational Opportunity Fund, T. Edward Hollander, Chairman.

Authority: P.L. 1987, c.183 (N.J.S.A. 18A:72J-1 et seq.).

Proposal Number: PRN 1987-530.

The agency proposal follows:

Summary

P.L. 1987, c.183 creates the Martin Luther King Physician-Dentist Scholarship Program which provides up to full tuition scholarships for qualified minority and disadvantaged students attending either University of Medicine and Dentistry of New Jersey or Fairleigh Dickinson University School of Dentistry. The program seeks to increase the number of physicians and dentists practicing in New Jersey from minority and/or disadvantaged backgrounds. The proposal sets forth rules for program eligibility, grant amounts and the application of other EOF regulations.

Social Impact

The proposal and underlying program will have the beneficial impact of providing a greater number of physicians and dentists from under-represented minority and disadvantaged groups who otherwise might not be able to afford to attend medical or dental school.

Economic Impact

The proposal and underlying program will assist underrepresented minority and disadvantaged groups on paying for the costs of medical or dental school. Grant amounts, depending upon annual appropriations, will be determined by the Board of Directors of the Educational Opportunity Fund up to a maximum of full tuition at the attending institution.

Regulatory Flexibility Statement

The proposal does not require a small business regulatory flexibility analysis since it does not apply to or impact on small businesses as contemplated by the Act.

Full text of the proposed new rules follows.

SUBCHAPTER 2. MARTIN LUTHER KING PHYSICIAN-DENTIST SCHOLARSHIP PROGRAM

9:11-2.1 Student eligibility

(a) To be eligible for a Martin Luther King Physician-Dentist Scholarship (King Scholarship), a student must have demonstrated that he or she:

1. Is or has been a legal resident of the State of New Jersey for at least two years immediately prior to receiving the scholarship, and;
2. Is a student who meets the requirements of N.J.A.C. 9:11-1.5 and falls within one of the following categories:

i. A minority student included in one of the ethnic groups recognized by the Association of American Medical Colleges or the American Association of Dental Schools as underrepresented in the medical or dental professions, or;
ii. A former or current recipient of the New Jersey EOF undergraduate grant, or;
iii. A student who would have been eligible as an undergraduate for a New Jersey EOF, and;

3. Is or will be a full-time student enrolled in a post-baccalaureate program of study leading toward an initial M.D., D.O. or D.M.D. degree at the University of Medicine and Dentistry of New Jersey or the Fairleigh Dickinson University School of Dentistry.

(b) Priority shall be given to those students who meet the criteria of (a)2.i. and ii., or (a)2.i. and iii. as set forth above.

9:11-2.2 Grant amounts

(a) The maximum and minimum award ranges for a King Scholarship shall be annually established by the Board of Directors of the New Jersey Educational Opportunity Fund but shall not exceed the maximum amount of tuition charged at the university in which the student is enrolled.

(b) The amount of each King Scholarship shall be based on the financial need of the student as determined pursuant to N.J.A.C. 9:11-1.7(a), (b), (c) and (f).

9:11-2.3 Rules incorporated by reference

The following provisions of subchapter 1 of this chapter, N.J.A.C. 9:11-1, governing the EOF Program shall also apply to grants made under the Martin Luther King Physician-Dentist Scholarship program unless they are inconsistent with, or otherwise excepted within the provisions of this subchapter: N.J.A.C. 9:11-1.2, 1.3, 1.4, 1.6(a), (c), (d), (f), 1.13, 1.15, 1.16, 1.17, 1.19, 1.21 and 1.22.

HUMAN SERVICES

The following proposals are authorized by Drew Altman, Commissioner, Department of Human Services.

DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

For proposals numbered PRN 1987-514 and 520, submit comments by January 20, 1988 to:

Henry W. Hardy, Esq.
Administrative Practice Officer
Division of Medical Assistance and Health Services
CN 712
Trenton, New Jersey 08625

(a)

Pharmacy Manual; Pharmaceutical Assistance to the Aged and Disabled Eligibility Manual PAAD Income Levels

Proposed Amendments: N.J.A.C. 10:51-5.6; 10:69A-1.2, 6.2, 6.6, 6.10

Authority: N.J.S.A. 30:4D-20, 21, 24, and P.L. 1987, c.221.

Proposal Number: PRN 1987-520.

The agency proposal follows:

Summary

The proposed amendments will increase the income limits for PAAD (Pharmaceutical Assistance for the Aged and Disabled) beneficiaries in accordance with P.L. 1987, c.221. The income limit for single individuals will be \$13,650; the income limit for married persons will be \$16,750.

The text concerning an eligible PAAD beneficiary that appears in the Pharmacy Manual (N.J.A.C. 10:51-5.6(a)) is being amended to indicate that a person who is under age 65 and over 18 years of age and is receiving Social Security Title II disability benefits may qualify for PAAD if they meet other eligibility criteria, such as residence, income limit, etc. This amendment will make the Pharmacy Manual consistent with the PAAD Eligibility Manual. In addition, the requirement for disabled persons to be recipients of Social Security Title II benefits reflects the statutory standard.

The Division is also amending the requirement for completion of renewal forms. N.J.A.C. 10:69A-6.10 indicates renewal applications must be returned to the PAAD Bureau at least 45 days prior to the expiration date to ensure continuous coverage.

Social Impact

The proposal impacts some beneficiaries who receive slight increases in their income in that they may still be able to retain their eligibility for PAAD. The proposal impacts on applicants for PAAD, because they may be able to qualify under the proposed standard.

The proposal also impacts indirectly on pharmaceutical providers, who will continue to be reimbursed for providing services to PAAD beneficiaries in accordance with PAAD policies and procedures.

Economic Impact

It is estimated that the inclusion of the additional eligibles will cost the state approximately 4 million dollars in state funds for state fiscal year 1988. The funds were included as part of the PAAD appropriations for the Department of Human Services. The PAAD program is wholly state funded.

Regulatory Flexibility Statement

A regulatory flexibility analysis is not required, as the rules apply to clients of the PAAD Program and not to small businesses. The Division of Medical Assistance and Health Services is responsible for processing PAAD applications.

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

10:51-5.6 Eligible PAAD beneficiary

(a) An eligible patient is a legal resident of the State of New Jersey, 65 years of age or older or **who is under 65 and over 18 years of age and is receiving Social Security Title II disability benefits with an**

HUMAN SERVICES

annual income less than \$[9,000] **13,650** for a single person and less than \$[12,000] **16,750** in combined income for a married couple, who possesses a current, valid eligibility identification card (see N.J.A.C. 10:51-5.22).

1. (No change.)
- (b) (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.-5. (No change.)
6. Chapter 209, Laws of 1985, effective August 1, 1985[.] ; and
7. Chapter 221, Laws of 1987, effective July 29, 1987 and retroactive to December 31, 1986.

- (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 \$[13,250] **13,650** 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 \$[16,250] **16,750** to be eligible for PAAD.

- 1.-2. (No change.)
- (c)-(i) (No change.)

10:69A-6.6 PAAD eligibility application and renewal application forms

- (a) (No change.)

(b) The only acceptable form to be utilized in determining the beneficiary's continuation of eligibility will be the PAAD [e]Eligibility [r]Renewal [a]Application form (AP-12). This form is automatically mailed to the beneficiary approximately four months prior to the expiration date.

10:69A-6.10 Eligibility period

- (a) (No change.)

(b) Approximately four months prior to his or her expiration date, PAAD will notify the beneficiary if he or she is eligible for biennial eligibility or if he or she must complete a renewal form. Renewal applications must be returned to the PAAD Bureau by the beneficiary at least 45 days prior to the [renewal] **expiration** date to ensure continuous coverage.

(a)

Independent Clinic Services Manual Family Planning Services

Proposed Amendment: N.J.A.C. 10:66-3

Authority: N.J.S.A. 30:4D-6b(3); 1903(a)(2)5 and 1905(a)(4)(c) of the Social Security Act; 42 CFR 433.15; 42 CFR 440.250(c).

Proposal Number: PRN 1987-514.

The agency proposal follows:

Summary

This proposed amendment concerns family planning services provided by independent clinics. The New Jersey Medicaid Program is proposing a fee increase for certain services, including the initial family planning visit, annual medical revisit, brief follow-up visit, follow-up visit by nurse midwife, medical revisits, and prolonged follow-up visits.

The specific procedure codes and proposed fee increases are listed in the text of the proposal below. The procedure codes for independent clinics are part of the HCPCS. (Health Care Financing Administration Common Procedure Coding System). Procedure codes are referenced but not reproduced at N.J.A.C. 10:66-3.

It should be noted that family planning services are a required part of the State's title XIX (Medicaid) plan.

Social Impact

The proposed amendment impacts on Medicaid patients who require and receive family planning services, but these services will continue to be available to Medicaid patients.

PROPOSALS

The proposal also impacts on independent clinics that provide family planning services. However, the impact on these providers is more economic than social.

Economic Impact

There is no cost to the Medicaid patient for family planning services. Those independent clinics that treat Medicaid patients and submit claims for reimbursement will be reimbursed according to the new fee schedule for the appropriate procedure code. Independent clinic providers are responsible for submitting claims in accordance with Medicaid policies and procedures.

The estimated cost of the fee increases is approximately \$119,000. The cost to the State of New Jersey will be approximately \$12,000 provided from the Department of Health, because the formula for federal financial participation is 90 percent federal funding and 10 percent state funding for family planning services.

Regulatory Flexibility Statement

A regulatory flexibility analysis is not required for these proposed amendments. Independent clinic providers are already required to keep and maintain sufficient records to fully disclose the name of the recipient to whom the service was rendered, the date of the service, the nature of the service, etc. (N.J.S.A. 30:4D-12(d)). This proposed amendment does not impose any additional recordkeeping or reporting requirements on Medicaid providers.

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

10:66-3 HCFA Common Procedure Coding System (HCPCS)

Appendix 8

CODE	MOD	PROCEDURE DESCRIPTION	MAXIMUM FEE ALLOWANCE		
			\$	\$	NS
(c)		Initial Medical Visit			
90000	WF		[25.00] 45.00	[25.00] 45.00	
90010	WF		[25.00] 45.00	[25.00] 45.00	
90015	WF		[25.00] 45.00	[25.00] 45.00	
		Annual Medical Revisit			
90760	WF		[25.00] 45.00	[25.00] 45.00	
		Routine or Follow-Up Visit Brief			
90030	WF		[4.20] 7.60	[4.20] 7.60	
90040	WF		[4.20] 7.60	[4.20] 7.60	
90050	WF		[4.20] 7.60	[4.20] 7.60	
		Routine or Follow-Up Visit Prolonged			
90070	WF		[13.00] 23.00	[13.00] 23.00	
90080	WF		[13.00] 23.00	[13.00] 23.00	
		Routine or Follow-Up Visit by Nurse-Midwife			
90060	WM WF		[9.10] 16.40	[9.10] 16.40	
		Medical Revisit Family Planning			
90060	WF		[10.00] 18.00	[10.00] 18.00	

DIVISION OF PUBLIC WELFARE

For the following proposals, submit comments by January 20, 1988 to:

Marion E. Reitz, Acting Director
Division of Public Welfare
CN 716
Trenton, New Jersey 08625

(b)

General Assistance Manual Audits

Proposed Amendment: N.J.A.C. 10:85-1.5

Authority: N.J.S.A. 44:8-111(d).

Proposal Number: PRN 1987-512.

The agency proposal follows:

Summary

The proposed amendment to N.J.A.C. 10:85-1.5 adjusts the confidentiality regulations of the General Assistance (GA) Program to allow and instruct municipal welfare directors to cooperate in the auditing process which is now conducted primarily by the municipalities' own auditors. The confidential nature of welfare records is not compromised by the change.

PROPOSALS

Interested Persons see Inside Front Cover

Social Impact

The proposed amendment will have no influence on recipients and very little on the assistance agencies. It merely updates regulations to comport with a recent change in auditing procedure which, itself, had no influence on clients and almost none on the agencies.

Economic Impact

There will be no impact on clients and a negligible administrative cost impact on the municipal welfare departments.

Regulatory Flexibility Statement

This proposal has been reviewed with regard to the Regulatory Flexibility Act, P.L. 1986, c.169, effective December 4, 1986. This rulemaking imposes no compliance requirements on small businesses, since it applies only to municipal welfare departments.

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

10:85-1.5 Disclosure of information

(a) (No change.)

(b) Allowable disclosure of information: The municipal welfare department shall release information concerning an applicant or recipient in the following situations only:

1.-4. (No change.)

5. Quality control reviews: Information in connection with a quality control review [or State audit] shall be furnished to authorized representatives of the Division of Public Welfare.

6. Information necessary to the performance of regular or special audits by State staff or by the municipality's registered municipal accountant (RMA).

(a)

General Assistance Manual

Public Assistance Trust Fund Account

Proposed Amendment: N.J.A.C. 10:85-6.3

Authority: N.J.S.A. 44:8-111(d).

Proposal Number: PRN 1987-515.

The agency proposal follows:

Summary

The proposed amendment provides for the preparation of Form GA-12, General Assistance Program—Statement of Refunds, in quadruplicate with the original forwarded to the municipality's registered accountant and a copy routed to this Department's Division of Public Welfare, Bureau of Business Services, General Assistance Section. Currently, Form GA-12 is prepared in triplicate with the original being forwarded to the auditor for the Division's Bureau of Business Services as part of his or her examination of the General Assistance accounts. While some municipal directors were forwarding originals as stated, a large number of municipalities were directing the original page of Form GA-12 to the municipality's financial officer, causing discrepancies in the records of the State agency since refunds received by the municipalities are thus not reported to the State in a timely manner. In such instances, this results in excess payments of State aid which must be recovered from current year advances, thus causing a shortfall in the municipality's Public Assistance Trust Fund Account.

Having a copy of Form GA-12 forwarded to the Division of Public Welfare and to the municipal auditor will synchronize the records of both governmental agencies. The proposed amendment will reduce the number of excess payments of State Aid and minimize the number of delayed recoveries from municipal welfare departments.

Social Impact

The proposed amendment will not impact on General Assistance clients. It is an administrative adjustment to identify General Assistance State aid to municipalities which should be recovered by the Division of Public Welfare in a more timely manner and thus avoid having to reduce payments of State Aid in a subsequent year.

Economic Impact

The proposed amendment will not impact economically on General Assistance clients. Small administrative savings may be realized as a result of the proposed amendment since the Division of Public Welfare will be better able to identify recoveries secured by MWDs during the current

COMMERCE AND ECONOMIC DEVELOPMENT

fiscal year through use of a separately routed copy of the GA-12 form and thus avoid causing a shortfall in the municipality's Public Assistance Trust Fund Account in a subsequent year.

Regulatory Flexibility Statement

This proposal has been reviewed with regard to the Regulatory Flexibility Act, P.L. 1986, c.169, effective December 4, 1986. This rulemaking action imposes no compliance requirements on small businesses, since it applies only to municipal welfare departments.

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

10:85-6.3 Public Assistance Trust Fund Account

(a) The law provides that every payment made to a municipality as State aid for General Assistance, including all moneys received as a refund or in restitution of any year's assistance expenditures, shall be made payable to the treasurer (but not by name) of the municipality and deposited by him[/] or her in the Public Assistance Trust Fund Account.

1.-2. (No change.)

3. Deposit of refunds and receipts: All payments received by a municipal welfare department or any other municipal department from or on behalf of current or former recipients shall be deposited in the "Public Assistance Trust Fund Account" and duly accounted for on a monthly basis.

i. Preparation of statement of refunds and receipts: Each municipal welfare department is required to prepare [a Statement of General Assistance Refunds and Receipts (Form GA-12)] **Form GA-12, General Assistance Program—Statement of Refunds**. Refunds are separated according to items eligible and ineligible for State participation. Form GA-12 shall be prepared in [triplicate; the original shall be submitted to the auditor for the Bureau of Business Services, Division of Public Welfare during his/her examination of General (Public) Assistance Accounts; the duplicate retained by the municipal welfare department; and the third copy sent to the chief financial officer of the municipality.] **quadruplicate as follows:**

(1) **The original is to be submitted to the municipality's registered municipal accountant at the time of annual audit.**

(2) **The second copy (duplicate) forwarded to the Bureau of Business Services/Division of Public Welfare (BBS/DPW) as follows:**

(A) **With the exception of (B) below, the second copy is due every December and is to be submitted with Form GA-6, observing the December deadline for receipt of Form GA-6 by BBS/DPW.**

(B) **If at any time prior to the December submittal the MWD's reimbursement amount reaches \$500.00, Form GA-12 is to be submitted at such time. Such submittal does not replace the December deadline for submittal of the final form GA-12 for the calendar year.**

(3) **The third copy is to be retained by the municipal welfare department.**

(4) **The fourth copy is to be sent to the chief financial officer of the municipality.**

ii. (No change.)

(b) (No change.)

COMMERCE AND ECONOMIC DEVELOPMENT

The following proposals are authorized by Borden R. Putnam, Commissioner, Department of Commerce and Economic Development.

DIVISION OF DEVELOPMENT FOR SMALL BUSINESSES AND WOMEN AND MINORITY BUSINESSES

(b)

Development of Small Businesses and Women and Minority Businesses Services

Proposed New Rule: N.J.A.C. 12A:9-1

COMMERCE AND ECONOMIC DEVELOPMENT

PROPOSALS

Authority: N.J.S.A. 52:27 H-6F, P.L. 1987, ch. 55, specifically section 9.

Proposal Number: PRN 1987-516.

Submit comments by January 20, 1988 to:

Bernard McBride
Administrative Practice Officer
Department of Commerce and Economic Development
One West State Street
CN 825
Trenton, New Jersey 08625

The agency proposal follows:

Summary

The proposed new rules implement P.L. 1987, ch. 55, which establishes the Division of Development for Small Businesses and Women and Minority Businesses. The Act provides for the consolidation of several existing offices within the Department of Commerce and Economic Development into one division within the Department. The Act also establishes a new office of Women's Business Enterprise and Advisory Councils for small businesses and women and minority businesses.

The proposed rules include provisions regarding loan referral and packaging by the division, N.J.A.C. 12A:13-1.4; listing of qualified professionals to provide services, N.J.A.C. 12A:13-1.5; internships, N.J.A.C. 12A:13-1.6 and 1.22; market research, N.J.A.C. 12A:13-1.7; advertising, N.J.A.C. 12A:13-1.8; information on bidding for government contracts, N.J.A.C. 12A:12-1.9; Division role as liaison with other departments and agencies of state, federal and local governments, N.J.A.C. 12A:13-1.10; legal counsel, N.J.A.C. 12A:13-1.11; assistance with accounting, insurance, franchises, commercial loans, licensing, bonding, referrals to service providers, government financing, training and development, and regulatory information, N.J.A.C. 12A:13-1.12 through 1.21; and additional requirements addressing Uniform Certification by the division, N.J.A.C. 12A:13-1.23.

Social Impact

Under Section 1 of the Act, "it is the public policy of this State to provide a source of technical assistance and financial assistance in order to encourage the establishment and growth of small businesses and businesses owned by minorities and women". These proposed new rules attempt to facilitate this objective by defining the scope and manner of the various type of services specified in the Act.

Economic Impact

The Act and these proposed rules are expected to impact the State's economy by assisting in the development and promotion of small businesses, minority and women-owned businesses. The actual economic impact under the programs shall be ascertained through reports and surveys required under these rules and the Act.

Regulatory Flexibility Statement

Since the proposed new rules specify service to be provided by the Division to small businesses and minority and women businesses, the impact on small business will be positive. No reporting, recordkeeping or compliance requirements are imposed on small businesses.

Full text of the proposed new rule follows:

CHAPTER 9

DEVELOPMENT OF SMALL BUSINESSES AND WOMEN AND MINORITY BUSINESSES

SUBCHAPTER 1. SERVICES TO SMALL BUSINESSES AND WOMEN AND MINORITY BUSINESSES

12A:9-1.1 Applicability and scope

(a) The rules in this subchapter are promulgated by the Department of Commerce and Economic Development to implement P.L. 1987, ch. 55, an Act to establish within the Department of Commerce and Economic Development a Division of Development for Small Businesses and Women and Minority Businesses.

(b) The Act provides for consolidation, in the interest of efficiency, of the State's service to small businesses and women and minority businesses.

(c) The Act provides that the Division shall provide certain services to small businesses and women and minority businesses those services being: the establishment of a loan referral and packaging program; a compiled list of qualified professionals in specific areas of expertise; to coordinate managerial and technical assistance pro-

grams in the state; establish internship programs; serve as liaison on behalf of businesses with the agencies and departments of the state, federal, and local governments; provide assistance in obtaining legal counsel; provide financial analysis and accounting assistance; provide assistance in obtaining insurance; provide assistance in arranging contracts with franchisees; provide assistance in arranging for loans from commercial banks; assist in negotiating license agreements; assist in procuring bonding; make referrals to private consultants, institutions, and other business services; assist in finding sources of financing from federal, state and local sources; provide a central resource for eligible businesses in their dealings with various levels of governments; initiate and encourage education programs for eligible businesses; and establish a uniform procedure for certification of minority and women businesses.

(d) The Act also provides for the establishment of the office of the Director of the Division for the Development of Small Businesses and Women and Minority Businesses, and the Office of Women Business Enterprise.

12A:9-1.2 Definitions

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

"Authority" means the New Jersey Development Authority for Small Businesses and Minority and Women Enterprises.

"CAU" means the Certification and Approvals Unit which has sole authority in the Division to register vendors for the New Jersey Set-Aside program and/or certify businesses under the Uniform Certification Act for State programs.

"Commissioner" means the Commissioner of the Department of Commerce and Economic Development.

"DCED" means the Department of Commerce and Economic Development.

"Director" means the Director of the Division of Development for Small Businesses and Women and Minority Businesses.

"Division" means the Division of Development for Small Businesses and Women and Minority Businesses.

"Eligible businesses" means a minority and/or women business certified and/or registered by CAU or a small business registered by the Division and/or determined to be eligible to receive assistance and/or to participate in various State programs.

"Minority" means a person who is:

1. Black, which is a person having origins in any of the black racial groups of Africa;

2. Hispanic, which is a person of Spanish or Portuguese culture with origins in Mexico, South or Central America, or the Caribbean islands, regardless of race;

3. Asian American, which is a person having origins in any of the original people of the Far East, Southeast Asia, the Indian subcontinent, Hawaii, or the Pacific Islands; or

4. American Indian or Alaskan native, which is a person having origins in any of the original peoples of North America.

"Minority business" means a business which is at least 51 percent owned, operated and controlled by a minority or group of minorities and whose ownership is responsible for the daily as well as long term management decisions of the business.

"Small business" means a sole proprietorship, partnership, or corporation which is a size and type as defined by the Commissioner.

"Women" means all women regardless of race.

"Women business" means a business which is at least 51 percent owned, operated, and controlled by a woman or group of women and whose ownership is responsible for a daily as well as long term management decision of the business.

12A:9-1.3 Nature of Division service

The Division shall provide such services to small businesses, minority and women businesses as enumerated by the Act. Where specified, these services shall be subject to standards of Federal programs and be coordinated with the Authority. Services shall be limited in their scope to prevent the Department from incurring adverse liability and to ensure that the services do not compete with those private businesses traditionally providing services to the enumerated businesses.

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12A:9-1.4 Loan referral and packaging

(a) The Division shall develop a loan referral and packaging program for small businesses, minority and women businesses which shall be subject to standards established by the Authority.

(b) The Division shall make referrals to private sector sources for loans without prejudice to those sources.

1. The referrals shall, where market conditions permit, include a minimum of three private source referrals.

2. The Division shall not directly involve itself in negotiations between the referred business and the private sector financing source.

3. The Division may, based on market conditions and needs, negotiate with private sector financing sources to provide loan packages or programs.

12A:9-1.5 Qualified professional listing

(a) The Division shall compile a list of qualified professionals who can or have provided services to small businesses, minority and women businesses. This list of qualified professionals shall include:

1. Accountants;
2. Financial specialists;
3. Management consultants;
4. Marketing consultants;
5. Employee training and development specialists; and
6. Other professionals as may be deemed appropriate by the Director.

(b) The Qualified Professionals List shall be made available upon request by an eligible business. The list shall not be restricted or edited in any manner which would provide favoritism or be detrimental to any professional contained on the list.

(c) There shall be no limit to the number of enumerated qualified professionals on the list.

(d) For purposes of this subchapter, qualified professional shall mean a professional who meets all licensing and qualification standards required by the State of New Jersey.

12A:9-1.6 Internship programs

(a) The Division, in cooperation with institutions of higher education, shall establish internship programs for candidates pursuing undergraduate and graduate degrees.

(b) For purposes of this subchapter, institutions of higher learning shall mean those schools which at a minimum have undergraduate programs which provide recognized associate of arts or science degrees.

(c) The Director may limit the number of interns participating in the internship program.

(d) The Director may choose or limit the number of higher educational institutions in the internship program.

12A:9-1.7 Market research and analysis

(a) The Division shall, in conjunction with or at the request of the authority, undertake market research projects.

(b) To the extent possible, the market research projects pursuant to (a) above shall use existing pools of data and/or be coordinated with other entities within the State which have relevant information or the means of collecting the information.

(c) The Director shall define the scope and nature of the market research project in (a) above as may be necessary based on limitations of funds for such study.

12A:9-1.8 Advertising and marketing

(a) The Division shall, in conjunction with or at the request of the Authority, provide advice to eligible businesses as to advertising, marketing, and selecting sales and distribution channels.

(b) To the extent possible the assistance in (a) above shall use existing pools of data and/or be coordinated with other government entities within the State, which have relevant information or the means of providing the information.

(c) The Director shall define the scope and nature of the services in (a) above as may be necessary based on limitation of funds for such services.

12A:9-1.9 Training for bidding on government contracts

(a) The Division shall, in conjunction with or at the request of the Authority, provide training and information to eligible businesses on bidding for government contracts.

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(b) To the extent possible the training referred to in (a) above shall use existing pools of data and/or be coordinated with other government entities within the State.

(c) The training referred to in (a) above shall include but not be limited to:

1. Sponsoring or co-sponsoring seminars and training conferences for eligible businesses; and

2. Providing counseling as may be requested by eligible businesses.

(d) The Director shall define the scope and nature of the training referred to in (a) above as may be necessary based on limitation of funds for training and counseling.

12A:9-1.10 Liaison with other departments and agencies of State, Federal and local government

(a) The Division shall serve as liaison with the Department of Treasury and other departments and agencies of State, Federal and local government to promote procurement of contracts and purchases from eligible businesses.

(b) The Division shall, where requested, provide assistance to the various entities of government to facilitate the procurement of contracts and purchases to eligible businesses.

(c) The Division shall make available a means by which the various government entities may obtain lists of eligible businesses.

(d) Upon request the Division shall provide technical assistance to the various government entities wishing to establish contracting and purchasing set-aside programs for eligible businesses.

(e) The Director shall define the scope and nature of the technical assistance referred to in (d) above as may be necessary based on limitations of funds for technical assistance.

12A:9-1.11 Obtaining legal counsel

(a) The Division shall, in conjunction with or at the request of the Authority, provide assistance in obtaining legal counsel to eligible businesses.

(b) The provision of legal service shall be limited to referrals by the Division to the New Jersey Bar Association referral service, County Bar referral services, legal professional associations referral services, or public or quasi-public legal service associations.

(c) The Division shall make no referrals to individual attorneys or law firms.

12A:9-1.12 Financial analysis and accounting assistance

(a) The Division shall, in conjunction with or at the request of the Authority, provide financial analysis and accounting assistance to eligible businesses.

(b) Financial analysis and accounting assistance shall be limited to:

1. Referrals by the Division to professional associations in the field respective of the eligible business request for assistance;

2. Analysis or assistance provided by staff of the Division;

3. The Division shall make no referrals to individual companies or individuals who are capable of providing financial analysis or accounting assistance.

(c) The Director shall define the scope and nature of this assistance as may be necessary based on limitations of funding for this type of assistance.

12A:9-1.13 Assistance in obtaining insurance

(a) The Division shall in conjunction with, or at the request of the authority, provide assistance to eligible businesses in obtaining insurance.

(b) The assistance referred to in (a) above shall only cover commercial insurance including but not limited to employee benefit packages, product liability insurance, and general commercial liability insurance.

(c) The service in (a) above shall be limited to providing information about the requirements for making an eligible business capable of obtaining insurance or reducing premium levels.

(d) The Division shall not be involved in any negotiations or transactions between an eligible business and an insurance company which is authorized to conduct business under the laws of the United States.

12A:9-1.14 Assistance in arranging contracts with franchisees

(a) The Division shall, in conjunction with or at the request of the Authority, provide assistance to eligible businesses in arranging contracts with franchisees.

(b) The assistance referred to in (a) above shall be limited to providing information on franchises at the request of an eligible business.

(c) The Division shall not be involved in any negotiations or transactions between an eligible business and a franchisee.

12A:9-1.15 Assistance in arranging commercial loans

(a) The Division shall, in conjunction with or at the request of the Authority, provide assistance in arranging for loan referral and packaging programs for eligible businesses.

(b) The Division shall develop commercial loan programs with State or Federal chartered banks, savings banks, or savings and loan associations.

(c) All loan packaging programs, when made in conjunction with State chartered institutions, must be made in accordance with the powers conferred on these institutions pursuant to Title 17 of the revised statutes including bridge loans and cash flow loans.

12A:9-1.16 Assistance in negotiating license agreements

(a) The Division shall, in conjunction with or at the request of the Authority, provide assistance to eligible businesses for purposes of negotiating license agreements.

(b) The Division shall not become directly involved or become a participant in negotiations dealing with license agreements.

(c) The Division shall, at the request of the any eligible business, provide counseling and information relevant to the business securing a licensing agreement.

12A:9-1.17 Assistance in procuring bonding

(a) The Division shall, in conjunction with or at the request of the Authority, provide assistance in procuring bonding.

(b) The Division shall at the request of an eligible business provide counseling and information relevant to the procuring of bonding.

(c) The Division where applicable shall seek to ease bonding requirements and availability.

(d) The Division shall, at the request of an eligible business, provide counseling and information relevant to a business procuring substitutes for bonding.

12A:9-1.18 Referrals to private consultants, institutions, and other providers of services

(a) The Division shall, in conjunction with or at the request of the Authority, make referrals to private consultants, institutions and other providers of services at the request of eligible business.

(b) All referrals in (a) above shall be made available from the Qualified Professionals List pursuant to N.J.A.C. 12A:13-1.5.

(c) The Division shall make no referrals pursuant to (a) above to individual companies or individuals.

12A:9-1.19 Assistance in finding sources of financing from government sources

(a) The Division shall, in conjunction with or at the request of the Authority, assist eligible businesses in finding sources of financing from Federal, State, and local sources.

(b) For purposes of assistance in finding sources of financing from government entities pursuant to (a) above, the Division shall maintain a listing of these financing sources and make them available to eligible businesses at their request.

12A:9-1.20 Assistance in gaining information about employee training and development programs

(a) The Division shall, in conjunction with or at the request of the Authority, assist eligible businesses in gaining information about employee training and development programs.

(b) The Division shall refer the eligible requesting business in (a) above to the Qualified Professionals List pursuant to N.J.A.C. 12A:12-1.5.

12A:9-1.21 Centralized information concerning laws and rules

(a) The Division shall create a centralized source of information

for eligible businesses in their dealings with Federal, State and local governments, which shall include:

1. Government rules affecting eligible businesses;
2. Laws affecting eligible businesses; and
3. Government procurement programs affecting eligible businesses.

(c) The Division shall not provide materials to eligible businesses relevant to pending State legislation except as provided for at the direction of the Commissioner.

12A:9-1.22 Internship programs

(a) The Division, in conjunction with requirements of this subchapter, shall initiate and encourage education programs for eligible businesses.

(b) The Division may sponsor educational seminars and conferences for eligible business to facilitate the Division's ability to accomplish its other duties provided for under the Act.

12A:9-1.23 Uniform certification

(a) The Division shall establish, pursuant to the requirements of the Uniform Certification Act, P.L. 1986, c. 195, a uniform procedure for the certification of minority and women businesses wishing to participate in State programs which require certification of authenticity of ownership and control of a business as a criteria for participation in State programs, state political subdivision programs, and casino set-aside programs pursuant to P.L. 1987, c. 137.

(b) The Division shall be the certifying authority for all departments, agencies, and authorities of the State.

(c) Where the certification procedure established by the Division pursuant to (a) above conflicts with Federal certification procedures, and that conflict would adversely affect the Federal funding of a State project, the Federal certification procedure shall take precedence when the Division has been properly and reasonably notified by the affected public agency that such conflict exists and the State's participation in such program is in jeopardy.

(d) The political subdivisions of the State shall certify the eligibility of minority and women businesses for the political subdivision's programs which require certification of the authority of ownership and control of a vendor or firm.

1. The political subdivisions of the State may accept those businesses certified by the Division as eligible to participate in their programs.

2. The political subdivisions of the State may by specific assignment and agreement have the Division serve as its certifying authority pursuant to approval by the Commissioner.

(e) The political subdivisions of the State shall utilize the uniform procedures formulated by the Division pursuant to (a) above.

1. Any political subdivision of the State choosing to establish its own certification program shall submit a plan to the Division for review and approval. The plan shall include:

- i. A description of the political subdivision's certification program;
- ii. An analysis of the program as to its compliance with the Division's uniform procedures;
- iii. The amount of funds assigned by the political subdivision for the programs;
- iv. Resumes of the personnel who will supervise and work within the program; and
- v. Any other information the Director or CAU administrator may deem relevant.

2. Any political subdivision of the State choosing to establish its own certification program shall submit annual reports to the Division as to the performance of the program. The report shall include:

- i. The number of minority businesses certified by the political subdivision;
- ii. The number of women businesses certified by the political subdivision;
- iii. Total number of applications for certification received by that political subdivision;
- iv. The number of site visits conducted by the political subdivision; and
- v. The number of businesses decertified by the political subdivision.

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3. Any political subdivision of the State choosing to establish its own certification program shall make available, at the request of the Division, any and all information relevant to any businesses applying for status as a certified business.

(f) The authority of the Division in matters relating to certification and vendor set-aside approval shall be vested in the CAU administrator.

1. The ruling of the administrator in these matters shall be final, except as may be provided by appeals of his decisions relating to the status of a business provided in regulation under those programs.

12A:9-1.24 Advisory Council

(a) For the purpose of assisting the Division in development and establishment of financial and technical assistance policy; resource allocation; eligibility for assistance and program participation standards; and coordination of programs with the Authority there is established, pursuant to the Act, the Small Business Advisory Council, the Minority Business Advisory Council, and the Women Business Advisory Council.

(b) Each Council shall consist of members appointed pursuant to and in the manner described in the Act.

(c) The respective Councils shall elect a chairman from among their membership. The chairman shall preside over all Council meetings.

(d) Each Council shall meet at least six times a year.

(e) At their discretion, the Councils may meet together as a group to satisfy the meeting requirements in (d) above.

(f) The Council may not hold an official meeting without a quorum. A quorum shall consist of five members of the board being present.

(g) Each member of a Council shall have one equal vote.

(h) The Councils may form ad hoc committees for specific areas of concern by majority vote.

(i) The Division shall be represented at the Council meetings by the Director or his or her designee.

(j) The Councils shall hold meetings pursuant to the requirements of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq.

(a)

Local Development and Financial Assistance

Local Development Financing Fund

Proposed New Rules: N.J.A.C. 12A:12-2

Authority: N.J.S.A. 52:27H-6F; N.J.S.A. 34:1B-36 (P.L. 1983, Ch. 190)

Proposal Number: PRN 1987-519.

Submit comments by January 20, 1988 to:

Bernard J. McBride
Administrative Practice Officer
Department of Commerce and Economic Development
One West State Street
CN 825
Trenton, N.J. 08625

The agency proposal follows:

Summary

New rules are being proposed to implement the Local Development Financing Fund Act; P.L. 1983, Ch. 190 (N.J.S.A. 34:1B-36). These rules are promulgated by the Department of Commerce and Economic Development, which is given responsibility for implementing the Act. The purpose of the Act and these rules is to encourage economic development in specifically designated municipalities by providing supplementary financial assistance of certain commercial and industrial projects.

Some key provisions of the proposed rules include:

1. What types of project cost are eligible for funding under this program (see N.J.A.C. 12A:12-2.2);

2. What type of information must be provided in an application for financial assistance under this program (see N.J.A.C. 12A:12-2.3(b) et seq.);

3. Deadlines for application for financial assistance from the program (see N.J.A.C. 12A:12-2.4);

4. Reason for rescission of funding for a project under this program (see N.J.A.C. 12A:12-2.8).

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Social Impact

The Social Impact of this program will be positive in the sense that the Local Development Financing Fund program will provide additional possibilities of capital for the development of certain commercial and industrial projects in distressed urban areas. Consequently, through the development of various projects by this program, these distressed areas should be relieved of problems such as high chronic unemployment and limited capital funds for economic revitalization and growth.

Economic Impact

The Local Development Financing Fund should impact on the State in a positive manner by providing low cost capital for certain industrial and commercial projects in areas unable to acquire sufficient capital investment. The cost of the program to the state is relatively minor in that the Local Development Financing Fund program is a revolving loan fund initially financed through the issuance of the Community Development Bond Act. The administrative costs associated with the program are covered by an application fee provided by the applicant.

Regulatory Flexibility Statement

Unless a defined small business applies for project financing under this program, there shall be no impact upon those businesses in New Jersey. However, if a defined small business were to apply for financing, their burden as to paperwork, etc. would be no different than that of businesses defined not to be a small business.

Full text of the new proposed rules follows.

SUBCHAPTER 2. LOCAL DEVELOPMENT FINANCING FUND

12A:12-2.1 Applicability and scope

(a) The rules in this subchapter are promulgated by the Department of Commerce and Economic Development to implement P.L. 1983, Ch. 190, an Act establishing the Local Development Financing Fund.

(b) The Act provides for the establishment of a special depository fund for the purpose of providing financial assistance to certain commercial and industrial projects in certain municipalities who sponsor these projects.

(c) Applications and questions regarding participation in the program should be addressed to:

Office of Urban Programs
N.J. Department of Commerce and Economic
Development
1 West State Street
CN 829
Trenton, New Jersey 08625

(d) The Act applies to specified municipalities who sponsor certain commercial and industrial projects in those municipalities.

12A:12-2.2 Definitions

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

"Commissioner" means the Commissioner of the Department of Commerce and Economic Development or his designee.

"DCED" means the Department of Commerce and Economic Development.

"Director" means the Director of the Office of Urban Programs in the Department of Commerce and Economic Development.

"Eligible project" means a project which has been approved by the Commissioner to receive financial assistance from the Local Development Financing Fund.

"Eligible project cost" means the cost of planning, developing, executing and making operative and industrial or commercial redevelopment projects. Eligible project cost includes the cost:

1. Of purchasing, leasing, condemning, or otherwise acquiring land or other property, or an interest therein, in the designated project area or as necessary for a right-of-way or other easement to or from the project area;

2. Incurred for, or in connection with or incidental to acquiring and managing the land, property or interest;

3. Incurred for, or in connection with the relocating and moving of persons displaced by acquisition;

4. Of development or redevelopment, including:
 - i. The comprehensive renovation or rehabilitation of the land, property or interest;
 - ii. The cost of equipment and fixtures which are part of the real estate, and the cost of production machinery and equipment necessary for the operation of the project;
 - iii. The cost of energy conservation improvements designed to encourage the efficient use of energy resources, including renewable and alternative energy resources and cogenerating facilities; and
 - iv. The disposition of land or other property for these purposes;
 5. Of demolishing, removing, relocating, renovating, altering, constructing, reconstructing, installing or repairing any land or any building, street, highway, alley, utility, service or other structure or improvement;
 6. Of acquisition, construction, reconstruction, rehabilitation or installation of public facilities and improvements necessary to the project; and
 7. Incurred or incidental cost including but not limited to:
 - i. Administrative, appraisal and economic analysis;
 - ii. Engineering service;
 - iii. Planning service;
 - iv. Design service;
 - v. Architectural service;
 - vi. Surveying service; and
 - vii. Other professional service.
- "Financial assistance" means but is not limited to, loans, loan guarantees, grants, secondary mortgages, and equity participation provided by the fund.
- "Fund" means the Local Development Financing Fund.
- "Municipality" means a municipality qualifying for aid pursuant to the state formula for state aid to municipalities for services and to offset property taxes (see N.J.S.A. 52:27D-178)
- "Project" means an industrial or commercial enterprise within a municipality that would not be undertaken in its intended scope but for the assistance provided for under the Act and these rules.
- "Sponsor" means the governing body of a municipality or, with the approval of the government of the municipality, a local development corporation, community development corporation, municipal port authority, or governing body of a county, or, with the approval of the government of a county, a county development corporation or other public entity designated by the Commissioner as a sponsor. (See N.J.S.A. 40:68A-29)
- 12A:12-2.3 Application for financial assistance
- (a) Each application for financial assistance from the Fund shall be accompanied by a non-refundable application fee of \$250.00. The amount of the fee shall be established by the Commissioner annually.
 - (b) Each application for financial assistance from the Fund shall be accompanied with evidence of the support of the municipality in which the project is located. For purposes of these rules, evidence of municipal support shall mean an approved resolution of the governing body of the municipality.
 - (c) Each application for financial assistance from the Fund shall be accompanied by a benefit statement prepared by the municipality in which the project is located. The benefit statement shall address:
 1. The number of permanent jobs to be created in the municipality in which the project is located, excluding the period of construction or development;
 2. The number of jobs preserved by the completion of the project in the case of an existing enterprise;
 3. The increase in the valuation of real property in the municipality as a result of the completion of the project;
 4. Whether the project will result in the maintenance or provision of at least the same number of housing units at comparable rates as exists prior to the undertaking of the project;
 5. Whether the project will be located in an area targeted for economic development and receiving federal, state and/or local development assistance under other programs;
 6. The extent to which the project will contribute to an economic revitalization of the municipality and/or the region;
 7. The extent to which the project will advance State and/or regional planning and development strategies; and

8. The extent to which the location of the project is accessible to and promotes the use of public transportation.
- (d) Each application for financial assistance from the Fund shall be accompanied with evidence of private source or other public source financing commitments.
 - (e) Each application for financial assistance from the Fund shall be accompanied with evidence of all requisite federal and/or state environmental permits where necessary for the project.
 - (f) Each application for financial assistance from the Fund shall be accompanied by a minority business set-aside plan. (See N.J.A.C. 12A:12-2.7)
- 12A:12-2.4 Time for application for financial assistance from the Fund
- (a) An application for financial assistance from the Fund shall be submitted no later than:
 1. February 28, for first quarter round financial assistance awards;
 2. May 31, for second quarter round financial assistance awards;
 3. August 31, for third quarter round financial assistance awards; and
 4. November 30, for fourth quarter round financial assistance awards.
 - (b) All applications must be received by the Office of Urban Programs by the designated quarterly deadlines for consideration in that quarterly award round.
 - (c) The Commissioner may change any or all of the quarterly application deadlines as he deems necessary.
 1. When the Commissioner changes any or all of the dates for receipt of the financial assistance applications to the Fund he must forward by registered mail a timely notice of such action to municipalities which are eligible to be a sponsor under these rules.
- 12A:12-2.5 Financial assistance
- (a) No more than 20 percent of the total financial assistance provided from the Fund shall be in the form of grants or other non-lending assistance.
 - (b) The total amount of financial assistance provided to project applicants in any county during any year shall not exceed 20 percent of the appropriation made during that year to the Fund.
 - (c) No financial assistance from the Fund shall be granted to an individual applicant project unless at least 50 percent of the total eligible project cost consists of private resources. For purposes of these rules, private resources shall include but is not limited to:
 1. Conventional private sector mortgages;
 2. Purchase money mortgages;
 3. Industrial Revenue Bonds;
 4. Leases;
 5. Loans guaranteed by the federal Small Business Administration or similar loan guarantees of other government and/or quasi governmental entities; and
 6. Equity investments in the project.
 - (d) The Fund shall provide loans in the form of permanent subordinate mortgage financing for eligible project cost at or below market rates of interest, as determined by the Commissioner.
 - (e) The applicant shall secure interim financing on all projects involving construction, unless the DCED agrees otherwise in writing. The interim lender shall assume full responsibility for monitoring the construction of a project and for its timely completion. The interim lender may be the first mortgage lender or another experienced, qualified construction lender and shall be approved by the Department.
 - (f) The minimum loan amount from the Fund shall be \$50,000.
 - (g) The applicant shall have such equity in the project as the DCED may deem appropriate to insure the applicant's ability to repay the loan from the Fund.
 - (h) The applicant shall certify in writing that it is unable to provide additional funds in the project beyond its stated commitment and that without assistance from the Fund the project would be economically unviable and unable to proceed.
 - (i) Assistance other than loans from the Fund may be approved where the DCED deems such assistance necessary to the success of the project. Such assistance shall not be provided for projects that can be funded by loans.

PROPOSALS

Interested Persons see Inside Front Cover

12A:12-2.6 Evaluation of grant applications

(a) The Office of Urban Programs shall evaluate and rank each application for financial assistance considering the following factors:

1. The number of unemployed persons to be employed in the municipality in which the project is located;

2. The number of permanent full-time jobs to be located and/or maintained directly by the project, excluding the period of construction or development;

3. The number of jobs preserved by the completion of the project for an existing enterprise that otherwise would leave the State but for the LDFF;

4. The increase in the valuation of real property in the municipality as a result of the completion of the project;

5. The percentage of the total eligible project costs to be financed from private and/or other public resources;

6. Whether the project results in the maintenance or provision of at least the same number of housing units at comparable rates that exist prior to the undertaking of the project within the municipality or surrounding area;

7. Whether the project will be located in an area targeted for economic development and/or is receiving federal, state and/or local development incentives under other programs;

8. The extent to which the project will contribute to an economic revitalization of a municipality or region, and will promote or add to the rehabilitation of the physical environment of the immediate area or municipality in which it is to be located;

9. The degree to which the project will facilitate the advancement of State or regional planning development strategies;

10. The extent to which the locations of the project is accessible to and/or promotes the use of public transportation;

11. The degree of support for, participation in, and/or consultation with the community in which the project will be located in the planning of the project;

12. The likelihood that the project will create and/or preserve private sector jobs, which jobs will last for a period of over two years; and

13. The likelihood that the project will result in providing a significant increase in the real property tax base of the municipality in which the project is located.

(b) After the evaluation and ranking is completed, the Office of Urban Programs shall forward to the Commissioner for his review and approval those projects evaluated by the Office of Urban Programs.

(c) All awards of financial assistance from the Fund for eligible projects shall be made on a quarterly basis. All awards shall be announced by the application deadlines for the new quarters. (See N.J.A.C. 12A:12-2.4(a))

12A:12-2.7 Minority business set aside plans and requirements

(a) Each project approved to receive financial assistance from the Fund shall set aside not less than 10 percent of the aggregate project construction costs for the purpose of providing contracting opportunities for minority businesses.

(b) The developer and/or general contractor of the project shall identify the minority business that will participate in the project by construction trade, together with the contract sum to be paid to each minority business.

(c) In determining compliance with these goals, a developer and/or general contractor may only utilize those minority businesses duly approved and registered pursuant to the Set-Aside Act for Small Businesses, Female Businesses and Minority Businesses, N.J.S.A. 52:32-17 (See N.J.A.C. 12A:10-1)

12A:12-2.8 Rescission of financial assistance from the Fund

(a) The Commissioner may at his discretion rescind part or all of the financial assistance from the Fund when it has become evident after the granting of financial assistance that:

1. The commitment of other financial resources from private sources has been withdrawn;

2. The project is judged no longer capable of repaying the Fund for the financial assistance it has received;

3. The project is judged incapable of achieving its set aside requirement, pursuant to N.J.A.C. 12A:12-2.7, or that the project is not

COMMERCE AND ECONOMIC DEVELOPMENT

employing good faith efforts to achieve the requirements under N.J.A.C. 12A:12-2.7; or

4. The participants in the project are found not to be of a good moral character. Good moral character shall include but not be limited to convictions of felony offenses and/or conduct of the applicant which may be viewed in a nonfavorable light by a reasonable person.

(b) Upon determination of the Commissioner that financial assistance from the Fund shall be rescinded, the DCED shall send a certified letter to the project and the sponsor informing them of the rescission and the right of the project to appeal the decision.

12A:12-2.9 Appeals of rescission of financial resources from the Fund

(a) An appeal of rescission of financial assistance from the Fund shall be made in writing to the Department of Commerce and Economic Development.

(b) An appeal of rescission of financial assistance shall only address those reasons as stated in the notification to the project for the rescission.

(c) The project shall have 14 calendar days from the receipt of the notification of rescission for financial assistance from the Fund to file an appeal with the DCED.

(d) The DCED shall schedule within 21 calendar days, if deemed necessary, an administrative review for an appeal which is received within the specified time period.

(e) The DCED shall notify all interested parties of the time and place of the administrative review and the right to attend and be represented at the administrative review.

(f) The administrative review will be conducted by the designee of the Commissioner. This designee shall issue a written report to the Commissioner within seven calendar days of the close of the administrative review.

(g) Thereafter, the Commissioner shall issue a final decision on the appeal and notify the parties by certified letter.

(a)

DIVISION OF ENERGY PLANNING AND CONSERVATION

Cogeneration Planning and Reporting

Proposed New Rules: N.J.A.C. 12A:50-1

Authority: N.J.S.A. 52:27F-18, 11, and 15(b).

Proposal Number: PRN 1987-521.

Submit comments by January 20, 1988 to:

Edward J. Linky

Chief Regulatory Officer

Division of Energy Planning and Conservation

101 Commerce Street

Newark, New Jersey 07102

The agency proposal follows:

Summary

These rules establish a duty on the part of all non-utility generators, primarily cogenerators, to make a timely filing of required data with the Division of Energy Planning and Conservation. The information required will include data and documentation concerning the size of the equipment, fuel input, steam load, electric output, its location, operation and fuel type(s).

The rules are sensitive to administrative burdens placed on an infant industry and also the need to protect proprietary information associated with the project. The Division has adopted rules for the protection of confidential information (see N.J.A.C. 14A:7.1 et seq.) and is prepared to protect information received pursuant to these rules, consistent with those procedures.

This information will be used by the Cogeneration Center in the Division to track the development of non-utility generation projects, assist projects facing regulatory delays and integrate cogeneration into the Division's energy planning responsibilities (see N.J.S.A. 52:27F-18). Specifically, the information will be used in assessing how much cogenerated electricity can be expected over a period of years. This information will be vital to the update of the existing Energy Master Plan which is required by 1988 (see N.J.S.A. 52:27F-14). These rules apply

to those facilities which have received "qualifying facility" status from the Federal Energy Regulatory Commission as well as other non-utility generation projects.

Social Impact

The proposed new rules will have a positive social impact. They will assist the Division of Energy Planning and Conservation in maintaining an accurate data base on existing and planned non-utility generation projects in the State. Promotion of cogeneration is a principal policy of the Energy Master Plan. The Plan further identifies cogeneration as a major component of a "least cost energy strategy" for the State's electric utilities. The social goal of trying to reduce energy costs to the electric consumers of the State while improving air quality will be accomplished to the extent that these rules promote the orderly development of the cogeneration industry in the State.

Economic Impact

The cornerstone behind the Energy Master Plan and its promotion of cogeneration is the reduction of electric rates for the State. Moreover, the commercial and industrial sectors can benefit from lower total energy costs from the more efficient utilization of fuel to produce useful thermal energy and electricity. These reduced energy costs help preserve jobs by fostering a more attractive economic climate in which existing industries may consider expansion and others may consider relocating to the State. In addition, these rules are intended to ensure that the orderly issuance of permits attends such projects and that undue bureaucratic delays do not add unnecessary costs to the project.

Environmental Impact

Non-utility generation, and in particular cogeneration, is a means of providing additional peak and base load generating capacity and hold the potential for reducing certain types of air pollutant emissions in the state on a more cost effective basis than is current practice. These rules will allow the Division to monitor the development of non-utility projects.

Regulatory Flexibility Statement

The proposed new rules apply to small businesses, which should not be exempt from the rules, as State energy planning would not be effectively accomplished without the data required by the rules. The reporting requirements are designed to provide minimum administrative burden for the cogeneration industry, and are only for state energy planning purposes.

Full text of the proposed new rules follows.

CHAPTER 50 COGENERATION

SUBCHAPTER 1. NON-UTILITY GENERATION REPORTING

12A:50-1.1 Purpose and scope

(a) The purpose of the rules in this chapter is to assist the Division in promoting cogeneration and other alternative electricity generation, collectively known as non-utility generation. Further, the Division can represent the public's interest in having available to it reliable, affordable, and environmentally-sound energy sources. The rules have been written to impose only minimal reporting requirements on the non-utility generating industry.

(b) The rules will also enable the Division to determine appropriate action to facilitate the maximum feasible use of non-utility generation, calculate its potential development and its impact on meeting current and prospective demands for energy, devise plans for meeting State electric energy needs in the most cost-effective and environmentally sound manner, and generally assist the Division, the Department and the public in assessing New Jersey's energy future.

12A:50-1.2 Applicability

The reporting requirements of this subchapter shall apply to owners/operators of non-utility generation facilities. There are complementary reporting requirements for gas distribution companies and electric utilities operating within the State.

12A:50-1.3 Definitions

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

"Cogeneration" means and includes all forms of simultaneous or sequential production of electricity and useful thermal energy from

a single fuel and as further defined in the Public Utilities Regulatory Policy Act, 16 U.S.C.A. Sec. 796 (18)(A) (West Supp. 1892) and regulations promulgated by the Federal Energy Regulatory Commission (FERC), 18 C.F.R. 292.101.

"Non-utility generation" means and includes all cogeneration, small power production and any other electric generating equipment of which 50 percent or less is owned by an electric utility.

"Qualifying facility (QF)" means a cogeneration facility or a small power production facility which is a qualifying facility under Subpart B of the regulations promulgated by the Federal Energy Regulatory Commission, 18 C.F.R. 292.101.

12A:50-1.4 Duty to file non-utility generation reports with the Division

(a) Each owner/operator of a non-utility generation facility located within the State of New Jersey shall file with the Division within 30 days: after the effective date of this subchapter; after filing with the appropriate agency(ies); and after updates, as necessary:

1. A copy of FERC QF Application or Self-Certification;
2. A copy of New Jersey Department of Environmental Protection Air Quality Permit Application;
3. A copy of contract(s) with the New Jersey Board of Public Utilities (BPU);
4. A list of other agency(ies) contacted and permits required;
5. A schedule of key dates for financing and permitting as well as for start and completion of construction and start of operation.

(b) Each non-utility generation facility shall file with the Division within 30 days after the end of each calendar year, or more often if so requested, a report setting forth information in a format to be prescribed by the Division, including but not limited to:

1. Heat rate;
2. Fuel use;
3. Installed electrical capacity and thermal output(s);
4. Efficiency(ies);
5. Hours of operation;
6. Capacity factor;
7. Forced and planned outages;
8. Total electrical energy produced, used on site, sold to a utility or to any other customer or wheeled to another user; and
9. Cost of back-up power and revenues received.

(c) Each electric utility shall file with the Division:

1. Annually, within 30 days of the end of the calendar year, a report setting forth information in a form and/or format to be prescribed by the Division, including but not limited to:

- i. Description of energy cost estimation methodology;
- ii. Fifteen-year fuel cost summary;
- iii. Current load forecast;
- iv. NJDOE OTA/EFL;
- v. Twenty-year capacity forecast;
- vi. Cost of capacity additions;
- vii. Company discount rate;
- viii. Fifteen-year forecast of avoided energy costs;
- ix. Fifteen-year forecast of production costs by fuel source;
- x. Fifteen-year forecast of fuel escalation factors; and
- xi. Fifteen-year forecast of avoided capacity costs.

2. Monthly, by the end of the month following the reporting month, reports setting forth information in a form and/or format to be prescribed by the Division, including but not limited to:

- i. Actual payments to non-utility generation facilities; and
- ii. Prior month's rate and projected rates for the next three months.

(d) Each gas distribution company shall file with the Division by the end of the month following the reporting month, a report setting forth information in a form and/or format to be prescribed by the Division, including but not limited to:

1. Sales,
2. Transportation volumes and revenues by rate schedule to non-utility generation facilities.

(e) The filing shall be made to the Cogeneration Center, New Jersey Division of Energy Planning and Conservation, State Department of Commerce and Economic Development, 101 Commerce Street, Newark, New Jersey 07102.

12A:50-1.5 Notification of intent to cease non-utility generation

The owner/operator shall notify the Division as soon as practicable of its date to cease operation of its non-utility generation.

LAW AND PUBLIC SAFETY

NEW JERSEY RACING COMMISSION

The following proposals are authorized by Charles K. Bradley, Deputy Director, New Jersey Racing Commission.

Submit comments by January 20, 1988 to:
Charles K. Bradley, Deputy Director
New Jersey Racing Commission
Justice Complex
CN 088
Trenton, New Jersey 08625

(a)

Thoroughbred Rule Trifecta

Proposed Amendment: N.J.A.C. 13:70-29.53.

Authority: N.J.S.A. 5:5-30.

Proposal Number: PRN 1987-523.

The agency proposal follows:

Summary

The proposed amendment will allow the track associations to conduct trifecta wagering when there are seven horses entered instead of the present limitations of nine horses for the conduct of trifecta wagering.

Social Impact

The proposed amendment will allow the track associations the flexibility of conducting trifecta wagering when they have at least seven horses entered in races. The proposed amendment allows the track associations to provide the betting public with better quality fields for trifecta wagering. The competition for quality horses throughout the United States is very acute, and it is difficult for the track associations to have large fields of high quality horses in competition. This amendment would have a positive impact on the wagering public by permitting the racing associations to schedule more diversified races as trifecta wagering events.

Economic Impact

The economic impact of the proposed amendment is a positive one for the track associations and the competing horsemen. The scratching of horses before wagering begins on trifecta races sometimes prevents the track associations from conducting trifecta wagering, since the present rule mandates that there must be at least nine entries. In these cases, the tracks must conduct exacta wagering which has a different pari-mutuel take-out than trifecta wagering, which results in lost revenues to the track associations and to the competing horsemen in the form of purses.

Regulatory Flexibility Statement

The track associations regulated by this rule employ more than one hundred employees; therefore, the rule does not apply to small businesses and a regulatory flexibility analysis is not required.

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

13:70-29.53 Trifecta

(a) (No change.)

(b) Trifecta tickets shall be sold in not less than \$2.00 denominations and only from machines capable of issuing three numbers. Nothing in this section shall preclude any permit-holders from the sale of combination trifecta tickets in the amount of [46.00] **\$6.00**.

(c) Races in which trifecta pools shall be conducted shall be approved by the [c]Commission and shall be clearly designated in the program.

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

(h) Where a field in a trifecta race [in thoroughbred racing] is less than [nine] **seven** at wagering time [or where a field in a trifecta race in harness racing is two or more horses short of filling the available

positions of the starting gate at wagering time,] said race will be run as an exacta. A late scratch after wagering starts will not affect the trifecta.

(i) (No change.)

(b)

Harness Rule Trifecta

Proposed Amendment: N.J.A.C. 13:71-27.50.

Authority: N.J.S.A. 5:5-30.

Proposal Number: PRN 1987-522.

The agency proposal follows:

Summary

The proposed amendment will allow the track associations to conduct trifecta wagering when there are seven entries in races. The present rule provides for cancellation of trifecta wagering when there are two or more horses short of filling the available positions of the starting gate at wagering time. This amendment will allow for uniformity since the starting gate at a mile track has ten positions and the starting gate at a half-mile track only has eight positions.

Social Impact

The proposed amendment will allow the track associations the flexibility of conducting trifecta wagering when they have at least seven horses entered in races. The proposed amendment allows the track associations to provide the betting public with better quality fields for trifecta wagering. The competition for quality horses throughout the United States is very acute, and it is difficult for the track associations to have large fields of high quality horses in competition. This amendment would have a positive impact on the wagering public by permitting the racing associations to schedule more diversified races as trifecta wagering events.

Economic Impact

The economic impact of the proposed amendment is a positive one for the track associations and the competing horsemen. The scratching of horses before wagering begins on trifecta races sometimes necessitates the track associations from conducting trifecta wagering since the present rule mandates that there must be at least nine entries. In these cases, the tracks must conduct exacta wagering which has a different pari-mutuel take-out than trifecta wagering which results in lost revenues to the track associations and to the competing horsemen in the form of purses.

Regulatory Flexibility Statement

The track associations regulated by this rule employ more than one hundred employees; therefore, the rule does not apply to small businesses and a regulatory flexibility analysis is not required.

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

13:71-27.50 Trifecta

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

(h) Where a field in a trifecta race [in thoroughbred racing] is less than [nine] **seven** at wagering time, [or where a field in a trifecta race in harness racing is two or more horses short of filling the available positions of the starting gate at wagering time,] said race will be run as an exacta. A late scratch after wagering starts will not affect the trifecta.

(i) (No change.)

TREASURY-GENERAL

(a)

DIVISION OF PENSIONS

Public Employees' Retirement System
Interfund Transfers

Proposed Amendment: N.J.A.C. 17:2-7.1

Authorized By: Janice Nelson, Secretary, Public Employees'
Retirement System.

Authority: N.J.S.A. 45:15A-17.

Proposal Number: PRN 1987-511.

Submit comments by January 20, 1988 to:

Peter J. Gorman, Esq.
Administrative Practice Officer
Division of Pensions
20 West Front Street
CN 295
Trenton, New Jersey 08625

The agency proposal follows:

Summary

The proposed amendment will permit members of the retirement system for service prior to the date of enrollment in the Public Employees' Retirement System (PERS) to transfer the credit to PERS at any time. At present, such transfers must be done at the time of enrollment in PERS and a transfer cannot be made by a person who has been granted a deferred retirement in the other system. This amendment will permit transfers in cases of deferred retirement and at any time after enrollment in PERS, provided that the person did not continue to earn service credit in the other system after enrollment in PERS. For persons who make the transfers at the time of enrollment in PERS, their contribution rate will be based upon their age at the time of enrollment in the other system, subject to commutation in cases of deferred retirement. The contribution rate for persons who do not make timely transfers will be based upon their age at the time of enrollment in PERS.

Social Impact

The proposed amendment will benefit the members of PERS and the other State-administered retirement systems because it liberalizes the rules concerning transfers of service credit among the systems.

Economic Impact

No economic impact on the retirement system or its beneficiaries is anticipated from the adoption of this proposal since the amendment simply concerns transfers of service credit.

Regulatory Flexibility Statement

The rules of the Public Employees' Retirement System affect only public employers and employees. Thus, this proposed amendment will not have any effect upon small businesses or private industry in general. A regulatory flexibility analysis is therefore not required.

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

17:2-7.1 Interfund transfers; State-administered retirement systems

(a) The system will transfer membership to any State-administered retirement system as follows:

1.-4. (No change.)

5. This procedure would not apply where a member [does not make a timely transfer in accordance with N.J.S.A. 43:2-1 et seq. or who has been granted a deferred retirement allowance by the present system] **has credit in the present system for service after the date of enrollment in the new system.**

6. (No change.)

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

(d) [The] **A member who makes a timely transfer in accordance with N.J.S.A. 43:2-1 et seq.** will contribute to the new system at a rate based on his or her age at the time of enrollment in the present system and no refund of pension contributions will be made except for those contributions made by veterans covering service prior to January 1, 1955, where applicable. **The contribution rate for a member granted a deferred retirement in the present system who makes a timely transfer**

at the time of enrollment in the new system will be determined in accordance with the rules concerning enrollment after deferred retirement in the new system. A member who does not make a timely transfer will contribute to the new system at a rate based on his or her age at the time of enrollment in the new system.

OTHER AGENCIES

(b)

HACKENSACK MEADOWLANDS DEVELOPMENT
COMMISSION

District Zoning Regulations

Proposed Amendments: N.J.A.C. 19:4-4.35, 4.39,
and 4.41

Authorized By: Anthony Scardino, Executive Director,
Hackensack Meadowlands Development Commission.

Authority: N.J.S.A. 13:17-1 et seq., specifically 13:17-6(i).

Proposal Number: PRN 1987-517.

A **public hearing** concerning this rule will be held on January 7, 1988 at 10:00 A.M. at:

Hackensack Meadowlands Development Commission
One DeKorte Park Plaza
Lyndhurst, New Jersey 07071

Submit comments by January 20, 1988 to:

Thomas R. Marturano, Acting Chief Engineer
Hackensack Meadowlands Development Commission
One DeKorte Park Plaza
Lyndhurst, New Jersey 07071

The agency proposal follows:

Summary

The proposed amendments to the Hackensack Meadowlands District Zoning Regulations would allow residential development as another permitted use in the Waterfront Recreation zones.

Social Impact

The provision for residential development in the Waterfront Recreation zones would create new areas for housing in the Meadowlands District. Housing vacancies are very low in the vicinity of the Meadowlands and the need for housing, especially affordable housing, is great. The proposed amendments would provide the opportunity for additional housing areas in the District.

Economic Impact

The proposed amendments are consistent and compatible with other housing developments and uses along the Hackensack River. Based on a fiscal impact study, a maximum density of 15 dwelling units to the acre was selected to provide the communities of the District with the most equitable economic benefits overall.

Regulatory Flexibility Statement

The effect of this proposal would be to increase the permitted uses in the Waterfront Recreation zone of the Meadowlands District to allow residential development. The proposal will have no impact on small businesses, therefore no regulatory flexibility analysis is required. The zoning change will affect the property owners in a beneficial manner in that it increases the potential use of the affected properties. No recordkeeping or bookkeeping is required.

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

19:4-4.35 Waterfront recreation zone; required marina and other permitted uses

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

(c) When included with a marina meeting the minimum requirements set forth in (a) above, the following uses shall be permitted:

1.-4. (No change.)

5. Residential development: any type of structure containing dwelling units may be built except single family houses, duplexes and two-family houses.

PROPOSALS

Interested Persons see Inside Front Cover

OTHER AGENCIES

19:4-4.39 Waterfront recreation zone; bulk regulations

(a) The bulk regulations in the waterfront recreation zone are:

1.-5. (No change.)

6. Maximum gross density of 15 dwelling units per acre of which 50 percent shall be in townhouse or other low-rise development.

19:4-4.41 Waterfront recreation zone; environmental performance standards

(a) All uses in the waterfront recreation zone shall comply with

the following environmental performance standard categories of Subchapter 6:

1.-2. (No change.)

3. Residential development: all category "A" environmental performance standards shall apply;

4.[3.] (No change in text.)

5.[4.] (No change in text.) _____

RULE ADOPTIONS

ADMINISTRATIVE LAW

(a)

OFFICE OF ADMINISTRATIVE LAW

Uniform Administrative Procedure Rules Transmission of Contested Cases to OAL

Adopted Amendment: N.J.A.C. 1:1-8.2

Proposed: October 5, 1987 at 19 N.J.R. 1761(a).

Adopted: November 19, 1987 by Ronald I. Parker, Acting
Director, Office of Administrative Law.

Filed: November 23, 1987 as R.1987 d.519, **without change**.

Authority: N.J.S.A. 52:14f-5(e); (f) and (g).

Effective Date: December 21, 1987.

Expiration Date: May 4, 1992.

Summary of Public Comments and Agency Responses:

The OAL received only one comment, which was from the Department of Personnel and which supported the proposed amendment. Therefore, the proposal is being adopted without change.

Full text of the adoption follows.

1:1-8.2 Transmission of contested cases to the Office of
Administrative Law

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

(d) If there was a previous hearing in a matter which upon appeal is subject to de novo review, the agency shall not transmit the record of the previous hearing to the Office of Administrative Law.

(e) (No change in text.)

(f) (No change in text.)

(b)

OFFICE OF ADMINISTRATIVE LAW

Uniform Administrative Procedure Rules Sanctions: Failure to appear; Failure to comply with Orders or Chapter Requirements

Adopted Amendment: N.J.A.C. 1:1-14.4

Proposed: September 8, 1987 at 19 N.J.R. 1591(b).

Adopted: November 20, 1987 by Ronald I. Parker, Acting
Director, Office of Administrative Law.

Filed: November 23, 1987 as R.1987 d.506, **with substantive and technical changes** not requiring additional notice and comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 52:14F-5(e), (f) and (g).

Effective Date: December 21, 1987.

Expiration Date: May 4, 1992.

Summary of Public Comments and Agency Responses:

The OAL received comments from the Department of Personnel and the Attorney General's office. Both were concerned about how the rule would be applied and under what circumstances the judge would take proofs. The OAL has assured both commenters that the proposed amendment was not intended to change existing practice at OAL hearings; rather, the change was meant to clarify that proofs may be taken only in the few limited situations where they had been taken before the recent adoption of the revised Uniform Administrative Procedure Rules (N.J.A.C. 1:1 et seq.). No change in practice was intended by the proposal.

The Attorney General's office was particularly concerned that proofs might be required in cases where an agency could have taken action but for a hearing request. The Attorney General's position was that proofs should not be required when the person who requested that hearing then fails to appear. Currently, this is the practice and it will continue. To make certain that the OAL did not mislead litigants by overly emphasizing

ing the possible need for taking proofs in failure to appear situations, the OAL has decided to eliminate from the adoption the sentence specifically referring to proofs. The rule will therefore indicate only that the judge may dismiss the matter or grant the request relief after ten days if the judge does not receive an explanation for the nonappearance. Thus, the OAL adoption is merely intended to clarify that the judge may, in those limited and rare occasions when the case or circumstances so warrant, direct the party who is present at the hearing to present some proofs. The adoption is not an invitation to require proofs when such is neither warranted nor necessary. As is currently the practice when proofs are taken, the judge will ensure that the parties who are present are not caused unnecessary expense and inconvenience. Proofs when necessary will continue to be taken in the least burdensome manner possible. For example, if the pleadings contain a verified complaint, testimony may not be necessary. If testimony is required, it will be taken summarily, as quickly as possible.

Full text of the adoption follows (deletions from proposal shown in brackets with asterisks *[thus]*).

1:1-14.4 Sanctions: failure to appear; failure to comply with orders or requirements of this chapter

(a) If a party or representative fails to appear at any proceeding scheduled by the Clerk or judge, the judge shall hold the matter for 10 days before taking any action. If the judge does not receive an explanation for the nonappearance within 10 days, the judge may dismiss the matter or grant the requested relief. *[The judge may, in his or her discretion, require proofs in support of the proposed action prior to dismissing the matter or granting the requested relief.]* The initial decision shall note that the dismissal or relief is granted because the party failed to appear. If the nonappearing party submits an explanation in writing, a copy must be served on all other parties and the other parties shall be given an opportunity to respond.

1.-2. (No change.)

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

COMMUNITY AFFAIRS

(c)

DIVISION OF HOUSING AND DEVELOPMENT

Relocation Assistance Lawful Occupancy and Eligibility

Adopted Amendments: N.J.A.C. 5:11-1.2 and 2.1

Proposed: September 8, 1987 at 19 N.J.R. 1596(a).

Adopted: November 12, 1987 by Leonard S. Coleman, Jr.,
Commissioner, Department of Community Affairs.

Filed: November 19, 1987 as R.1987 d.518, **with substantive changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 20:4-10 and 52:31B-10.

Effective Date: December 21, 1987.

Expiration Date: March 1, 1989.

Summary of Public Comments and Agency Responses:

A comment was received from Legal Services of New Jersey which made the following recommendations:

1. That "lawful occupant" be defined as "a person whose occupancy of a dwelling unit or property is recognized by the owner or the owner's predecessors and is not the result of a trespass or unauthorized sublease or agreement. Where there has been no prosecution under N.J.S.A. 20:4-4.1, an occupancy shall be presumed lawful for purpose of relocation benefits unless it is established by agreement or by administrative hearing that the code violation was primarily attributable to the conduct of the tenant."

2. That proposed rule N.J.A.C. 5:11-2.1(d) be amended by addition of the following language: "unless that person did not know of the violation at the time it was created, or the tenancy was commenced,

whichever occurred later, the conduct was approved or acquiesced in by the owner or the municipality or its agents or the conduct was legally required or constitutionally protected."

3. That N.J.A.C. 5:11-2.1(b), which was not proposed to be amended, be amended to eliminate the provision denying relocation benefits to persons displaced under an imminent hazard vacate order issued pursuant to the State Uniform Construction Code Act.

The Department believes that the text as proposed clearly encompasses the requirements, set forth in *Haddock et al v. Department of Community Development, A-1908-85T1*, that "the occupancy must be lawful in the sense that it is not the result of a trespass or unauthorized sublease, but one recognized by the owner; and the Code violation must be one not primarily caused by the occupant's own conduct but by factors for which the landlord is liable under N.J.S.A. 20:4-4.1." For purposes of clarification, additional language from the decision is being added to N.J.A.C. 5:11-2.1(d). However, the rules are not being so amended as to go beyond the decision, since the stated purpose of the amendment was to conform the rules to the decision.

With regard to the comment that the prohibition on State-funded relocation assistance for persons displaced by imminent hazard vacate orders under the State Uniform Construction Code ought to be repealed, the Department points out that P.L. 1981, c.491 provides for optional municipal relocation assistance, without State reimbursement unless otherwise provided in the annual appropriations act, for a tenant in a dwelling of two or more units as a result of "fire or other emergency" when the official having jurisdiction finds the dwelling to be uninhabitable. The Department considers a structural defect that is so hazardous as to necessitate a vacate order to be within the meaning of "other emergency" as used in P.L. 1981, c.491.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks *thus*).

5:11-1.2 Definitions

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

...

"Lawful occupant" means a person whose occupancy of a dwelling unit or property is recognized by the owner and is not the result of a trespass or unauthorized sublease or assignment.

...

5:11-2.1 Building, housing and health code enforcement

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

(c) An owner-occupant who is displaced by health, building or housing code enforcement shall be entitled to the benefits applicable to tenants only.

(d) No person displaced by code enforcement shall be eligible for benefits if the code violation which resulted in displacement was primarily caused by that person's own conduct ***and not by factors for which the owner is liable under N.J.A.C. 20:4-4.1.**

1. In the event that there has been no prosecution of the owner under N.J.S.A. 20:4-4.1, a displaced lawful occupant shall be presumed to be eligible for relocation benefits unless it is established by agreement or by administrative hearing that the code violation was primarily attributable to conduct of the displaced person.*

(a)

DIVISION OF HOUSING AND DEVELOPMENT

Uniform Construction Code

Asbestos Hazard Abatement Subcode

Adopted Amendments: N.J.A.C. 5:23-8.1 through 8.8, 8.10 through 8.13, 8.15 through 8.18, 8.21

Proposed: June 1, 1987 at 19 N.J.R. 902(a).

Adopted: November 23, 1987 by Leonard S. Coleman, Jr., Commissioner, Department of Community Affairs.

Filed: November 24, 1987 as R. 1987 d.525, with technical changes not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

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

Effective Date: December 21, 1987.

Expiration Date: April 1, 1988.

Summary of Public Comments and Agency Responses:

The Department received one letter commenting on this proposal. The commentor recommended that the statement that these regulations are not intended to conflict with or impede the regulations of the Occupational Safety and Health Administration be expanded to include the Asbestos Subchapter of the New Jersey Safety and Health Standards for Public Employees. This has been incorporated into N.J.A.C. 5:23-8.1(e).

State-managed buildings were reinstated into the scope of the regulations at the request of Mr. Bill Tipton of the Department of Treasury who manages these buildings. N.J.A.C. 5:23-8.1(c), 8.2, 8.3(a)1.i.

Several changes were instituted by the Department to streamline the operation of this system. A change in N.J.A.C. 5:23-8.5(a)1, further defines the information that must be provided when a request for an occupancy variance is submitted to the Department. Another change in N.J.A.C. 5:23-8.15(a), requires the Asbestos Safety Technician (AST) to notify the Department whenever the AST changes employers. A third change, in N.J.A.C. 5:23-8.11(b)3., clarifies the point at which general employees can remove books, equipment, etc. from an area proposed for an Asbestos Hazard Abatement Project. A fourth change, in N.J.A.C. 5:23-8.10(b)1., requires the doors of a decontamination unit and airlock system to have a minimum width of four feet. Since this requirement is met routinely it will have a minimum effect on contractors.

Most of the other changes from the proposed amendments are administrative in nature. Many Asbestos Safety Control Monitor (A.S.C.M.) firms, in a meeting between the Department and these firms, verbally expressed difficulty with meeting the designated time periods for submission of final reports, etc. In most cases the Department lengthened the allowable time periods for these administrative requirements.

Other changes in the proposal were made to clarify the intent and language of the rules.

The following is a detailed description of these changes in the proposal.

N.J.A.C. 5:23-8.1(c)1. The Department further clarified the intent of this paragraph to prevent any misinterpretation which could result in possibly contaminating a day care center, nursery or educational facility.

N.J.A.C. 5:23-8.1(c)2. The Department included common areas in State-leased buildings that would be included in the scope of these rules because State employees would normally transverse these areas and/or these areas contain mechanical equipment that services areas under the jurisdiction of these rules.

N.J.A.C. 5:23-8.2. The Department further clarified the following definitions: "Airlock", "Minor asbestos hazard abatement job" and "State facility".

N.J.A.C. 5:23-8.4(b). The Department removed the time designation of two days for the maintenance/custodial/worker training course since the length of this course can be changed by a directive of the Department.

N.J.A.C. 5:23-8.5(a)1. The Department further defined the information that must be provided when a request for an occupancy variance is submitted to the Department. The Department of Health, which must also approve this variance, would ask for this information during a review of the variance request. This resulted in a 2 or 3 week delay in the variance procedures. The Department now requests this information with the initial request so as to minimize this delay.

N.J.A.C. 5:23-8.6(b)3. The Department added this paragraph to ensure that the Department receives proper notification whenever there is a change in the Asbestos Safety Control Monitor, the licensed Asbestos Contractor and/or the registered waste hauler on a project and to ensure that the replacement firm is aware that it assumes all responsibilities for the asbestos work to continue and that the preceding firm still bears responsibility for its action.

N.J.A.C. 5:23-8.10(a)7. The Department deleted the use of waste shower water as a wetting agent when it was pointed out by many ASCM firms that this could cause the spread of germs because of the unsanitary practices of some workers.

N.J.A.C. 5:23-8.10(b)1. The Department set a minimum width for doors and a minimum distance between sets of flaps in the decontamination chamber at the request of the ASCM firms to make it easier to enforce. Since this requirement is met routinely it will have a minimum effect on contractors.

N.J.A.C. 5:23-8.10(c)2. The Department further, as the result of discussions with ASCM firms, clarified the point at which general employees can remove books, equipment etc. from an area proposed for an Asbestos Hazard Abatement Project.

N.J.A.C. 5:23-8.10(d)2 and 3. The Department reverted to the rule as it previously existed, deleting proposed additional requirements for isola-

tion and barrier construction which it determined should not be included in the rule.

N.J.A.C. 5:23-8.11(b)3. The Department further delineated who should remove furniture and moveable equipment from a proposed work area in order to remove any misinterpretation of this requirement in the field.

N.J.A.C. 5:23-8.15(a). The Department imposed the requirement that the Asbestos Safety Technician (AST) inform the Department who his employer is at the time he applies for certification and within 10 days of any change of employment. This will aid the Department in performing the Quality Assurance Program.

N.J.A.C. 5:23-8.15(g)2. The Department added the use of leaf blowers along with the criteria for their use in simulating normal occupancy. This was added at the request of the Department of Health. Since this has been routinely practiced in the field it will not have a significant effect on any of the parties involved with asbestos abatement.

N.J.A.C. 5:23-8.16(b). The Department clarified this subsection by limiting it to buildings and structures that are subject to this subchapter. It further allowed the waiver of a health assessment.

The following administrative changes were made as the result of a meeting between the Department and ASCM firms.

N.J.A.C. 5:23-8.17(c)1.i. Since the ASCM, in most cases, does not obtain the permit, the requirement for the ASCM to provide a copy of the permit and application has been deleted. In its place the ASCM firm is required to provide the Department with a copy of the plan release and any variation request submitted to the administrative authority having jurisdiction.

N.J.A.C. 5:23-8.17(c)1.ii. The time allowed for notification of personnel changes has been lengthened from 10 days to 30 days.

N.J.A.C. 5:23-8.17(c)3.ii. This reaffirms the time requirement in N.J.A.C. 5:23-8.17(c)1.i. for the submission of the plan release to the Department.

N.J.A.C. 5:23-8.17(c)3.xiii. The Department clarified the rule requiring the ASCM firm to maintain additional documentation and certification.

N.J.A.C. 5:23-8.17(c)3.xv. The Department lengthened the time allowance for the submission of the final report from 20 days to 30 days.

N.J.A.C. 5:23-8.17(h)1. and 2. The Department determined that monies obtained from the preparation of plans and specifications are not to be included in the calculation of the Quarterly Fees for the ASCM firms.

N.J.A.C. 5:23-8.18(d)3. and 5. The Department clarified the requirements for an Asbestos Safety Technician (AST).

N.J.A.C. 5:23-8.21(e). The Department clarified that the asbestos safety control monitor may require air monitoring samples and final samples for a small asbestos abatement job, consistent with N.J.A.C. 5:23-8.11.

Full text of the adoption follows (additions to proposal indicated in bold face with asterisks *thus*; deletions from proposal indicated in brackets with asterisks *[thus]*).

5:23-8.1 Title; scope; intent

(a) This part of the regulations, adopted pursuant to c.217, P.L. 1975, the Uniform Construction Code Act (N.J.S.A. 52:27D-119 et seq.) and entitled Asbestos Hazard Abatement Subcode shall be known and may be cited throughout the regulations as N.J.A.C. 5:23-8 and when referred to in this subchapter, may be cited as "this subchapter."

1. In addition, the New Jersey Departments of Health and Labor have jointly adopted regulations pursuant to c.217, P.L. 1984, the Asbestos Control and Licensing Act (N.J.S.A. 34:5A-32 et seq.) and are cited as N.J.A.C. 8:60, and N.J.A.C. 12:120, respectively. These regulations provide for: a standardized training course for all asbestos workers; licensing of asbestos removal contractors; and issuing work-permits for asbestos removal workers.

i. Copies of N.J.A.C. 8:60 may be obtained from the New Jersey Department of Health, Asbestos Control Program, Division of Occupational and Environmental Health, CN 360, Trenton, New Jersey 08625-0360.

ii. (No change.)

2. The New Jersey Department of Environmental Protection has authority to enforce regulations regarding the transport and disposal of asbestos-containing materials pursuant to N.J.S.A. 13:1D9, 13:1E-1 et seq. and are cited as N.J.A.C. 7:26-1 et seq.

i. Copies of N.J.A.C. 7:26 may be obtained from the New Jersey Department of Environmental Protection, Division of Hazardous

Waste Management, Twin Rivers Professional Bldg., East Windsor, New Jersey 08520.

(b) (No change.)

(c) This subchapter, which pertains to Educational Facilities as defined in N.J.A.C. 5:23-8.2, all State-owned*, **State-managed*** and State-leased buildings, and all county and municipal facilities as defined in N.J.A.C. 5:23-8.2 shall control matters relating to: construction permits for asbestos abatement; fees; licenses; certification; work permits; reports required; documentation; inspections by the asbestos safety technician; air monitoring; enforcement responsibilities; and remedies and enforcement.

1. Any private or public building which houses a day care center, nursery or educational facility shall be under the jurisdiction of this subchapter when an asbestos hazard abatement job takes place within the building or any part of the building ***regardless of the remoteness of the facility or its size relative to the building***. A small or large asbestos hazard abatement job shall have a construction permit from the administrative authority having jurisdiction.

2. All common areas in a State-leased building such as but not limited to building entrances and lobbies, rest rooms, cafeterias, hallways, stairwells, and elevators where employees from the State-leased portion of the building may normally transverse and all areas with mechanical equipment that serve the State-leased areas shall be under the jurisdiction of this subchapter when an asbestos hazard abatement job takes place within the building or any part of the building.

(d) Until further action is taken, this Subcode remains advisory for all other buildings and structures in the State.

(e) This subchapter seeks to provide and ensure public safety, health, and welfare insofar as they are affected by asbestos and asbestos-containing materials. It is not intended to, nor shall it be construed to, conflict with or impede the operation of the asbestos work standards issued by the Occupational Safety and Health Administration, 29 CFR Section 1910.1001 et seq. ***and N.J.A.C. 12:100-12, the Asbestos Subchapter of the New Jersey Safety and Health Standards for Public Employees, N.J.A.C. 12:100 et seq.*** The purpose of this subchapter is to assure that work is performed in a safe manner as a pre-condition to the issuance of a certificate of occupancy.

1.-3. (No change.)

5:23-8.2 Definitions

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

"Airlock" means a serial arrangement of rooms ***whose doors are*** spaced a minimum of four feet apart so as to permit ingress or egress through one room without interfering with the next and constructed in such a manner as to prevent or restrict the free flow of air in either direction.

"Air pressure differential" means air pressure lower than surrounding areas, generally caused by exhausting air from a sealed space (work area).

"Asbestos" means a general term used to describe a group of naturally occurring hydrated mineral silicates. The asbestiform varieties include chrysotile (serpentine); crocidolite (riebeckite); amosite (cummingtonitegrunerite).

"Asbestos-containing material" means any material which contains more than one percent asbestos by weight.

"Asbestos Safety Control Monitor" means a business entity authorized pursuant to N.J.A.C. 5:23-8 to ensure compliance with the Asbestos Hazard Abatement Subcode.

"Asbestos Safety Technician" means a person certified by the New Jersey Department of Community Affairs, hired by the asbestos safety control monitor who continuously monitors and inspects the asbestos abatement work pursuant to this subchapter. This person shall be required to be on the job site during the time the asbestos abatement work is taking place and perform all duties and responsibilities established by these regulations.

"Construction permit for asbestos abatement" means required official approval to commence any asbestos hazard abatement job. This permit is issued by the administrative authority having jurisdiction.

"Contractor" means the Asbestos Removal Contractor licensed by the New Jersey Department of Labor.

"County facility" means all buildings and structures, or parts thereof, which are under the ownership or control of a county. This includes, but is not limited to, administration offices, court houses, sheriff offices, welfare offices, maintenance facilities and garages.

"Decontamination unit" means serial arrangement of rooms or spaces for the purpose of separating the work site from the building environment upon entering the work site and for the cleaning of persons, equipment, and contained waste prior to returning to the clean environment.

"Demolition" means the actual destruction and removal of a building, or part of a building, without intent to renovate, repair, or replace. If it is later decided to retain the building, or part of the building for further use, the project shall not be considered demolition and the criteria for re-entry shall be .010 fibers/cc.

"Educational facility" means all buildings and structures, or parts thereof, (both public and private) which are under the ownership or control of an educational institution and which are used for student residences, educational purposes or learning experiences, dining facilities, libraries, or support facilities. Educational institutions include schools, colleges, universities, academies, child day care centers and nurseries.

"Employee" means an asbestos abatement worker having a valid work permit, issued by the New Jersey Department of Labor and employed by the contractor.

"Encapsulation" means treatment of asbestos-containing materials, generally ceilings, using a liquid to bond or seal the surface to minimize the potential for fiber release.

"Enclosure" means an impermeable barrier (made of wood, metal, etc.) placed around asbestos-containing material.

"Engineering controls" means all methods used to maintain low work site fiber counts, including air management and barriers to assure public safety.

"Friable" means any material applied to ceilings, wall, piping, duct work, etc., which when dry may be crumbled, pulverized, or reduced to a powder by moderate hand pressure.

"Glove bag" means a plastic bag especially designed to contain sections of pipe for the purpose of removing short lengths of damaged asbestos materials without releasing fibers into the air.

"HEPA" means High Efficiency Particulate Absolute filter, capable of filter efficiency of 99.97 percent down to 0.3 um (microns).

"Large asbestos hazard abatement job" means asbestos-containing materials which involves the removal, enclosure, or encapsulation within one year of 160 square feet or more of asbestos-containing material used on an equipment, wall, or ceiling area; or involves the removal or encapsulation, using a liquid material applied by a pressurized spray, within one year of 260 linear feet or more of asbestos-containing material on covered piping.

"Minor asbestos hazard abatement job" means corrective action using recommended work practices to minimize the likelihood of fiber release from small damaged areas of asbestos ceilings, pipe and boiler insulation which involves the removal, repair, encapsulation or enclosure of 25 square feet or less of asbestos-containing material used on an equipment, wall or ceiling area; or involves the removal or encapsulation, using a liquid material applied by a pressurized spray, of 10 linear feet or less of asbestos-containing material on covered piping within one year ***from the start of the initial abatement work***. The repair, enclosure and encapsulation by methods other than pressurized spray of any amount of asbestos-containing material, used to cover piping, shall also be a minor asbestos hazard abatement job.

"Municipal facility" means all buildings and structures, or parts thereof, which are under the ownership or control of a municipality. This includes, but is not limited to, city halls, police stations, fire houses, welfare offices, maintenance facilities, and garages.

"Primary seal/critical barrier" means two layers of 6 mil polyethylene sheeting that completely seals off the work area to prevent the distribution of fibers to the surrounding area, such as the opening between the top of a wall and the underside of ceiling construction,

electrical outlets, nonremovable lights, HVAC systems, windows, doorways, entranceways, ducts, grilles, grates, diffusers, wall clocks, speaker grilles, floor drains, sink drains, etc.

"Privately owned buildings containing educational facilities" means all buildings and structures, or parts thereof, which are under the ownership or control of private parties, and which are used for educational purposes or learning experiences. Educational facilities include child day care centers, nurseries, laboratories, and schools.

"Sealant" means a liquid or solution to be used as a binding agent such as a diluted encapsulant or a water based paint, on dried exposed surfaces from which asbestos containing material has been removed. The color of the coat shall be separate and distinct from the underlying substrate.

"Separation barrier" means a constructed wall with no door that separates the clean area from the work area having a fire rating, if applicable, and shall not interfere with means of egress. Polyethylene sheeting (minimum of 2 layers of 6 mil) shall be placed on the work side of the barrier so that it completely seals off the work area to prevent the distribution of fibers to the surrounding area.

"Small asbestos hazard abatement job" means asbestos-containing materials which involves the removal, enclosure, or encapsulation within one year of more than 25 and less than 160 square feet of asbestos-containing material used on an equipment, wall or ceiling area; or involves the removal or encapsulation, using a liquid material applied by a pressurized spray, within one year of more than 10 and less than 260 linear feet of asbestos-containing material on covered piping.

"State facility" means all buildings and structures, or parts thereof, which are owned*, **managed*** or leased by the State of New Jersey.

"um" means microns, or micrometers.

"Wet cleaning" means the process of eliminating asbestos contamination from building surfaces and objects by using cloths, mops, or other cleaning utensils which have been dampened with amended water or a removal encapsulant and afterward thoroughly decontaminated or disposed of as asbestos contaminated waste.

"Work area" means the area where asbestos related work or removal operations are performed which is defined and/or isolated to prevent the spread of asbestos dust, fibers or debris, and entry by unauthorized personnel.

5:23-8.3 Enforcement: licensing; special technical services

(a) Except as is otherwise provided in 1 below, the provision of this subchapter shall be enforced by municipal enforcing agencies utilizing Asbestos Safety Control Monitors (the New Jersey Department of Community Affairs, hereafter cited as the Department, if applicable) and shall be administered and enforced uniformly throughout the State. This subchapter shall be in addition to existing regulations already adopted pursuant to the Uniform Construction Code Act (P.L. 1975, c.217 as amended) and known as the Regulations for the Uniform Construction Code (N.J.A.C. 5:23). This subchapter contains administrative procedure for the inspection of asbestos abatement work involving: removal; encapsulation; enclosure; repair; renovation or demolition work which disturbs asbestos *[in Educational Facilities]*.

1. Rules concerning exceptions are as follows:

i. State-owned*, **State-managed*** or State-leased buildings: The Department utilizing asbestos safety control monitors shall be the sole enforcing agency to administer and enforce the Asbestos Hazard Abatement Subcode with respect to State-owned*, **State-managed*** or State-leased buildings.

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

5:23-8.4 Minor asbestos hazard abatement job

(a) Minor asbestos hazard abatement job, as defined in N.J.A.C. 5:23-8.2 involves asbestos abatement work which may be made without application or notice to the administrative authority having jurisdiction. Mechanical, electrical, plumbing or general construction work which involves the incidental disturbance of less than 25 square feet of asbestos-containing material used on an equipment, wall or ceiling area, or less than 10 linear feet of asbestos-containing material on covered piping shall be considered a minor asbestos hazard abatement job.

1. Exception: Although the enclosure of any amount of asbestos-containing material used to cover pipe does not require a permit for asbestos abatement pursuant to this subchapter it shall be considered construction work. A construction permit, therefore, may be required by the administrative authority having jurisdiction pursuant to N.J.A.C. 5:23-2.

(b) ***[Minor asbestos hazard abatement]*** ***This* work *in (a) above*** requires general isolation of the work area from the surrounding environment, proper clean-up procedures, and shall be conducted by those who have successfully completed a ***[two day]*** maintenance/custodial/worker training course approved by the New Jersey Department of Health. Anyone who performs minor work must have access to shower facilities after performing asbestos related work.

(c) Specific records of each minor asbestos hazard abatement job shall be kept on file at a central location by the owner of the facility and shall be open for review and audit by the administrative authority having jurisdiction and for public inspections during normal business hours.

1. The information required shall be:
 - i. Exact locations of the worksite within the building;
 - ii. Type of abatement work conducted;
 - iii. Scope of work;
 - iv. Type of replacement material used (if applicable);
 - v. Date;
 - vi. Name(s) and address(es) of personnel; and
 - vii. Location of the disposal site.

2. A copy of this information shall be sent to the administrative authority having jurisdiction each time a minor asbestos hazard abatement job takes place.

5:23-8.5 Variations

(a) No variations from the requirements of this subchapter shall be made except upon written approval from the administrative authority having jurisdiction, after receiving approval in writing from the asbestos safety control monitor firm, and shall be consistent with N.J.A.C. 5:23-2.

1. Exception: When a building or part of a building is ***required*** to be occupied during an asbestos hazard abatement project, a written release shall be ***requested from the department, and*** obtained by the authorized asbestos safety control monitor firm.* ***[from t]*** ***T*he New Jersey Departments of Community Affairs and Health (and New Jersey Department of Education for public school projects) *shall review the application and approve or deny within 20 business days from receipt of the application*.** A copy of the plans and specifications must accompany the variation request from the authorized asbestos safety control monitor firm to the department ***along with the number of intended occupants and their purpose, location within the building and time of day the occupants will be in the building. A variation for occupancy shall not be required for maintenance or security personnel. In addition, a variation request for occupancy is not required for a cleared area in a multi-phase project which has received a Temporary Certificate of Occupancy from the administrative authority having jurisdiction when such occupancy applies to contractors or related personnel involved with post abatement activity*.**

(b) An application for a variation pursuant to this section shall be filed in writing with the administrative authority having jurisdiction and shall include specifically:

- 1.-3. (No change.)
4. A statement of feasible alternatives to the requirements of the subcode which would adequately protect the health, safety and welfare of the occupants or intended occupants and the public generally and which would adequately prevent contamination of the environment. Plans describing any relevant aspects of the variation requested, as pertaining to the layout of the work area, work procedures, exit requirements, or safety, shall be submitted with the statement of feasibility.

5:23-8.6 Construction permit for asbestos abatement

(a) (No change.)

(b) The application for a construction permit for asbestos abatement shall be subject to the following:

1. (No change.)

2. The application for a construction permit for asbestos abatement shall be required to include the following:

i. (No change.)

ii. The asbestos hazard assessment prepared by the New Jersey Department of Health, county or local department of health or a private business entity authorized by the New Jersey Department of Health, unless the requirement for an assessment has been waived; iii-vii. (No change.)

3. It shall be the responsibility of the owner or his agent to file with the administrative authority having jurisdiction, in the event of any change in (b) 2. i., iii. and vi. above. Such change shall be filed as an amendment to the application and shall be forwarded to the department as set forth in (f) below. The replacement firm shall assume all responsibilities for the asbestos abatement work to continue, while the preceding firm still bears responsibility for its action.

(c) The issuance of a construction permit for asbestos abatement shall be subject to the following:

1.-4. (No change.)

[5. The Department of Community Affairs, Asbestos Hazard Abatement Section, shall receive notification from the owner or his agent by telephone within 24 hours of issuance of a construction permit for asbestos abatement. Such notification shall include an approximate starting date for the asbestos abatement project.]

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

(f) The owner or his agent shall notify the department in writing ***[,*** within three business days of the issuance of the construction permit for asbestos abatement ***,* if the administrative authority is a municipal enforcing agency and not the department. Such notice shall be supplied in the form of a copy of the completed application for a construction permit for asbestos abatement and a copy of the permit.**

1. Notification shall be sent to:

New Jersey Department of Community Affairs
Bureau of Construction Code Enforcement
Asbestos Hazard Abatement Section
CN 805

Trenton, New Jersey 08625-0805

(g) The owner or his agent shall notify the U.S. Environmental Protection Agency in writing ten days prior to the start of the asbestos abatement project.

1. Notification shall be sent to:

U.S. Environmental Protection Agency
Asbestos NESHAPs Contact
Air & Waste Management Division
USEPA
26 Federal Plaza
New York, New York 10007

5:23-8.7 Inspections, violations

(a) Pre-commencement inspections shall be conducted as follows:

1. (No change.)

2. The asbestos safety technician or another certified asbestos safety technician designated by the asbestos safety control monitor shall ensure that:

i.-iii. (No change.)

iv. The contractor has a list of emergency telephone numbers at the job site which shall include the Asbestos Safety Control Monitor firm employed by the building owner and telephone numbers for fire, police, emergency squad, local hospital and health officer, New Jersey Department of Labor, New Jersey Department of Health and New Jersey Department of Community Affairs.

3. (No change.)

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

5:23-8.8 Certificate of occupancy; certificate of completion

(a) Certificate of occupancy requirements are as follows:

1. (No change.)

2. The application for a certificate of occupancy shall be in writing and submitted in such form as the department may prescribe and shall be accompanied by the required fee as provided for in this subchapter.

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- i. The application shall include the following:
 - (1)-(3) (No change.)
 - (4) Final air monitoring level of .010 fibers/cc or lower submitted by the Asbestos Safety Control Monitor.
 - 3. (No change.)
 - (b) Certificate of completion requirements are as follows:
 - 1.-3. (No change.)
 - 4. A certificate of completion shall be issued only if:
 - i.-iii. (No change.)
 - iv. Final air monitoring level of .010 fibers per cc or lower has been attained.

5:23-8.10 Precautions and procedures during a large asbestos abatement job

(a) Protective clothing and equipment for asbestos abatement shall be subject to the following requirements:

- 1.-6. (No change.)
- 7. The contractor shall have available shower stalls and sufficient plumbing for these showers including hot and cold running water and sufficient hose length and drain systems or an acceptable alternate such as a portable decontamination trailer with showers. Waste shower water shall be **[recycled to be used as a wetting agent,]** added to asbestos contaminated waste before disposal in an approved landfill or solidified using an approved polymer to prevent leaks or accidental spills within a facility or during transport for disposal to an approved landfill;
- 8. (No change.)
- 9. The contractor shall have available air filtering equipment capable of filtering asbestos fibers to 0.3 um at 99.97 percent efficiency and of sufficient quantity and capacity to cause a complete air change or total air filtration within the work area once every 15 minutes to effectively reduce the work site fiber count;
- 10. Air shall flow into the work site through all openings, including the decontamination chamber and waste exit ports, and any areas in the work site where air leakage may occur. Air should exhaust through the air pressure differential filtration unit by means of flexible or solid duct leading outside the building. If air exhaust outside the building is not feasible, the asbestos safety technician shall determine where the exhaust shall be emitted outside the work area. The air-filtering equipment should be positioned at a maximum distance from the decontamination chamber to maximize filtration of airborne fibers. Sufficient air shall be exhausted by HEPA filtered vacuum cleaner or approved HEPA equipped vacuum truck or HEPA equipped air filtration units when necessary to provide air pressure differential. Air pressure differential filtration units shall be in operation at all times.
- 11. No asbestos hazard abatement work including preparation can be performed without having a certified asbestos safety technician on the job site.

(b) Decontamination procedures are as follows:

- 1. The contractor shall provide an adequate decontamination unit consisting of a serial arrangement of rooms or spaces adjoining the work area or a decontamination trailer. Each airlock shall be clearly identified and separated from the other by plastic crossover sheet doors designed to minimize fiber and air transfer as people pass between areas. A minimum of two layers of 6 mil plastic sheeting shall be required for floors, walls, and the ceiling for on-site constructed decontamination units. Plastic crossover sheet doors shall have at least three layers of 6 mil plastic sheetings and be weighted so as to fall into place when people pass through the area. Decontamination chamber doors shall be of sufficient height and width to enable replacement of equipment that may fail and to safely stretch or carry an injured worker from the site without destruction of the chamber or unnecessary risk to the integrity of the work area. ***Such doors must be at least four feet wide, and the distance between sets of flaps must be at least four feet.***

2.-6. (No change.)

(c) Preliminary preparations in the work area shall be conducted as follows:

- 1. (No change.)

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2. ***Employees of the*** **[The]** contractor ***permitted pursuant to N.J.A.C. 8:60 and N.J.A.C. 12:120*** or persons employed by the building owner, who have successfully completed a **[two day]** maintenance/custodial/worker training course approved by the New Jersey Department of Health, ***unless the room and objects within it are shown to be uncontaminated by asbestos in which case other employees of the building owner or contractor may be used,*** shall clean with wet cloths and/or with HEPA vacuums as appropriate all items that can be removed from the work area without disrupting the asbestos material. This shall include furniture, equipment, drapes, and curtains. The cloths used for cleaning shall be disposed of as asbestos contaminated waste;

- 3. (No change.)

4. The contractor shall arrange for the shut down and seal off of all lighting, heating, cooling, ventilating or other air handling systems;

- 5. (No change.)

(d) Isolation and barrier construction in the work area shall be conducted as follows:

- 1. (No change.)
- 2. All vertical and horizontal surfaces except those of asbestos containing materials shall be sealed with watertight polyethylene plastic sheeting except as provided in (d) 3 below; **[. Staircases may be covered with at least one layer of polyethylene. Double sided carpet tape should be attached under the polyethylene on the top of steps and non-slip treads attached to prevent slips and falls;]**
- 3. The only permissible exception to total enclosure shall be:

- i.-ii. (No change.)

- iii. Staircases.

- 4. (No change.)

(e) Initial activity in the work area shall be conducted in the following order:

- 1.-6. (No change.)

7. As all existing ventilating systems in the work area are to be sealed throughout the removal operation, an alternative system shall be utilized. Install approved HEPA filtration units with filters in place. HEPA filtration units shall be of sufficient number and capacity to ensure that total air volume is exchanged once every 15 minutes and shall be U.L. listed as to their air capacity.

8. When air pressure differential is required in order to reduce the possible escape of contaminated air, this ventilating system shall be installed and operating prior to commencement of asbestos abatement.

(f) Sequence of asbestos removal activities shall be conducted as follows:

1. The asbestos-containing material shall be sprayed with water containing an additive to enhance penetration (amended water) or removal encapsulant. All wetting agents shall be tested on a small area before use to ensure effectiveness. A fine low-pressure spray of this solution shall be applied to prevent fiber disturbance preceding removal. The removal encapsulant **[,]** or amended water shall be sprayed on as many times and as often as necessary to ensure that the asbestos material is adequately wetted throughout (especially that asbestos nearest the substrate) to prevent dust emission. No dry removal of asbestos is allowable.

2. As a method of organizing the asbestos removal work, workers shall begin working on the areas nearest to the decontamination unit and work towards the HEPA filtration units.

- 3.-6. (No change.)

7. After completion of this removal phase (stripping), all surfaces from which asbestos has been removed shall be scrubbed using nylon or bristle brushes and wet sponged or cleaned by an equivalent method to remove visible asbestos containing material. During this work the surfaces being cleaned shall be kept wet using amended water or a removal encapsulant. All disposable equipment shall be packaged for disposal. Containers shall be washed with amended water or a removal encapsulant and shall have all exterior particulate matter removed prior to removal from the contaminated area.

- 8. (No change.)

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9. All free water (in contaminated areas) shall be retrieved and added to asbestos-contaminated waste and/or placed in plastic lined leak-tight drums and/or solidified with an acceptable polymer.

10. (No change.)

(g) final clean-up of the work area shall be conducted as follows in the order listed:

1. The contractor shall first clean all surfaces in the work area using a fine spray or mist of amended water or removal encapsulant applied to all surfaces followed by the wet-wiping procedure using disposable cloths. These cloths shall be disposed of or rinsed thoroughly on a frequency sufficient to eliminate visible accumulation of debris. Allow all surfaces to dry before re-entering the work area and proceeding to step No. 2 below of this procedure.

i. (No change.)

2.-3. (No change.)

4. Wet clean with amended water or a removal encapsulant all walls, floors, woodwork, ceilings, electric light fixtures and other surfaces. Allow all surfaces to dry and repeat procedure. Cloths or sponges used in the cleaning operation shall be disposed of as contaminated waste.

5.-6. (No change.)

7. Air monitoring results must indicate asbestos concentrations of no more than .010 f/cc for every 10,000 square feet of floor space contained by the critical barrier. These results must be achieved before critical barrier removal and reconstruction activities may begin. If the test results show asbestos fiber concentrations above the acceptance criteria, then clean-up shall be repeated until compliance is achieved by re-cleaning all surfaces using wet methods and operating all HPEA air filtration units to filter the air.

8.-10. (No change.)

5:23-8.11 Precautions and procedures during a small hazard abatement job

(a) Small asbestos hazard abatement jobs shall be carried out according to the following procedures which require that all asbestos abatement work be performed by a licensed contractor and that the employees have valid work permits issued by the New Jersey Department of Labor. A construction permit shall be required. An asbestos safety control monitor authorized by the New Jersey Department of Community Affairs shall ensure compliance with the regulations except air monitoring will not be required. However a final air sample shall be taken to ensure that the asbestos fiber content of the air is .010 fibers/cc or lower for every 10,000 square feet of floor space contained by the critical barrier.

1. Exception: The asbestos safety control monitor may require air monitoring and the installation of a decontamination unit consisting of a serial arrangement of rooms or spaces adjoining the work area or a decontamination trailer when the type of asbestos abatement work to be performed may involve a highly friable asbestos-containing material, or when the asbestos containing material contains a high percentage of asbestos by weight, or when the asbestos containing material becomes highly friable due to the asbestos abatement procedure. If the owner or his agent believes that such measures are not necessary, the owner or his agent may appeal the requirement to the New Jersey Department of Community Affairs*, New Jersey Department of Health, county or local department of health or a private business entity authorized by the New Jersey Department of Health which performed the hazard assessment]*.

(b) The following minimum level of precautions and procedures shall be employed:

1.-2. (No change.)

3. Work areas where asbestos-containing materials will be disturbed must be isolated from the surrounding environment. This enclosure is extremely important where work is to be performed adjacent to occupied areas. Furniture and movable equipment shall be removed from the work area. ***Proper cleaning of these items using cloths wetted with amended water or removal encapsulant, and/or HEPA vacuuming shall be performed by employees of the contractor permitted under N.J.A.C. 8:60 and N.J.A.C. 12:120 or persons employed by the building owner, who have successfully completed a maintenance/custodial/worker training course approved by the New Jersey Department of Health, unless the room and items within it are shown**

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to be uncontaminated.* The work area shall then be sealed off from the surrounding area with polyethylene sheeting having a thickness of 6 mil. The material and building conditions involved in each job need to be evaluated carefully to develop a proper enclosure;

4.-7. (No change.)

8. All gross contamination of people of their disposable clothing shall be removed using a HEPA vacuum before leaving the work area. The suits shall be discarded after cleaning up the work area with the HEPA vacuum.

9.-14. (No change.)

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

5:23-8.12 Asbestos encapsulation and enclosure

(a) Encapsulation constitutes spraying friable asbestos-containing material with a liquid sealant (not including paint) that helps bind the asbestos together with other material components to adhere it firmly to the building structure.

1. The requirements of this section are set forth in order to prevent the contamination of the building environment which may be caused by improperly performed asbestos encapsulation work.

i. Encapsulation shall not be performed where:

(1)-(2) (No change.)

(3) The source of asbestos is highly accessible to building occupants and damage to material is possible;

(4)-(7) (No change.)

ii.-iii. (No change.)

iv. Sealants considered for use in encapsulation shall first be tested to ensure that the sealant is adequate for its intended use. A section of the asbestos-containing material shall be evaluated following this initial test application of the sealant to quantitatively determine the sealant's effectiveness in terms of penetrating and hardening the asbestos-containing material, its toxicity, its flammability, its tolerance to disturbance or abuse, its solubility (dissolvability) in water, its effects on the acoustical properties of the asbestos*-containing material, and its tolerance to top-covering paints. The United States Environmental Protection Agency, Office of Toxic Substances, has developed guidelines for the use of encapsulants on asbestos-containing materials which discuss advantages and disadvantages of encapsulation. The American Society of Testing and Materials (ASTM) Committee E06.21.06E on Encapsulation of Building Materials has developed a guidance document to assist in the selection of an encapsulant once a decision to encapsulate has been made. When a choice of an encapsulant has been made, written justification of this choice (based on the characteristics of the encapsulant, the asbestos-containing material to be encapsulated, and the substrate surface underneath the asbestos-containing material) shall be included in the job specifications, and a copy of this justification shall be available for review at the job site.

v.-vii. (No change.)

viii. Where encapsulants are sprayed on asbestos-containing materials:

(1) Low pressure airless spray shall be used. The airless spray gun shall have an appropriately sized tip which shall be tested by briefly spraying the encapsulant onto a surface from approximately 12 inches away. An appropriately sized tip will spray the encapsulant in a fan approximately eight inches wide; it will also distribute the encapsulant uniformly within the fan, giving even coverage.

(2) A suitable quantity of HEPA filtration units shall be used during the encapsulation process which shall have sufficient capacity to cause one complete air exchange every 30 minutes.

(3) At least three coats of the encapsulant shall be applied to the surface of the asbestos-containing material. Each coat shall be applied in a two-step procedure. The first step is to apply a light mist coat to moisten and seal any loose fibers and keep them from breaking away from the surface. This mist coat should ***be*** applied in three or four quick passes with the gun held 18 to 24 inches from the surface. After an area of 16 to 20 square feet has been given the mist coat, a heavier coating is applied, using 8 or 10 passes with the gun held 10 and 12 inches from the material. The gun should be kept in constant motion to create a smooth and even coat. This two-step application shall be considered one coat of encapsulant. Each subsequent coat shall be applied at a 90 degree angle to the direction of

the preceding coat application, to ensure complete coverage of the asbestos-containing material. When questions rise regarding drying time, curing time, dilution, or use under different weather conditions, the manufacturer's recommendations and instructions shall be consulted.

(4) All other preparation, decontamination, and work requirements and procedures used in encapsulation projects shall be the same as those used in removal projects.

ix. Sealants used in encapsulation shall be flame resistant and meet the flame spread and smoke generation requirements of N.J.A.C. 5:23-3 of the Uniform Construction Code.

(b) Enclosure constitutes construction of an air-tight barrier to isolate a surface coated with asbestos-containing material. The barrier for an enclosure job should be impact-resistant and all materials shall *[comply with]* ***meet*** N.J.A.C. 5:23-3 of the Uniform Construction Code. It is not necessary to have an air-tight barrier for piping if the insulation has first been covered with an appropriate sealant or tape.

1. The requirements of this section are set forth in order to prevent the contamination of the building environment which may be caused by improperly performed asbestos enclosure work. The following procedures shall be adhered to:

i. The surface of the asbestos-containing material which will be disturbed during the installation of hangers, brackets or other enclosure supports shall first be sprayed with amended water or a removal encapsulant using a low pressure airless spray:

ii-vi. (No change.)

5:23-8.13 Glove bag technique

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

(c) The following is a list of equipment and tools for the removal of asbestos by the glove bag technique:

1.-2. (No change.)

3. Wetting agent: Amended water (water with a surfactant) or a removal encapsulant;

4.-8. (No change.)

(d) Removal procedures shall be conducted as follows:

1.-5. (No change.)

6. Using the smoke tube and aspirator bulb, place the tube into the wetting agent sleeve (two-inch opening to glovebag). By squeezing the bulb, fill the bag with visible smoke. Remove the smoke tube and twist the wetting agent sleeve closed. While holding the wetting agent sleeve tightly, gently squeeze the glovebag and look for smoke leaking out, especially at the top and ends of the glovebag. If leaks are found, they shall be taped closed using duct tape and the bag shall be re-tested.

7. Insert the wand from the wetting agent sprayer through the wetting agent sleeve. Using duct tape, tape the wetting agent sleeve tightly around the wand to prevent leakage.

8. One person places his hands into the long-sleeved gloves while the second directs the wetting agent spray at the work.

9. (No change.)

10. With the insulation exposed, using the bone saw, cut the insulation at each end of the section to be removed. A bone saw is a serrated heavy-gauge wire with ring-type handles at each end. Throughout this process, wetting agent is sprayed on the cutting area to keep dust to a minimum.

11. Once the ends are cut, the section of insulation should be split from end to end using the utility knife. The cut should be made along the bottom of the pipe and the wetting agent continuously supplied. Again, care should be taken when using the knife not to puncture the bag. Some insulation may have wire to be clipped as well. Again, a box may be used as in step nine above to protect the bag from puncture.

12. Rinse all tools with wetting agent inside the bag and place back into pouch.

13.-15. (No change.)

16. Remove the wetting agent wand from the wetting agent sleeve and attach the small nozzle from the HEPA-filtered vacuum. Turn on the vacuum only briefly to collapse the bag.

17. Remove the vacuum nozzle and twist the wetting agent sleeve closed and seal with duct tape.

18.-20. (No change.)

21. All surfaces in the work area should be cleaned using disposable cloths wetted with wetting agent. These cloths shall be disposed of or rinsed thoroughly to eliminate visible accumulation of debris. Then, when these surfaces have been allowed to dry, all surfaces shall be cleaned again using a HEPA filtered vacuum.

22.-25. (No change.)

5:23-8.15 Duties of the Asbestos Safety Technician

(a) The asbestos safety technician shall perform all air sampling specified in this subchapter, and shall be thoroughly familiar with this subchapter. ***He shall inform the department who his employer is at the time of his application for certification, and shall notify the department in writing within 10 working days of any change in status or employer.*** He shall have access to all areas of the asbestos removal project at all times and shall continuously inspect and monitor the performance of the contractor to verify that said performance complies with this subchapter. The asbestos safety technician shall be on site from the initial preparation of the work area and during the entire abatement operation.

(b) (No change.)

(c) The asbestos safety technician upon receipt of testing results indicating that concentrations above 0.010 fibers per cc have occurred outside the containment barriers or above 0.020 fibers/cc within the clean room of the decontamination chamber during the abatement action shall report these results within one working day verbally or by telephone communication if necessary to the contractor, the owner and the architect/engineer so that prompt corrective action may be taken. This telephone or verbal communication shall be followed by a written report to the contractor, the owner and the architect/engineer a copy of which shall be sent to the administrative authority having jurisdiction.

(e) The asbestos safety technician shall prepare a comprehensive final report, including daily logs, required inspection reports, observations and air monitoring results. This report shall be made part of the official record filed by the asbestos safety control monitor firm.

(f) During the removal phase the duties of the asbestos safety technician shall be as follows:

1. (No change.)

2. Filter cassettes and sampling train shall be assembled as specified in NIOSH #7400. The flow rate shall be between 0.5 and 16 liters per minute. The total volume shall be a volume sufficient to achieve a detection limit of 0.010 f/cc. Pumps shall be calibrated before and after sampling and a record kept of this calibration;

3.-6. (No change.)

7. The evaluation criteria shall be 0.010 fibers per cubic centimeter;

8. (No change.)

9. The asbestos safety technician shall calculate the required number of air pressure differential filtration units for each work area. This calculation shall be made whenever the volume of the work area changes. The asbestos safety technician or his employer, shall inform the owner, contractor and the architect/engineer of any discrepancies between the number of units required and those in operation within the work area. If problems are identified and not corrected, the asbestos safety technician shall inform the administrative authority having jurisdiction.

10.-11. (No change.)

(g) Post-removal test shall be conducted as follows:

1. Within 48 hours after final clean-up and before the removal of critical barriers, a visual inspection and a final air test shall be performed. This test is required to establish safe conditions for removal of critical barriers and to permit reconstruction activity to begin. Sufficient time following clean-up activities shall be allowed so that all surfaces are dry during monitoring. Air pressure differential filtration units shall *[not]* be in use during monitoring. At least 24 hours shall be allowed to pass after any wet cleaning has been done and *[air pressure differential filtration units have been used]* before the post-removal tests are begun;

2. Normal occupancy use conditions shall be simulated using propeller-type fans ***or leaf blowers***. The fans shall be placed in each room to be sampled so as to cause settled fibers to rise and enter the air. The fans shall have blades with a radius of at least one foot

and shall be capable of creating a minimum air velocity of 500 feet per minute. These fans may be of the oscillating type. The sampling pump and sampling media shall be placed 20-40 feet at a right angle from the line(s) of air flow created in front of the fan. ***The leaf blower and its use must meet the criteria set forth in EPA document 560/5-85-024, Guidance for Controlling Asbestos-Containing Materials in Buildings, appendix section M.1.5., or any replacement criteria set forth by the United States Environmental Protection Agency. Their use should be restricted to general occupancy areas, and they should not be used in any space with an open dirt, sand or gravel floor;***

3. Filter cassettes and sampling train shall be assembled as specified in NIOSH #7400. The flow rate shall be between 0.5 and 16 liters per minute. The total volume shall be a volume sufficient to achieve a detection limit of 0.010 f/cc. Pumps shall be calibrated before and after sampling and record kept of this calibration.

4.-6 (No change.)

7. Evaluation criteria: If test results exceeds 0.010 fiber/cc, the asbestos safety technician, or his employer, shall so inform the contractor, the owner and the architect/engineer. If these criteria have not been met, the contractor shall be required to re-clean all surfaces using wet cleaning methods and provide HEPA filtration units to exhaust air during the re-cleaning process. This process of re-cleaning, allowing surfaces to dry and re-testing shall be repeated until compliance is achieved.

(h) (No change.)

5:23-8.16 Coordination with other permits

(a) (No change.)

(b) When it is certified that asbestos may become disturbed ***in a building or structure subject to this subchapter***, an assessment performed by the New Jersey Department of Health, county or local health department, or by a private business entity authorized by the New Jersey Department of Health shall be required*, **unless the requirement for an assessment has been waived***.

1. Boiler and water storage tank removal projects which require the removal of asbestos insulation from the boiler, water storage tank and piping shall not require an assessment before a permit is issued by the administrative authority having jurisdiction.

2. If the assessment indicates that the work and the disturbance which will result from it has made asbestos hazard abatement work necessary, then the construction official shall inform the building owner, or his agent, that all asbestos abatement work shall conform to this subchapter.

i.-ii. (No change.)

5:23-8.17 Asbestos Safety Control Monitor

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

(c) Records shall be maintained by the asbestos safety control monitor of all inspections, applications, plans reviewed, air tests, and any other information that may be required by the municipal construction official or the department. These records shall be open to department audit and shall not be destroyed or removed from the offices of the asbestos safety control monitor without the permission of the department.

1. The asbestos safety control monitor shall provide the department with the following:

i. A copy of each permit ***[and]* application *and permit***, ***(if a firm is the duly authorized agent of the owner), plan release, and any variation request submitted to the administrative authority having jurisdiction and determination of same by the construction official*** within three business days of the issuance, that they are contracted for;

ii. A list of names, certification numbers, addresses and telephone numbers of all technical personnel employed. Notification of any change in personnel shall be submitted in writing to the department within ***[10]**30*** days.

iii. A copy of the certificate of completion within three business days of its issuance.

2. (No change.)

3. Each asbestos safety control monitor shall have the following responsibilities:

i. (No change.)

ii. To review plans and specifications, and release in writing, and forward to the administrative authority having jurisdiction for issuance of a permit*, **and to the department within three days after release***;

iii.-xii. (No change.)

xiii. To issue and maintain documentation and certification, of all requirements of this subchapter such as but not limited to plan release, permit application*, **[,]* *and*** permit issued by the administrative authority having jurisdiction ***(if a firm is the duly authorized agent of the owner)***, variations ***[issued]* *submitted***, written notice to proceed, written notice to remove barriers, certificate of completion*, ***[and]* violation notices, daily logs, inspection*[s]* *records***, observations, calculations, backup records, air monitoring results and a separate listing of any contractor deficiencies observed during the course of the work.

xiv. (No change.)

xv. Upon completion of an asbestos hazard abatement project the asbestos safety control monitor shall submit a final ***comprehensive*** report consisting of but not limited to plan release, permit application*, **[,]* *and*** permit issued by the administrative authority having jurisdiction ***(if a firm is the duly authorized agent of the owner)***, variations ***[issued]* *submitted***, written notice to proceed, written notice to remove barriers, certificate of completion and violation notices, daily logs, inspection*[s]* ***records***, observations, calculations, backup records, air monitoring results and a separate listing of any contractor deficiencies observed during the course of the work. The report shall be submitted within ***[20]**30*** ***business*** days of issuance of the Certificate of Completion. Copies of the final report shall be submitted to the building owner and the department.

(d) Whenever an asbestos safety control monitor enters into a contract to provide asbestos safety control monitor services, in connection with an asbestos hazard abatement project, then the asbestos safety control monitor shall not have any economic relationship with another party involved with the project, except for a sub-contract for laboratory services needed by the asbestos safety control monitor to perform its duties under this subchapter.

(e) Suspension and revocation procedures are as follows:

1. In addition to any other remedies provided by the Uniform Construction Code regulations, N.J.A.C. 5:23, the department may suspend or revoke its authorization of any asbestos safety control monitor or assess a civil penalty of not more than \$500.00 per violation, if the department determines that the authorization or reauthorization was based on the submission of fraudulent or materially inaccurate information, or that the authorization or reauthorization was issued in violation of this subchapter, or that a change of facts or circumstances make it unlikely that the asbestos safety control monitor can continue to discharge its responsibilities under this subchapter in satisfactory manner, or that the asbestos safety control monitor has violated this subchapter.

i. (No change.)

2.-4. (No change.)

(f) The department, in addition or as an alternative to revoking or suspending an authorization, or assessing a penalty, may issue a letter of warning, reprimand, or censure with regard to any conduct which, in the judgment of the department, warrants such a response. Such letter, in addition to any other filing requirements, shall be made part of the authorization file of the firm.

(g) Conviction of a crime or an offense in connection with the practice as an Asbestos Safety Control Monitor shall constitute grounds for revocation or suspension of an authorization.

(h) Authorization and reauthorization fees are as follows:

1. Authorization fee: Any asbestos safety control monitor submitting an application to the department under this subcode, for approval as an asbestos safety control monitor shall pay a fee of \$2,000 for the authorization which is sought, plus an amount equal to five percent of the gross revenue earned from asbestos safety control monitor activities, payable quarterly. ***The monies obtained from the preparation of plans and specifications shall not be included in the calculation of this quarterly fee.***

2. Reauthorization fee: Any asbestos safety control monitor submitting an application to the department under this subcode for reapproval as an asbestos safety control monitor shall pay a fee of

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\$1,000 plus an amount equal to five percent of the gross revenue of four consecutive quarters starting with the previous year's last quarter. The fee shall be payable quarterly with the first quarter due with application. ***The monies obtained from the preparation of plans and specifications shall not be included in the calculation of this quarterly fee.***

5:23-8.18 Asbestos Safety Technician: Certification requirements

(a) (No change.)

(b) No person shall act to enforce this subchapter without first holding a certification from the department.

1. Any individual who holds a certification as an Asbestos Safety Monitor from the New Jersey Department of Health and who applies within one year from the date of the issuance of that certification shall be entitled to certification as an Asbestos Safety Technician upon submittal of a proper application, the successful completion of a mandatory training course for asbestos safety technicians required by the Department of Community Affairs, and the required fee.

(c) (No change.)

(d) Any candidate for certification as an asbestos safety technician shall submit an application to the department accompanied by the required application fee established in (i) below. The requirements for certification as an asbestos technician are as follows:

1.-2. (No change.)

3. Successful completion in an approved ***[core]*** training course for asbestos ***[workers]*** ***worker/supervisors*** certified by the New Jersey Department of Health pursuant to N.J.A.C. 12:120 and N.J.A.C. 8:60; or two years of experience in monitoring asbestos abatement activities may be substituted for completion of a certified training course;

4. (No change.)

5. Successful passing of ***[an Asbestos Abatement Examination]*** ***a special Examination for Asbestos Safety Technicians approved and*** administered by the Department of Health ***[(pursuant to N.J.A.C. 12:120-6.12 and 8:60-6.12)]***.

(e)-(i) (No change.)

5:23-8.21 Demolition

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

(e) Air monitoring samples during removal ***shall be required for a large asbestos abatement job, and a small asbestos abatement job if it has been determined by the asbestos safety control monitor to be required during the plan review.*** ***[and final]*** ***Final*** air samples after removal will be required for large ***and small*** asbestos abatement jobs only unless this is changed during the plan review.

1. Results of .020 fibers/cc or less shall be attained prior to demolition;

2. (No change.)

3. If air levels above .020 fibers/cc are obtained in either of the above cases the areas where the asbestos removal took place must be recleaned and resampled until they do meet the required level.

EDUCATION

(a)

STATE BOARD OF EDUCATION

Bilingual Education

Adopted Amendments: N.J.A.C. 6:31-1.1 through 1.10, 1.12 through 1.16

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Adopted: November 24, 1987 by Saul Cooperman,

Commissioner, Department of Education; Secretary, State Board of Education.

Filed: November 25, 1987 as R.1987 d.523, with technical changes not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 18A:1-1, 4-15, 35-15 to 35-26 and 7A-1 et seq.

EDUCATION

Effective Date: December 21, 1987.

Expiration Date: January 24, 1990.

Summary of Public Comments and Agency Responses:

Twenty-five letters were received from agencies and organizations, school district personnel, college personnel and lay persons. All written comments expressed opposition to the proposed amendment of the policy for exit from bilingual and ESL programs. Major arguments raised included the following:

1. The proposal is contrary to the legislative intent of the Bilingual Education Act.

2. A single exit criterion is inadequate to assess the ability of limited English proficient (LEP) students to compete within the monolingual program.

3. Language proficiency tests are limited in predicting academic preparedness to work in English.

4. The proposal will exit students prematurely into the mainstream and push them into remedial classes.

5. The proposal lacks adequate rationale or comprehensive exploration of the research.

After careful consideration of the concerns raised by written and oral testimony, the Department of Education decided to adopt the change in exit criteria as proposed. The following summarizes the major arguments that support the change:

1. It is consistent with the intent of the Bilingual Education Act and with New Jersey's requirement of a "thorough and efficient" education for every student that LEP students be given the opportunity to join their English speaking peers in mainstream classes as soon as they have developed sufficient English proficiency to function in the monolingual program. The proposed change in exit policy would ensure that LEP students are exited as soon as they are ready to benefit from the regular program.

2. In New Jersey, English language proficiency has been defined operationally in terms of a language proficiency test which measures listening, speaking, reading and writing.

3. The operational definition of English language proficiency, that is, the cutoff score on a language proficiency test, is used to identify students as limited English proficient when they enter the district. Those students who score below the cutoff are LEP; those who score at or above the cutoff are considered to have sufficient English proficiency to function in the regular program.

4. At the present time, program exit is determined by a complex review process. The process includes the results of a language proficiency test as only one factor to be considered. The proposed change would make the exit criterion congruent with the criterion used for program entry, that is, the operational definition of English language proficiency.

5. The present exit policy requires LEP students to perform at or above district norms on standardized achievement tests in reading, writing, and mathematics. This means that LEP students are being held to a higher standard than other students. Other students below district basic skills standards are educated in the mainstream program and receive supplemental basic skills improvement services to address their identified needs. When LEP students have demonstrated English language proficiency, they should be mainstreamed. If they are experiencing basic skills problems, their basic skills needs can be addressed through remedial programs taught by teachers trained to do so. New Jersey has ample resources through federal, state, and local dollars to support quality remedial programs.

6. The present exit policy allows considerable latitude to districts. For example, a student considered still LEP in one district might be mainstreamed in another. The proposed revision would create a uniform exit criterion in the state and eliminate discrepancies among district definitions of English proficiency.

7. There is no substantial research with findings directly relevant to the issue of appropriate exit criteria within the context of transitional bilingual education and it is not possible for educational policy to await conclusive results.

Full text of the adoption follows (additions indicated in boldface with asterisks *thus***; deletions indicated in brackets with asterisks ***[thus]***).**

6:31-1.1 Definitions

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

...

"Children of limited English speaking ability" means pupils whose native language is other than English and who have sufficient difficulty speaking, reading, writing or understanding the English language so as to be denied the opportunity to learn successfully in the classrooms where the language of instruction is English. This term means the same as limited English proficiency, the term used in Federal guidelines.

...

"English as a second language (ESL) program" means a developmental second language program which teaches English vocabulary and structures using second language teaching techniques and incorporates the cultural aspects of the pupils' experiences in their ESL instruction.

"English language fluency" means the ability to speak the English language with sufficient structural accuracy, to use vocabulary to participate effectively in most formal and informal conversations on practical, social and school topics, to read material for information and to complete forms and write essays and reports on familiar topics. Language fluency is not the same as language proficiency, which is the full command of language skills.

"Exit criterion" means the criterion which must be considered before a pupil may be terminated or exited from a bilingual program. The criterion is the English language proficiency test score.

"Native language" means the language first acquired by the pupil, the language most often spoken by the pupil, or the language most often spoken in the pupil's home, regardless of the language spoken by the pupil.

"Parent(s)" means the natural parent(s) or the legal guardian(s), foster parent(s), surrogate parent(s) or person acting in the place of a parent with whom the pupil legally resides. Where parents are separated or divorced, parent means the person(s) who has legal custody of the pupil, provided such parental rights have not been terminated by a court of appropriate jurisdiction.

6:31-1.2 Identification of eligible participants

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

(c) The district shall administer the Maculaitis Assessment Program (Alemany Press) to all limited English proficient pupils who enter New Jersey schools after grade eight at the time of enrollment to determine their level of English language fluency. These pupils shall be administered the Maculaitis Assessment Program annually thereafter until they achieve the passing level of fluency on the Maculaitis Assessment Program or they pass the High School Proficiency Test, in accordance with guidelines prescribed by the Department of Education.

6:31-1.3 Bilingual education program

(a) When, at the beginning of any school year, there are within the schools of the district, 20 or more pupils of limited English speaking ability in any one language classification, the district board of education shall establish for each such classification a program in bilingual education for all pupils therein, providing also that a district board of education may establish a program in bilingual education for any language classification with less than 20 pupils.

(b) A program ~~of~~ bilingual education may make provisions for the voluntary enrollment on a regular basis of pupils whose dominant language is English in order that they may acquire an understanding of the language and the cultural heritage of the pupils of limited English speaking ability for whom the particular program of bilingual education is designed, provided that no bilingual class contains a majority of pupils whose native language is English.

(c) (No change.)

(d) The bilingual program curriculum shall include the full range of required courses and activities offered on the same basis and under the same rules that apply to all pupils within the school district. In subjects and activities in which verbalization is not essential to understanding, including, but not limited to, art, music and physical education, pupils of limited English speaking ability shall participate fully with English speaking pupils in the regular class or activities provided. There shall be a formal bilingual program curriculum which addresses the use of two languages within the curriculum.

(e) At the secondary level, sufficient courses and other relevant opportunities shall be offered to enable the pupil to fulfill all credits and other requirements for graduation. When sufficient numbers of pupils are not available to form a bilingual class in a subject area, plans must be developed in consultation with the Department of Education to meet the needs of the pupils.

(f) Bilingual programs and services designed to meet the special needs of pupils of limited English speaking ability shall include, but not be limited to, compensatory education, special education and vocational education services and be provided by districts in accordance with N.J.S.A. 18A:7A-4.

6:31-1.4 Programs for English proficiency

(a) (No change.)

(b) Whenever there are 10 or more pupils of limited English speaking ability enrolled within the schools of the district, regardless of whether they speak the same native language those pupils shall be taught by a certified ESL teacher in an ESL program.

(c) ESL curriculum and services shall be developed to address the basic instructional needs of pupils of limited English speaking ability. ESL programs and services designed to meet the special needs of pupils of limited English speaking ability shall include, but not be limited to, compensatory education, special education and vocational training and be provided in accordance with N.J.S.A. 18A:7A-4.

6:31-1.5 Approval procedures

(a) (No change.)

(b) Plans submitted by districts for approval shall include information on the following:

1. Identification of pupils;
2. Program description;
3. School information;
4. Evaluation design; and
5. Evaluation data.

(c) Districts shall submit annually the Report of the Limited English Proficient Students as part of the Fall Survey.

(d) Districts shall also submit annually their bilingual and ESL program budget as part of the Annual Improvement Budget.

6:31-1.6 Supportive services

(a) (No change.)

(b) School districts should use full or part-time bilingual personnel to provide supportive services, such as counseling, to pupils of limited English speaking ability.

6:31-1.7 Administration and supervision

(a) School districts shall ensure the adequate administration and supervision of bilingual and ESL education programs.

(b) (No change.)

6:31-1.8 Inservice training

(a) Districts shall develop a plan for inservice training in the areas of bilingual and ESL education for bilingual, ESL and other program staff based on their needs.

(b) The Professional Improvement Plan of the Annual Report (N.J.S.A. 18A:7A-11(e)) shall include the needs of bilingual and ESL teachers that will be addressed through inservice training.

6:31-1.9 Certification

(a) All teachers of bilingual classes shall hold a valid New Jersey teacher's certificate for the appropriate grade level and/or content area and an endorsement in bilingual education pursuant to N.J.S.A. 18A:6-38 et seq. and N.J.S.A. 18A:35-15 to 26.

(b) All teachers of ESL classes shall hold a valid New Jersey teacher's certificate in English as a second language pursuant to N.J.S.A. 18A:6-38 et seq. and N.J.S.A. 18A:35-15 to 26.

6:31-1.10 Bilingual and ESL program participation

(a) (No change.)

(b) Pupils enrolled in the bilingual or ESL education program shall be placed in a regular program when they have met the exit criterion of a passing score on the English language proficiency test. This shall take effect in the spring of 1988.

6:31-1.12 Notification

(a) No later than 10 working days after the enrollment of any pupil in a bilingual or ESL education program, the district shall notify, by mail, the parent(s) that a pupil has been enrolled in a bilingual or ESL education program. The notice shall contain a simple, non-technical description of the purposes, method and content of the program in which the pupil is enrolled. The notice shall also inform the parent(s) of their right to review and discuss with district administrators the procedures and pertinent data used to identify their child as having limited English speaking ability. The notice shall also *advise* the parent(s) of the appeal process to be followed pursuant to N.J.S.A. 18A:6-9, if they wish to challenge the identification of their child. During the pendency of any such appeal before the commissioner, the child shall remain enrolled in the program. The notice shall be in English and in the language in which the parent(s) possess*es* a primary speaking ability.

(b) School districts shall send progress reports to parent(s) of pupils enrolled in bilingual or ESL education programs in the same manner and frequency as progress reports are sent to parents of other pupils enrolled in the school district.

(c) Progress reports shall be written in English and in the native language of the parents of *[pupil(s)]* *pupils* enrolled in the bilingual program. The progress reports for pupils enrolled in an ESL program shall be written in English and in the native language of the parent(s) unless it can be demonstrated that this requirement would place an unreasonable burden on the local school district.

6:31-1.13 Joint programs

A school district may join with any other school district(s), according to procedures prescribed by the Commissioner of Education with the approval of the county superintendent, to provide programs in bilingual or ESL education.

6:31-1.14 Parental involvement

(a) Each district shall provide for the maximum practicable involvement of parent(s) of pupils of limited English speaking ability in the development and review of program objectives and dissemination of information to and from the local school districts and communities served by the bilingual or ESL education program.

(b) Each school district implementing a bilingual education program shall establish a parent advisory committee on bilingual education on which the majority will be parent(s) of pupils of limited English speaking ability.

(c) (No change.)

6:31-1.15 Office of Bilingual Education

(a) There shall be established in the State Department of Education an Office of Bilingual Education.

(b) The Office of Bilingual Education shall be charged with the following:

1.-3. (No change.)

6:31-1.16 State advisory committee on bilingual education

(a) (No change.)

(b) The committee shall advise the Department of Education and the Department of Higher Education in the formulation of policies and procedures relating to the Act.

(c) The committee shall be composed of at least 15, but not more than 25 members, one of whom shall be elected chairperson. The membership shall include the following representation:

1. A minimum of two, but not more than four, parents of pupils of limited English speaking ability;

2. A minimum of three, but not more than four, persons from institutions of higher education experienced in the training of teachers of bilingual and ESL education;

3. A minimum of four, but not more than six, teachers experienced in bilingual and ESL teaching techniques;

4. A minimum of one, but not more than three, persons serving on a district board of education implementing a bilingual or ESL education program;

5. A minimum of two, but not more than four, school administrators of bilingual or ESL education programs;

6. A minimum of two, but not more than four, *[laymen]* *layperson* knowledgeable in the field of bilingual and ESL education.

(a)

STATE BOARD OF EDUCATION

Policies for Free and Reduced-Price Meals and/or Free Milk

Readoption with Amendments: N.J.A.C. 6:79

Proposed: September 8, 1987 at 19 N.J.R. 1599(a).

Adopted: November 24, 1987 by Saul Cooperman,

Commissioner, Department of Education; Secretary, State Board of Education.

Filed: November 25, 1987 as R.1987 d.524, **without change.**

Authority: N.J.S.A. 18A:1-1, 4-15, 33-4 and 58-7.1.

Effective Date: November 25, 1987 for Readoption; December 21, 1987 for Amendments.

Expiration Date: November 25, 1992.

Summary of Public Comments and Agency Responses:

No comments received.

Full text of the readoption follows.

CHAPTER 79

BUREAU OF CHILD NUTRITION PROGRAMS

SUBCHAPTER 1. POLICIES FOR FREE AND REDUCED-PRICE MEALS AND/OR FREE MILK

6:79-1.1 Definitions

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

"Agreement for School Nutrition Programs" means the agreement entered into between the Department and each sponsor pursuant to regulations promulgated by the federal government.

"Application" means the notifying letter and application form issued to all parents of students enrolled in school to determine eligibility for child nutrition programs.

"Bureau" means the Bureau of Child Nutrition Programs, which administers the federal child nutrition program in the State of New Jersey.

"Department" means the State Department of Education.

"Foods of minimal nutritional value" means those foods contained in the following categories as specified in 7 CFR 210 Appendix B: soda water, water ices, chewing gum, certain candies: hard candy, jellies and gums, marshmallow candies, fondant, licorice, spun candy and candy coated popcorn.

"Hours of operation" means from the beginning of the first scheduled meal period until the end of the last scheduled meal period.

"Policy" means the free and reduced-price policy required by applicable regulations of the United States Department of Agriculture.

"School" means a school operating under the supervision of a sponsor as defined herein.

"Sponsor" means the school district.

"Survey" means the procedure required of every school and sponsor to determine eligibility of every enrolled student for free and reduced-price meals.

6:79-1.2 Policy

The Bureau shall develop a free and reduced-price policy pursuant to Federal regulations which shall be adopted by all sponsors. This policy shall be signed and returned to the Bureau no later than the end of the second calendar month for which any reimbursement can be claimed for meals served under the child nutrition programs. However, for sponsors starting programs in September, the deadline for submission of the policy shall be September 30. This policy shall become a part of the sponsor's Agreement for School Nutrition Programs with the Department.

6:79-1.3 Eligibility

The Bureau shall administer Statewide eligibility standards for free and reduced-price meals and/or free milk. Such standards shall be used by all sponsors participating in the child nutrition programs.

6:79-1.4 Survey

(a) By September 30 of each school year, each school, under the supervision of its sponsor, shall survey the families of the students it has enrolled to determine which students are eligible to receive free or reduced-price meals and/or free milk.

(b) This survey shall be conducted according to procedures required by the Bureau which shall include, but not be limited to, the distribution of an application to the family of every student enrolled in the school.

(c) The results of this survey shall be filed with the Bureau by October 15 of the school year in which the survey is made.

6:79-1.5 Application

(a) The Bureau shall prepare an application which shall be used by all sponsors participating in the child nutrition programs. A copy of the application used by each sponsor must be filed with the Bureau together with the policy described in N.J.A.C. 6:79-1.2.

(b) Parents shall be given at least two weeks from the date of receipt of the application to complete and submit the application to the sponsor who must provide adequate assistance to parents in completing these applications.

(c) Applications in languages other than English must be provided where non-English speaking parents are possible applicants. (An application in Spanish is available upon request from the Bureau.)

(d) Upon receipt of the completed application, the sponsor must determine each student's eligibility for a free or reduced-price meal and/or free milk from the information submitted. Each student shall be offered free or reduced-price meals and/or free milk as soon as eligibility has been determined. If the school has reason to question the information provided, the student affected must continue to receive the free or reduced-price meal and/or free milk until completion of the appeal procedures set forth in the sponsor's policy.

(e) Any school may authorize free or reduced-price meals and/or free milk on the recommendation of a teacher, nurse or other school official, based on known economic need, in cases where parents will not or cannot apply for free or reduced-price meals and/or free milk for their children. The school must complete applications for these students.

6:79-1.6 Participation

(a) Any school in which five percent or more of the school enrollment is found to be eligible for free or reduced-price meals shall offer lunch to all students enrolled in that school.

(b) Any school may participate in the lunch program.

(c) School food authorities shall maintain a non-profit school food service. All revenues are to be used only for the operation or improvement of the food service.

(d) The school food authority shall limit its net cash resources to an amount that does not exceed three months' average expenditures for its non-profit school food service.

6:79-1.10 Competitive food policy

(a) The sale of extra food items of minimal nutritional value on the school property at any time before the end of the last lunch period shall not include those items prohibited by regulations promulgated by the United States Department of Agriculture for the administration of child nutrition programs.

(b) All income derived from the sale of food and beverage items within a school during the hours when child nutrition programs are in operation must accrue to the accounts of said programs.

6:79-1.11 Meal accountability

Sponsors shall count and record daily, at the point of service, the number of meals or milks served by category (free, reduced price and paid).

HEALTH

DRUG UTILIZATION REVIEW COUNCIL

(a)

Interchangeable Drug Products

Adopted Amendment: N.J.A.C. 8:71

Proposed: April 20, 1987 at 19 N.J.R. 615(a).

Adopted: November 17, 1987 by the Drug Utilization Review Council, Robert Kowalski, Secretary.

Filed: November 23, 1987 as R.1987 d.520, with portions of the proposal not adopted and portions not adopted but still pending.

Authority: N.J.S.A. 24:6E-6(b).

Effective Date: December 21, 1987.

Expiration Date: April 2, 1989.

Summary of Public Comments and Agency Responses:

No comments received.

The following products and their manufacturers were **not adopted**:

Lithium carbonate caps & tabs 300 mg	Roxane
Lithium carbonate tabs 300 mg	Bolar
Propanolol/HCTZ tabs 40/25, 80/25	Cord

The following products were **not adopted** but are still **pending**:

Allopurinol tabs 100, 300 mg	Mutual
Amitriptyline/perphenazine 2/10, 2/25, 4/25	Cord
Butalbital, APAP, caffeine tabs	Graham
Cephalexin caps 250, 500 mg	Nuovo
Chlorothiazide tabs 500 mg	Mylan
Doxepin caps 75, 150 mg	Chelsea
Flurazepam caps 15, 30 mg	Duramed
Glutethimide tabs 250, 500 mg	Halsey
Haloperidol tabs 0.5, 1, 2, 5, 10, 20 mg	Chelsea
Haloperidol tabs 10, 20 mg	Cord
Ibuprofen tabs 800 mg	Chelsea
Isosorbide dinitrate S.L. tabs 2.5, 5 mg	West-Ward
Isosorbide dinitrate oral tabs 20, 30 mg	Par
Isosorbide dinitrate oral tabs 5, 10, 20 mg	West-Ward
Lithium citrate syrup 8 mEq/5ml	My-K
Lorazepam tabs 0.5, 1 mg	Bolar
Lorazepam tabs 0.5, 1, 2 mg	Cord
Lorazepam tabs 2 mg	Bolar
Methyldopa/HCTZ tabs 250/15, 250/25	Chelsea
Nitroglycerin E.R. caps 2.5, 6.5, 9 mg	Vitarine
Nitroglycerin transdermal patch 10 mg	Hercon
Nitroglycerin transdermal patch 15 mg	Hercon
Nitroglycerin transdermal patch 5 mg	Hercon
Norethindrone 0.5 mg/ethinyl estr. 35 mcg	Corona
Norethindrone 1 mg/ethinyl estr. 35 mcg	Corona
Ortho-Novum formula 1/35, 1/50	Syntex
Perphenazine tabs 8 mg	Chelsea
Pramoxine 1%/HC 1% rectal foam	Copley
Prazosin caps 1, 2, 5 mg	Zenith
Prednisone tabs 5, 10, 20 mg	Amer. Ther.
Procainamide E.R. tabs 1000 mg	Bolar
Pyrimilamine/Chlorpheniramine/PE tannates susp	Copley
Pyrimilamine/Chlorpheniramine/PE tannates tabs	Copley
SMZ/TMP Susp. 200 mg + 40 mg/5 ml	Naska
Salsalate tabs 500, 750 mg	Copley
Temazepam caps 15, 30 mg	Cord
Temazepam caps 15, 30 mg	Duramed
Trifluoperazine tabs 5 mg	Bolar
Verapamil tabs 80, 120 mg	Bolar
Verapamil tabs 80, 120 mg	Cord

OFFICE OF ADMINISTRATIVE LAW NOTE: Related Notices of Adoption may be found at 19 N.J.R. 1312(b) and 1644(a).

(a)

Interchangeable Drug Products**Adopted Amendment: N.J.A.C. 8:71**

Proposed: August 17, 1987 at 19 N.J.R. 1488(a)

Adopted: November 17, 1987 by Robert Kowalski, Secretary,
Drug Utilization Review Council.

Filed: November 23, 1987 as R.1987 d.521, with portions of the
proposal not adopted and portions not adopted but still
pending.

Authority: N.J.S.A. 24:6E-6(b).

Effective Date: December 21, 1987.

Expiration Date: April 2, 1989.

Summary of Public Comments and Agency Responses:
CONCERNING SODIUM LEVOTHYROXINE:

A. Opposing comments from Flint Laboratories

Dr. Peter Bernardo, Vice President for technical services at Flint Laboratories, specified that company's objections to the proposed levothyroxine products:

1. Flint disputes the protocol of the biostudies. One study was uncontrolled, thus it "was not a biostudy." In addition, Dr. Bernardo said that subjects should be euthyroid (not hypothyroid, as in the Daniels' studies) and crossed over.

2. Flint said that the second study also was inappropriate because the subjects were hypothyroid. Flint also questioned what product was used as a comparison in this study; the very large standard deviations seen make them doubt that it was Synthroid. This second study also emphasized TSH measurements; the real question is whether T4 is released and gets into the body.

3. Flint also questions the stability of the generics. An independent laboratory, commissioned by Flint to assay several strengths of the Daniels products, found the 0.2 mg strength was less than 90 percent of labeled potency before the expiration date. Flint will have that product re-assayed and will submit those results.

Flint suggested a proper biostudy protocol, like that developed by Flint with the University of Kentucky, which looks at free T4, total T4, T3, and TSH. Dr. Bernardo pointed out that small amounts of T4 are already present in the body, and that several (at least 6 to 8) data points are needed after steady state to show equivalency. Single point assays are highly variable, and thus may not properly demonstrate bioavailability.

Boots (Flint) also provided documentation on their claim that certain strengths of Daniels products do not meet potency standards, as measured by HPLC assays. Boots also synopsized their idea of a well-designed biostudy.

Boots replied to the specific criticism from Daniels that Synthroid itself had been shown to be only 75 percent potent in the literature by explaining that the Flint product so found was the old formulation (before 1982) as assayed by HPLC.

At the Council meeting, Flint had an expert clinician testify that the Daniels' products might pose clinical problems for selected patients, that "shelf stability" was also questionable, and that re-testing of patients would negate any savings.

B. Supporting comments from Daniels:

Daniels Pharmaceuticals supported their application by submitting, in addition to the usual bioequivalency studies, data addressing the stability issues raised and a letter from the FDA stating that their levothyroxines are "identical" to other marketed products. Daniels also stated that the various strengths are identical in their formulation (other than the amount of active ingredients, of course).

Daniels also sent responses to the criticisms of their biostudies from the laboratory performing the study and an analysis of the biostudies by an independent physician. Both supported the Daniels products.

Dr. B. Wolfson, representing Daniels, commented in support of their proposed levothyroxine tablets. He noted that both of the biostudies presented found no statistically significant differences between Synthroid and the Daniels products.

Regarding stability, Dr. Wolfson said that the Flint literature itself shows the instability of Synthroid. He referred to a Flint graph (showing stability among various generic levothyroxines) cited in a 1986 article by Dong in Drug Intelligence and Clinical Pharmacy, which found Synthroid itself to be only 75 percent potent. Dr. Wolfson also questioned the assay used in the independent laboratory's test of the generic levothyroxine.

At the Council meeting, Daniels presented additional clinical data from two clinical consultants who had tested the Daniels products against Synthroid in several dozen patients and found no laboratory or clinical evidence of problems with the generics.

COUNCIL'S RESPONSE: The Council acknowledged that levothyroxines have been noted to show bioequivalency problems based on lack of equal potency (strength) between generics and the brand, which itself was subpotent in the early 1980s. Action had been deferred pending receipt of additional clinical data from Dr. LaJoie and to give Dr. Amorosa, a Council member, sufficient time to review all the submitted data. After reviewing the clinical data, Dr. Amorosa was of the opinion that the Daniels' products would not present any hazard to patients.

Unsatisfied by the conflicting clinical testimony, the Council again decided to defer action on generic substitutes for Synthroid, thus leaving the issue unresolved and Synthroid remaining not generically substitutable in New Jersey.

The following products and their manufacturers were **adopted**:

Betamethasone diprop. crm, oint, lot 0.05%	Lemmon
Cephalexin caps 250, 500 mg	M.J.
Cephalexin caps 250, 500 mg	Novopharm
Clonidine tabs 0.1, 0.2, 0.3 mg	Barr
Clorazepate dipot. tabs 3.75, 7.5, 15 mg	Quantum
Doxepin caps 100 mg	Danbury
Doxepin caps 25 mg	Par
Ibuprofen tabs 600 mg	Interpharm
Meprobamate/aspirin tabs 200/325	Par
Meprobamate/aspirin tabs 200/325	Vitarine
Methyldopa/HCTZ 250/25, 500/30, 500/50	Cord
Propranolol/HCTZ tabs 80/25	Mylan
SMZ/TMP tabs 400/80, 800/160	Interpharm
Thiothixene oral solution 5 mg/ml	Barre-National

The following products and their manufacturers were **not adopted**:

Acetohexamide tabs 250, 500 mg	Barr
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The following products were **not adopted** but are still **pending**:

Allopurinol tabs 100 mg	Interpharm
Amantadine HCl caps 100 mg	Pharmacaps
Amitriptyline/perphenazine 4/10, 4/25, 4/50	Mylan
Amitriptyline/perphenazine 2/10, 2/25	Mylan
Carbamazepine tabs 200 mg	Barr
Carbamazepine tabs 200 mg	Interpharm
Carbamazepine tabs 200 mg	Purepac
Cephalexin caps 250, 500 mg	Purepac
Chlorzoxazone/APAP tabs 250/300	Interpharm
Clonidine/chlorthal. tabs 0.1, 0.2, 0.3	Par
Clorazepate dipot. tabs 3.75, 7.5, 15 mg	Mylan
Cyproheptadine tabs 4 mg	Interpharm
Diazepam tabs 2, 5, 10 mg	Ferndale
Doxepin caps 10, 25, 50, 75, 100 mg	Danbury
Doxepin caps 10, 25, 50, 75, 100, 150 mg	Par
Dyphylline/guaifenesin syrup	Barre-National
Erythromycin estolate susp 125/5, 250/5	Barr
Erythromycin ethylsuccinate 200/5 susp	Barre-National
Erythromycin/sulfisoxazole 200/600 for susp	Barr
Furosemide oral solution 10 mg/ml	Barre-National
Haloperidol tabs 2 mg	Lemmon
Ibuprofen tabs 400, 600, 800 mg	Interpharm
Indomethacin caps 25, 50 mg	Interpharm
Iodinated glycerol drops 50 mg/ml	Barre-National
Isosorbide dinitrate oral tabs 20 mg	Cord
Lactulose syrup 10 g/15 ml	Barre-National
Levothyroxine tabs 150, 175, 200, 300 mcg	Daniels
Levothyroxine tabs 25, 50, 75, 100, 125 mcg	Daniels
Lorazepam tabs 0.5, 1, 2 mg	Mylan
Metoclopramide tabs 10 mg	Mylan
Minoxidil tabs 2.5, 10 mg	Par
Nystatin oral susp 100,000 U/ml	Lemmon
Oxtriphylline/guaifenesin syrup	Barre-National
Phenylephrine ophth. soln 10%	Steris
Prednisone tabs 5, 10, 20 mg	Amer. Ther.
Prednisone tabs 5, 20 mg	Cord
Procainamide E.R. tabs 750 mg	Copley
Propranolol tabs 10, 20, 40, 60, 80, 90	Halsey
Propranolol tabs 10, 20, 40, 80 mg	Interpharm

HEALTH

Thiothixene caps 20 mg
Tolazamide tabs 100 mg
Trazodone tabs 50, 100 mg
Trazodone tabs 50, 100 mg
Verapamil tabs 80, 120 mg

Cord
Cord
Mylan
Purepac
Mylan

(a)

Interchangeable Drug Products

Adopted Amendment: N.J.A.C. 8:71

Proposed: January 5, 1987 at 19 N.J.R. 13(a).

Adopted: November 17, 1987 by Robert Kowalski, Secretary,
Drug Utilization Review Council.

Filed: November 23, 1987 as R.1987 d.522, with portions of the
proposal not adopted and portions not adopted but still
pending.

Authority: N.J.S.A. 24:6E-6(b).

Effective Date: December 21, 1987.

Expiration Date: April 2, 1989.

Summary of Public Comments and Agency Responses:

No comments received.

The following products and their manufacturers were **adopted**:

Flurazepam caps 15, 30 mg

Barr

The following products were **not adopted** but are still **pending**:

Allopurinol tabs 100, 300 mg

Superpharm

Amiloride/HCTZ tabs 5/50

Barr

Cefradroxil for susp 125, 250, 500/5 ml

Biocraft

Cefadroxil caps 500 mg

Biocraft

Clonidine tabs 0.3 mg

Cord

Codeine/phenyleph/chlorphen/KI ("Pediocof")

Life

Decongestant caps (Entex cap. formula)

Amide

Doxepin caps 10, 25, 50, 75, 100 mg

Quantum

Ergoloid mesylates SL tabs 0.5, 1 mg

Superpharm

Methyldopa tabs 125, 250, 500 mg

Roxane

Quinidine gluconate E.R. tabs 324 mg

Superpharm

Temazepam caps 15, 30 mg

Sandoz

Tetracycline HCl caps 250, 500 mg

Superpharm

Tolazamide tabs 250, 500 mg

Superpharm

OFFICE OF ADMINISTRATIVE LAW NOTE: Related Notices of
Adoption appear at 19 N.J.R. 641(a), 880(a), 1314(a) and 1644(b).

HUMAN SERVICES

(b)

DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

Pharmaceutical Services Manual Dispensing Fee

Adopted Amendment: N.J.A.C. 10:51-1.17

Proposed: September 21, 1987 at 19 N.J.R. 1711(a)

Adopted: November 30, 1987 by Drew Altman, Commissioner,
Department of Human Services.

Filed: November 30, 1987 as R.1987 d.530, **without change**.

Authority: N.J.S.A. 30:4D-3i, 30:4D-6b(6) and g(1) and (2),
30:4D-7a, b and c and 12; 30:4D-20 and 24.

Effective Date: December 21, 1987.

Expiration Date: October 28, 1990.

Summary of Public Comments and Agency Responses:

No comments received.

Full text of the adoption follows.

10:51-1.17 Legend drug dispensing fee

(a) The dispensing fee for legend drugs, dispensed by providers
having Retail Permits to patients other than those in long-term care

(CITE 19 N.J.R. 2402)

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facilities, shall be \$3.63. Additional increments shall be given to
pharmacy providers who provide the following:

1.-3. (No change.)

(b) (No change.)

(c)

DIVISION OF PUBLIC WELFARE

Food Stamp Program

Increased Income Deductions and Maximum Coupon Allotments

Adoption of Concurrent Proposals: N.J.A.C. 10:87-12.1 and 12.2

Proposed: October 19, 1987 at 19 N.J.R. 1916(a).

Adopted: November 30, 1987 by Drew Altman, Commissioner,
Department of Human Services.

Filed: November 30, 1987 as R.1987 d.529, **without change**.

Authority: N.J.S.A. 30:4B-2; the Food Stamp Act of 1977 as
amended (7 USC 2014); 7 CFR 273.9(d)(6), (7), and (8); 7 CFR
273.10(e)(4); and P.L. 100-77.

Effective Date: November 30, 1987.

Expiration Date: March 1, 1989.

Summary of Public Comments and Agency Responses:

No comments received.

Full text of the adoption follows.

10:87-12.1 Income deduction table

TABLE I
Income Deductions

Standard Deduction	\$102.00
Shelter Deduction	\$152.00
(for households certified prior to October 1, 1987)	
Shelter Deduction	\$164.00
(for households certified or recertified effective October 1, 1987 or later)	
Dependent Care Deduction	\$160.00
Uniform Telephone Allowance	\$ 13.80
Standard Utility Allowance	\$103.00
Heating Utility Allowance	\$169.00

10:87-12.2 Maximum coupon allotment table

TABLE II
Maximum Coupon Allotment (MCA)

Household Size	MCA
1	\$ 87
2	159
3	228
4	290
5	344
6	413
7	457
8	522
9	587
10	652
Each Additional Member	+65

CORRECTIONS

(a)

THE COMMISSIONER

Inmate Discipline

Introduction; Scope

Adopted Amendment: N.J.A.C. 10A:4-1.2

Proposed: August 17, 1987 at 19 N.J.R. 1531(a).

Adopted: November 25, 1987 by William H. Fauver,
Commissioner, Department of Corrections.

Filed: November 25, 1987 as R.1987 d.526, **with 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 30:1B-10.

Effective Date: December 21, 1987.

Expiration Date: July 21, 1991.

Summary of Public Comments and Agency Responses:

No comments received.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks ***[thus]***).

10A:4-1.2 Scope

[a) Subchapter 2 through subchapter 12 shall be applicable to the Division of Adult Institutions, the Training School for Juveniles at Jamesburg, the Girl's Unit of the Training School for Boys at Skillman and the Juvenile Medium Security Unit unless otherwise indicated.

(b) (No change.)

INSURANCE

(b)

DIVISION OF ADMINISTRATION

Dangerous Drivers/Drivers with Excessive Claims

Adopted New Rules: N.J.A.C. 11:3-23

Proposed: October 19, 1987 at 19 N.J.R. 1880(a).

Adopted: November 30, 1987 by Kenneth D. Merin,
Commissioner, Department of Insurance.

Filed: November 30, 1987 as R.1987 d.527, **with technical changes**
not requiring additional public notice and comment (see
N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 17:1-8.1, 17:1C-6(e), 17:29C-2.1 and
17:30E-20.

Effective Date: December 21, 1987.

Expiration Date: January 6, 1991.

Summary of Public Comments and Agency Responses:

The Department of Insurance received one comment from an organization representing insurance brokers which addressed various sections of the proposed new rules regarding the designation of dangerous drivers and drivers with excessive claims. The commenter's specific recommendations follow:

COMMENT: The commenter advocated that the rules be imposed uniformly and specifically objected to the fact that the rules state that voluntary market insurers "may" and the New Jersey Automobile Full Insurance Underwriting Association (Association) "shall" impose higher collision and/or comprehensive rates for individuals identified as dangerous drivers and drivers with excessive claims.

RESPONSE: N.J.A.C. 11:3-23 merely implements the provisions of N.J.S.A. 17:29C-2.1. The statute specifically provides that voluntary companies may refuse to issue or nonrenew physical damage coverage to individuals who are identified as dangerous drivers/drivers with excessive claims. In those instances where voluntary companies determine to offer

such coverages to dangerous drivers, the law permits them to do so at rates based on the driver's experience. The statute, however, requires that the Association offer physical damage coverages to dangerous drivers, at higher rates.

COMMENT: The commenter objected to the inclusion in the list of convictions of motor vehicle violations that may lead to the designation of an individual as a dangerous driver, "Following Too Closely (0489)". Specifically, the writer believes the conviction is too subjective.

RESPONSE: The Division of Motor Vehicles (DMV) has determined that "Following Too Closely" is a serious moving violation and drivers convicted of this offense are assessed five motor vehicle points. The issuance of a citation for "Following Too Closely" or any other violation by a police officer represents his or her professional judgment and, to that extent, is subjective. However, the driver who receives a citation is afforded the opportunity to present his or her side of the story before an impartial arbiter who has the authority to dismiss or downgrade the violation. It is only after the opportunity to be heard that the driver is convicted and the offense can contribute to a dangerous driver designation.

COMMENT: The commenter objected to the inclusion in the list of convictions of motor vehicle violations that may lead to the designation of an individual as a dangerous driver, "Exceeding the Maximum Speed 15 or more MPH over the Limit". Specifically, the writer thought it was unfair for an individual with only one conviction for driving 40 mph in a 25 mph zone to be considered a dangerous driver in the same category with many more serious violations.

RESPONSE: The Department believes that a conviction for speeding 15 or more mph over the limit properly results in a dangerous driver designation. In the example given, 25 mph zones are commonly found near schools or in residential areas where children play. Driving 40 mph in such a zone is extremely dangerous and a dangerous driver designation as a result would not be unreasonable. Further, speed can be an important contributing factor in the severity of auto accidents. For this reason, the Department continues to believe that a conviction for speeding 15 or more mph over the limit is appropriate for inclusion in the violations resulting in a dangerous driver designation.

Finally, as a result of internal review of the proposed new rules and communication with the Association office, the Department is correcting certain errors and omissions in the list of DMV abstract codes. For example, speeding convictions reported prior to DMV's event code conversion appear on the abstract with the code "SPED". The rule has been amended to include this code. However, the "SPED" code can indicate a conviction for which two, four or five DMV points were assessed and a dangerous driver designation only results from speeding convictions for which four or five points are assessed. The rule has been amended, therefore, to include a note stating that a dangerous driver designation shall only occur where 4 or 5 is reported in the "Pts" column of the abstract.

Full text of the adoption follows (additions indicated in boldface with asterisks ***thus***; deletions indicated in brackets with asterisks ***[thus]***).

SUBCHAPTER 23. DANGEROUS DRIVERS OR DRIVERS WITH EXCESSIVE CLAIMS

11:3-23.1 Purpose

The purpose of this subchapter is to implement N.J.S.A. 17:29C-2.1 (P.L. 1985, c.520) which authorizes insurers in the voluntary market to refuse to issue or nonrenew physical damage coverages to drivers who are identified as dangerous drivers or drivers with excessive claims. The statute permits voluntary market insurers, and requires the New Jersey Automobile Full Insurance Underwriting Association, to issue physical damage coverages to drivers identified as dangerous drivers or drivers with excessive claims on the basis of their experience. N.J.S.A. 17:29C-2.1 requires that the Commissioner adopt standards and guidelines for the identification of dangerous drivers and drivers with excessive claims which take into consideration the total driving record of the driver including serious driving offenses and at-fault accidents occurring within a three year period.

11:3-23.2 Scope

This subchapter shall apply to all insurers authorized to write private passenger automobile insurance in this State including the

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New Jersey Automobile Full Insurance Underwriting Association, and to all policies covering automobiles as defined in N.J.S.A. 39:6A-2 or N.J.S.A. 17:30E-3.

11:3-23.3 Definitions

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

"Association" means the New Jersey Automobile Full Insurance Underwriting Association and its servicing carriers.

"Commissioner" means the Commissioner of the Department of Insurance.

"DMV" means the New Jersey Division of Motor Vehicles.

"DMV abstract" means the New Jersey Division of Motor Vehicles Abstract of Driver History Record.

"Insurer" means an insurance company authorized to write private passenger automobile insurance in this State, including the New Jersey Automobile Full Insurance Underwriting Association.

"Physical damage coverages" means collision coverage or comprehensive coverage or both coverages.

"Voluntary market insurer" means an insurance company authorized to write private passenger automobile insurance in this State, except the New Jersey Automobile Full Insurance Underwriting Association.

11:3-23.4 Availability of physical damage coverages for dangerous drivers or drivers with excessive claims

(a) Any voluntary market insurer may refuse to issue or may nonrenew physical damage coverages for any policy covering a driver who is identified as a dangerous driver or driver with excessive claims pursuant to criteria set forth at N.J.A.C. 11:3-23.5. The form and content of any nonrenewal made pursuant to this subchapter shall be subject to the standards and requirements set out at N.J.A.C. 11:3-8.

(b) Any voluntary market insurer may issue or renew physical damage coverages for any policy covering a driver who is identified as a dangerous driver or driver with excessive claims pursuant to N.J.A.C. 11:3-23.5 at rates based on their experience and approved by the Commissioner. Any voluntary market insurer wishing to impose higher rates for physical damage coverage for dangerous drivers or drivers with excessive claims shall submit to the Commissioner filings of rates and manual rules prepared in accordance with N.J.A.C. 17:29A-1 et seq., N.J.A.C. 11:1-2 and any applicable insurance laws, rules, and the Department's current filing procedures. The filing of a rating organization shall be applicable to the members of the organization who have authorized the organization to file on their behalf.

(c) The New Jersey Automobile Full Insurance Underwriting Association shall issue physical damage coverages to its insureds identified as dangerous drivers or drivers with excessive claims pursuant to the requirements and procedures found in its Plan of Operation, Operating Principles, Part IV, Association Rates, Section 2, Driver Improvement Plan.

11:3-23.5 Identification of dangerous drivers or drivers with excessive claims

(a) A dangerous driver or driver with excessive claims shall mean:

1. A driver who has been involved within the three-year period ending 60 days prior to the date of application or renewal in:

i. Three or more at-fault accidents as defined in N.J.A.C. 11:3-23.7;

ii. Three or more comprehensive claims resulting in payment by the insurer of at least \$300.00 per claim; or

iii. Four or more combined at-fault accidents or comprehensive claims; or

2. A driver who has been convicted within the three-year period ending 60 days prior to the date of application or renewal of any of the offenses listed in N.J.A.C. 11:3-23.8; or

3. A driver who has accumulated nine or more DMV points. DMV point accumulation shall apply regardless of any annual safe driving point credits granted by DMV.

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11:3-23.6 Application of dangerous driver designation

(a) Dangerous driver designations arising from conviction of the offenses described in N.J.A.C. 11:3-23.7 shall include similar violations in other states.

(b) For the purpose of identifying dangerous drivers or drivers with excessive claims as set forth in N.J.A.C. 11:3-23.5, each accident and/or claim shall be assigned to the driver of the vehicle at the time of the incident. In the event that there was no driver when the incident occurred, the accident or claim shall be assigned to the named insured.

11:3-23.7 At-fault accidents

(a) An at-fault accident is any accident involving a driver insured under the policy which occurred within the three-year period ending 60 days prior to the date of application or renewal and which resulted in payment by the insurer of at least a \$300.00 claim. Provided, however, that for the purposes of this subchapter, an accident shall not be considered at-fault and shall not be counted toward the dangerous driver or driver with excessive claims designation unless it has been determined that the driver was at least 50 percent at fault in the occurrence and that none of the exceptions set forth in (b) below are applicable.

1. The degree of driver responsibility for an accident shall be investigated and determined by the insurer for each accident that results in its paying a claim of at least \$300.00 under any of the following coverages or combinations thereof:

i. Bodily injury liability;

ii. Property damage liability;

iii. Personal injury protection; or

iv. Collision.

2. In determining whether a \$300.00 claim payment has been made, the insurer shall include any applicable sales tax, but shall exclude any interest or other costs that it must pay pursuant to N.J.S.A. 39:6A-5c.

3. The insurer shall conduct its investigation and render its determination in compliance with N.J.S.A. 17:29B-4 and any rules promulgated pursuant thereto. The requirement of determining the degree of driver responsibility shall include those accidents which involve a claim payment only under first party coverages, such as collision or PIP, where payment is actually made by the insurer without regard to fault.

(b) Any accident occurring under the following circumstances shall not be considered an at-fault occurrence:

1. The named insured, or other insured driver obtained a judgment against, or a settlement from or on behalf of the person responsible for the accident and no judgment was obtained against nor any amount paid in settlement by or on behalf of the named insured or other insured driver as a result of the accident;

2. The accident occurred while the motor vehicle owned or operated by a driver insured under the policy was lawfully parked. An automobile rolling from a parked position shall not be considered as lawfully parked, but shall be considered as in the operation of the last operator;

3. The automobile was struck in the rear by another vehicle and the named insured or other insured driver has not been convicted of a moving traffic violation in connection with this accident;

4. The operator of the other automobile involved in the accident was convicted of a moving traffic violation and the named insured or other insured driver was not convicted of a moving traffic violation in connection with the accident;

5. The automobile was struck by a hit and run driver, if such accident was reported to the proper authority within 24 hours;

6. The accident occurred when using the automobile in response to an emergency if the insured driver at the time of the accident was a paid or volunteer member of any Police or Fire Department, First Aid Squad, or any law enforcement agency. This exception does not include an accident occurring after the automobile ceases to be used in response to such emergency; or

7. Physical damage losses other than collision.

11:3-23.8 Convictions

(a) Table I below sets forth those offenses and, where applicable, corresponding Event Identifier Codes for violations that appear on

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the DMV Abstract, which shall result in a dangerous driver or driver with excessive claims designation pursuant to N.J.A.C. 11:3-23.5.

Table I

Conviction Description	Event Identifier Code
1. Allowing unlicensed driver to operate vehicle.	339b
2. Altered driver's license/registration.	3381
3. Obtaining a license or registration through deception of any kind.	0337, 0312, *[MS05]* *MSOS*, MSNJ I312, C312, *[0505]* *05D5*
4. Operating a motor vehicle without a license or registration.	0310, 0304
5. Operating during a period of suspension or revocation.	0340
6. No liability insurance on motor vehicle.	06B2
7. Failure to verify insurance—accident or termination.	FVIA, FVIT *ACCD, TERM*
8. Vehicular homicide.	C115
9. Fatal accident, emergent or nonemergent.	EFTL, NFTL
10. Possession of narcotic drugs.	4491
11. Use of counterfeit plates or plates other than issued.	0338
12. Consuming alcohol while operating/riding.	451A
13. Any driver insured under the policy has had a vehicle registered in New Jersey during the preceding year but has failed to carry compulsory liability insurance or has had a lapse in compulsory liability coverage for more than 30 days.	Inapplicable
14. Operating under the influence of liquor or drugs.	0450, 3261
15. Refuse alcohol breath test.	4504
16. Racing on highway.	0452, 05C1
17. Reckless driving.	0496
18. Following too closely.	0489
19. Leaving the scene of an accident; Personal Injury.	129A
20. Passing school bus.	1281
21. Exceeding maximum speed 15 or more mph over limit.	9124, 4984, A114, 4985 9125, 8124, A115, 8125*, 12A4, 12A5, 12B4, 12B5, SPED*
22. Any individual covered under the policy has been found by a court of competent jurisdiction to have committed any act which is in violation of the New Jersey Insurance Fraud Prevention Act (N.J.S.A. 17:33A-1) or has been convicted of any crime in any jurisdiction involving insurance fraud.	Inapplicable

NOTE: No conviction represented by the Event Identifier Code "SPED" shall result in a dangerous driver designation under item 21 above unless the "Pts" column on the Abstract displays a 4 or 5. Convictions with the Event Identifier Code "SPED" where the "Pts" column on the abstract shows a 2 shall not result in a dangerous driver designation. However, the DMV points assessed for the conviction shall be included toward a dangerous driver designation resulting from accumulation of nine or more DMV points as specified at N.J.A.C. 11:3-23.5(a)3.

(b) With respect to any conviction of a violation that is disclosed on the DMV abstract, the insurer shall use the Event Responsibility Codes shown on column two of the abstract to determine whether the listed violation reflects a Court Code (including foreign state violations listed on the abstract) or a Division Code.

1. The dangerous driver designation for Court Code violations shall apply only where the Event Type column of the abstract (column three on the abstract) contains a "V" designation; court code violations where the Event Type column contains an "O" designation shall be disregarded. The dangerous driver designation for Division Code violations shall apply only where the Event Type column of the abstract contains an "O" designation; Division Code violations where the Event Type column contains an "S" designation shall be disregarded.

2. The three year period specified at N.J.A.C. 11:3-23.5(a) shall be computed based upon the date shown in the event date column (column one) of the abstract.

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3. With respect to out-of-state violations for driving under the influence of alcohol or drugs and refusal to take an alcohol breath test (compact and non-compact states) the dangerous driver designations shall apply only where the Event Type column contains a "V" designation. Subsequent entries reflecting administrative action by DMV based upon the out-of-state violation (Division Code, Event Type "O") shall be disregarded.

11:3-23.9 Severability

If any provision of this subchapter or its application to any person or circumstance is held invalid, the remainder of this subchapter and its application to other persons or circumstances shall not be affected.

LAW AND PUBLIC SAFETY

(a)

BOARD OF NURSING

Fee Schedule

Adopted Amendment: N.J.A.C. 13:37-12.1

Proposed: October 19, 1987 at 19 N.J.R. 1886(a).

Adopted: November 23, 1987 by Sylvia C. Edge, R.N., M.A.,

President, New Jersey State Board of Nursing.

Filed: December 1, 1987 as R.1987 d.536, **without change**.

Authority: N.J.S.A. 45:1-3.2; 45:11-23.

Effective Date: December 21, 1987.

Expiration Date: February 11, 1990.

Summary of Public Comments and Agency Responses:

The New Jersey State Nurses Association submitted a letter in support of the fee increase because it believes additional financial resources are necessary to accomplish the Board's objectives.

Full text of the adoption follows.

13:37-12.1 Fee schedule

(a) The following fees shall be charged by the Board.

1. Certification for original examination and licensure:

i. Professional nurse—\$40.00;

ii. Practical nurse—\$30.00.

2. Certification for reexamination and licensure:

i. Professional nurse—\$40.00;

ii. Practical nurse—\$30.00.

3. Licensure by endorsement:

i. Professional nurse—\$35.00;

ii. Practical nurse—\$25.00.

4. Verification—\$30.00.

5. Renewal of license (Biennial)—\$24.00.

6. Late renewal of license—\$34.00.

7. Duplicate license—\$10.00

8. Temporary work permit—\$5.00.

9. Notary fee—\$5.00.

10. Instate verification—\$5.00.

11. Record duplication—\$5.00.

PUBLIC UTILITIES

(b)

BOARD OF PUBLIC UTILITIES

Winter Termination of Residential Electric and Gas Service

Winter Termination Program

Adopted New Rule: N.J.A.C. 14:3-7.12A

Proposed: November 17, 1986 at 18 N.J.R. 2315(a).

Adopted: November 12, 1987 by Robert N. Guido,

Commissioner, Board of Public Utilities.

Filed: November 16, 1987 as R.1987 d.516, **with substantive changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 48:2-12, 48:2-13 and 48:2-24.

Effective Date: December 21, 1987.

Expiration Date: May 6, 1990.

Summary of Public Comments and Agency Responses:

Written comments concerning the proposal were provided by the Consumers League of New Jersey, the Hudson County Legal Services Corporation, the New Jersey Department of Human Services, the Atlantic City Electric Company, the South Jersey Gas Company, the New Jersey Natural Gas Company, Public Service Electric and Gas Company and the Elizabethtown Gas Company.

The following comments were submitted on behalf of the Consumers League of New Jersey:

1. The Board should eliminate the requirement of enrollment in a budget payment plan as said requirement may result in a payment amount that is beyond the customer's present ability to pay. The minimum winter payment should be tailored to the customer's ability to pay.

2. The Board should eliminate the requirement for mandatory "seal-up" of residences as said conservation measure is not occurring to any significant degree.

3. N.J.A.C. 14:3-7.12A(a)7 should be redefined to cover "persons unable to pay their utility bills because of insufficient income or other hardships" thus focusing on present financial conditions only.

The following comments were submitted on behalf of the Department of Human Services:

1. Home Energy Assistance Program benefits should be considered to be a sufficient down payment for purposes of restoring service to eligible customers who have been terminated and not had service reconnected by November 15.

2. Prior to the referral of a customer to the low income seal-up program, a waiver of confidentiality must be obtained from said customer.

The following comments were submitted on behalf of the Hudson County Legal Services Corporation:

1. In addition to the protection from discontinuance of service provided in the proposed rule, the Board should implement a weather moratorium which would prohibit discontinuance of service to eligible customers on any day when the temperature falls to freezing or below.

2. The use of the words "beyond their control" contained in N.J.A.C. 14:3-7.12A(a)7 creates an arbitrary standard of eligibility in that it allows a utility to pass judgment on whether an individual's financial hardship was, in fact, beyond his control.

3. The Board should eliminate the requirement that an eligible customer enroll in a budget payment plan (Subsection (c)) and not equate a budget payment with good faith payment. Rather, utilities should be required to individually calculate what each customer can realistically afford to pay.

4. The Board should require that utility companies refrain from sending discontinuance notices to eligible customers during the heating season.

5. N.J.A.C. 14:3-7.12A(i)1.ii. should provide that the utility company must come forward with sufficient credible evidence that shows that the tampering with utility facilities was done by the customer of record and that the customer must be given the opportunity to rebut any presumption that he or she is responsible for the tampering.

The following comments were submitted on behalf of the Atlantic City Electric Company:

1. The rule should contain specific language setting forth the customer's ultimate responsibility for payment.

2. Subsection (b) should not limit a down payment to 25 percent of the outstanding balance as a condition precedent to reconnection on or after November 15 as that effectively eliminates those customers who can afford more than 25 percent. Accordingly, this requirement should be based upon the ability of the customer to make payment.

3. Subsection (c) should be amended to reflect a budget payment plan on a schedule not to exceed one year as most customers do not want to be placed on such a plan and the sooner payment is made the less animosity the customer will have for the budget payment plan.

4. Subsection (d) provides that customers are required to make good faith payments during the winter period if they have the ability to do so and that said payments "should be equal to a budget payment amount, although a lesser amount should be accepted from those customers who do not have the ability to pay the budget amount." The company rec-

ommends that the lesser amount be accepted only during the heating season and that any amount not paid during the heating season be made up during the rest of the non-heating season.

5. In order to conserve the company's resources, it is recommended that the words "or means to obtain one" be inserted after the word "form" in the second sentence of subsection (h)9 regarding landlord consent forms for weatherization work.

6. As it believes that N.J.A.C. 14:3-7.12A(i)2. does not adequately differentiate between customers who cause unauthorized restorations and customers who are discontinued prior to the heating season for nonpayment, the company recommends that the rule require those customers who have caused an unauthorized use to make a down payment of an amount greater than 25 percent.

7. In order to distinguish the different types of utility companies, the company recommends that in subsections (a), (b), (c), (d), (f) and (g) "electric and gas" be amended to "electric or gas".

The following comments were submitted on behalf of Public Service Electric and Gas Company:

1. The annual Board approval of the Winter Termination Program fact sheet as required in subsection (g) is inordinate in that all changes must be approved and is "as open invitation to abuse and an onerous requirement without apparent benefit."

2. The landlord consent form mandated in subsection (h)9. should be made available only to those customers requesting it rather than as a bill insert. The company is of the opinion that the universal distribution of the form may unfairly restrict information that would have otherwise been included as a bill insert.

3. The program commencement date should not be extended from December 1 to November 15 each year.

The following comments were submitted on behalf of Elizabethtown Gas Company:

1. Subsection (d) should establish additional procedures which will allow a utility to seek an administrative hearing on the ability of a chronically delinquent customer to make good-faith payments in return for the program's protections.

2. In order to insure that all energy related assistance funds are forwarded to a customer's electric or gas utility, if either is the customer's major heat supplier as required by subsection (e), the Board should investigate a means by which local agencies could be mandated to make separate energy payments directly to the utility.

3. The expenditures associated with the obligation to be more aggressive in pursuit of seal-up participation could negatively affect the company's cash flow. In addition, sufficient contractor manpower does not exist on a statewide basis to accomplish such an aggressive program.

4. The requirements that contractors record and report any structural measures requiring greater weatherization beyond the scope of the seal-up (subsection (h)4.) and that utilities compile historic consumption and billing data as well as a list of specific conservation measures installed (subsection (h)6.) are costly and unnecessary.

The following comments were submitted on behalf of the New Jersey Natural Gas Company:

1. The regulation should provide a method to achieve the full payment of outstanding bills.

2. Subsection (h) should be clarified to indicate that the limitations of the down payment to an amount of up to 25 percent of the outstanding balance was intended to assist those customers having a bona fide difficulty in obtaining necessary funds for utility services.

3. Subsection (d) should be clarified to indicate that a good-faith payment in an amount less than a budget payment amount must be accepted only during the heating season.

4. The protection from discontinuance of service afforded in subsection (d), should be limited to the heating season.

5. Subsection (h)9 should be amended to reflect that a landlord consent form regarding the low income seal-up programs, or the means to obtain one shall be forwarded to customers along with the descriptive information on the seal-up program and the Winter Termination Program fact sheet.

6. As unauthorized service obtained through tampering, whether metered or unmetered, is a prosecutable offense and should not be condoned by offering routine payment arrangements for same, subsection (i)2. should require a customer to pay in full all charges for unauthorized use and to make a down payment of up to 25 percent of the outstanding account balance prior to the unauthorized use as a precondition for the continuation of service during the heating season.

The following comments have been submitted on behalf of South Jersey Gas Company:

1. The provision contained in subsection (b) requiring an annual payment of 25 percent prohibits the utility from ever collecting the full unpaid balance and amounts to social engineering for which the Board has no lawful authorization.

2. Subsections (c) and (d) should be amended to include language that would clearly state the right of a customer and a utility to enter into a deferred payment agreement for a period of less than 12 months without the loss of protected status for the customer.

3. Subsection (e) does not reflect the need that arrearages must be adequately addressed without long-term dependence on fuel assistance programs.

4. In order to avoid costs to the utility and its customers, subsection (h)9. should be amended to permit the landlord consent form to be forwarded to the customer upon the return of a coupon indicating that said customer is a tenant.

5. Protected status should not be extended to any customer who causes the unauthorized restoration of service. Accordingly, subsection (i)2. should require that such customers make full payment for the unauthorized use as a precondition for the continuation of service during the heating season.

AGENCY RESPONSES: Through a series of Orders in Docket No. 792-88 beginning February 20, 1981, the Board established a formal policy regarding the termination of residential electric and gas service during the heating season. As stated in these Orders and as noted in the social impact section of the proposed rule, the purpose of the Winter Termination Program "is to recognize that the loss of residential electric and gas utility service during the heating season poses a potential danger to the health and welfare of many citizens of this State."

The Board, however, has made it clear that while eligible customers may have their service continued during the heating season by having a portion of their bills deferred, said customers remain obligated to satisfy their bills in full.

The Board is of the opinion that the rule as drafted adequately reflects the obligations of the customers and, in addition to providing necessary protection during the heating season, offers a reasonable means by which eligible customers may continue to receive gas and electric utility service in an uninterrupted manner subsequent to the heating season. The Board is of the further opinion that the heating season should commence as of November 15 of each year and run through March 15 unless otherwise ordered.

The Board continues to believe that the Winter Termination Program must take into consideration a customer's ability to pay. Indeed, in the Board's Order of February 20, 1981, the Board specifically rejected a total ban on winter residential shut-offs because that policy would have eliminated such a consideration.

The categories of protected customers as set out in subsection (a) are based on present individual economic conditions and the Board is aware of no instance since their inception when such classifications have been or could have been arbitrarily interpreted or applied.

The good-faith payments required by subsection (d) are clearly designated to be made during the heating season and are based on ability to pay. The enrollment in a budget plan (subsection (c)) is an attempt to allow protected customers to have service continued beyond the protected period and should be retained as a requirement for participation in the Program. In the event that a dispute regarding ability to make a good-faith payment is referred to the Board, an appropriate procedure will be instituted by the Board which allows for applicable due process considerations.

After review of the comments regarding the requirements for a down payment contained in subsection (b), the Board is of the opinion that a maximum amount of 25 percent is reasonable and is necessary for purposes of implementation and avoidance of potential abuse. And while the transfer of energy related financial assistance to the utilities (subsection (e)) may in many instances amount to a satisfactory down payment, the Board does not deem it necessary at this time to place specific limitations on the down payment beyond the maximum of 25 percent of the outstanding balance.

As previously stated, the Board considers the participation of protected customers in the low income seal-up programs to be an important means by which to reduce the consumption of those who are least able to afford the current costs of utility services while alleviating, to some degree, the prospective uncollectables facing the affecting utility companies.

The Board finds the requirements associated with the low income seal-up program to be reasonable and necessary. It is also the considered opinion of the Board that any potential problems, including costs, that may be faced by the affected utilities may be effectively addressed within the ongoing review of utility conservation programs. The Board is of the further opinion that as customers seeking the protection of the Winter Termination Program do so on a voluntary basis and must identify themselves to the utilities, there is no need to address the question of confidentiality with regard to participation in the seal-up program.

The Board has, however, amended subsection (h)9. to allow for utilities to forward to eligible customers a landlord consent form or the means to receive one in order that excess costs to utilities and their customers may be avoided.

The Board also deems the annual review of the Winter Termination Program fact sheet to be a necessary tool in assuring that essential information is provided to eligible customers accurately and appropriately.

While agreeing that the unauthorized restoration of service is a serious matter, the Board is of the opinion that for purposes of providing the protection afforded by the Winter Termination Program, a distinction between unauthorized restoration and tampering is reasonable.

With regard to tampering with utility facilities, the burdens set out in subsection (i)1.ii. are reasonable and logical. Once the utility has established that tampering has in fact occurred, the burden should shift to the customer to either rebut that charge or show that he did not contribute to the situation.

In addition, as noted in subsection (i)1., no discontinuance of service for tampering with utility facilities "shall occur until the customer has been afforded all reasonable due process, including an opportunity to be heard."

It should be further noted that the Board has amended subsections (a), (b), (c), (d), (f) and (g) to reflect, where appropriate, "electric or gas" instead of "electric and gas."

The Board will closely monitor the Winter Termination Program and amend this rule when and where appropriate. In this regard, the Board will continue to pursue avenues by which to insure that energy related assistance payments for service provided by utility companies reach their intended destination.

The comment calling for a weather moratorium is one that would affect discontinuance of service in general and is not suited specifically for the Winter Termination Program. The Board would consider such a proposal if it is presented with a proposed rule that would affect all residential electric and gas service. In addition, the comment that the Board require utilities to refrain from forwarding discontinuance notices to known eligible customers during the heating season is best left to direct Board contact with a utility if necessary and need not be addressed within the context of this rule.

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]*).

14:3-7.12A Winter termination of residential electric and gas service (Winter Termination Program)

(a) A regulated electric ***[and]*** ***or*** gas utility shall not discontinue service during the period from November 15 through March 15, referred to in this section as the "heating season", unless otherwise ordered by the Board, to those residential customers who demonstrate at the time of the intended termination that they are:

1. Recipients of benefits under the Lifeline Credit Program;
2. Recipients of benefits under the Federal Home Energy Assistance Program (HEAP), or certified as eligible therefore under standards set by the New Jersey Department of Human Services;
3. Recipients of Federal Aid to Families with Dependent Children (AFDC);
4. Recipients of Federal Supplemental Security Income (SSI);
5. Recipients of Pharmaceutical Assistance to The Aged and Disabled (PAAD);
6. Recipients of general welfare assistance benefits; or
7. Persons unable to pay their utility bills because of circumstances beyond their control. Such circumstances shall include but shall not be limited to unemployment, illness, medically related expenses, recent death of a spouse and any other circumstances which might cause financial hardship.

(b) Those residential electric ***[and]* *or*** gas customers whose services have been discontinued for non-payment and have not been reconnected as of November 15, and who are otherwise eligible for protection under the Winter Termination Program, shall be required to make a down payment of up to 25 percent of the outstanding balance as a condition precedent to the ***[recipient]* *receipt*** of services during the current heating season. The customer shall be notified, at the time of enrollment in a budget payment plan as required by (c) below, that the 25 percent down payment shall represent a maximum required amount and is not to be regarded as a minimum required payment. The utility shall consider the customer's ability to pay in determining the appropriate level of the required down payment, but in no instance shall such required payment exceed 25 percent of the outstanding balance. The utility shall refer to the Board for resolution, all disputes regarding the appropriate level of down payments.

(c) All residential electric ***[and]* *or*** gas customers who are eligible for and who seek the protection of the Winter Termination Program shall enroll in a budget payment plan on an annual basis.

(d) All residential electric ***[and]* *or*** gas customers who are eligible for and who seek the protection of the Winter Termination Program shall make good-faith payments during the heating season, if they have the ability to do so. Said payments should be equal to a budget payment amount, although a lesser amount shall be accepted from those customers who do not have the ability to pay the full budget amount.

1. If an eligible customer has the ability to make a good-faith payment but refuses to do so, or if there is any other dispute related to good-faith payments, the servicing utility ***[may]* *shall*** refer said dispute to the Board for a determination. In addition, the servicing utility shall inform each eligible customer involved in such a dispute that the matter has been forwarded to the Board for a determination and that the customer may also notify the Board of the dispute if he or she so chooses. Until the Board has rendered a determination in such an instance, the servicing utility shall not unilaterally discontinue service ***during the heating season***.

(e) Customers who are eligible for and who seek the protection of the Winter Termination Program shall forward all energy related financial assistance, such as Home Energy Assistance Program (HEAP) heating benefits, to their electric or gas utility, if either utility is their major heat supplier.

(f) During the heating season, the affected electric ***[and]* *or*** gas utilities shall not request a security deposit or an addition to an existing security deposit from a customer who is eligible for and seeks the protection of the Winter Termination Program.

(g) During the heating season, all notices of discontinuance of residential electric ***[and]* *or*** gas services shall be ***[accomplished]* *accompanied*** by a Winter Termination Program fact sheet, printed in both English and Spanish, setting forth all terms and conditions of the Program. The affected electric and gas utilities shall submit drafts of their proposed fact sheets to the Board no later than October 1, in order that the Board may approve their form and substance prior to the heating season. The form and substance of the Winter Termination Program fact sheets shall be subject to Board review and approval on an annual basis.

(h) Customers who are eligible for and seek the protection of the Winter Termination Program shall participate in the low income seal-up programs, if eligible therefore, currently approved by the Board and administered by the affected electric and gas utilities. The implementation of this requirement shall be effectuated through the following procedures:

1. Descriptive information on the low income seal-up programs shall accompany the Winter Termination Program fact sheet as required in (g) above;

2. The utility shall refer to its seal-up contractor, the names of responding protected customers who are eligible for the low income seal-up program***s***. The contractor or the utility shall contact the customers to schedule the seal-up. Scheduling shall take place as soon as practicable after receipt of the customer response to the notice of discontinuance;

3. Winter Termination Program customer seal-ups shall be performed as soon as practicable. If a utility projects that it cannot

complete these seal-ups prior to the end of the heating season, it shall submit an alternate implementation schedule to the Board for review on or before January 31;

4. The contractor shall perform a general audit of the dwelling and perform the most cost effective weatherization measures first. The contractor shall record and report to the utility any structural deficiencies requiring greater weatherization measures beyond the scope of the seal-up. The utility shall refer the customer names to those agencies providing low income weatherization programs;

5. The utility shall inform all agencies administering the Low Income Weatherization Grant Program in its territory of the new seal-up and weatherization grant provisions of the Winter Termination Program;

6. The utility shall monitor the usage and billing payment record of participating customers. The utility shall also compile historic consumption and billing data for these customers as well as a list of specific conservation measures installed in order to provide a basis for evaluating the Program. This information shall be submitted to the Board for analysis by May 1;

7. Electric utilities shall provide seal-up to those eligible participating customers who heat with electricity or any fuel other than natural gas in accordance with the existing Board approved low income seal-up programs;

8. Electric utilities shall not be required to provide the seal-up to those customers who heat with natural gas. The electric utilities shall forward the names of these gas heating customers to the appropriate gas utility for processing;

9. Tenants shall be required to secure landlord permission for the weatherization work. A landlord consent form*****, or the means to obtain one***** shall be forwarded to customers along with the descriptive information and Winter Termination Program fact sheet as required in (h)1 above;

10. The utility may utilize the services of the local Community Action Program (CAP) Agencies or other local social service organizations, to certify the economic eligibility for the low income seal-up programs for those customers who seek the protection of the Winter Termination Program ***[since]* *because*** they are unable to pay their utility bills because of circumstances beyond their control. This option shall be related solely to the economic eligibility ***of a customer*** for the low income seal-up programs and shall not be utilized as a means of determining the eligibility of a customer for protection under the Winter Termination Program. Economic eligibility for the seal-up measures for these customers shall be determined by those standards applicable to the low income seal-up programs as established and approved by the Board;

11. As participation in the low income seal-up programs is a continued program eligibility requirement, the utility shall refer to the Board, for purposes of an administrative review, the names of all protected customers who refuse such participation. Pending said administrative review, the utility***** shall not unilaterally discontinue service for failure to participate in the low income seal-up programs. Discontinuance for said failure to participate shall not occur unless authorized by the Board. Tenants who are unable to obtain appropriate landlord/owner permission shall not be considered to have refused participation in the low income seal-up programs. The utility shall provide the ***Board with the*** names and addresses of those tenants who have indicated their inability to obtain landlord/owner consent.

(i) An electric or gas utility may terminate service to a customer who is eligible for the Winter Termination Program if said customer connects, disconnects or otherwise tampers with the meters, pipes, wires or conduits of the utility for the purpose of obtaining electric or gas service without payment therefor.

1. No discontinuance shall occur until the customer has been afforded all reasonable due process considerations, including an opportunity to be heard. Toward this end, the electric and gas utilities shall comply with the following requirements prior to discontinuing service to any customer who has allegedly tampered with the meter or other company facilities resulting in the receipt of unmetered service:

i. The utility shall notify the Board of all pertinent facts related to the alleged tampering;

ii. The Board shall have seven days after receipt of said information to complete an impartial and informal investigation of the matter. In the event that a utility comes forward with sufficient credible evidence that shows that the meters, pipes, wires, conduits or attachments through which a customer is thus being furnished with electric or gas service have been tampered with, the Board shall immediately notify the customer and the burden shall shift to the customer to come forward with sufficient evidence to rebut the charges of the utility. Failure to do so will result in a finding that tampering did not occur for the purpose of obtaining the utility service without payment and that the customer is responsible therefor;

iii. Upon a finding by the Board that tampering did occur, the utility shall give written notification to the customer, by certified mail, return receipt requested, and to the local public welfare agency and the local municipal health agency, by regular mail, *[to give notification of]* ***as to*** the date upon which service to the customer shall be terminated. Said notification shall be made at least seven days prior to the date of the proposed service termination. The utility shall further advise the customer in the written notification that if he or she claims to be dependent on life sustaining equipment, the customer must furnish a physician's certificate within the aforementioned seven day period, wherein the condition requiring such equipment is identified and verified;

iv. Any relief requested under N.J.A.C. 14:3-3.6(d) regarding medical emergencies shall be reviewed on a case-by-case basis.

2. A customer, otherwise eligible for the Winter Termination Program, whose electric or gas service had been discontinued prior to the start of the heating season and who has subsequently caused the unauthorized restoration of said service shall, when said unauthorized service has been registered on the meter, be required to make a down payment of up to 25 percent of the outstanding account balance as of the most current meter reading as a pre-condition for the continuation of service during the heating season.

ENVIRONMENTAL PROTECTION

(a)

DIVISION OF PARKS AND FORESTRY

Natural Areas System

Adopted Repeal: N.J.A.C. 7:2-11

Adopted New Rules: N.J.A.C. 7:2-11

Proposed: December 1, 1986 at 18 N.J.R. 2349(b)

Adopted: November 25, 1987 by Richard T. Dewling,
Commissioner, Department of Environmental Protection and
Thomas F. Hampton, Administrator, Office of Natural Lands
Management.

Filed: November 30, 1987 as R.1987 d.533, **with substantive and technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3(c)).

Authority: N.J.S.A. 13:1D-1 et seq., 13:1B-3, 13:1B-15.4 et seq., 13:1B-15.12a et seq., and 23:7-9.

DEP Docket Number: 054-86-10.

Effective Date: December 21, 1987.

Expiration Date: July 19, 1988.

Summary of Public Comments and Agency Responses:

Notice of the proposed repeal and new rules appeared in the December 1, 1986 New Jersey Register. Six comments were received prior to the close of the public comment period on December 31, 1986.

COMMENT: Our natural resources would be better served if forest management practices were incorporated into Natural Land strategies.

RESPONSE: For some areas, forest management practices are essential for preserving species and communities at their current stage of succession. For areas where natural succession is encouraged, little or no forest management is necessary. N.J.A.C. 7:2-11 allows both practices depending upon whether the area is classified as an ecological reserve or conservation preserve. See N.J.A.C. 7:2-11.7.

COMMENT: One area of the proposed new rules that should be reassessed is the concept of how much acreage is necessary to maintain a specific feature of the ecosystem. There is already a repetition of Natural Area types as indicated in N.J.A.C. 7:2-11.12. Perhaps reduction of this repetition, utilizing smaller areas, and buffer strips around these areas would be more practical and manageable.

RESPONSE: The determination of adequate acreage to permanently preserve a species or ecosystem is not easily made. Focusing on smaller areas with buffers is not supported by current theory on island biogeography and, although this strategy may be pursued in some cases, it should not be an overall management goal of the Natural Areas System (System). Repetition of habitat types in the System should not be viewed in a negative light. It may be advantageous to have duplication so that one area could be managed as an ecological reserve and one as a conservation preserve. Over time, the habitats could be compared for educational and research purposes. The Natural Areas System Act, N.J.S.A. 13:1B-15.12a et seq., directs the Department to study "all remaining State lands" and "lands that are not State-owned lands" for possible inclusion in the System. No limitation on acreage is placed on this legislative mandate.

COMMENT: Habitat manipulation is conducted to enhance the wildlife resources which indirectly enhance use. The blanket prohibition against all habitat manipulation contained in N.J.A.C. 7:2-11.9(d)16i is overly restrictive. This provision should be modified to allow for habitat manipulation after review and approval by the administering agency, the Natural Areas Council and the Office of Natural Lands Management.

RESPONSE: N.J.A.C. 7:2-11.9(e)16i (proposed as N.J.A.C. 7:2-11.9(d)16i) allows hunting, fishing, trapping, and the stocking of fish and game, within all natural areas. This provision does not, on an interim basis, allow manipulation of the habitat solely for the purposes of enhancing these activities. However, further manipulation of habitat may be permitted pursuant to a management plan if it is not contrary to the designation objective.

COMMENT: One comment opposed the prohibition of consumptive use of any product of natural areas as provided at N.J.A.C. 7:2-11.9(d)7 since this would, in effect, preclude hunting, trapping and harvest type fishing.

RESPONSE: N.J.A.C. 7:2-11.9(e)7 (proposed as N.J.A.C. 7:2-11.9(d)7) does not prohibit hunting, fishing or trapping. This paragraph begins with the limitation, "Except as provided in this section. . . ." Hunting, trapping, and fishing are expressly allowed at N.J.A.C. 7:2-11.9(e)16i (proposed as N.J.A.C. 7:2-11.9(e)16i).

COMMENT: One comment questioned the wisdom of the limitations at N.J.A.C. 7:2-11.9(d)6, especially if the area is becoming overgrown by noxious, non-native plants.

RESPONSE: This provision only prohibits removal of vegetation for "the purpose of enhancing the beauty or neatness of a natural area." this subchapter does allow removal of vegetation, subject to approval of a specific plan by the Commissioner, to preserve habitat. See N.J.A.C. 7:2-11.9(e)12 (proposed as N.J.A.C. 7:2-11.9(d)12).

COMMENT: One comment opposed the specifying of the "primary classification" for the proposed designations to the Natural Areas System as described in N.J.A.C. 7:2-11.7 and used in N.J.A.C. 7:2-11.12. The commenter was of the opinion that the "primary classification" would be made only upon adoption of the management plan for a designated area.

RESPONSE: The purpose of a primary classification is to allow consistent decision making and management by the administering agency absent a management plan. Upon adoption, the management plan would refine management techniques and public uses based on a thorough evaluation of the natural area. The definition at N.J.A.C. 7:2-11.3 has been changed to clarify this intent, and, since the term "primary classification" may be confusing to some, it has been changed throughout the rule to "interim classification" to better reflect its intent.

COMMENT: N.J.A.C. 7:2-11.9(d)14 will substantially damage and inhibit the ability to treat mosquito breeding areas, which directly interferes with the duty imposed upon county mosquito control commissions under N.J.S.A. 26:9-13 et seq. Instead of the Department of Environmental Protection, the duty to declare a public health threat should remain with the Commissioner of the Department of Health. Declaring a public health threat after cases have been documented is at least two to four weeks too late. Control based on scientific surveillance that is carried out before documented cases of mosquito-borne infectious disease occur and viruses are present would be more appropriate.

RESPONSE: The Council and Department agree. N.J.A.C. 7:2-11.9(e)14 (proposed as N.J.A.C. 7:2-11.9(d)14) has been revised to allow spraying of certain larvicides, but not adulticides which have less specificity for target organisms, to control mosquito populations in coastal wetland natural areas. Physical manipulation will not be allowed. The changes will allow control of mosquito populations while maintaining species diversity in natural areas.

COMMENT: The use of the term "habitat management" in line 12 of the summary reflects an inappropriately narrow perspective of natural areas since natural areas are often created to protect scenic, geological, and recreational values as well as wildlife. The term "resource management" would be more appropriate.

RESPONSE: The Natural Areas Act, N.J.S.A. 13:1B-15.4 et seq., clearly indicates that the Department has the responsibility to protect areas as habitat for rare and vanishing species of plants and animal life. Such areas may contain scenic, geological and recreational values, yet they are not the primary reasons for designation of the area. Consequently, retention of the term "habitat management" is appropriate.

COMMENT: N.J.A.C. 7:2-11.4(d) narrows the criteria for selecting areas for addition to the Register and protection in the Natural Areas System to "endangered species habitat" and various "ecosystems." Although "habitats" are important, we believe the Natural Areas Act was also intended to protect areas with outstanding natural scenic values, wilderness recreational values, and other aesthetic values.

RESPONSE: Protection of aesthetic and recreational values are secondary when selecting areas for inclusion in the System. Although these values are important, they are commonly found and adequately protected in various other lands held by the Department, such as, State Parks, Forests, and Wildlife Management Areas. The Natural Areas System was established to identify and protect special plant and wildlife areas of the State and to manage these lands differently from other State holdings. See N.J.S.A. 13:1B-15.5.

COMMENT: A fifth criterion should be added to the list in N.J.A.C. 7:2-11.4(d) as follows:

"5. Natural scenic areas: areas of special scenic value; areas of outstanding natural beauty; areas with significant wilderness characteristics or with outstanding opportunities for wilderness related recreation."

RESPONSE: The types of factors suggested in this "fifth criterion" would inappropriately qualify many areas of the State for inclusion in the System. Such a criterion would be an unauthorized extension of the Natural Areas Act (see preceding response).

COMMENT: N.J.A.C. 7:2-11.6(h) appears inconsistent with section 8 of the Natural Areas System Act, N.J.S.A. 13:1B-15.12a7, which provides: "No land in the system may be leased, sold or exchanged . . . nor shall the timber thereon be sold . . . nor minerals extracted, except by authorizing special legislation." Allowing the Governor to remove lands from the System without the concurrence of the Legislature would be contrary to the intent of section 8 of the Natural Areas System Act. N.J.A.C. 7:2-11.6(h) should be simply deleted entirely or at least modified to include the necessary legislative concurrence.

RESPONSE: Although N.J.A.C. 7:2-11.6(g) and (h), in providing for the removal of an area from the System, are not patently contrary to the statutory provisions at N.J.S.A. 13:1B-15.12a7, which proscribe the lease, sale or exchange of, or removal of natural resources from, and land in the System, except by authorizing special legislation, the Department agrees that removal of an area from the System should not be allowed without an act by the Legislature. Therefore, N.J.A.C. 7:2-11.6(g) and (h) have been deleted.

COMMENT: We urge the Department to strengthen interim practice N.J.A.C. 7:2-11.9(d)3 to read as follows: "Vehicular access lanes should be phased out as soon as practical unless needed for administrative purposes. No new or enlarged access lanes will be constructed except for unavoidable emergency administrative purposes such as fighting fires. Such emergency actions must be approved by the Commissioner."

RESPONSE: The presence of vehicles in a natural area, on an interim basis, is not contrary to the Natural Areas Act or the Natural Areas System Act, provided the designation objective may be achieved. Prior to passage of the Natural Areas Act, the bill contained an entire section prohibiting vehicle use in a natural area. That section was deleted by the Legislature prior to passage. Notwithstanding the above, vehicle use may be prohibited, on a case-by-case basis, upon adoption of the management plan in accordance with N.J.A.C. 7:2-11.8.

COMMENT: The interim management practice at N.J.A.C. 7:2-11.9(d)7iii should be strengthened to read as follows: "Structures having no (delete utilitarian) historic, scientific or habitat value should

be demolished and removed unless such structure is deemed essential for administrative purposes."

RESPONSE: There are times when removal of structures or access for removal may cause significantly more damage to natural features than retention of the structure itself. The Council and Department agree with parts of the above comment except that the administering agency must retain the option of removing the structure. N.J.A.C. 7:2-11.9(e)7iii (proposed as N.J.A.C. 7:2-11.9(d)7iii) has been changed to incorporate the suggested language, except that "should" has been replaced with "may."

COMMENT: Wildfires often play an essential role in maintaining the ecology of natural ecosystems, especially in the Pinelands. N.J.A.C. 7:2-11.9(d)9 and 10 should be modified to give forest managers some flexibility in the way they manage wildfires.

RESPONSE: While fire is essential for maintaining some ecosystems, the goal of combating a wildfire is to protect human life and property. Therefore, wildfires will continue to be brought under control as quickly as possible. Use of prescribed burning in natural areas may be permitted under the adopted rules.

COMMENT: One comment stated that N.J.A.C. 7:2-11.9(d)13 should be changed so that biological controls are given preference to chemical means to control gypsy moths.

RESPONSE: The Council and the Department agree that non-chemical means of control of gypsy moths should be used where possible. However, decisions must be made on a case-by-case basis. N.J.A.C. 7:2-11.9(e)13 (proposed as N.J.A.C. 7:2-11.9(d)13) has been modified to reflect the preference, but other means of control will be allowed when necessary.

COMMENT: N.J.A.C. 7:2-11.9(e)4 should be deleted and N.J.A.C. 7:22-11.9(e)6 should be strengthened as follows: "New structures and enlargement of existing structures may be undertaken by the administering agency only if such structure is essential to the administration of the natural area and cannot reasonably be located outside the boundary of the natural area."

RESPONSE: Both these provisions apply only to the buffer area of a natural area. The provisions are sufficiently protective as proposed because they permit new vehicle access lanes and structures only within buffer areas.

COMMENT: The word "limited" should be deleted from the definition of "ecological reserve" at N.J.A.C. 7:2-11.7 and replaced with the term "little or no".

RESPONSE: The Council and the Department agree. The term "limited" implies some, but very little, habitat manipulation. The Council and Department intended to be more restrictive in allowing minor habitat manipulation as the exception and only when necessary to attain the designation objective. "Ecological reserve" has been modified accordingly at N.J.A.C. 7:2-11.7(b)1.

COMMENT: N.J.A.C. 7:2-11.9(e)5 should be deleted to provide flexibility in combating forest fires. N.J.A.C. 7:2-11.9(d)9 provides adequate protection for natural areas.

RESPONSE: The Council and Department agree. In a densely populated state like New Jersey, fire fighters must have flexibility in order to protect lives and property. These individuals must consider natural resource protection as secondary to that goal while combating wildfires. N.J.A.C. 7:2-11.9(e)9 (proposed as N.J.A.C. 7:2-11.9(d)9) provides sufficient flexibility for fire fighting while protecting natural areas.

COMMENT: N.J.A.C. 7:2-11.9(d)1 should be revised to provide for flexibility where boundary posting at prescribed intervals may be difficult. Further, the posting every 300 feet is too frequent. Boundaries should be posted, where possible, at a density of 10 signs per mile.

RESPONSE: N.J.A.C. 7:2-11.9(e)1 (proposed as N.J.A.C. 7:2-11.9(d)1) has been modified to provide for posting "at a maximum density of 10 signs per mile."

COMMENT: N.J.A.C. 7:2-11.3(e) should be revised from "easement" to "conservation easement" to avoid confusion with utility easements which more properly come under the definition of "right-of-way".

RESPONSE: N.J.A.C. 7:2-11.3(e) has been modified accordingly with respect to the term "easement."

COMMENT: The administering agency listed for Cape May Wetlands Natural Area at N.J.A.C. 7:2-11.2(c)10iv should be Cape May Point State Park, and for Great Bay Natural Area at N.J.A.C. 7:2-11.2(c)17iv, the administering agency should be Bass River State Forest.

RESPONSE: These changes have been made in the adopted rule.

COMMENT: It may be better not to preclude development of facilities for interpretation or with a primary purpose of education as implicit in

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the provisions at N.J.A.C. 7:2-11.9(e)6. What better place to provide interpretation than within these protected areas?

RESPONSE: Other adjacent State lands are more appropriate locations for educational facilities than are natural areas. While the buffer area of a natural area may be appropriate for such structures, the decision to develop facilities for interpretation in buffer areas must be made on a case-by-case basis and adopted in the management plan.

COMMENT: One comment questioned the prohibition against the removal of vegetation in ecological reserves at N.J.A.C. 7:2-11.9(e)8vii. In all but the most ecologically sensitive areas, the harvesting of over-mature, diseased, or dying timber would be beneficial. Without forest management, natural areas will be degraded and we may lose the very plant and animal life which caused these lands to be set aside as natural areas.

RESPONSE: Forest management practices may not only be desirable but essential to preserve an existing successional stage of a community and its various elements. This subchapter allows for that type of habitat management in conservation preserves. The prohibition of this type of practice in an ecological reserve is consistent with the intent in such areas to allow natural succession to occur. These are common forest management practices on United States Forest Service Lands where "research natural areas" are comparable to our State "ecological reserve".

COMMENT: The alteration or restoration of water levels within an ecological reserve is not permitted under N.J.A.C. 7:2-11.9(e)8. These water levels may, however, be altered by a private property owner upstream of the natural area. Should not some provision be made for allowing restoration of water levels within a natural area where those levels have been altered outside of the area?

RESPONSE: Exceptions and unique situations may be found where the provisions at N.J.A.C. 7:2-11.9 will not be appropriate. A new subsection at N.J.A.C. 7:2-11.9(c) has been provided to allow the Council and Commissioner to review proposed exceptions to the interim management practices. This action may be necessary when the administering agency believes that the interim practices may be detrimental to achieving the designation objective.

Agency initiated changes:

The criteria at N.J.A.C. 7:2-11.4(d) have been rewritten to include both "representative ecosystems" and "unusual ecosystems" under the adopted "natural community" category at N.J.A.C. 7:2-11.4(d)2 in order to avoid the use of the potentially misleading term "unusual."

The notice requirement at N.J.A.C. 7:2-11.4(e) has been amended to delete the requirement for notice to local and county planning boards, environmental commissions, and other Department agencies in order to expedite the process of listing new sites on the Register. This notice requirement was not statutorily mandated.

The specific requirement that removal of a site from the Register be only by administrative order has been deleted from N.J.A.C. 7:2-11.4(g) to add flexibility and expedite the process of removal of sites from the Register. Listing new sites on the Register does not require execution of an administrative order in this rule or by statute. Therefore, this deletion is consistent with the process of listing new sites.

A provision has been added at N.J.A.C. 7:2-11.9(c) that would allow the substitution of a specific interim management practice upon a finding by the Natural Areas Council and approval by the Commissioner that the practice would be detrimental to achieving the designation objective for a specific Natural Area.

N.J.A.C. 7:2-11.9(e)10 has been changed to make it clear that a proposal for prescribed burning, not the natural area management plan described at N.J.A.C. 7:2-11.8, is the document to be reviewed by the Council prior to approval for prescribed burning.

The designation objective for the Black River Natural Area at N.J.A.C. 7:2-11.12(c)6ii has been expanded to include the preservation of rare species habitat.

The location of the salt marsh slated for protection at Liberty Park Natural Area has been corrected at N.J.A.C. 7:2-11.12(c)23ii to "upper" New York Bay.

Corrections to municipal and county locations have been made at N.J.A.C. 7:2-11.12(c)2i, 6i, 8i, 9i, 10i, 14i, 18i, 19i, 20i, and 37i.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks ***[thus]***).

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SUBCHAPTER 11. NATURAL AREAS AND THE NATURAL AREAS SYSTEM

7:2-11.1 Scope

(a) This subchapter constitutes the rules and regulations of the Department of Environmental Protection concerning the identification, classification, and management of natural areas and administration of the Natural Areas System pursuant to N.J.S.A. 13:1B-15.4 et seq. and 13:1B-15.12a et seq.

(b) This subchapter shall be deemed to be supplemental to existing Departmental rules and not in derogation thereof.

7:2-11.2 Purpose

The purpose of this subchapter is to provide detailed procedures, standards, and criteria for the administration and public use of natural areas and the Natural Areas System in order to protect and preserve the natural and ecological resources thereon for present and future generations.

7:2-11.3 Definitions

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

"Administering agency" means the Division of Parks and Forestry or Fish, Game and Wildlife in the Department of Environmental Protection, or any other group or organization managing land designated as part of the Natural Areas System.

"Commissioner" means the Commissioner of the Department of Environmental Protection.

["Easement"] *****Conservation easement***** means an interest in land less than fee simple absolute, stated in the form of a right, restriction, easement, covenant, or condition, in any deed, will or other instrument, other than a lease, executed by or on behalf of the person vested with a greater interest therein, appropriate to retaining land or water areas predominantly in their natural, scenic, open or wooded condition, or for conservation of suitable habitat for plants or animals.

"Department" means the Department of Environmental Protection.

"Designation objective" means the stated purpose or goal for placing an area in the Natural Areas System.

"Division" means the Division of Parks and Forestry.

"Existing use or activity" means a use or activity which was lawful prior to designation of a site to the Natural Areas System.

[Primary] ***Interim*** classification" means a category reflecting the type of habitat management permitted within the *[largest single portion of a]* natural area ***prior to adoption of a management plan***.

"Interim management practice" means any use, activity, or management conducted within a natural area prior to adoption of a management plan.

"Natural area" means an area of land or water, owned in fee simple or held as *[an]* ***a conservation*** easement by the Department, which has retained its natural character, although not necessarily completely undisturbed, or having rare or vanishing species of plant and animal life, or having similar features of interest, which are worthy of preservation for present and future residents of the State.

"Natural Areas Council", hereafter "Council," means that body consisting of seven members including the Administrator of the Office of Natural Lands Management and six members of the public appointed by the Governor in accordance with N.J.S.A. 13:1B-15.7.

"Natural Areas System", hereafter "System," means those lands designated as natural areas pursuant to this subchapter, identified at N.J.A.C. 7:2-11.12, and consisting of lands that serve as habitat for rare plant species or animal species, or both, or are representative of natural communities.

"Natural Heritage Inventory" means a mapped and computerized data base of the State's rare plant and animal species and representative natural communities.

"Prescribed burning" means the open burning of plant life under such conditions that the fire is confined to a predetermined area and

accomplishes the environmentally beneficial objectives of habitat management and prevention or control of wildfires.

"Primary classification" means a category reflecting the type of habitat management permitted within the largest single portion of a natural area.

"Register" means the registry, required by N.J.S.A. 13:1B-15.12a6, of all lands, public and private, which are suitable for inclusion within the System. See also N.J.A.C. 7:2-11.4.*

"Right-of-way" means a less-than-fee interest in property held by another over which the Department has no control, such as, but not limited to, use of property for pipelines, transmission lines, and roads.

7:2-11.4 Register of Natural Areas

(a) The Register of Natural Areas, hereinafter "Register," is a list of sites which serves as:

1. The official recognition of the site's important natural features which are worthy of preservation by the property owner; and
2. The list of sites from which to draw new areas for designation to the System.

(b) Listing on the Register does not, in itself, alter land use or ownership, nor does it impose any regulatory authority.

(c) Any individual or organization may suggest a potential Register site for Division study through a request to the Commissioner or the Council. Potential sites may also be studied and presented to the council by the Department's Office of Natural Lands Management.

(d) Upon review of a written analysis prepared by the Office of Natural Lands Management and recommendation by the Council, the Commissioner may place a site on the Register. The site must satisfy one or more of the following criteria:

- *[1. Endangered species habitat: significant habitats for plant or animal species, or both, which have been determined to be rare, threatened, or endangered in the State or nation;
- 2. Representative ecosystems: significant examples of each terrestrial and aquatic ecosystem or community occurring in the State;
- 3. Unusual ecosystems: unique, unusual, or rare habitats, communities, or ecosystems; and
- 4. Wildlife habitats: spawning, breeding, nesting, resting, or feeding habitats which are highly significant in supporting the fauna of the State.]*

***1. Endangered species habitat: The site is verified as supporting a significant, viable natural occurrence of one or more plant or animal species, or both, determined to be rare, threatened, or endangered in the State or United States;**

2. Natural community: The site supports a significant, viable example of a rare natural community or an extremely high quality representative of other natural communities of New Jersey. Quality includes, but is not limited to, characteristics of structure, composition, age, and degree of disturbance.

3. Wildlife habitat: The site provides spawning, breeding, nesting, resting, or feeding habitat which is highly significant for supporting resident or migratory wildlife, or both, of the State, the United States, or the world.*

(e) The Division shall notify *[the local and county planning boards and environmental commissions,]* property owners*[and other Department agencies, within]* ***no later than*** 45 days subsequent to listing on the Register.

(f) The Division shall maintain a list of sites that have been placed on the Register together with a summary of information used to justify the listing.

(g) Register sites may be removed from the list by *[administrative order of]* the Commissioner upon a finding and recommendation by the Council that the site can no longer be classified in accordance with the categories enumerated in (d) above.

7:2-11.5 Natural Areas Council

(a) The Natural Areas Council shall advise the Commissioner in matters relating to the administration of the Natural Areas Act (N.J.S.A. 13:1B-4 et seq.) and the Natural Areas System Act (N.J.S.A. 13:1B-15.12a et seq.). The specific functions of the Council include, but are not limited to, the following:

1. Recommending sites to be studied by the Division for possible listing on the Register;

2. Evaluating studies conducted by the Division and providing a recommendation to the Commissioner for listing on the Register;

3. Periodically evaluating sites listed on the Register and recommending to the Commissioner acquisition of those considered most important for preservation;

4. Evaluating those lands owned in fee or easement by the State that are listed on the Register, and recommending to the Commissioner their inclusion within the System.

5. Evaluating management plans prepared by the Division and recommending to the Commissioner revisions or adoption, or both; and

6. Evaluating rules proposed by the Division for implementation of the Natural Areas System Act.

7:2-11.6 Natural areas designation

(a) To qualify for designation to the System, a site must be:

1. Listed on the Register; and
2. Owned in fee or held *[as]* ***a conservation*** an easement by the Department.

(b) Upon request of the Commissioner or a majority vote of the Council, the Division shall undertake a study of a site to assess appropriateness of designation. This study shall include, but not be limited to, the following analyses:

1. The overall quality of the site including:
 - i. The inherent ability to perpetuate the feature(s) of concern;
 - ii. The size of the site necessary to perpetuate the feature(s) of concern;

iii. The size of the population(s) at the site sufficient to assure perpetuation of biotic features of concern; and

iv. The integrity of the site in terms of its ability to significantly illustrate the feature(s) of concern;

2. The significant diversity of biotic features and the number of plant or animal species, or both, per community;

3. The relative scarcity or uniqueness of plant and animal species, community types, and wildlife habitats;

4. The presence and quality of surrounding buffer areas to provide protection and insure integrity of the site;

5. The degree of disturbance or potential threat, directly or indirectly, from one or more of the following:

- i. Highways, roads, or railroads;
- ii. Housing or commercial development;
- iii. Industrial use;
- iv. Military use;
- v. Utility lines or rights-of-way;
- vi. Visitor use;
- vii. Active recreational use; and
- viii. Flooding or erosion;

6. The ability of an administering agency to adequately manage the site or enter into a management agreement with others, to preserve the integrity of the natural features including such factors as cost, usability, boundaries, and accessibility;

7. The degree of threat to the public health, safety, and welfare which may be encountered as a result of terminating existing uses or activities such as, but not limited to, prescribed burning and maintenance of firebreaks;

8. The existence of similar sites of equal significance under public or private ownership that are apparently assured of preservation; and

9. The identification of preliminary boundaries of the area in the form of a site map to be refined upon adoption of a management plan.

(c) Upon review of the study and comments from the administering agency, the Council shall submit a final recommendation to the Commissioner for designation of the lands in question for inclusion within the System. If the Council favors designation, their recommendation shall include:

1. A designation objective for the area;

2. A summary of qualifications of the site related to quality, diversity, and scarcity of the feature or species and potential management practices which may be necessary to ensure preservation; and

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3. An interim **[primary]** classification for the area as provided in N.J.A.C. 7:2-11.7. **[This primary classification may be modified upon preparation of a management plan.]**

(d) If the Council recommends designation of an area to the System, and the Commissioner concurs, the Commissioner shall propose such designation as an amendment to this subchapter and the Department shall hold a public hearing in accordance with the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq.

(e) The Commissioner shall review the recommendation of the Council together with comments from the public or administering agency and shall take the following action on the proposal:

1. Adopt subject to Gubernatorial approval;
2. Make changes to the proposal and adopt subject to Gubernatorial approval;
3. Request the Council's reconsideration of the recommendation for designation; or
4. Take no action.

(f) Inclusion of an area in the System shall be effective upon publication in the New Jersey Register of the notice of adoption after compliance with the provisions of (d) and (e) above.

[(g) If the Council recommends removal of an area from the System, and the Commissioner concurs, the Commissioner shall propose such removal as a revision to this subchapter and the Department shall hold a public hearing in accordance with the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq.]

(h) Designated natural areas may be removed from the System in accordance with the following:

1. Natural Areas shall only be removed from the System if the Commissioner finds that:
 - i. The area no longer serves the purpose for which it was designated to the System; or
 - ii. A public safety or health hazard exists and cannot be eliminated while the area is part of the System;
2. After making the findings in (h)1 above, the Commissioner shall propose such removal as an amendment to this subchapter and the Department shall hold a public hearing in accordance with the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq.;
3. The Commissioner shall review the comments submitted at the hearing and shall take the following action on the proposal:
 - i. Adopt subject to Gubernatorial approval;
 - ii. Make changes to the proposal and adopt subject to Gubernatorial approval;
 - iii. Request the Council's reconsideration of its recommendation for designation; or
 - iv. Take no action.*

7:2-11.7 Classification of natural areas

(a) **[Primary]** **[Interim]** classification of natural areas shall be related to the designation objective of the area.

[(b) Primary classification of a natural area shall be determined at the time of its designation to the System. Primary classifications may be revised upon adoption of a management plan or amendment thereto.]

[(c) Each](b) Prior to approval of a management plan, each designated natural area [or portion of an area] shall be categorized into one of the following [primary] [interim] classifications:

1. Ecological reserve: an area managed to allow natural processes to proceed with **[limited]** **[little or no]** habitat manipulation;
2. Conservation preserve: an area where habitat manipulation is permissible in order to preserve a plant or animal species, community type, or ecosystem;
3. Buffer area: an area that forms the perimeter of the natural area and which may serve the purpose of protecting ecological reserves and conservation preserves.

7:2-11.8 Natural area management plans

(a) Management and uses of natural areas shall be subject to:

1. Interim management practices conducted by the administering agency;
2. Management practices requiring approval by the Commissioner as provided in N.J.A.C. 7:2-11.9; or
3. A management plan adopted by the Commissioner specifying users, activities, or management.

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(b) The Division, with the cooperation of the administering agency and other units of the Department, shall prepare a management plan. The primary purpose of the management plan is to describe the natural features of the area and prescribe management practices and public uses to ensure preservation in accordance with the designation objective.

(c) Each management plan shall include, but not be limited to:

1. A site description identifying the physical features, natural communities, and species composition of the area;
2. A description of the existing uses and activities;
3. A description of existing rights-of-way which are to be expected from the boundaries;
4. Any management practices that will contribute towards preservation in accordance with the designation objective;
5. An analysis of public uses and their impact on the natural area resulting in identification of:
 - i. Areas dedicated and restricted to ecological research and study;
 - ii. Areas which provide opportunities for public interpretation, observation, and study of the natural communities, species, and ecosystem; and
 - iii. Areas where recreational activities will be permitted provided that these activities have no serious or long term effects on natural values; and
6. An evaluation of the current boundaries and changes, if necessary, to achieve preservation in accordance with the designation objective.

(d) A draft management plan shall be reviewed by the administering agency and other agencies within the Department, as appropriate, prior to submission to the Council.

(e) The Council shall review the management plan and the comments of the administering agency and shall request additional information from the Division or recommend to the Commissioner that the plan be adopted.

(f) If the Division or the administering agency disagrees with the recommendation of the Council, the recommendations of each shall be forwarded to the Commissioner for a final decision.

7:2-11.9 Interim management practices

(a) Interim management practices shall be implemented by the administering agency, provided that:

1. The practice will have no direct or indirect adverse impact on natural features of concern;
2. The administering agency notifies the secretary of the Council, in writing, no later than 30 days after initiating the practice;
3. Approval of the Commissioner is not required by provision elsewhere in this subchapter; and
4. The practice is consistent with terms of any **[conservation]** easement held by the Department.

(b) Interim management practices which require the approval of the Commissioner shall first be submitted to the Council for its review and recommendation.

[(c) Upon finding that an interim management practice listed below at (e) or (f) would be detrimental to achieving a specific designation objective, the Council shall recommend to the Commissioner the substitution of a more appropriate interim management practice. Should the Commissioner concur with the recommendation of the Council, the Commissioner may approve substitution of a more appropriate interim management practice.]

[(c)](d) Where there are conflicts between general practices described below at [(d)] (e)* and practices specific to a natural area classification described below at [(e)] (f)*, the latter shall apply.

[(d)](e)* The following interim management practices apply generally to all natural areas:

1. Natural area boundaries shall be made clearly evident by posting **[boundary signs at intervals of approximately 300 feet]** **[signs at a maximum density of 10 signs per mile]**; entrance points shall be posted to indicate to users that they are entering a natural area; boundary signs shall be of a standard size and format as approved by the Commissioner and provided by the Division;

2. Boundary fences that are needed to protect the natural area may be installed provided the fence shall not have a detrimental effect on movement of wildlife, air circulation, or other natural conditions;

3. Vehicular access lanes may be maintained within a natural area but may not be enlarged in any manner except upon approval of the Commissioner.

4. Existing firebreaks within a natural area may be maintained for safety purposes; temporary firebreaks made by mowing, raking, plowing or wetting, may be used in conjunction with prescribed burning for habitat management;

5. Existing structures may be maintained in a natural area but may not be enlarged; new structures, of a temporary nature, may be constructed for research purposes in accordance with N.J.A.C. 7:2-11.10;

6. No measures, such as cutting of grass, brush or other vegetation, thinning of trees, opening of scenic vistas, or planting, shall be taken to alter natural processes or features for the purpose of enhancing the beauty or neatness of a natural area;

7. Except as ***otherwise*** provided in this section, there shall be no introduction, removal or consumptive use of any material, product or object to or from a natural area; prohibited activities include grazing by domestic animals, farming, gathering of plants or parts thereof, mining or quarrying, and dumping, burying, or spreading of garbage, trash or other materials; structures or materials may be removed as follows:

i. Old interior fences may be removed, giving consideration to leaving posts to mark boundaries between former land uses;

ii. Rubbish or any other waste material may be removed; and

iii. Structures having no ***[utilitarian,]*** historic, scientific or habitat value may be demolished and removed ***unless such structures are deemed essential for administrative purposes***;

8. Water levels within a natural area shall not be altered except to restore water levels which have been altered due to a sudden natural phenomena or man-induced conditions off-site; routine repairs to existing water control structures may be undertaken but the structures may not be enlarged;

9. All wildfires shall be brought under control as quickly as possible; after a fire within a natural area, there shall be no cleanup or replanting except as approved by the Commissioner to achieve the designation objective or for reasons of health and safety;

10. Prescribed burning, to eliminate safety hazards and to manage habitat, may be conducted upon review of a ***[plan]* *proposal for prescribed burning*** by the Council and approval by the Commissioner; use of vehicles and equipment shall be specified in the ***[plan]* *proposal for prescribed burning***;

11. Erosion control within a natural area shall not be undertaken except to restore existing grades which have been altered due to a sudden natural phenomena or man-induced conditions within or beyond the natural area;

12. Habitat manipulation may be undertaken if preservation of a particular habitat type or species of native flora or fauna is included in the designation objective of the natural area and the prior approval of the Commissioner is obtained;

13. Gypsy moth control activities may be implemented as an interim management practice after approval by the Commissioner; the Commissioner shall review a control plan only after the State Forester has determined that egg mass counts and prior year defoliation indicate the tree mortality will be severe without intervention; ***to the extent practicable, biological controls, rather than chemical means, shall be used to control gypsy moths***;

14. There shall be no physical manipulation of a natural area ***or application of chemicals known as adulticides*** for the purpose of controlling mosquitos; ***[spraying of chemicals to control mosquitos shall not be permitted unless the Commissioner has determined that a threat to the public health exists as a result of documented cases of mosquito-borne infectious disease;]* *the application of larvacides may be permitted in salt marshes only and only as follows:**

i. The application of *Bacillus thuringiensis var. israeliensis* (BTI) may be initiated by a mosquito control agency at any time; and

ii. The application of other larvacides may be initiated upon approval by the Commissioner of a specific plan submitted by a mosquito control agency; the plan shall identify the specific area where an application

will be made, the types and amount of larvacide to be applied, the need for the application, and the reason why BTI cannot be used for this application;*

15. Research activities and the collection of specimens may only be conducted in accordance with N.J.A.C. 7:2-11.10 and upon approval of the administering agency; and

16. Public use of natural areas shall be allowed only to the extent and in a manner that it will not impair natural features; the administering agency may restrict access and use as necessary to protect the natural area; the following are permissible public uses:

i. Hunting, trapping, and fishing are permitted in accordance with N.J.A.C. 7:25-5 and 7:25-6; except for the stocking of fish and game, habitats may not be manipulated for the purpose of enhancing hunting, trapping, or fishing;

ii. Occasional camping along trails, boating, and swimming may be permitted in specified locations of natural areas in accordance with N.J.A.C. 7:2-2, 7:2-5, 7:2-7, 7:2-8, and 7:25-2, and are further limited as follows:

(1) No permanent structures may be erected;

(2) No motorized methods of boating or camping are permitted;

(3) Trailside shelters of the type called lean-tos are permitted, but there may not be two such shelters within three miles of each other; and

iii. Existing trails may be maintained, but not enlarged in any manner, by the administering agency to allow public use and prevent erosion, trampling of vegetation beyond the trails, and other deterioration as follows:

(1) New trails or enlargement of existing trails for interpretive purposes may be initiated subsequent to review of a plan therefore by the Council and approval of that plan by the Commissioner;

(2) Rare plants may not be removed for the purpose of maintaining existing or constructing new trails; and

(3) To the extent possible, natural materials shall be used on and along trails; and

iv. All pets shall be kept caged or leashed and under immediate control of the owner except that dogs used while legally hunting shall be exempt from the leashing requirement.

[(e)]*(f) The following interim management practices, unless superseded by an adopted management plan, apply to the appropriate specified natural area classifications:

1. Location markers identifying interpretation points of interest may be installed except within ecological reserves;

2. Trail blazes may be used within any natural area;

3. Existing vehicular access lanes may not be enlarged in any manner within an ecological reserve;

4. New vehicular access lanes may be constructed only within buffer areas and upon approval by the Commissioner;

[5. New firebreaks to contain wild fires, made by any appropriate means, may be initiated on an emergency basis except within an ecological reserve;]

[6.]*5. New structures and enlargement of existing structures may be undertaken by the administering agency only within buffer areas, provided the structures directly or indirectly contribute to the designation objective;

[7.]*6. The alteration of natural processes or features for the purpose of enhancing public use of the natural area may be conducted by the administering agency only within buffer areas; and

[8.]*7. The following management practices shall not be permitted within ecological reserves:

i. New, existing or temporary firebreaks;

ii. Construction of new trails;

iii. Alteration or restoration of water levels;

iv. Prescribed burning;

v. Erosion control measures;

vi. Gypsy moth control activities; and

vii. Manipulation of vegetation and wildlife habitats.

7:2-11.10 Procedures for conducting research and collecting specimens

(a) In accordance with this section, research or collection within a natural area may be conducted by individuals, groups, or governmental agencies, who, in the opinion of the administering agency,

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are qualified to conduct such activities and which, in the opinion of the administering agency, will not have a detrimental effect on the natural features of the area.

(b) A written proposal for research or collection activities within a natural area shall be submitted to the administering agency. The submission shall contain:

1. The name, address, position, and professional qualifications of the applicant;
2. The purpose and theme of the research or collecting and benefits to be derived therefrom;
3. The specific methods and procedures for carrying out the activity;
4. The location of the research sites;
5. The duration of the project, the frequency of visitation, and the method of access;
6. The name(s) and number of persons involved; and
7. Any anticipated direct and indirect impacts on the natural area that may result from implementation of the project.

(c) The administering agency shall review the submission and approve, conditionally approve, or disapprove the application for research or collection. The decision shall be based on:

1. The relationship of the activity to the designation objective of the area and the benefits to be derived;
2. The ability and competence of the applicant to conduct the activity; and
3. The approved activity having minimal adverse impact on the natural area and the administering agency's ability to adequately manage the area while subject to research and collection.

(d) Interim and final reports and publications resulting from the research or collection, as specified in the approval, shall be submitted to the administering agency and secretary of the Council.

7:2-11.11 Enforcement of rules

(a) Any employee or agent of the Department upon whom the Commissioner has conferred powers of police officers shall have the authority to enforce any of the provisions of this subchapter.

(b) Remedies for the violation of the provisions of this subchapter applicable to those State-owned or leased lands, waters and facilities administered by the Department other than wildlife management areas or reservoir lands shall be as provided at N.J.S.A. 13:1L-23.

(c) Penalties for the violation of the provisions of this subchapter applicable to State-owned or leased lands under the control of the Division of Fish, Game and Wildlife shall be as provided for at N.J.S.A. 23:7-9.

7:2-11.12 Natural Areas System

(a) The Division shall maintain general location maps of each area in the System and shall periodically update these maps to reflect minor boundary changes due to acquisitions or new information. Major changes in boundaries may be made upon adoption of a management plan or amendment thereto.

(b) Boundaries indicated on these maps shall reflect the true location of the natural area and be made available to the administering agency and the general public.

(c) The following are designated as components of the Natural Areas System:

1. Absegami Natural Area:
 - i. Location: Bass River State Forest, Bass River Township, Burlington County;
 - ii. Designation Objective: preservation of southern white cedar and pine/oak communities and a southern swamp habitat;
 - iii. *[Primary]* ***Interim*** Classification: conservation preserve;
 - iv. Administering Agency: Division of Parks and Forestry, through Bass River State Forest;
2. Allamuchy Natural Area:
 - i. Location: Allamuchy State Park, Allamuchy Township, Warren County, and *[Hopatcong Borough]* ***Byram Township***, Sussex County;
 - ii. Designation Objective: preservation of a *[hardwood forest and old fields in various stages of succession, and rare species habitat]* ***a hardwood forest of significant size and successional fields and protection of a rare plant community***;

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- iii. *[Primary]* ***Interim*** Classification: conservation preserve;
- iv. Administering Agency: Division of Parks and Forestry, through Hopatcong State Park;

3. Batsto Natural Area:

- i. Location: Wharton State Forest, Mullica Township, Atlantic County, and Washington Township, Burlington County;
- ii. Designation Objective: preservation of a southern swamp, Pine Barrens bog and floodplain habitats, and rare species habitat;
- iii. *[Primary]* ***Interim*** Classification: conservation preserve;
- iv. Administering Agency: Division of Parks and Forestry, through Wharton State Forest;

4. Bearfort Mountain Natural Area:

- i. Location: Wawayanda State Park, West Milford Township, Passaic County;
- ii. Designation Objective: preservation of scrub oak and hardwood swamp habitats;
- iii. *[Primary]* ***Interim*** Classification: conservation preserve;
- iv. Administering Agency: Division of Parks and Forestry, through Wawayanda State Park;

5. Bear Swamp East Natural Area:

- i. Location: Downe Township, Cumberland County;
- ii. Designation Objective: preservation of ecological communities and relationships, management of bald eagle nesting site and other known and potential endangered species habitat;
- iii. *[Primary]* ***Interim*** Classification: ecological reserve;
- iv. Administering Agency: *[to be determined upon preparation of a management plan]* ***Division of Parks and Forestry, through the Office of Natural Lands Management***;

6. Black River Natural Area:

- i. Location: Black River Wildlife Management Area, Chester and Washington Townships, Morris County;
- ii. Designation Objective: preservation of mesic, marsh, *[and]* floodplain habitat*, and rare species habitat*;
- iii. *[Primary]* ***Interim*** Classification: conservation preserve;
- iv. Administering Agency: Division of Fish, Game and Wildlife, through Whittingham Wildlife Management Area;

7. Bull's Island Natural Area:

- i. Location: Bull's Island Recreation Area, Delaware Township, Hunterdon County;
- ii. Designation Objective: preservation of a northern floodplain habitat, and rare species habitat;
- iii. *[Primary]* ***Interim*** Classification: conservation preserve;
- iv. Administering Agency: Division of Parks and Forestry, through Delaware and Raritan Canal State Park;

8. Bursch Sugar Maple Natural Area:

- i. Location: Hope ***and Knowlton*** Township*s*, Warren County;
- ii. Designation Objective: preservation of a northeastern climax forest, and sugar maple/mixed hardwood community;
- iii. *[Primary]* ***Interim*** Classification: conservation preserve;
- iv. Administering Agency: Division of Parks and Forestry, through Jenny Jump State Forest;

9. Cape May Point Natural Area:

- i. Location: Cape May Point State Park, *[West]* Cape May ***Point* Borough *and Lower Township***, Cape May County;
- ii. Designation Objective: preservation of fresh water marsh behind a coastal dune, habitat diversity for migratory birds, and rare species habitat;

- iii. *[Primary]* ***Interim*** Classification: conservation preserve;
- iv. Administering Agency: Division of Parks and Forestry, through Cape May Point State Park;

10. Cape May Wetlands Natural Area:

- i. Location: Avalon Borough, Dennis *[and]**,* Middle*, and **Upper*** Townships, Cape May County;
- ii. Designation Objective: preservation of tidal salt marsh ecosystem;
- iii. *[Primary]* ***Interim*** Classification: ecological reserve;
- iv. Administering Agency: Division of Parks and Forestry, through *[Region 1 Office]* ***Cape May Point State Park***;

11. Cedar Swamp Natural Area:

- i. Location: Lebanon State Forest, Woodland Township, Burlington County;

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- ii. Designation Objective: preservation of southern swamp and floodplain habitat, southern white cedar, red maple and pine/oak forest communities, and rare species habitat;
- iii. ***[Primary]* *Interim*** Classification: conservation preserve;
- iv. Administering Agency: Division of Parks and Forestry, through Lebanon State Forest;
- 12. Cheesequake Natural Area:
 - i. Location: Cheesequake State Park, Old Bridge Township, Middlesex County;
 - ii. Designation Objective: preservation of habitat diversity including hardwood forest, cedar swamp, mature white pine stand, fresh water swamp, Pine Barren outlier and salt marsh, and rare species habitat;
 - iii. ***[Primary]* *Interim*** Classification: conservation preserve;
 - iv. Administering Agency: Division of Parks and Forestry, through Cheesequake State Park;
- 13. Cook Natural Area:
 - i. Location: South Brunswick Township, Middlesex County;
 - ii. Designation Objective: preservation of freshwater marsh habitat;
 - iii. ***[Primary]* *Interim*** Classification: ***[ecological reserve]* *conservation preserve***;
 - iv. Administering Agency: Division of Parks and Forestry, through Delaware and Raritan Canal State Park;
- 14. Dryden Kuser Natural Area:
 - i. Location: High Point State Park, Montague ***and Wantage*** Township*s*, Sussex County;
 - ii. Designation Objective: preservation of a northern bog habitat, and rare species habitat;
 - iii. ***[Primary]* *Interim*** Classification: conservation preserve;
 - iv. Administering Agency: Division of Parks and Forestry, through High Point State Park;
- 15. Dunnfield Creek Natural Area:
 - i. Location: Worthington State Forest, Pahaquarry Township, Warren County;
 - ii. Designation Objective: preservation of a hemlock ravine, and rare species habitat;
 - iii. ***[Primary]* *Interim*** Classification: conservation preserve;
 - iv. Administering Agency: Division of Parks and Forestry, through Worthington State Forest;
- 16. Fanny Natural Area:
 - i. Location: Fanny State Park, Rockaway Township, Morris County;
 - ii. Designation Objective: preservation of rare species habitat;
 - iii. ***[Primary]* *Interim*** Classification: conservation preserve;
 - iv. Administering Agency: Division of Parks and Forestry, through Region 3 Office;
- 17. Great Bay Natural Area:
 - i. Location: Little Egg Harbor Township, Ocean County;
 - ii. Designation Objective: preservation of tidal salt marsh ecosystem;
 - iii. ***[Primary]* *Interim*** Classification: ecological reserve;
 - iv. Administering Agency: Division of Parks and Forestry, through ***[Region 1 Office]* *Bass River State Forest***;
- 18. Hacklebarney Natural Area:
 - i. Location: Hacklebarney State Park, Chester and Washington Townships, Morris County*, **Tewksbury Township, Hunterdon County and Bedminster Township, Somerset County***;
 - ii. Designation Objective: preservation of a river ravine and northern hemlock/mixed hardwood forest, and rare species habitat;
 - iii. ***[Primary]* *Interim*** Classification: conservation preserve;
 - iv. Administering Agency: Division of Parks and Forestry, through Hacklebarney State Park;
- 19. Island Beach Northern Natural Area:
 - i. Location: Island Beach State Park, ***[Ocean]* *Berkeley*** Township, Ocean County;
 - ii. Designation Objective: preservation of barrier island dune system, ***[and]*** plant community associations, and rare species habitat;
 - iii. ***[Primary]* *Interim*** Classification: ecological reserve;
 - iv. Administering Agency: Division of Parks and Forestry, through Island Beach State Park;

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- 20. Island Beach Southern Natural Area:
 - i. Location: Island Beach State Park, Ocean ***and Berkeley*** Township*s*, Ocean County;
 - ii. Designation Objective: preservation of barrier island dune system, salt water marsh and fresh water bogs;
 - iii. ***[Primary]* *Interim*** Classification: conservation preserve;
 - iv. Administering Agency: Division of Parks and Forestry, through Island Beach State Park;
- 21. Johnsonburg Natural Area:
 - i. Location: Frelinghuysen Township, Warren County;
 - ii. Designation Objective: preservation of habitat diversity for rare species;
 - iii. ***[Primary]* *Interim*** Classification: ecological reserve;
 - iv. Administering Agency: Division of Parks and Forestry, through Jenny Jump State Forest;
- 22. Ken Lockwood Gorge Natural Area:
 - i. Location: Ken Lockwood Gorge Wildlife Management Area, Lebanon Township, Hunterdon County;
 - ii. Designation Objective: preservation of hemlock/mixed hardwood forest with highly varied understory, and rare species habitat;
 - iii. ***[Primary]* *Interim*** Classification: conservation preserve;
 - iv. Administering Agency: Division of Fish, Game and Wildlife, through Whittingham Wildlife Management Area;
- 23. Liberty Park Natural Area:
 - i. Location: Liberty State Park, Jersey City, Hudson County;
 - ii. Designation Objective: preservation of a salt marsh in ***[lower]* *Upper*** New York Bay;
 - iii. ***[Primary]* *Interim*** Classification: conservation preserve;
 - iv. Administering Agency: Division of Parks and Forestry, through Liberty State Park;
- 24. Manahawkin Natural Area:
 - i. Location: Manahawkin Wildlife Management Area, Stafford Township, Ocean County;
 - ii. Designation Objective: preservation of a mature bottomland hardwood forest, and rare species habitat;
 - iii. ***[Primary]* *Interim*** Classification: ecological reserve;
 - iv. Administering Agency: Division of Fish, Game and Wildlife, through Edward G. Bevan Wildlife Management Area;
- 25. North Brigantine Natural Area:
 - i. Location: City of Brigantine, Atlantic County;
 - ii. Designation Objective: preservation of salt marsh habitat behind a coastal dune, and rare species habitat;
 - iii. ***[Primary]* *Interim*** Classification: conservation preserve;
 - iv. Administering Agency: Division of Parks and Forestry, through Wharton State Forest;
- 26. Osmun Forest Natural Area:
 - i. Location: Knowlton Township, Warren County;
 - ii. Designation Objective: preservation of a northeastern mixed hardwood forest;
 - iii. ***[Primary]* *Interim*** Classification: ecological reserve;
 - iv. Administering Agency: Division of Parks and Forestry, through Jenny Jump State Forest;
- 27. Oswego River Natural Area:
 - i. Location: Wharton State Forest, Washington and Bass River Townships, Burlington County;
 - ii. Designation Objective: preservation of a variety of Pinelands habitats including uplands, white cedar stands, bogs, pine/oak forest, and rare species habitat;
 - iii. ***[Primary]* *Interim*** Classification: ecological reserve;
 - iv. Administering Agency: Division of Parks and Forestry, through Wharton State Forest;
- 28. Parvin Natural Area:
 - i. Location: Parvin State Park, Pittsgrove Township, Salem County;
 - ii. Designation Objective: preservation of mixed oak and pine forest on the Pine Barrens fringe with a diversity of plant and animal species, and rare species habitat;
 - iii. ***[Primary]* *Interim*** Classification: conservation preserve;
 - iv. Administering Agency: Division of Parks and Forestry, through Parvin State Park;

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29. Ramapo Lake Natural Area:
i. Location: Ramapo Mountain State Forest, Wanaque and Ringwood Boroughs, Passaic County, and Oakland Borough, Bergen County;
ii. Designation Objective: preservation of northern upland habitats;
iii. *[Primary]* *Interim* Classification: conservation preserve;
iv. Administering Agency: Division of Parks and Forestry, through Ringwood State Park;
30. Rancocas Natural Area:
i. Location: Rancocas State Park, Westampton Township, Burlington County;
ii. Designation Objective: preservation of fresh water marsh and southern floodplain habitat, including one of the largest stands of wild rice in state;
iii. *[Primary]* *Interim* Classification: conservation preserve;
iv. Administering Agency: Division of Parks and Forestry, through Lebanon State Forest;
31. Readington Natural Area:
i. Location: Readington Township, Hunterdon County;
ii. Designation Objective: preservation of early stages of secondary field succession;
iii. *[Primary]* *Interim* Classification: conservation preserve;
iv. Administering Agency: Division of Parks and Forestry, through Round Valley Recreation Area, for the New Jersey Natural Lands Trust;
32. Strathmere Natural Area:
i. Location: Corson's Inlet State Park, Upper Township, Cape May County;
ii. Designation Objective: preservation of a dune habitat;
iii. *[Primary]* *Interim* Classification: conservation preserve;
iv. Administering Agency: Division of Parks and Forestry, through Belleplain State Forest;
33. Sunfish Pond Natural Area:
i. Location: Worthington State Forest, Pahaquarry Township, Warren County;
ii. Designation Objective: preservation of a lake of glacial origin surrounded by a hardwood forest, and rare species habitat;
iii. *[Primary]* *Interim* Classification: ecological reserve;
iv. Administering Agency: Division of Parks and Forestry, through Worthington State Forest;
34. Swan Point Natural Area:
i. Location: Brick Township, Ocean County;
ii. Designation Objective: preservation of tidal salt marsh ecosystem;
iii. *[Primary]* *Interim* Classification: ecological reserve;
iv. Administering Agency: Division of Parks and Forestry, through Island Beach State Park;
35. Swimming River Natural Area:
i. Location: Borough of Tinton Falls, Monmouth County;
ii. Designation Objective: preservation of habitat diversity including fresh water marsh, salt water marsh, woodlands, fields and estuary;
iii. *[Primary]* *Interim* Classification: conservation preserve;
iv. Administering Agency: Division of Parks and Forestry, through Allaire State Park;
36. Tillman Ravine Natural Area:
i. Location: Stokes State Forest, Walpack and Sandyston Townships, Sussex County;
ii. Designation Objective: preservation of a hemlock ravine and associated geologic forms, and rare species habitat;
iii. *[Primary]* *Interim* Classification: conservation preserve;
iv. Administering Agency: Division of Parks and Forestry, through Stokes State Forest;
37. Troy Meadows Natural Area:
i. Location: *East Hanover and* Parsippany-Troy Hills Township*s*, Morris County;
ii. Designation Objective: preservation of freshwater marsh habitat northern swamp and floodplain habitat, and rare species habitat;
iii. *[Primary]* *Interim* Classification: conservation preserve;
iv. Administering Agency: Division of Parks and Forestry, through Region 3 Office;

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38. Washington Crossing Natural Area:
i. Location: Washington Crossing State Park, Hopewell Township, Mercer County;
ii. Designation Objective: preservation of natural succession and mixed hardwood forests;
iii. *[Primary]* *Interim* Classification: conservation preserve;
iv. Administering Agency: Division of Parks and Forestry, through Washington Crossing State Park;
39. Wawayanda Hemlock Ravine Natural Area:
i. Location: Wawayanda State Park, Vernon Township, Sussex County;
ii. Designation Objective: preservation of hemlock/mixed hardwood forest and rare species habitat;
iii. *[Primary]* *Interim* Classification: conservation preserve;
iv. Administering Agency: Division of Parks and Forestry, through Wawayanda State Park;
40. Wawayanda Swamp Natural Area:
i. Location: Wawayanda State Park, Vernon Township, Sussex County, and West Milford Township, Passaic County;
ii. Designation Objective: preservation of extensive northern swamp and forest habitats, glacially formed, spring fed pond, and rare species habitat;
iii. *[Primary]* *Interim* Classification: conservation preserve;
iv. Administering Agency: Division of Parks and Forestry, through Wawayanda State Park; and
41. Whittingham Natural Area:
i. Location: Whittingham Wildlife Management Area, Fredon Township, Sussex County;
ii. Designation Objective: preservation of a northern swamp and floodplain forest with rare species of plants on a limestone cliff;
iii. *[Primary]* *Interim* Classification: conservation preserve;
iv. Administering Agency: Division of Parks and Forestry, through Swartswood State Park.

(a)

DIVISION OF WATER RESOURCES Underground Storage Tank Registration Requirements and Fee Rules Adopted New Rules: N.J.A.C. 7:14B

Proposed: August 17, 1987 at 19 N.J.R. 1477(a)

Adopted: November 25, 1987 by Richard T. Dewling,

Commissioner, Department of Environmental Protection

Filed: November 30, 1987 as R.1987 d.531, **with substantive and technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 58:10A-21 et seq.

DEP Docket Number: 036-87-07

Effective Date: December 21, 1987.

Expiration Date: December 21, 1992

Summary of Public Comments and Agency Responses:

A public hearing on the proposed new rules was held on September 3, 1987, at which seven people testified. Thirty-one written comments were received by the Department by the close of the public comment period on September 16, 1987.

COMMENT: One comment was received which requested that the Department state what the economic impact will be to a facility required to provide the Department with the registration information.

RESPONSE: The official New Jersey Underground Storage Tank Registration Questionnaire is designed to facilitate compliance with N.J.S.A. 58:10A-21 et seq. (the "State Act") at minimal expense to the owner or operator of the facility. All of the information requested by the Department should be a part of a responsible underground storage tank owner's standard operating records. The Department estimates that completion of the questionnaire would, where the owner or operator has absolutely no records, cost a maximum of \$2,500.00.

COMMENT: One comment was received which requested that the Department clarify the program staff and program costs provided for in the proposed budget set forth in the Economic Impact Statement.

RESPONSE: The budget set forth in the Economic Impact Statement provides a clear list of the staff and program costs which the Department requires to implement the underground storage tank program during Fiscal Year 1988. Titles, positions and the numbers of positions are subject to modification as programmatic conditions warrant. Standard state audit and budget constraints apply to the Bureau of Underground Storage Tanks ("the Bureau"), and the Department of Personnel and the Office of Management and Budget control personnel and spending matters, respectively. In addition, the fees assessed pursuant to the rules may only be in an amount necessary to cover "the estimated yearly cost of implementing the provisions of the" State Act. The Department, therefore, will only receive funds or have the authority to assess fees in an amount equal to that which is necessary to meet the responsibilities provided for under the State Act.

COMMENT: One comment was received which stated that enforcement staff should be added to the budget set forth in the Economic Impact Statement.

RESPONSE: The staff positions set forth in the proposed budget reflect only Fiscal Year 1988 positions. The Fiscal Year 1989 budget will provide for enforcement staff.

COMMENT: N.J.A.C. 7:14B-1.4 (Applicability). Several comments were received questioning why the Department:

1. Exempts sumps and emergency spill or overflow tanks from the proposed new rules;
2. Exempts flow-through process tanks from the proposed new rules;
3. Does not exempt sewage and sewage sludge from the proposed new rules.

RESPONSE: The Department will promulgate rules concerning sumps and emergency spill or overflow tanks in the technical underground storage tank rules to be proposed, since these tanks have the potential to release hazardous substances into the environment.

Although flow-through process tanks are not specifically exempted under the State Act, they are exempt under the Federal "Hazardous and Solid Waste Amendments of 1984 to the Resource Conservation and Recovery Act" (42 U.S.C. §6901 et seq.). In accordance with the Federal exemption (see 52 FR 12,692), the Department has concluded that this type of underground storage tank does not require regulation pursuant to the State Act. Flow-through process tanks must have a steady or uninterrupted flow of materials during the operation of the process. Any tank which stores hazardous substances prior to their introduction into an industrial or commercial process, or is used to store hazardous substances as intermediate by-products or finished products, will not be included under this exemption.

Where sewage or sewage sludge contains a hazardous substance as defined in N.J.A.C. 7:14B-1.6, it will be regulated pursuant to the new rules. The Federal regulations defer all requirements on wastewater treatment systems as defined by Sections 402 and 307(b) of the Federal Clean Water Act (33 U.S.C. §1251 et seq.). The Department agrees with this decision and has excluded wastewater systems from the State underground storage tank rules. The Department reserves the authority to regulate wastewater treatment systems in the future if the United States Environmental Protection Agency takes the position that they can be effectively regulated under the Federal regulations. Those underground storage tanks which store sewage and sewage sludge and do not provide treatment will, however, be subject to the new rules upon adoption.

COMMENT: N.J.A.C. 7:14B-1.4 (Applicability). Several comments were received questioning the Department's interpretation of tank capacity.

RESPONSE: The Department will determine capacity in terms of the size of the tank, and will not include the piping or other appurtenant structures attached to the tank in making this determination. It should be noted that the capacity of the tanks exempted in the new rules are based on statutory exemptions and will not be changed. However, the Department will also determine capacity on the basis of the aggregate volume of hazardous substance located at a single facility, without regard to the number and size of each tank. Therefore, three 1000 gallon heating oil tanks will be subject to the new rules if they are located at a single facility (considered by the Department to be one contiguous piece of property). The Department is basing capacity on aggregate volume to ensure that the owner or operator of underground storage tanks will not circumvent the law by replacing one large tank with several smaller tanks.

COMMENT: N.J.A.C. 7:14B-1.4 (Applicability). Number 2 fuel oil can be used as both a motor fuel (in a generator) or as a heating oil. When would it be exempt from the requirements of the new rules?

RESPONSE: When a particular tank and its contained hazardous substance can be used for more than one purpose, the Department will

consider the use or purpose of the hazardous substance in terms of the most environmentally protective use. Therefore, Number 2 fuel oil will be considered a motor fuel when used for emergency generators and those tanks that contain it (except those specifically exempted under N.J.A.C. 7:14B-1.4(b)) will be regulated under this chapter. Note that when the motor fuel tank is used for farm or residential use and is 1100 gallons or less, or when the tank is used to store heating oil for on-site consumptive use and is 2000 gallons or less, the tank is exempt from this chapter.

COMMENT: N.J.A.C. 7:14B-1.4(b)3 (Applicability). One commenter requested that the Department clarify the applicability of the new rules to an underground storage tank greater than 2,000 gallons that stores heating oil.

RESPONSE: The State Act provides for three basic categories of heating oil tanks: Tanks less than or equal to 2,000 gallons used for on-site consumptive use are totally exempt; tanks greater than 2,000 gallons used for on-site consumptive use at a residential building are subject to only the registration requirements, inventory control procedures and release reporting requirements of the State Act; and tanks greater than 2,000 gallons used for on-site consumptive use at a non-residential building must meet all requirements of the State Act.

COMMENT: N.J.A.C. 7:14B-1.4(b)5 and (b)7 (Applicability). One commenter requested that the Department specifically state that liquid traps, pipelines and other gas transmission equipment that is used in conjunction with landfill methane gas production facilities are exempt from the new rules.

RESPONSE: The United States Environmental Protection Agency has specifically exempted this type of equipment in their "Underground Storage Tank Proposed Regulations" (52 Fed. Reg. 12,662 (April 17, 1987)). The Department, at N.J.A.C. 7:14B-1.4(b)5 and (b)7, provides for this exemption.

COMMENT: N.J.A.C. 7:14B-1.6 (Definitions). Why is Number 6 fuel oil included within the definition of "heating oil"?

RESPONSE: Number 6 fuel oil is a petroleum-based product. Even though Number 6 fuel oil has certain physical properties which distinguish it from other types of fuel oil, if it comes into contact with rain or runoff it presents the danger of contaminating groundwater and is therefore considered a hazardous substance. The Department recognizes that the properties of Number 6 fuel oil make it unique, and the Department will develop specialized regulatory requirements for it within the technical underground storage tank rules to be proposed.

COMMENT: N.J.A.C. 7:14B-1.6 (Definitions). Two comments were received which stated that the definition of "below the surface of the ground" would exclude from the proposed new rules certain types of vaults which are below the surface but available for inspection.

RESPONSE: The Department has determined that the definitions of "underground storage tank" and "below the surface of the ground", when read in conjunction with the section on applicability (N.J.A.C. 7:14B-1.4), precludes such exemption from the State Act.

COMMENT: N.J.A.C. 7:14B-1.6 (Definitions). Three comments were received questioning the broad definition of "underground storage tank" to include abandoned, closed, non-operational and bulk storage tanks, as well as sumps and hydraulic lifts.

RESPONSE: All tanks that were in the ground on the effective date of the State Act (September 3, 1986) are subject to the requirements of the new rules. Where the Department has determined that the owner or operator has abandoned or removed a tank in accordance with the requirements of the State Act, it may remove the tank from the registration list. Bulk storage tanks and sumps are not currently covered under the Federal regulations. The Department, however, takes an environmentally protective position and requires that the owner or operator register these tanks with the Department. The Department will issue technical rules for these types of tanks. The Department agrees that hydraulic lift tanks should be exempt from the new rules and has modified N.J.A.C. 7:14B-1.4 to reflect this change.

COMMENT: N.J.A.C. 7:14B-1.6 (Definitions). One comment was received stating that section 2 of the definition of "hazardous substance" be changed to exclude the words "elements and compounds, including" as such over-inclusiveness would incorporate such items as milk and water.

RESPONSE: The Department agrees and the definition has been changed to reflect this comment.

COMMENT: N.J.A.C. 7:14B-1.6 (Definitions). One comment was received which noted that the definition of "leak" omits the language "a method of" specifically provided for in the State Act.

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RESPONSE: The definition has been corrected to accurately reflect the language of the State Act.

COMMENT: N.J.A.C. 7:14B-1.6 (Definitions). Two comments were received which requested that the Department amend the language of the definition "leak".

RESPONSE: The definition of "leak" is specifically provided for in the State Act and will not be amended.

COMMENT: N.J.A.C. 7:14B-1.6 (Definitions). One comment was received stating that the wording provided for in the definition of "liquid", specifically "flammable and combustible", be changed to "combustible and noncombustible".

RESPONSE: The Department agrees that such a language change would make the definition more accurate and has made the change.

COMMENT: N.J.A.C. 7:14B-1.6 (Definitions). One comment was received which stated that the Department should revise the definition of "nonoperational storage tank" to exclude any underground storage tanks which may contain small amounts of residual sludge remaining after the product is removed.

RESPONSE: The definition of "nonoperational storage tank" is specifically provided for in the State Act and will not be amended.

COMMENT: N.J.A.C. 7:14B-1.6 (Definitions). One comment was received which stated that the word "or" be changed to "and" in the definition of "operational storage tank".

RESPONSE: The Department believes that such change would lessen the Department's ability to regulate a large segment of underground storage tanks and that such change does not comport with the Department's mandate to provide for the most environmentally protective regulations allowable under the State Act.

COMMENT: N.J.A.C. 7:14B-1.6 (Definitions). One comment was received which requested that the Department include in the definition of "person" the additional language "any other political subdivisions of the State".

RESPONSE: The definition of "person" is specifically provided for in the State Act and cannot be changed to reflect this comment. However, the words "any other legal entity" included in the definition of "person" incorporates the concept raised by the commenter.

COMMENT: N.J.A.C. 7:14B-1.6 (Definitions). One comment was received which requested that the Department explain how it will interpret the language "used primarily as a dwelling" as provided for in the definition of "residential building".

RESPONSE: The Department will determine the utilization of a building as either residential or non-residential on the basis of the total floor area in a building used for each purpose. Therefore, if 50 percent or more of the total area of a building is used for residential purposes, the Department will consider the building to be residential.

COMMENT: N.J.A.C. 7:14B-1.6 (Definitions). Several comments were received which requested that the Department provide a definition of modification in addition to that for "substantial modification".

RESPONSE: The Department believes that the definition provided in the new rules for "substantial modification" adequately sets forth the meaning and intent of the words for purposes of the rules.

COMMENT: N.J.A.C. 7:14B-1.6 (Definitions). One comment was received which stated that the definition of "underground storage tank" is not the same as that provided for in the State Act.

RESPONSE: The Department agrees. "Underground storage tank" has been changed to reflect the definition provided for in the State Act. For clarification, the Department is including the definition of "tank" provided for in the United States Environmental Protection Agency's "Underground Storage Tank Proposed Regulations" (52 FR 12,662 (April 17, 1987)).

COMMENT: N.J.A.C. 7:14B-1.6 (Definitions). One comment was received which requested that the Department clarify the definition of "wastewater treatment tank".

RESPONSE: The definition incorporates the language set forth in the United States Environmental Protection Agency's "Underground Storage Tank Proposed Regulations" (52 FR 12,662 (April 17, 1987)). The addition of the term "treatment works" is based on the use of the specific definition provided for under the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., and the NJPDES rules, N.J.A.C. 7:14A-1 et seq.

COMMENT: N.J.A.C. 7:14B-2.1(a) (General registration requirements). One comment was received which questioned whether an underground storage tank abandoned in the ground prior to the effective date of the Act (September 3, 1986) is required to register.

RESPONSE: All underground storage tanks, except those that are specifically exempted under the State Act, must be registered regardless

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of their status. An abandoned tank may be a source of groundwater contamination and the Department intends to maintain an inventory of all potential sources of pollution. Abandoned tanks may be removed from the registration file following a site assessment that demonstrates that the tank poses no actual or potential threat of contamination. The Department is preparing rules on the protocols of an acceptable site assessment.

COMMENT: N.J.A.C. 7:14B-2.1(a) (General registration requirements). Two comments were received, one of which stated that the Department should specify that the operator should be assigned the duty of registration as that individual has the day to day control over the use of the tank; the second comment stated that the Department should specify either the owner or the operator because the absence of such a determination is confusing when the tank is at a leased facility.

RESPONSE: The Department disagrees. Each regulated facility has the option of determining which party, where the owner or operator are separate individuals, shall comply with the requirements of the new rules. The Department considers this flexibility to be a benefit rather than a burden to the regulated community.

COMMENT: N.J.A.C. 7:14B-2.1(b) (General registration requirements). One comment was received which requested that the Department clarify the Federal-State relationship pertaining to the "notification"- "registration" processes.

RESPONSE: The Federal underground storage tank registration process is called "notification". Pursuant to Section 9002 of the Federal "Hazardous and Solid Waste Amendments of 1984 to the Resource Conservation and Recovery Act" (42 U.S.C. 6901 et seq.), the "notification" process was delegated to the Department (specifically the Bureau of Ground Water Discharge Permits and known now as the Bureau of Ground Water Quality Management). The Federal Act permits each state to develop its own form for purposes of "notification" as long as, at a minimum, all Federal "notification" requirements are complied with. New Jersey has proposed a "registration" program that complies with the requirements of the Federal Act as well as the requirements of N.J.S.A. 58:10A-21 et seq. (the State Act). The official New Jersey Underground Storage Tank Registration Questionnaire has been approved by the United States Environmental Protection Agency for use in lieu of the "notification" form. Completion of the official Questionnaire by the owner or operator of a facility will meet the Federal "notification" requirements as well as the registration requirements set forth in the State Act.

COMMENT: N.J.A.C. 7:14B-2.1(c) (General registration requirements). One commenter recommended that Registration Certificate be defined.

RESPONSE: The Department agrees and has added a definition of "Registration Certificate" for clarification.

COMMENT: N.J.A.C. 7:14B-2.1(c) (General registration requirements). Several comments were received questioning why the owner or operator of each underground storage tank was required to obtain an annual Registration Certificate.

RESPONSE: The State Act requires that the Department register and reregister all applicable underground storage tanks. The Department, as part of its program to register all applicable tanks, intends to issue a Registration Certificate to every facility after the owner or operator submits the annual registration certification and the annual fee. Facilities which do not comply with the rules by failing either to file the official New Jersey Underground Storage Tank Annual Certification Form or by not paying the appropriate fee will not receive a Registration Certificate. Failure to have a Registration Certificate will serve as a bar to the operation of the facility and may trigger the application of penalties pursuant to N.J.A.C. 7:14B-4. The Department, however, is phasing in the certification process. It will not take effect until two years following the effective date of the new rules. The Department will issue Certificates during this phase-in period, but tanks without Certificates will be allowed to operate.

COMMENT: N.J.A.C. 7:14B-2.1(d) (General registration requirements). One comment was received requesting that the Department clarify the requirements concerning registration of an underground storage tank placed in the ground after September 3, 1986.

RESPONSE: The owner or operator of an underground storage tank regulated pursuant to the State Act and in the ground on or after September 3, 1986 has a continuing obligation to register the facility with the Department.

COMMENT: N.J.A.C. 7:14B-2.1(d) (General registration requirements). One comment was received requesting that the Department ex-

tend the date of submission for underground storage tank registrations for facilities in operation on or before the effective date of the new rules.

RESPONSE: The owner or operator of an underground storage tank has had a significant period of time in which to register his or her facility and the additional 60 days granted in the new rules is a more than adequate additional period.

COMMENT: N.J.A.C. 7:14B-2.1(d) (General registration requirements). One comment was received which suggested that for clarification purposes the words "was installed" be substituted for "began operation" in this provision of the proposed regulations.

RESPONSE: The Department agrees and the language change has been made.

COMMENT: N.J.A.C. 7:14B-2.2(a) (Registration and certification procedures). One comment was received which requested that the Department include the tank test date on the registration questionnaire.

RESPONSE: The Department anticipates that it will incorporate this requirement in the underground storage tank technical rules to be proposed.

COMMENT: N.J.A.C. 7:14B-2.2(c) (Registration and certification procedures). Two comments were received which requested that time frames be placed on the Department to provide Registration Certificates upon receipt of an annual certification or a notice of transfer of ownership.

RESPONSE: There is no provision in the State Act which mandates that the Department issue a Registration Certificate within a specified time period after receipt of a request for a Certificate. The Department is aware that unnecessary delay can cause confusion and potential hardship to the regulated community. The Department is committed to approving the annual certification and issuing a Registration Certificate as expeditiously as possible.

COMMENT: N.J.A.C. 7:14B-2.2(c) (Registration and certification procedures). Two comments were received which questioned the appropriateness of an annual certification, and suggested that the time period between reregistrations be increased from one to two or even five years.

RESPONSE: The State Act requires the annual reregistration of each facility (see N.J.S.A. 58:10A-23(b)).

COMMENT: N.J.A.C. 7:14B-2.3 (Signatories). One comment was received which questioned whether certifications, filed with the Department on either the Federal "notification" form or on early Department registration forms which do not comport with the proposed signatory language, must be re-signed.

RESPONSE: A section on the official New Jersey Annual Certification Form will provide for updating of the signatory requirement.

COMMENT: N.J.A.C. 7:14B-2.3 (Signatories). Several comments were received which criticized the proposed signatory provision.

RESPONSE: The Department is changing the signatory provision upon adoption to ensure that the certification language incorporated in the new rules reflects the highest level of oversight necessary to ensure that the New Jersey Underground Storage Tank Program forms are accurately completed and filed with the Department. Upon adoption, the certification provided for in N.J.A.C. 7:14B-2.3(a)1 shall be signed "by the highest ranking individual at the facility with overall responsibility for that facility". The Department believes that it is appropriate that "the highest ranking individual at the facility with overall responsibility for that facility" be held to have personal knowledge as to the truth, accuracy and completeness of all underground storage tank program registration, annual certification, and reporting information. Responsibility for the operations at a facility must be in some identifiable and responsible individual at the facility who has personal knowledge of these activities. Although some of the required underground storage tank program information may come from other individuals at the facility, the individual who signs the form has a duty to make such information her/his personal knowledge prior to submittal to the Department.

COMMENT: N.J.A.C. 7:14B-2.4 (Transfer of registration). One comment was received which requested that the Department clarify the transfer of ownership process.

RESPONSE: The new rules require that the owner or operator of an underground storage tank notify the Department of any change in the ownership of a facility on the Standard Reporting Form within 30 days after the contract date or the date of closing. It is the responsibility of the owner or operator of a facility to register with the Department. Therefore, if the Department is not notified of the change by the date of closing, it will be the responsibility of the new owner to notify the Department within 30 days.

COMMENT: N.J.A.C. 7:14B-2.5(b)4 (Changes to registration). Several comments were received which stated that the provision requires the submission of a great deal of material and that this requirement will be overly burdensome to both the Department and the regulated community.

RESPONSE: The Department agrees and has not adopted this provision. The Department's technical rules to be proposed will contain recordkeeping provisions which will include the types of testing, monitoring or inspection reports that the owner or operator of an underground storage tank must maintain or submit.

COMMENT: N.J.A.C. 7:14B-2.7 (Display of Registration Certificate). One comment was received which stated that prominently displaying the Registration Certificate, while practicable at a service station, is impracticable at a major facility. It was suggested that, as set forth in the Department's Basis and Background Document to the proposed new rules, the provision provide that the Certificate be displayed or be made available for inspection by any authorized local, State or Federal representative.

RESPONSE: The Department agrees and this section has been changed to reflect this position.

COMMENT: N.J.A.C. 7:14B-3 (Fees). Two comments were received which requested that the Department explain the need for and the applicability of underground storage tank fees.

RESPONSE: N.J.S.A. 58:10A-31 provides the Department with the authority to develop rules imposing fees for the processing of initial registrations, renewals, and permitting to the extent that the fees do not exceed the estimated yearly cost of implementing the provisions of the State Act. In accordance with this provision of the State Act, the Department has developed a planning document that sets forth proposed staffing and program costs for Fiscal Year 1988 and the level of funding necessary to operate the Department's underground storage tank registration program in Fiscal Year 1988. The Department has decided that all first-time registrations (including homeowners) shall, starting one year after the effective date of the rules, cost a flat fee of \$100.00 (the initial registration fee). The Department has determined that the cost of annually re-registering a facility (the annual certification fee) with five or less tanks was significantly different from the amount of resources necessary to re-register a facility with six or more tanks, regardless of the size or use of the tank. Therefore, a facility with five tanks or less is required to pay \$100.00 in Fiscal Year 1988. A facility with more than five tanks will be required to pay \$100.00 plus \$15.00 for each additional tank.

COMMENT: N.J.A.C. 7:14B-3 (Fees). Several comments were received stating that the Department should provide an exemption from the fee requirement for public schools, non-profit organizations, municipal utilities authorities, and/or publicly owned treatment works (POTWs).

RESPONSE: The Department has included language that provides for an exemption from the fees for public schools or religious or charitable institutions. This is consistent with the Department's NJPDES fee regulations (see N.J.A.C. 7:14A-1.8(a)2). The Department will not provide an exemption for municipal utilities authorities and/or POTWs.

COMMENT: N.J.A.C. 7:14B-4 (Penalties). One comment was received which stated that even though N.J.S.A. 58:10A-10 authorizes fines up to \$50,000 per day per violation, the rule of reason will prevail for minor infractions.

RESPONSE: The Department is drafting new rules which will set forth the regulatory framework for assessing reasonable monetary penalties as provided for under N.J.S.A. 58:10A-10.

COMMENT: General issue. One comment was received which stated that the proposed new rules do not set forth a comprehensive examination of the rights and responsibilities as between a landlord and tenant where one party owns the land and/or the tank and the other is a lessee.

RESPONSE: The Department will hold landlords and tenants, and owners and operators, jointly and severally liable with regard to compliance with any provision of the State Act and the Department's rules.

COMMENT: General issue. One comment was received which stated that the proposed new rules require that any person that owns or operates an underground storage tank submit three different forms to the Department (the Registration Questionnaire, the Annual Certification Form and the Standard Reporting Form) and that such duplication of effort is unfair to the regulated community.

RESPONSE: The Department disagrees. Each Department form has a specific purpose: The Registration Questionnaire provides the Department with a comprehensive record on the operation of an underground storage tank system, the Annual Certification Form provides the Department with an annual update of the condition and status of the underground storage tank system, and the Standard Reporting Form provides

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a convenient means by which to alert the Department of specific changes to the status to the underground storage tank system. It is the Department's position that complying with the requirement for submitting any of the three forms will not place an undue burden on the regulated community and will greatly assist the Department in its efforts to ensure that the environment of the State is not contaminated by releases from underground storage tanks.

COMMENT: General issue. One comment received questioned why the Department is not proposing all of the underground storage tank program rules at one time.

RESPONSE: The Department agrees that it would be much less complicated and less work for the Department to combine all of its regulatory efforts into one proposal and subsequent public hearing. However, this realistically can not be done. The underground storage tank program is a new Department program, and one that requires that the Department acquire a great deal of technical expertise. The Department is therefore developing the program in stages, proposing individual parts, to the extent possible, in accordance with the Legislature's time-frame.

COMMENT: General issue. One comment received stated that permits for air pollution control and underground storage tank installation are often required for one tank and that the Department should attempt to combine the two permits.

RESPONSE: The proposed new rules do not address the permitting issue. The Department's technical rules to be proposed will address the permitting issue in detail. The Department will examine the feasibility of combining the application forms for these two types of permits.

COMMENT: General issue. One comment stated that certain activities addressed under N.J.S.A. 58:10A-21 et seq. and the proposed new rules are already addressed under the Uniform Construction Code and the Uniform Fire Code.

RESPONSE: The Legislature, in the State Act, requires that the Department coordinate the development of the underground storage tank program with the Department of Community Affairs (DCA), which is the department charged with implementing the Uniform Construction Code and the Uniform Fire Code. The Department is currently coordinating its efforts with the DCA. Pursuant to N.J.S.A. 58:10A-25(c), the registration provisions of the new rules will become part of the Uniform Construction Code, and the Department will work closely with local officials to ensure cooperation with regard to those provisions of the Uniform Construction Code and the Uniform Fire Code which relate to underground storage tanks.

COMMENT: General issue. One comment was received requesting that the Department explain the color-coding of Appendix A.

RESPONSE: The official New Jersey Underground Storage Tank Registration Questionnaire (Appendix A) is color coded to expedite the registration and billing aspects of the underground storage tank program and to make for ease of administration. Additional copies of the form are available at no cost by calling the toll-free Underground Storage Tank Hotline at 1-800-722-TANK.

COMMENT: General issue. One comment was received which requested that the Department clarify the instructions in Section A of Appendix B.

RESPONSE: The instructions in Section A of the official New Jersey Underground Storage Tank Annual Certification Form (Appendix B) will be changed to read: "If NO, please complete Sections B, D, and E".

COMMENT: General issue. One comment was received which requested that the Department include a date space in Appendix A.

RESPONSE: There is no need to have a date space on the Registration Questionnaire because the critical date is not when the form is signed and/or mailed but rather when it arrives at the Department. There is a date space on the Annual Certification Form.

COMMENT: One comment was received which requested that the Department define "tank management" as provided on Appendix B.

RESPONSE: The term "tank management" has been deleted from Appendix B. The underground storage tank technical rules to be proposed may contain requirements for tank management.

COMMENT: General issue. One comment was received which asked why the Department did not develop a keypunch readable format for Appendix C as it did for Appendix A.

RESPONSE: Appendix C is intended to be a simple form for recording changes in registration status. Keypunch readable format is an unnecessary burden on the regulated community for such a simple form. Therefore the format of the official New Jersey Underground Storage Tank Standard Reporting Form (Appendix C) will not be changed at this time.

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COMMENT: General issue. One comment was received which questioned who the Department will bill when more than one person owns an underground storage tank.

RESPONSE: The Department anticipates receipt of the appropriate fee as set forth in N.J.A.C. 7:14B-3 from the owner listed on the official New Jersey Underground Storage Tank Registration Questionnaire.

Full text of the adoption follows (additions to the proposal shown in boldface with asterisks ***thus***; deletions from the proposal shown in brackets with asterisks ***[thus]***).

CHAPTER 14B UNDERGROUND STORAGE TANKS

SUBCHAPTER 1. GENERAL INFORMATION

7:14B-1.1 Scope

This chapter shall constitute the rules of the Department of Environmental Protection for all underground storage tank facilities regulated by N.J.S.A. 58:10A-21 et seq.

7:14B-1.2 Construction

This chapter shall be construed so as to permit the Department to implement its statutory functions and to effectuate the purposes of the law.

7:14B-1.3 Purpose

(a) This chapter is promulgated for the following purposes:

1. To establish the Department's underground storage tank program;
2. To implement the registration requirements of the State Act;
3. To establish Initial Registration and Annual Certification fees; and
4. To protect human health and the environment of the State by ensuring sound underground storage tank management, thereby preventing, controlling, remediating and/or abating actual or potential groundwater contamination.

7:14B-1.4 Applicability

(a) This chapter applies to all underground storage tanks containing hazardous substances except as provided in (b) below.

(b) The following types of underground storage tanks are exempt from the requirements of this chapter:

1. Farm or residential tanks of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes;
2. Tanks with a capacity of 2,000 gallons or less used to store heating oil for onsite consumption in a nonresidential building;
3. Tanks used to store heating oil for onsite consumption in a residential building, except that for the purposes of registration pursuant to this chapter, and inventory control and release detection under sections 7 and 8 of the State Act (N.J.S.A. 58:10A-27 and 58:10A-28), respectively, a tank with a capacity of more than 2,000 gallons used to store heating oil for onsite consumption in a residential building shall be considered an underground storage tank;
4. Septic tanks installed in compliance with rules adopted by the Department pursuant to The Realty Improvement Sewerage and Facilities Act (1954), Pub. L. 1954, c.199 (N.J.S.A. 58:11-23 et seq.);
5. Pipelines, including gathering lines, regulated under the Natural Gas Pipeline Safety Act of 1968, Pub. L. 90-481 (49 U.S.C. §§1678 et seq.), the Hazardous Liquid Pipeline Safety Act of 1979, Pub. L. 96-129 (49 U.S.C. §§2001 et seq.), or intrastate pipelines regulated under State law as approved by the Department;
6. Surface impoundments, pits, ponds, lagoons, storm water or wastewater collection systems operated in compliance with N.J.A.C. 7:14A-1 et seq.;
7. Liquid traps or associated gathering lines directly related to oil and gas production and gathering operations;
8. Tanks situated in an underground area including, but not limited to, basements, cellars, mines, drift shafts, or tunnels, if the storage tank is situated upon or above the surface of the floor;
9. Tanks situated in an underground area including, but not limited to, basements, cellars, mines, drift shafts, or tunnels if the storage tank is located below the surface of the ground, is equipped with secondary containment, and is uncovered so as to allow visual inspection of the exterior of the tank;

10. Any pipes, lines, fixtures, or other equipment connected to any tank exempted from the provisions of the State Act as set forth in (b)1 to 8 above;

11. Flow-through process tanks;

12. Wastewater treatment tanks; *[and]*

13. Electrical equipment*[.]* *; and*

14. Hydraulic lift tanks.

7:14B-1.5 Severability

If any section, subsection, provision, clause or portion of this chapter is adjudged unconstitutional or invalid by a court of competent jurisdiction, the remainder of this chapter shall not be affected thereby.

7:14B-1.6 Definitions

As used in this chapter, the following words and terms shall have the following meanings unless the context clearly indicates otherwise:

"Abandoned" or "abandonment" means a tank rendered permanently nonoperational and left in the ground.

"Annual certification" means the yearly reregistration of a tank with the Department pursuant to this chapter.

"Below the surface of the ground" means beneath the ground surface or otherwise covered so that physical or visual inspection of the exterior is precluded.

"Close" or "closure" means the permanent elimination from service of any underground storage tank by removal or abandonment.

"Commercial" means any activity involving a hazardous substance from an underground storage tank including, but not limited to, the resale, distribution, processing and transportation of any hazardous substance, as well as the use of any hazardous substance to perform or carry out these or other activities, that results in monetary gain.

"Commissioner" means the Commissioner of the Department of Environmental Protection.

"Department" means the Department of Environmental Protection.

"Discharge" means the intentional or unintentional release by any means of hazardous substances from an underground storage tank into the environment.

"Electrical equipment" means underground equipment which contains dielectric fluid which is necessary for the operation of equipment such as transformers and buried electrical cable.

"Existing facility" means an underground storage tank that holds or held any quantity of any hazardous substance and is not closed pursuant to this chapter.

"Extended out-of-service" means an underground storage tank not in use for a period between 90 days and two years.

"Facility" means one or more underground storage tanks owned by one person on a contiguous piece of property.

"Farm tank" means an underground storage tank which contains or contained hazardous substances located on a tract of land devoted to the production of crops or raising animals pursuant to the Farmland Assessment Act of 1964, (N.J.S.A. 54:4-23.1 et seq.), and including fish hatcheries, rangeland, and nurseries with growing operations.

"Flow-through process tank" means a tank that forms an integral part of an industrial or commercial process through which there is a steady or uninterrupted flow of materials during the operation of the process.

"Hazardous substances" means:

1. Motor fuel;

2. *[Elements and compounds, including petroleum]* ***Petroleum*** products which are liquid at standard conditions of temperature and pressure (60 degrees Fahrenheit and 14.7 pounds per square inch absolute);

3. The hazardous wastes designated pursuant to:

i. Section 3001 of the Resource Conservation and Recovery Act of 1976, Pub. L. 94-580 (42 U.S.C. § 6921); and

ii. N.J.A.C. 7:26-8;

4. The hazardous substances designated pursuant to:

i. Section 311 of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500 (33 U.S.C. § 1321);

ii. Section 101 (14) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. 96-150 (42 U.S.C. § 9601); and

iii. The Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq.; and

5. The toxic pollutants designated pursuant to Section 307 of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500 (33 U.S.C. § 1317).

"Heating oil" means any grade of petroleum product including, but not limited to, No. 1, 2, 4 (light and heavy), 5 (light and heavy) and 6 fuel oils, diesel and kerosene of any grade or type used to heat residential, industrial or commercial premises.

"Hydraulic lift tank" means a tank holding hydraulic fluid for a closed-loop mechanical system that uses compressed air and hydraulic fluid to operate lifts, elevators and other similar devices.*

"Installation" means the emplacement of a new underground storage tank including the replacement of an existing underground storage tank.

"Leak" means the release of a hazardous substance from an underground storage tank into a space created by ***a method of*** secondary containment wherein hazardous substances can be detected by visual inspection or a monitoring system before it enters the environment.

"Liquid" means any material which has a fluidity greater than that of 300 penetration asphalt when tested in accordance with the ASTM D-5-78 Test for Penetration for Bituminous Materials. If not specified, liquid shall mean both *[flammable and]* combustible ***and noncombustible*** liquids.

"Long term out-of-service" means an underground storage tank not in use for a period of more than two years.

"Modify" or "modification" means a revision, update, adjustment, correction or change in any information included in a facility's registration material.

"Motor fuel" means any petroleum product that includes, but is not limited to, all grades of gasoline, diesel fuel and kerosene used in the operation of any type of engine.

"Monitoring system" means a system capable of detecting leaks or discharges, or both, other than an inventory control system, used in conjunction with an underground storage tank, or a facility conforming to criteria established pursuant to Section 5 of the State Act (N.J.S.A. 58:10A-25).

"Nonoperational storage tank" means any underground storage tank in which hazardous substances are not contained or from which hazardous substances are not dispensed.

"Operational storage tank" means any underground storage tank in which hazardous substances are contained or from which hazardous substances are dispensed.

"Operator" means any person in control of, or having responsibility for, the daily operation of a facility.

"Owner" means any person who owns a facility, or in the case of a nonoperational storage tank, the person who owned the nonoperational storage tank immediately prior to the discontinuation of its use.

"Person" means any individual, partnership, company, corporation, consortium, joint venture, commercial or any other legal entity, the State of New Jersey, or the United States Government.

"Petroleum" or "petroleum products" means all hydrocarbons which are liquid at one atmosphere pressure (760 millimeters or 29.92 inches Hg) and temperatures between -20°F and 120°F (-29°C and 49°C), and all hydrocarbons which are discharged in a liquid state at or nearly at atmospheric pressure at temperatures in excess of 120°F (49°C) including, but not limited to, gasoline, kerosene, fuel oil, oil sludge, oil refuse, oil mixed with other wastes, crude oil, and purified hydrocarbons that have been refined, re-refined, or otherwise processed for the purpose of being burned as a fuel to produce heat or useable energy or which is suitable for use as a motor fuel or lubricant in the operation or maintenance of an engine.

"Registration Certificate" means a control document issued by the Department to implement the registration requirements of this Chapter.*

"Release" means a leak or discharge.

"Removal" or "removed" means an underground storage tank(s) that has been taken out of the ground and been disposed of in accordance with applicable local, State and Federal laws.

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"Residential building" means a single or multi-family dwelling, nursing home, trailer, condominium, boarding house, apartment house, or other structure designed and used primarily as a dwelling.

"Secondary containment" means an additional layer of impervious material creating a space wherein a leak of hazardous substances from an underground storage tank may be detected before it enters the environment.

"Standard Reporting Form" or "SRF" means the official form of the Department used to report a change in the status of a registered underground storage tank.

"State Act" means P.L. 1986, c.102 (codified at N.J.S.A. 58:10A-21 et seq.) and any amendments thereto.

"Substantial modification" means any construction at, or restoration, refurbishment or renovation of, an existing facility which increases or decreases the in-place storage capacity of the facility or alters the physical configuration or impairs or affects the physical integrity of the facility or its monitoring systems.

"Tank" means a stationary device designed to contain an accumulation of hazardous substances which is constructed of non-earthen materials (for example, concrete, steel, plastic) that provide structural support.*

"Temporarily out-of-service" means an underground storage tank not in use for a period of 90 days or less.

"Test" means the testing of underground storage tanks in accordance with standards adopted by the Department.

"Transfer of ownership" means a change in the ownership of a facility.

"Underground storage tank" means any one or combination of [stationary devices constructed primarily of non-earthen materials which provide structural support] ***tanks***, as set forth in N.J.A.C. 7:14B-1.4, including appurtenant pipes, lines, fixtures, and other related equipment, used to contain an accumulation of hazardous substances, the volume of which, including the volume of the appurtenant pipes, lines, fixtures and other related equipment, is 10 percent or more below the ground.

"Underground storage tank program" means the regulatory requirements and activities conducted pursuant to the authority of N.J.S.A. 58:10A-21 et seq.

"Use" means the filling, dispensing or storing of any hazardous substance from or in an underground storage tank.

"Wastewater treatment tank" means a tank that is part of a wastewater treatment facility regulated under either section 402 or 307(b) of the Federal Water Pollution Control Act (33 U.S.C. §§ 1251 et seq.) and receives and treats or stores an influent wastewater which contains a hazardous substance, or is regulated as a treatment works pursuant to N.J.A.C. 7:14A-1 et seq.

SUBCHAPTER 2. REGISTRATION REQUIREMENTS AND PROCEDURES

7:14B-2.1 General registration requirements

(a) Any person that owns or operates an underground storage tank shall register each tank with the Department.

(b) Any person that owns or operates an underground storage tank who notified the Department pursuant to Section 9002 of the "Hazardous Solid Waste Amendments of 1984 to the Resource Conservation and Recovery Act", 42 U.S.C. §§ 6901 et seq., shall comply with all requirements set forth in this chapter.

(c) Any person that owns or operates an underground storage tank shall, two years following the effective date of this chapter, only use such tank upon receipt of a valid Registration Certificate issued by the Department.

(d) Any person that owns or operates an underground storage tank that began use of the tank on or before the effective date of this chapter shall register the facility with the Department no later than 60 days following this date. Any person that owns or operates an underground storage tank that ***[began operation]* *was installed*** after the effective date of this chapter shall register the facility with the Department 30 days prior to the use of that tank.

(e) Any person that owned or operated an underground storage tank which was removed from the ground on or after September 3,

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1986 shall register that tank for the period between September 3, 1986 and the date that the tank was removed.

7:14B-2.2 Registration and certification procedures

(a) Any person that owns or operates a facility shall file registration and certification information on the official New Jersey Underground Storage Tank Registration Questionnaire (see Appendix A) and the official New Jersey Underground Storage Tank Annual Certification Form (see Appendix B), respectively.

(b) All registration and certification forms shall be obtained from and accurately completed, signed, dated and returned to:

Bureau of Underground Storage Tanks/Registration Unit
Division of Water Resources
Department of Environmental Protection
CN-029
Trenton, New Jersey 08625

(c) The owner or operator of a facility shall complete the New Jersey Underground Storage Tank Annual Certification Form prior to the annual anniversary date of the facility's registration. The Department may issue the annual Registration Certificate to the registrant following submission of the complete Annual Certification Form.

7:14B-2.3 Signatories

(a) All registrants shall, upon submission, sign the following certification on the forms identified in (b) below:

1. "I certify under penalty of law that the information provided in this document is true, accurate and complete. I am aware that there are significant civil and criminal penalties for submitting false, inaccurate or incomplete information, including fines and/or imprisonment."

*[i. The certification required by (a)1 above shall be signed by the owner or operator of the facility as follows:

(1) For a corporation, by a principal executive officer of at least the level of vice president;

(2) For a partnership or sole proprietorship, by a general partner or the proprietor, respectively; or

(3) For a municipality, State, Federal or other public agency, by either the principal executive officer or ranking elected official.]*

i. The certification required by (a)1 above shall be signed by the highest ranking individual at the facility with overall responsibility for that facility.

(b) The certification set forth in (a) above shall be signed on the following forms:

i. The New Jersey Underground Storage Tank Registration Questionnaire;

ii. The New Jersey Underground Storage Tank Annual Certification Form; and

iii. The New Jersey Underground Storage Tank Standard Reporting Form.

7:14B-2.4 Transfer of registration

(a) A Registration Certificate issued by the Department is not transferable.

(b) The owner or operator of an underground storage tank shall notify the Department of any change in the ownership of a facility within 30 days after the contract date or the date of closing on the Standard Reporting Form (see Appendix C) obtainable from the Department at the address provided in N.J.A.C. 7:14B-2.2(b) and in accordance with the procedures for reporting modifications set forth in N.J.A.C. 7:14B-2.5.

(c) The Department may issue to the new owner or operator a new Registration Certificate indicating all changes that appear on the Standard Reporting Form.

7:14B-2.5 Changes to registration

(a) The owner or operator of a facility shall amend a facility's registration to reflect any modification to any information included in the New Jersey Underground Storage Tank Registration Questionnaire or New Jersey Underground Storage Tank Annual Certification Form. Each modification shall be reported to the Department on a separate Standard Reporting Form within 30 days after completion of the modification.

(b) Modifications include, but are not limited to, the following:
 1. The sale or transfer of ownership of a facility;
 2. The installation, abandonment, removal or substantial modification of a facility;

3. A change in the type of hazardous substances stored at a facility; and

[4. An update of all maintenance, repairs or testing performed at a facility.]

7:14*[C]* ***B*-2.6** Public access to registration information

(a) All completed New Jersey Underground Storage Tank Registration Questionnaires and New Jersey Underground Storage Tank Annual Certification Forms, as well as documented information pertaining to the registration, shall be considered public records pursuant to N.J.S.A. 47:1A-1 et seq.

(b) Interested persons shall request in writing an appointment to review the public records.

7:14B-2.7 Display of Registration Certificate

The owner or operator of an underground storage tank shall prominently display a valid Registration Certificate at the facility *[and]* ***or*** shall make the Registration Certificate available for inspection by any authorized local, State or Federal representative.

SUBCHAPTER 3. FEES

7:14B-3.1 Initial Registration Fee

The owner or operator of an underground storage tank shall submit a \$100.00 Initial Registration fee for each facility upon registration of the facility with the Department. This subsection shall be operative one year following the effective date of these rules.

7:14B-3.2 Annual Certification Fee

(a) The owner or operator of an underground storage tank shall submit an Annual Certification Fee for each facility upon the yearly re-registration of the facility with the Department.

(b) The Annual Certification Fee is as follows:

1. \$100.00 per facility up to the first five underground storage tanks located on a contiguous piece of property; and
2. \$15.00 per tank for each additional underground storage tank located on a contiguous piece of property.

[7:14C-3.3]* 7:14B-3.3 Fee payment

(a) Payment of all fees shall be made by check or money order, payable to "Treasurer, State of New Jersey" and submitted to:

Bureau of Underground Storage Tanks/Billing Unit
 Division of Water Resources
 Department of Environmental Protection
 CN 029
 Trenton, New Jersey 08625

***7:14B-3.4 Exemption from fees**

The Department shall not assess a fee to public schools or religious or charitable institutions.*

SUBCHAPTER 4. PENALTIES

7:14B-4.1 Penalties

Failure by an owner or operator of an underground storage tank to comply with any requirement of the State Act or this chapter may result in the penalties set forth in N.J.S.A. 58:10A-10.

AGENCY NOTE: Appendices A, B and C, the New Jersey Underground Storage Tank Registration Questionnaire, the New Jersey Underground Storage Tank Annual Certification Questionnaire and the Standard Reporting Form, *[respectively, were filed with the above proposal with the Office of Administrative Law and are available for inspection at the agency's offices and at Quakerbridge Plaza, Building 9, Trenton, New Jersey.]* ***are not published in the New Jersey Administrative Code, but are available from the Department of Environmental Protection, Division of Water Resources, Bureau of Underground Storage Tanks, CN-029, Trenton, New Jersey 08625.***

DIVISION OF HAZARDOUS WASTE MANAGEMENT

(a)

Hazardous Waste Management Accumulation Areas, Rigid Structures and Paint Filter Test

Adopted Amendments: N.J.A.C. 7:26-9.1, 9.3, 10.8, 11.4, 12.1

Proposed: December 1, 1986 at 18 N.J.R. 2356(a).

Adopted: November 25, 1987 by Richard T. Dewling,

Commissioner, Department of Environmental Protection.

Filed: November 30, 1987 as R.1987 d.532, **with technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3(c)) and **with portions not adopted.**

Authority: N.J.S.A. 13:1D-9, 13:1E-6(a)2 and 58:10A-4.

DEP Docket Number: 053-86-10.

Effective Date: December 21, 1987.

Expiration Date: November 4, 1990.

Summary of Public Comments and Agency Responses:

The public comment period closed on December 31, 1986. Written comments were submitted by 11 commenters.

I. N.J.A.C. 7:26-9.1, 9.3 and 12.1 (Accumulation Areas)

The New Jersey Department of Environmental Protection ("Department") received five written comments on the proposed satellite accumulation rule. Three of the commenters favored the proposal without exception. These commenters cited decreased waste handling costs as well as greater flexibility in waste management practices as benefits of the proposed amendments.

The remaining two comments concerned the requirements of the proposed amendments. These comments are discussed below:

COMMENT: The proposed amendment at N.J.A.C. 7:26-9.3(d)6ii states that when the volume of waste in a container has reached 55 gallons, the generator may comply by placing the waste in an on-site "authorized facility". This creates a disparity in that, if the generator has an on-site authorized facility, then he is a permitted facility and therefore not affected by the proposed amendment.

RESPONSE: As defined at N.J.A.C. 7:26-1.4, authorized facilities are not restricted to permitted hazardous waste treatment, storage or disposal facilities, but may also include certain types of facilities which are exempt from permit requirements, such as facilities which burn hazardous wastes for energy recovery, or industrial waste management facilities receiving wastes from intracompany and intrastate sources. The accumulated waste may be placed in any of these authorized facilities.

COMMENT: The proposed amendments at N.J.A.C. 7:26-9.3(d) should be reworded to avoid confusion over whether the accumulation must be performed in accordance with N.J.A.C. 7:26-9.3(a), and to clarify that the 90 day limitation does not apply to satellite accumulation.

RESPONSE: The Department agrees and has modified N.J.A.C. 7:26-9.3(d) as well as the title of N.J.A.C. 7:26-9.3 to eliminate this confusion.

II. N.J.A.C. 7:26-10.8 and 11.4 (Paint Filter Test)

COMMENT: The requirement of either testing every container of waste, or performing repetitive testing of a known waste stream is unwarranted. Since rules exist to prohibit a generator from packaging free liquids for landfill disposal, the proposed amendment should allow testing on a random and/or waste stream specific basis and as a last step Quality Assurance/Quality Control mechanism to demonstrate overall compliance with landfill requirements.

RESPONSE: The proposed amendments does not specifically require testing of every container of waste, but are intended to require that facility operators use the test to determine, on a pass/fail basis, whether free liquids are present in a representative sample of the waste, before acceptance for landfill disposal. Sampling and testing frequency should be determined in accordance with the facility's waste analysis plan, in compliance with N.J.A.C. 7:26-9.4(b).

III. N.J.A.C. 7:26-10.4 and 12.2 (Rigid Structures)

COMMENT: The proposed amendments required certain container storage areas to be equipped with a rigid structure to prevent rainfall from entering the secondary containment area. The Department received seven written comments on the proposed amendment. All of the com-

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ments opposed the amendment, primarily because of the cost of constructing a roof or building over a drum storage area. Several comments stated that existing rules concerning container integrity, daily inspections, secondary containment and cleanup of leaks and spills are adequate for protection of surface waters. One comment recommended reuseable drum covers as an alternative method of preventing rainwater from accumulating on drums.

RESPONSE: In light of the comments received, the Department has reevaluated the proposed amendments and has elected not to adopt the proposed amendments regarding rigid structures at the present time. The Department will study alternatives for future reproposal.

Agency Instituted Changes: Technical changes have been made to N.J.A.C. 7:26-9.3(b), (c) and (d) for editorial reasons and to ensure consistency with the adopted amendments.

Full text of the adoption follows (additions to proposal shown in boldface with asterisks ***thus***; deletions from proposal shown in brackets with asterisks ***[thus]***).

7:26-9.1 Scope and applicability

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

(c) The standards and requirements of this subchapter do not apply to:

1.-15. (No change.)

[13.]**16. Any generator ***[accumulating]* *accumulating*** waste on-site in compliance with N.J.A.C. 7:26-9.3(d).

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

7:26-9.3 Accumulation of hazardous waste for 90 days or less

(a) (No change.)

(b) A generator may accumulate hazardous waste on-site in an above-ground tank, for 90 days or less without a permit, after obtaining written approval from the Department, provided that the following requirements are met:

1.-7. (No change.)

8. No part of ***the*** tank(s) is below grade unless the tank(s) is constructed to allow visual inspection of the tank, comparable to a totally above-ground tank, and to ***[prove]* *provide*** secondary containment for the below-grade part of the tank.

9. (No change.)

(c) A generator who accumulates hazardous waste for more than 90 days is an operator of a storage facility and is subject to all applicable standards and requirements of this subchapter, and the permit requirements of N.J.A.C. 7:26-12.1 et seq. unless ***the accumulation is performed in accordance with (d) below or*** the generator has been granted a temporary extension to the 90 day period.

1. An extension established ***[in (b) above]* *under this subsection*** may be granted in writing by the Department's Division of Hazardous Waste Management if hazardous wastes must remain on-site for longer than 90 days due to unforeseen, temporary, and uncontrollable circumstances.

(d) A generator may accumulate hazardous waste on-site without a permit ***and without complying with (a) above*** provided that:

1. The quantity of waste in each accumulation area is less than 55 gallons of hazardous waste or less than one quart of acutely hazardous waste listed in N.J.A.C. 7:26-8.15(e);

2. The waste is placed in containers which meet the standards of N.J.A.C. 7:26-7.2 and are managed in accordance with N.J.A.C. 7:26-9.4(d)2, 9.4(d)3, and 9.4(d)4i;

3. The accumulation area is at or near any point of generation where wastes initially accumulate in a process, which is under the control of the operator of the process generating the waste;

4. The generator marks the containers with the words "Hazardous Waste";

5. The generator marks the container with the date that the ***[container]* *quantity of waste*** reaches the volume indicated in (d)1 above; and

6. Within three days after the ***[container]* *quantity of waste*** reaches the volume identified in (d)1 above, the generator complies with one of the following:

i. Places the container in an accumulation area in accordance with (a) above; or

ii. Places the container in an on-site authorized facility, as defined at N.J.A.C. 7:26-1.4; or

iii. Transports the container to an off-site authorized commercial hazardous waste facility in accordance with N.J.A.C. 7:26-7.

7:26-10.8 Hazardous waste landfills

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

(e) Operational standards for hazardous waste landfills include the following:

1.-21. (No change.)

22. The owner or operator of a hazardous waste landfill shall, before accepting the waste, use the following test to determine the presence or absence of free liquids in either a containerized or a bulk waste: Method 9095 (Paint Filter Liquids Test) as described in "Test Methods for Evaluating Solid Wastes, Physical/Chemical Methods" (EPA Publication Number SW-846).

(f) The owner or operator of a landfill shall include the following items as part of the operating record required by N.J.A.C. 7:26-9.4(i):

1. (No change.)

2. The contents of each cell;

3. The approximate location of each hazardous waste within each cell; and

4. The records and results of waste analysis performed as specified in N.J.A.C. 7:26-10.8(e)***[21]**22***.

(g)-(j) (No change.)

7:26-11.4 Hazardous waste landfills

(a) Operational standards for hazardous waste landfills include the following:

1.-9. (No change.)

10. An empty container shall be crushed flat, shredded, or similarly reduced in volume before it is buried beneath the surface of a hazardous waste landfill;

11. The owner or operator of a hazardous waste landfill shall not continue to dispose of hazardous wastes subsequent to the detection of any liquid in the secondary collection system unless the owner or operator has obtained written authorization from the Department for continued disposal; and

12. The owner or operator of a hazardous waste landfill shall, before accepting the waste, use the following test to determine the presence or absence of free liquids in either a containerized or bulk waste: Method 9095 (Paint Filter Liquids Test) as described in "Test Methods for Evaluating Solid Wastes, Physical/Chemical Methods" (EPA Publication Number SW-846).

(b) The owner or operator of a hazardous waste landfill shall maintain in the operating record required in N.J.A.C. 7:26-9.4(i):

1. On a map, the exact location and dimensions, including depth of each cell with respect to permanently surveyed bench marks;

2. The contents of each cell and the appropriate location of each hazardous waste type within each cell; and

3. The records and results of waste analysis performed as specified in N.J.A.C. 7:26-11.4(a)12.

(c) (No change.)

7:26-12.1 Scope and applicability

(a) (No change.)

(b) The following persons are not required to obtain a permit pursuant to this subchapter to conduct the following activities or operate the following hazardous waste facilities:

1.-11. (No change.)

12. Any generator accumulating waste on-site in accordance with N.J.A.C. 7:26-9.3(d).

(c) (No change.)

(a)**Hazardous Waste Management System
Definition of Solid Waste****Adopted Amendments: N.J.A.C. 7:26-1.1, 1.4, 1.6,
2.1, 7.5, 8.1, 8.2, 8.13, 8.15, 9.1, 10.7, 11.5, 11.6,
12.1 and 12.3**

Proposed: June 15, 1987 at 19 N.J.R. 1035(a).

Adopted: November 30, 1987 by Richard T. Dewling,

Commissioner, Department of Environmental Protection.

Filed: November 30, 1987 as R.1987 d.534 **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. 13:1E-6 et seq. and 13:1D-1 et seq.

Effective Date: December 21, 1987.

Expiration Date: November 4, 1990.

DEP Docket Number: 021-87-05.

Summary of Public Comments and Agency Responses:

These amendments were proposed on June 15, 1987. Two public hearings were held (June 30, 1987 and July 1, 1987) at which no individuals testified. Eighteen comments were received before the close of the comment period on July 16, 1987.

COMMENT: One commenter was concerned that under the "Scope of rules" section (N.J.A.C. 7:26-1.1(a)1), non-hazardous industrial or chemical wastes will be exempted from regulation when being recycled in addition to household recyclables such as glass, newsprint, aluminum cans, etc. The commenter believes such recycling operations should be subject to "solid waste" regulations.

RESPONSE: As the rules stand now, there is an exemption for all source-separated, non-hazardous, recyclable materials, including non-hazardous industrial or chemical wastes. The Department's overall policy is to encourage recycling when it can be accomplished in an environmentally safe manner. If the recycling of non-hazardous industrial wastes is found to be a problem in the future, the Department will reevaluate the option of regulating these materials. However, at the present time, they are exempt from regulation.

COMMENT: Designating scrap metal as a solid waste would make it difficult to transport across county lines (in light of the waste flow rules) and would turn recyclers into "solid waste facilities".

RESPONSE: According to N.J.A.C. 7:26-1.1(a)1, such source-separated, non-hazardous, recyclable material would not be subjected to the solid waste rules, provided it was being recycled for reintroduction into the economic mainstream. Hazardous scrap metal is currently exempt from regulation under the Federal and State programs when it is recycled.

COMMENT: The definition of "co-product" at N.J.A.C. 7:26-1.4 is too complicated since it attempts to distinguish a useless by-product from a valuable by-product without consideration of its economic worth.

RESPONSE: The Department has attempted to define residuals in terms of their quality and consistency throughout the proposal rather than in terms of their economic worth, which may fluctuate. As stated in the summary section of the rule proposal, both EPA and the Department believe that the value of a material is not a valid criterion in determining whether or not a residual is a waste.

COMMENT: The Department should expand the definition of "boiler" at N.J.A.C. 7:26-1.4 to explain the concept of "integral design".

RESPONSE: The Department agrees and has inserted the language from 40 CFR 260.10 which explains what is meant by "integral design".

COMMENT: The definition of "designated facility" at N.J.A.C. 7:26-1.4 should be expanded to include recycling facilities which can accept New Jersey-regulated hazardous wastes, but are not required by their own state or EPA to have a permit (such as precious metals reclamation facilities).

RESPONSE: The Department agrees and has amended the definition of "designated facility" to include these types of facilities as well as approved waste reuse facilities because they could also fit the description of a facility which can accept New Jersey regulated hazardous waste but are not required by their state or EPA to have a permit.

COMMENT: The Federal definition of "industrial furnace", which includes cement kilns, should be adopted so that other devices can be added to the list of industrial furnaces after review and a comment period.

RESPONSE: The Department agrees and has amended the definition of "industrial furnace" at N.J.A.C. 7:26-1.4 to be more like the Federal

definition. However, cement kilns are still not listed as industrial furnaces in New Jersey.

COMMENT: The definition of incinerator should be clarified as to whether it includes air pollution control devices which are enclosed and use controlled flame combustion to destroy materials.

RESPONSE: The Department does not consider such air pollution control devices to be incinerators. Such devices are considered thermal oxidizers. They are usually connected directly to a manufacturing process and the materials they destroy are not considered to be wastes.

COMMENT: The definitions of "use or reuse", "discard" and "recycled" at N.J.A.C. 7:26-1.4 are circular. They should be clarified.

RESPONSE: Recycling is an umbrella term which encompasses both use or reuse and reclamation. Their definitions are not circular but they are interrelated. In order to make those definitions easier to apply, the Department has revised the definition of "use or reuse" to clarify it. The definition now reads: "'Use or reuse' means the procedure whereby a residual is: . . ." The word "material" has changed as it did not have the connotation the Department desired to utilize. The word residual has a more appropriate connotation in this context.

COMMENT: There is no definition of "hazardous scrap metal".

RESPONSE: Any material which both meets the definition of "scrap metal" and meets one of the criteria for "hazardous waste" (for example, exhibits the characteristic of EP toxicity) would be hazardous scrap metal. It should be noted that hazardous scrap metal is temporarily exempt from regulation under the Federal and State programs when it is recycled.

COMMENT: The definition of "scrap metal" at N.J.A.C. 7:26-1.4 should specifically include drosses and slags and scrap solder.

RESPONSE: Both the Department and EPA consider it inappropriate to include drosses and slags as scrap metal. In addition, used scrap solder is considered a spent material.

COMMENT: The definition of "precious metals" at N.J.A.C. 7:26-1.4 should be changed to delete the word "exclusively", since no refinery produces 100 percent pure precious metals. Also, the word "combinations" should be changed to "mixture" to conform to the Federal definition.

RESPONSE: The Department agrees and has deleted the word "exclusively" from the definition and changed "combinations" to "mixtures".

COMMENT: Several commenters noted that using the word "material" instead of "hazardous waste" in the definition of "treatment" would excessively broaden the scope to include pH adjustments during manufacturing processes as hazardous waste treatment processes. This proposed definition would also frustrate waste minimization efforts.

RESPONSE: It is not the Department's intent to regulate manufacturing processes, unless the process involves the use of hazardous residuals. The word "material" is used to avoid circular definitions, which would occur if waste were defined in terms of treatment and treatment could only be done to waste. These new definitions will not frustrate waste minimization efforts. Waste minimization involves source reduction to reduce the generation of waste and treatment to reduce the volume or toxicity of those wastes that are produced. The Department believes that not regulating the treatment of generated wastes would not foster waste minimization. As one commenter stated: "A facility's claim of future recycling intent or actual recycling activity does not inherently render the facility without need for regulation as a hazardous waste management facility".

COMMENT: The commenter believes that the definition of "other waste material" (N.J.A.C. 7:26-1.6(b)) is dependent on the phrase "original intended use". The commenter contends that a definition or criteria should be established to prevent use of the phrase "original intended use" in too broad a manner by industry.

RESPONSE: A material is considered to be used for its "original intended use" until it is no longer usable for that purpose for the original generator, that is, until it can no longer be used in the capacity for which it was originally employed.

COMMENT: The Department is attempting to regulate production processes which are beyond the scope of its jurisdiction. The definition of "other waste material" at N.J.A.C. 7:26-1.6(b), by including "any other material that has served or can no longer serve its original intended use", appears to include off-specification materials as wastes. The Department should not regulate product quality issues.

RESPONSE: This rule does not regulate production processes or off-specification products which have not yet served their original intended purpose and which can be inventoried for sale. The Department does not regulate all off-specification materials. The rules only cover those materials which have served or cannot serve their original intended purpose.

COMMENT: Three commenters were confused by the language found at N.J.A.C. 7:26-8.1(b)6 which describes circumstances under which a hazardous waste which has been subjected to recycling remains a hazardous waste. They requested a clarification of this clause.

RESPONSE: A material which has been recycled remains a hazardous waste under the following circumstances: if it is accumulated or stored prior to burning or is burned for energy recovery, if it is applied to or placed on the land in a manner that constitutes disposal, if it must be subjected to further processing before it is used to produce a commercial product. This is the same as the Federal regulation.

COMMENT: One commenter noted that his copy of N.J.A.C. 7:26-1 et seq. had "Dumps Prohibited" at N.J.A.C. 7:26-2.1, while in the proposal that section was cited as "Scope and applicability".

RESPONSE: The commenter has an outdated copy of the rules. Copies of recent hazardous waste rules are available, free of charge, from the Department of Environmental Protection, by calling the Division of Hazardous Waste Management at (609) 292-8341. N.J.A.C. 7:26-2 is contained in the rules of the Division of Solid Waste Management. To obtain a copy of those rules, call (609) 292-8242.

COMMENT: A commenter pointed out that the definition of material being "disposed of" found at N.J.A.C. 7:26-1.6(d) has been deleted. The commenter suggested that the deletion removed the onus of disposed solid waste from the resultant material.

RESPONSE: That subsection was originally deleted for editorial reasons. Upon reconsideration and evaluation of comments, the Department has decided to retain this language upon adoption in order to clarify the scope of the rules. This subsection has been recodified as subsection (c), and the wording changed slightly to conform with the section as it is not adopted.

COMMENT: The phrase "... is subjected to further processing prior to use or reuse." in N.J.A.C. 7:26-8.1(b)6 is confusing. If the intent is to define the point at which the material ceases to be a waste, the commenter suggests the phrase "... has not yet become a commodity as commonly traded in commerce". One commenter believes that the phrase "unless it is ... subject to further processing prior to use or reuse" in N.J.A.C. 7:26-8.1(d)4 confuses the issue of when a recycled hazardous waste becomes a product. He suggests the alternate wording "unless it requires further processing before becoming a commodity as commonly traded in commerce".

RESPONSE: The Department agrees and the wording of N.J.A.C. 7:26-8.1(b)6 "... or is subjected to further processing prior to use or reuse" has been changed to "or requires further processing before becoming a product as commonly traded in commerce" for additional clarity. Similarly, N.J.A.C. 7:26-8.1(d)4 has been changed from "... or is subject to further processing prior to reuse." to "... or requires further processing before becoming a product as commonly traded in commerce". The Department did not incorporate the suggested language regarding "commodities traded in commerce", since materials may meet the quality specification for a commodity yet still pose a threat to the public health. Commodity prices tend to fluctuate, making material valuable one month and virtually worthless the next. Such fluctuations may influence management and disposal practices. A product is consistent and is produced to meet certain standards. A material may be a commodity, that is, it may have some commercial value, but still be waste-like rather than product-like.

COMMENT: N.J.A.C. 7:26-8.1(b)6 and 8.1(d)4 seem to indicate that a recycled hazardous waste which is burned for energy recovery remains a hazardous waste, except in the case of reprocessed waste oil which is exempted under N.J.A.C. 7:26-8.2(a)20. If this is the case, it is not clear whether the generator whose industrial boiler or industrial furnace meets the exemption at N.J.A.C. 7:26-9.1(c)9 can qualify for two 90 day accumulation period exemptions, one before the fuel is reprocessed and one before burning the reprocessed fuel.

RESPONSE: Recycled hazardous wastes which are burned for energy recovery remain hazardous wastes after treatment. The Department allows only one 90 day accumulation exemption under N.J.A.C. 7:26-9.1(c)9 and has clarified the wording of this section.

COMMENT: A commenter believes that the definition of "other waste material" should be expanded to include the Federal recycled material exclusions found at 40 CFR 261.2(e)(1). These exemptions cover both on-site and off-site recycling.

RESPONSE: The Department allows an exemption for on-site recycling as described at N.J.A.C. 7:26-9.1(c)10. It is the Department's policy that all hazardous residuals should be tracked when they are sent off-

site for use/reuse. The Department does have rules at N.J.A.C. 7:26-9.1(c)13 which apply standards less stringent than those for hazardous waste facility standards to legitimate off-site recycling operations.

COMMENT: The current edition of the rules lists 1-12 at N.J.A.C. 7:26-8.2(a). The proposal says "1-13 (no change)". Where is 13?

RESPONSE: N.J.A.C. 7:26-8.2(a)13-14 contain amendments to the waste oil requirements, which were adopted and became effective June 15, 1987 at 19 N.J.R. 1091(a). The numbering of the proposal and the adoption has been changed to reflect this.

COMMENT: A commenter suggests that an exclusion be added to N.J.A.C. 7:26-8.2(a) for secondary materials that are reclaimed and returned to the original process in which they were generated provided certain conditions are met. Secondary materials that are reclaimed and returned to the original production process in which they were generated should be exempt from regulation provided: 1. Only tank storage is involved and the entire reclamation process is closed by being entirely connected with pipes; 2. Reclamation does not involve controlled flame combustion; 3. The secondary materials are not accumulated for more than 12 months without being reclaimed; and 4. The reclaimed material is not used to produce a fuel or used to produce products that are used in a manner constituting disposal.

RESPONSE: The Department already allows an exemption for on-site recycling. This is found at N.J.A.C. 7:26-9.1(c)10. Wastes which are recycled (see the definition of "recycle" at N.J.A.C. 7:26-1.4) on the site where they were generated are exempted from N.J.A.C. 7:26-9 and 12, subject to certain conditions listed at N.J.A.C. 7:26-9.1(c)10. This applies to wastes that are used, reused, reclaimed, burned for energy recovery or otherwise recycled. Of course, once a hazardous waste has been reclaimed, the reclaimed material is no longer a hazardous waste.

COMMENT: The exemption at N.J.A.C. 7:26-8.2(a)17 for waste-derived products produced for the general public's use is limited to certain fertilizers where the waste component is "inseparable by physical means". The Department should incorporate all of the Federal wording at 40 CFR 266.20(b).

RESPONSE: The Department agrees and has inserted the following language at N.J.A.C. 7:26-8.2(a)17: "Commercial fertilizers that are produced for the general public's use that contain recycled materials also are not presently subject to regulation".

COMMENT: On July 14, 1986, EPA adopted regulations exempting "closed-loop recycling" processes. The Department should incorporate the same exemption.

RESPONSE: The "closed-loop recycling" exemption was included at N.J.A.C. 7:26-8.2(a)19. Although it does not use the phrase "closed-loop recycling", it incorporates the same provisions as the Federal exemption.

COMMENT: A number of comments were received on N.J.A.C. 7:26-1.6(a)3 which suggested that spent sulfuric acid which is used to make virgin sulfuric acid not be regulated as solid waste. One commenter agreed with the exemption, but suggested it be placed in N.J.A.C. 7:26-8.2(a). Other commenters suggested that the exemption be broadened to include other legitimate uses of spent sulfuric acid.

RESPONSE: It was the Department's decision to incorporate the Federal exemption for spent sulfuric acid exactly as it is found at 40 CFR 261.4(a)(7). The Federal regulations exempt from inclusion in the category "solid waste" only spent sulfuric acid which is used to make virgin sulfuric acid. Under the rules of the NJDEP, other uses of spent sulfuric acid would be allowed; however, they would be regulated through the on-site recycling requirements (N.J.A.C. 7:26-9.1(c)9 and 10), the waste reuse facility requirements (N.J.A.C. 7:26-9.1(c)13), or the material could be sent to a hazardous waste facility that could treat it.

COMMENT: The Department's proposed rules did not include the "inherently waste-like" category, which was included in EPA's definition of solid waste regulations. The commenter was concerned that dioxin recycling might not be regulated.

RESPONSE: Although the Department did not include the specific phrase "inherently waste-like", the provisions of that section of the EPA regulation were included at N.J.A.C. 7:26-8.2(a)19ii.

RESPONSE: A commenter approved of the exemption at N.J.A.C. 7:26-8.2(a)19iv allowing oil-bearing hazardous wastes to be reinserted on-site into the oil refining process. The commenter believed the Department should add the Federal exemptions for oil-bearing hazardous wastes reinserted after the refining process and for petroleum coke produced from oil-bearing hazardous wastes. The commenter also recommended that the Federal used oil standard at 40 CFR 266.40(e) should be used as a standard for the product produced from oil-bearing hazardous wastes reinserted after the refining process.

COMMENT: The Department provided the exemption for oil-bearing hazardous wastes reinserted on-site into the oil refining process since the wastes are being processed further and result in a product which is indistinguishable from a product produced solely from raw materials. When oil-bearing hazardous wastes are reinserted after the oil refining process no further processing is being carried out which, in effect, is simply a dilution of hazardous waste, a practice not approved by the Department.

Further, using a less stringent standard, such as the standard for used oil fuels found at 40 CFR 266.40(e), instead of the standards for products is not in accordance with Department practice.

In regard to the suggestion that petroleum coke produced from oil-bearing hazardous wastes be exempted from regulation if it passes the characteristic tests, this is also contrary to Department practice. This disregards the possible hazardous constituents that might be present in petroleum coke produced from such a source.

COMMENT: What constitutes "a degree of processing acceptable to the Department" for the processing of waste oil used for fuel as cited in N.J.A.C. 7:26-8.2(a)20?

RESPONSE: The acceptable degree of processing shall be established in the facility's permit or by rule, when promulgated.

COMMENT: The Department should not exempt waste oil facilities from regulation and should regulate them as soon as possible.

RESPONSE: These facilities are currently regulated as hazardous waste facilities. They are required to get a permit to treat, store or dispose of hazardous wastes, including waste oils. In addition, the Department is making a concerted effort to promulgate standards which would specify the maximum permissible levels of contaminants in fuels produced from hazardous wastes.

COMMENT: The proposed rules classified API separator wastes at oil terminals as hazardous wastes. API separator bottoms (or sludges) at oil terminals do not fit the listing description for K051 and are only hazardous if they fail one of the tests for hazardous characteristics. Therefore, the example at N.J.A.C. 7:26-8.2(a)19iv should be deleted as it is erroneous.

RESPONSE: The Department agrees and has deleted the example. The substantive requirements of N.J.A.C. 7:26-8.2(a)19iv, however, have been retained.

COMMENT: The Department appears to provide a full-scale exemption for hazardous waste recycled on-site, provided the waste is burned as fuel. This must be deleted as EPA proposed (May 6, 1987) to regulate both on and off-site burning in devices other than incinerators. The Department should adopt those regulations and not differentiate between on and off-site burning.

RESPONSE: EPA's regulations, which appeared in the Federal Register on May 6, 1987 (52 FR 16982), are only proposed. It is not known at this time when they will be adopted or what changes they will undergo before they are finally adopted. When these regulations are adopted, the Department will take them under consideration.

COMMENT: There is an existing N.J.A.C. 7:26-9.1(c)13, and paragraph (c)13 in the proposal should not replace it.

RESPONSE: Paragraph (c)13 of N.J.A.C. 7:26-9.1 was not amended or replaced in this proposal.

COMMENT: N.J.A.C. 7:26-9.1(c)9viii and 12i(b)7viii require companies to have records proving that tanks used to store hazardous waste to be burned for energy recovery are emptied every 90 days. Routine emptying of fuel tanks while units are operating will disrupt processes. The commenter suggested either changing the wording to require that the tanks be emptied within 90 days after the unit is shut down or that inventory records showing continuous processing be considered sufficient.

RESPONSE: There is no basis for imposing substantially different requirements for wastes accumulated for management on-site versus wastes accumulated to be shipped off-site. Federal regulations at 40 CFR 262.34 also require that tanks must be rendered empty every 90 days. The State rule is required to be equivalent to this standard. If there is a separate tank of clean fuel for the system, than when the hazardous waste tank must be emptied, this source of fuel can be used with no interruption in processing.

COMMENT: One commenter agreed that precious metals recyclers should be regulated. However, several commenters strongly objected to regulation of their precious metals recycling operations. They contend that they are running manufacturing operations and are using valuable materials, not wastes, and should not even be subject to a "permit-by-rule". They suggest that the Department adopt the Federal regulations which do not affect manufacturing operations. Some commenters cited

problems in dealing with the transportation requirements calling for the use of registered hazardous waste haulers, such as requiring transporters to submit to a background investigation as per N.J.S.A. 13:1E-128 ("A901").

RESPONSE: The rules proposed by the Department in regard to precious metal recycling operations are basically the same as the Federal regulations. Both the Department and EPA recognize that the starting materials in question are hazardous wastes whose treatment and ultimate disposal must be regulated. These wastes contain precious metals in various concentrations making them valuable to recyclers. However, this does not guarantee proper disposal of the hazardous waste components after extraction.

The major differences between the State program and the Federal program involve storage requirements. The State limits storage to 90 days while EPA allows for speculative accumulation up to one calendar year. The Federal requirements for hazardous waste transporter registration are somewhat more lenient than the State requirements. However, they do require notification at the Federal level. In addition, the State requires owners of reclamation facilities to comply with closure requirements.

Those comments dealing with A901 background checks are beyond the scope of this rulemaking and the Department will not address that issue here.

The Department has decided to remove the phrase "permit-by-rule" from the rules; however, it has retained the substantive requirements.

COMMENT: N.J.A.C. 7:26-9.1(c)14 and 15 and 12.1(d) and (e) seem to exempt only those facilities that reclaim precious metals from hazardous waste, while not exempting those that reclaim precious metals from solid wastes as well. In addition, it seems that a precious metals reclaimer would not be allowed to practice on-site recycling, burning for energy recovery or other hazardous waste activities which do not require a permit, without losing the precious metals reclamation exemption.

RESPONSE: The Department agrees that precious metals reclaimers should be allowed to maintain their exempt status while reclaiming precious metals from non-hazardous waste materials as well as from hazardous waste and while conducting other hazardous waste activities which do not require a permit. In addition, the reclamation of materials non-hazardous wastes would not be a regulated hazardous waste activity. Accordingly, N.J.A.C. 7:26-9.1(c)14 and 15 and 12.1(e) have been amended to reflect this.

COMMENT: N.J.A.C. 7:26-9.1(c)15 refers to a "treatment unit", but that term is not defined.

RESPONSE: The Department does not believe a definition of this term is necessary. A treatment unit is a unit used to treat a hazardous waste. In the context of N.J.A.C. 7:26-9.1(c)15, treatment units may include incinerators, boilers or industrial furnaces.

COMMENT: The State should clarify at N.J.A.C. 7:26-9.1(c)13 and 14 that precious metals reclaimers who refine to an intermediate grade and then send the material off-site to another refiner are also eligible for exemption.

RESPONSE: Precious metals refiners who refine to an intermediate grade are eligible for the exemption. However, the material remains a waste between the first refiner and the second (see N.J.A.C. 7:26-8.1(b)6). It must be manifested, and remains subject to the requirements of N.J.A.C. 7:26-9.1(c)13 and 14.

COMMENT: N.J.A.C. 7:26-9.1(c)9viii states that waste shall not be stored for more than 90 days and the requirements of N.J.A.C. 7:26-9.3 shall be met. However, N.J.A.C. 7:26-9.1(c)9 applies to both on-site generated wastes and wastes which are shipped intra-company and intra-state, while N.J.A.C. 7:26-9.3 applies only to on-site wastes. Is the 90 day accumulation exemption intended to apply to both on-site and intra-company/intra-state wastes? Similarly, at N.J.A.C. 7:26-12.1(e), facilities which accept precious metal-bearing wastes from off-site for reclamation are referred to N.J.A.C. 7:26-9.3, which applies to on-site generated wastes. Are these off-site generated wastes eligible for a 90 day storage exemption?

RESPONSE: The 90 day exemption was intended to apply to both on-site and intra-company/intra-state wastes and the rules at N.J.A.C. 7:26-9.1(c)9 and 12.1(e) have been revised to reflect that these wastes may be stored for up to (but not more than) 90 days without obtaining a Transportation, Storage or Disposal facility permit.

COMMENT: In general, the commenter supported the Department's permit-by-rule provisions for precious metals reclaimers at N.J.A.C. 7:26-9.1(c) and 12.1. However, the commenter suggested that reclaimers should be allowed to store precious metal-bearing wastes for up to 180 days without a permit since reclaimers could sometimes receive more material than could be reclaimed 90 days.

RESPONSE: The Department has proposed a partial exemption from permitting for precious metals reclamation facilities which imposes minimal requirements for this activity. The Department believes environmental safeguards are necessary to minimize risk to the environment for any activity involving hazardous wastes. If it is necessary to store hazardous wastes for more than 90 days before reclaiming the precious metals from them, the reclaimer should seek a storage facility permit.

COMMENT: N.J.A.C. 7:26-12.1(e)2 and 4 (requirements for precious metals reclaimers to obtain an EPA identification number and file an annual report) concern confidential business information and should not be released.

RESPONSE: The Department requires this information of all hazardous waste treatment facility operators and sees no reason to exempt precious metals reclaimers.

COMMENT: It will not be possible for precious metals reclaimers to provide the information required by N.J.A.C. 7:26-12.1(e). It is not possible to predict with any degree of accuracy what types and volumes of materials will be received for reclamation as feedstocks change continually.

RESPONSE: The Department believes it is both possible and reasonable to submit this information. Reclaimers have knowledge of the materials they will be reclaiming, otherwise they would not know how to treat these materials. The reclaimer should submit whatever information is available. If the Department requires more information, it will be requested.

COMMENT: The proposed amendments governing precious metals reclaimers conflict with Federal hazardous waste import/export regulations. Some materials which would be received under manifest to be exported would not be considered a hazardous waste for export under Federal regulations. A company could not determine which materials required prior EPA approval for export and which did not. Sludges and by-products destined for silver refining should not be considered hazardous wastes just because they contain silver.

RESPONSE: All hazardous by-products and sludges are considered hazardous wastes in New Jersey. Since notification prior to export is a Federal requirement, EPA should be contacted to determine if notification is necessary for State-regulated wastes. Silver is listed both as a parameter in the extraction procedure (EP) toxicity test and as a hazardous constituent. There have been many cases of silver waste mismanagement, partly in response to greatly fluctuating silver prices.

COMMENT: Several commenters pointed out that owners and operators of precious metals reclamation facilities could not have complied with N.J.A.C. 7:26-12.3(i), since EPA's January 5, 1985 regulations only required them to notify EPA by April 4, 1985 and not to file a Part A application. One commenter pointed out that even the notification was voluntary since the Federal regulations were not immediately effective in authorized states such as New Jersey. Therefore, no precious metals reclaimers could have fulfilled the requirements to obtain interim status.

RESPONSE: The Department agrees. Those facilities which have not voluntarily notified or filed a Part A application shall do so within 90 days of the effective date of this rule. Those facilities will be considered to qualify for existing facility status in accordance with N.J.A.C. 7:26-12.3(i).

COMMENT: The proposal at N.J.A.C. 7:26-12.1(g) would exempt a hazardous waste facility from inclusion in a district Solid Waste Management Plan. Suppose a hazardous waste facility accepts a non-hazardous waste or accepts a waste the generator believes is hazardous, but further testing proves it to be non-hazardous. Is the facility then free to release this material into the waste flow of the facility's county, even though the generator resides in a different county?

RESPONSE: No. If the waste is to be disposed of off-site, the shipment must be returned to the generator for disposal as solid waste in accordance with the waste flow requirements for the generator's county.

COMMENT: A number of commenters expressed concern that the proposed amendments unduly expands the universe of regulated hazardous wastes in New Jersey. They will change many aspects of hazardous waste management. They will require manifesting of materials previously considered products and thus will cut New Jersey generators off from potential out-of-state markets. The proposed amendments have the potential to force more wastes into the facility system or require recycling operations to meet facility requirements. The commenters contend that wastes which have market value should be exempt from regulation and only industries with a history of mismanagement should be regulated. One commenter urges the adoption of the Federal "speculative accumulation" provision and another suggested the adoption of the Federal recycling exemption.

One commenter did support the proposal to regulate the reclamation of all by-products, spent materials, sludges and discarded chemical products.

RESPONSE: Since the inception of the hazardous waste regulatory program in New Jersey, the Department has been concerned with regulating both the disposal and recycling of all hazardous wastes in New Jersey. Sham recycling created a number of badly contaminated sites necessitating costly remediation. Mismanagement of hazardous wastes by generators has also resulted in significant environmental pollution.

The Department has allowed an exemption for on-site recycling which has been successful for several years. Off-site recycling is subject to regulation to prevent the recurrence of environmental pollution which occurred in the past.

The Department's policy has been and remains not to consider questions of value regarding hazardous waste destined for recycling. Typically market values can fluctuate widely making an "item of commerce" valuable one month and of little or no value the next month. The Department cannot adequately protect the environment from improper hazardous waste disposal on the basis of current value. The implementation and enforcement of the Federal "speculative accumulation" provision would also be difficult, costly and counterproductive. The policy of the Department is to look at the intrinsic nature of the waste stream in question.

It is the Department's intent to regulate all hazardous wastes generated in New Jersey or sent into New Jersey. There are some reasonable exemptions allowed for special circumstances. These rules clarify existing Department policy. In many instances they are making industry aware of rules that should have been complied with in the past. Precious metal refiners were previously subject to regulation when receiving hazardous wastes for the reclamation of precious metals. A purpose of the "Definition of Solid Waste" rule is to prevent future contaminated site requiring extensive clean-ups.

COMMENT: Two commenters suggested the criterion for "sometimes discarded" should be retained as its removal unduly expanded the universe of hazardous waste to include products. One commenter supported the removal of this term.

RESPONSE: In its January 4, 1985 adoption of the definition of solid waste, EPA removed the criterion of "sometimes discarded" in defining hazardous wastes in order to more easily determine when a residual is a waste. This action is not meant to expand the universe of hazardous waste to include products, but merely enables the regulatory agency to look at the hazardous waste characteristics and constituents of a waste stream without having to prove that the material is "sometimes discarded".

COMMENT: One commenter requested a clarification as to whether or not certain treatment activities require a permit, specifically whether a generator may treat hazardous waste in accumulation tanks without being permitted as per 40 CFR 262.34.

RESPONSE: Generators may treat hazardous waste in containers and above-ground tanks in accordance with N.J.A.C. 7:26-9.3(a) and (b). As long as they stay within the limits of these rules, permitting is not required.

COMMENT: Several commenters remarked that the proposed amendments were difficult to understand. One commenter suggested that it would be clearer if sections which had not been amended were also printed.

RESPONSE: The Department acknowledges the difficulty of understanding the topic. However, the Office of Administrative Law publishes only those provisions to be amended, not entire subchapters or sections. The commenters should refer to existing provisions in the N.J.A.C. if a proposed amendment is unclear or ambiguous.

COMMENT: The Department has not presented data as to the number of facilities which will be impacted by the rules. It should have this data before adopting them. There will be a significant economic impact on many companies. For example, the reclamation of spent solvents done within production areas will now require companies to install secondary containment, engage in increased personnel training and incur other expenses related to hazardous waste facility activities.

RESPONSE: The Department was not able to determine the exact number of impacted facilities because many facilities which believed their material was excluded from regulation under the never "sometimes discarded" principle are now finding that the material is regulated. Since those facilities never reported to the Department, the size of that universe is not clear. The solvent reclamation example would not require a full facility permit, but would be regulated under the on-site recycling regulations at N.J.A.C. 7:26-9.1(c)(10).

COMMENT: It is not accurate to say that the Department has always regulated hazardous waste recycling.

RESPONSE: The Department believes its statement that it has always regulated hazardous waste recycling is indeed accurate. Hazardous waste recycling was regulated under the previous rules; however, not all generators were fully cognizant of their responsibilities. Some of them claimed that certain materials were not wastes under the never "sometimes discarded" criterion, which was difficult to apply. The Department believes that these amended rules will clarify the scope of "hazardous waste" and make all regulated persons aware of their responsibilities under these rules.

COMMENT: The proposed amendments will discourage waste minimization by making it more difficult for generators to recycle and by including saleable and recyclable products under the definition of "waste".

RESPONSE: The amendments do not discourage on-site recycling, which is still allowed under N.J.A.C. 7:26-9.1(c)10. On-site recycling has been a regulated activity. Saleable residuals may be transferred to a manufacturer who can use them under the waste reuse facility rules at N.J.A.C. 7:26-9.1(c)13. The Department does not believe that waste minimization is achieved by calling fewer materials "wastes".

COMMENT: The proposed amendments will place New Jersey companies at a disadvantage with out-of-state competitors, since New Jersey companies will have greater expenses from having to manage more materials as hazardous wastes. Some materials which are wastes in New Jersey may not be wastes in other states and so may not need to go to a "designated facility" in that state. How will out-of-state generators know of the requirement to manifest wastes which are only regulated in New Jersey?

RESPONSE: The Department strongly believes in the need to regulate a greater universe of hazardous wastes than most states, given the concentrated population and large numbers of industries in this State. These conditions, coupled with past instances of mismanagement, may lead to environmental degradation or injuries to human health if not stringently regulated. The New Jersey facility which will be receiving waste from out-of-state should inform the generator as to which materials require a manifest in New Jersey.

COMMENT: It appears from the usage of the word "recycled" that the process of treating a waste to make a fuel would be considered "reclamation". If this is the case, this example should be added to the definition of "reclaim or reclamation".

RESPONSE: The Department agrees that the processing of hazardous waste to produce a fuel can be "reclamation" and the list of examples under the definition of "reclaim" or "reclamation" at N.J.A.C. 7:26-1.4 has been expanded to include such treatment.

COMMENT: The word "stored" is used repeatedly to refer to the 90 day accumulation limit in N.J.A.C. 7:26-9.3. "Storage" is properly reserved for activities carried out by regulated hazardous waste facilities. The word "stored" should be replaced with "accumulated", unless referring to regulated activities.

RESPONSE: Since storage connotes an activity subject to full regulation, the Department has substituted "accumulation" where activities are subject to less than full regulation under this chapter.

Several typographical errors have been corrected and the numbering of some sections has been changed due to recent adoptions.

Full text of the adoption follows (additions to the proposal shown in boldface with asterisks *thus*; deletions from the proposal shown in brackets with asterisks *[thus]*).

7:26-1.1 Scope of rules

(a) Unless otherwise provided by rule or statute, this chapter shall constitute the rules of the Department of Environmental Protection which govern the registration, operation, and closure maintenance of sanitary landfills in the State of New Jersey, and other solid and liquid waste facilities as may be approved by the Department; registration, operation and maintenance of collection and haulage operations and facilities in the State of New Jersey; a fee schedule for engineering review, registration and inspection of solid waste facilities and registration of collection, haulage, disposal operations and facilities in the State of New Jersey. These rules shall not apply to the following:

1. The purchase, sale, collection, storage, transport or controlled processing of source separated or commingled source separated recyclable, recycled or secondary nonhazardous materials for reintroduction into the economic mainstream as raw materials for further processing or as products for use, provided that such materials are free from putrescible matter and are not mixed with solid or liquid waste as defined herein. Specifically not exempted are solid waste materials recovery facilities designed or operated for the purpose of separating mixed solid waste into useful secondary materials (including fuel and useable energy), or thermal destruction facilities;

2.-6. (No change.)

(b) (No change.)

(c) The exemptions set out at (a) above are not applicable to activities associated with hazardous waste.

7:26-1.4 Definitions

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

"Boiler" means an enclosed device using controlled flame combustion to recover and export energy in the form of steam, heated fluids, or heated gases which:

1. Has a combustion chamber and primary energy recovery system of integral design (fluidized bed combustion units which are not of integral design will be reviewed by the Department on a case-by-case basis for classification as a boiler after considering the standards set out in 40 CFR Part 266)*. **To be considered of integral design, the combustion chamber and the primary energy recovery section(s) (such as waterwalls and super heaters) must be physically formed into one manufactured or assembled unit. A unit in which the combustion chamber and the primary energy recovery section(s) are joined only by ducts or connections carrying flue gas is not integrally designed; however, secondary energy recovery equipment (such as economizers or air preheaters) need not be physically formed into the same unit as the combustion chamber and the primary energy recovery section. The following units are not precluded from being boilers solely because they are not of integral design: process heaters (units that transfer energy directly to a process stream) and fluidized bed combustion units; and***

2. Maintains at least a 60 percent thermal energy recovery efficiency during operation, calculated in terms of the recovered energy compared with the thermal value of the fuel; and

3. Demonstrates to the Department's satisfaction that at least 75 percent of the recovered energy is used annually. Recovered heat which is used internally shall not be counted in the 75 percent.

"Burning" or "incinerating" means any method using combustion to decompose or otherwise change the physical, chemical, or biological composition of a material.

"By-product" means a material that is not one of the primary products of a production process and is not solely or separately produced by the production process. The term does not include a "co-product" as defined herein.

"Commercial chemical product" means a material listed in N.J.A.C. 7:26-8.15 which is manufactured or formulated for commercial or manufacturing use, including its off-specification species, container residues, and spill residues. It does not include materials such as process wastes that contain the substances listed in N.J.A.C. 7:26-8.15.

"Controlled processing" means the processing of nonhazardous material in a manner which minimizes the potential discharge of any constituents of the material into the environment.

"Co-product" means a material that is not a primary product, but is an incidentally produced product, of such quality that its composition is consistently equivalent to, or exceeds the standards for, a manufactured product of the same name. A co-product is used as a commodity in trade by the general public in the same form as it is produced, in lieu of an intentionally manufactured product.

... "Designated facility" means a hazardous waste treatment, storage or disposal facility which has received a permit from NJDEP, EPA or a state authorized by EPA (or a facility with existing facility status), ***or a waste reuse facility under N.J.A.C. 7:26-9.1(c)13, or a recycling facility which is allowed to accept hazardous waste under manifest in accordance with the regulations of the state it is located in,*** and which has been designated on the manifest by the generator pursuant to N.J.A.C. 7:26-7.4(a)4v.

... "Discard or discarded" means disposal; burning or incinerating; use or reuse; and/or reclaim or reclamation, all as defined in this section.

... "Hazardous waste incinerator" means any enclosed device burning hazardous waste using controlled flame combustion that neither meets the criteria for classification as an industrial boiler nor is defined as an industrial furnace. It also includes boilers and industrial furnaces which do not conform with the criteria for these devices under N.J.A.C. 7:26-9.1(c)9.

... "Industrial boiler" means a boiler for use in a manufacturing process or manufacturing facility.

"Industrial furnace" means an enclosed device which is an integral component of a manufacturing process and which uses controlled flame combustion to recover materials or energy including*, but not limited to]* ***the following:*** lime kilns, aggregate kilns, phosphate kilns, coke ovens, blast furnaces, smelting furnaces, melting furnaces, refining furnaces, titanium dioxide chloride process oxidation reactors, methane reforming furnaces, pulping liquor recovery furnaces, *[and]* sulfuric acid plant sulfur recovery furnaces*.[.]* ***and such other devices as the Department may add to this list on the basis of one or more of the following factors:**

1. The design and use of the device primarily to accomplish recovery of material products;
2. The use of the device to burn or reduce raw materials to make a material product;
3. The use of the device to burn or reduce secondary materials as effective substitutes for raw materials, in processes using raw materials as principal feedstocks;
4. The use of the device to burn or reduce secondary materials as ingredients in an industrial process to make a material product; and/or
5. Other factors as appropriate.*

... "Precious metals" means gold, silver, platinum, palladium, iridium, osmium, rhodium, ruthenium, or a *[mixture]* ***combination*** consisting ***[exclusively]*** of two or more of these eight metals.

... "Reclaim" or "reclamation" means a procedure whereby a material is treated to recover a useable product, or where a material is regenerated. Examples are recovery of lead values from spent batteries ***[and]**,*** regeneration of spent solvents ***and removal of impurities from waste oils, spent solvents or other hazardous wastes to render them usable as fuels*.**

"Recycling" means those processes constituting "use and reuse" and "reclamation" (as applicable to N.J.A.C. 7:26-7 through 12).

... "Scrap metal" means bits and pieces of metal parts (for example, bars, turnings, rods, sheets, wire) or metal pieces which may be combined together with bolts or soldering (for example, radiators, scrap automobiles, railroad box cars) which when worn or superfluous, can be recycled. Materials not covered by this term include residues generated from smelting and refining operations (that is, drosses, slags, and sludges), liquid wastes containing metals (that is, spent acids, spent caustics, or other liquid wastes with metals in solution), liquid metal wastes (for example, liquid mercury), or metal-containing wastes with a significant liquid component, such as spent batteries.

... "Spent material" means any material that has been used, and as a result of contamination, can no longer serve the purpose for which it was intended without being processed, reprocessed or reclaimed.

... "Treat" or "treatment" means any method, technique, or process, including neutralization or other pH adjustment, designed to change the physical, chemical, or biological character or composition of a material so as to:

1. Neutralize or otherwise change the pH of such material;
2. Recycle energy or material resources from the material;
3. Render such material non-hazardous, or less hazardous;
4. Render the material safer to transport, store, or dispose of; or
5. Render the material more amenable for recycling or storage or which reduces the volume of the material.

... "Use or reuse" means the ***[recycling]*** procedure whereby a ***[material]* ***residual***** is:

1. Employed as an ingredient in an industrial process to make a product (for example, distillation bottoms from one process used as feedstock in another process). However, a material will not satisfy this condition if distinct components of the material are recovered as separate end products (as when metals are recovered from metal-containing secondary materials); or
2. Employed in a particular function or application as an effective substitute for a commercial product (for example, spent pickle liquor used as phosphorous precipitant and sludge conditioner in wastewater treatment).

7:26-1.6 Definition of solid waste

(a) A solid waste is any garbage, refuse, sludge, or any other waste material except it shall not include the following:

1. Solid animal or vegetable wastes collected by swine producers, licensed by the State Department of Agriculture, who collect, prepare and feed such wastes to swine on their own farms; or
2. Recyclable materials that are excluded from regulation pursuant to N.J.A.C. 7:26-1.1(a)1; or
3. Spent sulfuric acid which is used to produce virgin sulfuric acid, provided at least 75 percent of the amount accumulated is recycled in one year.

(b) Any "other waste material" is any solid, liquid, semi-solid or contained gaseous material, including, but not limited to spent material, sludge, by-product, discarded commercial chemical products, or scrap metal resulting from industrial, commercial, mining or agricultural operations, from community activities, or any other material which has served or can no longer serve its original intended use, which:

1. Is discarded or intended to be discarded; or
2. Is accumulated, stored or physically, chemically or biologically treated prior to, or in lieu of, being discarded;
3. Is burned for energy recovery;
4. Is applied to the land or placed on the land or contained in a product that is applied to or placed on the land in a manner constituting disposal; or
5. Is recycled.

[(d)]** (c) A material is also a solid waste if it is "disposed of" by being discharged, deposited, injected, dumped, spilled, leaked or placed into or on any land or water so that such material or any constituent thereof may enter the environment or be emitted into the air or discharged into ground or surface waters.

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

7:26-2.1 Scope and applicability

(a) (No change.)

(b) This subchapter does not apply to hazardous waste. See N.J.A.C. 7:26-1, 7, 8, 9, 10, 11, 12 and 13. However, hazardous waste facilities and activities, both major and minor, are not exempt from the requirements of registration, approval and regulation under the Solid Waste Management Act except where expressly so provided. The principal rules pursuant to that Act, governing the registration and other aspects of the regulation of such facilities and activities, are set forth elsewhere in this chapter. See also other chapters of the New Jersey Administrative Code where applicable.

(c) (No change.)

ENVIRONMENTAL PROTECTION

ADOPTIONS

7:26-7.5 Hazardous waste hauler responsibilities

(a) This section applies to all hazardous waste hauling, including the hauling of hazardous waste fuels, except for the transportation of hazardous waste from one point to another on the site where the hazardous waste is generated, stored or disposed.

(b)-(i) (No change.)

7:26-8.1 Definition of hazardous waste

(a) (No change.)

(b) A solid waste which is not excluded from regulation under N.J.A.C. 7:26-8.2 becomes a hazardous waste when any of the following events occur:

1.-4. (No change.)

5. In the case of a waste listed in 40 CFR 261 Subpart D, when the waste first meets the listing description set forth therein; or

6. In the case of a hazardous waste which has been subjected to recycling when the recycled material is accumulated or stored prior to burning or is burned for energy recovery, applied to or placed on the land in a manner that constitutes disposal, or is subjected to further processing prior to ***[use or reuse]* *becoming a product as commonly traded in commerce***.

(c) Unless and until it meets the criteria of N.J.A.C. 7:26-8.2(1)(d):

1.-2. (No change.)

(d) Any solid waste described in (c)1 and (c)2 above is not a hazardous waste if it meets the following ***[criteria]* *criteria***:

1.-3. (No change.)

4. In the case of any solid waste, it is recycled from hazardous wastes and used beneficially, unless it is burned for energy recovery or applied to or placed on the land in a manner that constitutes disposal, or is subject to further processing prior to ***[use or reuse]* *becoming a product as commonly traded as commerce***.

7:26-8.2 Exclusions

(a) The following materials are not regulated as hazardous waste for the purposes of this subchapter:

1.-14. (No change.)

[14.]*15. Used batteries (or used battery cells) returned to a battery manufacturer ***[or]* *for*** regeneration. Generators, transporters or storers of lead acid batteries destined for reclamation are exempt from regulation under N.J.A.C. 7:26-7 through N.J.A.C. 7:26-12 provided that storage prior to their transportation to a reclamation facility does not exceed 90 days and the generators, transporters or storers do not themselves reclaim the batteries. Owners and operators of battery reclamation facilities are regulated under N.J.A.C. 7:26-7 through N.J.A.C. 7:26-12 (except for manifest requirements at N.J.A.C. 7:26-7.3 and 7.4);

[15.]*16. Reclaimed industrial ethyl alcohol regulated by the Federal Bureau of Alcohol, Tobacco and Firearms in the Federal Treasury Department;

[16.]*17. Waste-derived products produced for the general public's use that are applied to or placed on the land and that contain hazardous waste, provided the hazardous waste portion has undergone a chemical reaction in the course of production so as to become inseparable by physical means*. **Commercial fertilizers that are produced for the general public's use that contain recycled material also are not presently subject to regulations***;

[17.]*18. Hazardous scrap metal when recycled;

[18.]*19. Materials when they are reintroduced on-site to the original production process from which they are generated without first being processed, treated, reclaimed or changed in any way, provided that:

i. The material is returned to an on-site process as a substitute for raw material feedstock and the process uses raw materials as principal feedstocks; and

ii. The material is not a listed hazardous waste with numbers F020, F021, F022, F023, F026, F028; and

iii. The material is not applied to or placed on the land in a manner that constitutes disposal or used to produce products that are applied to or placed on the land, except as exempted in N.J.A.C. 7:26-8.2(a)*[14.]*17*; and

iv. The material is not burned for energy recovery, used to produce a fuel, or contained in fuels, except for fuels produced from the refining of oil-bearing hazardous wastes when such wastes directly result from a crude oil refining process, are reinserted on-site, and are reprocessed. The resultant fuel oil must be indistinguishable from and must meet the specifications in terms of trace contaminants, of fuels produced solely from crude oil. Specifically prohibited is the mixing of any hazardous wastes ***[(for example, API separator wastes generated at oil terminals)]*** into fuel oil without being reprocessed; and

v. The material is stored no longer than 90 days.

[19.]*20. Recycled waste oil burned for energy recovery that was processed to a degree acceptable to the Department in an authorized New Jersey waste oil facility;

[20.]*21. Pulping liquors (that is, black liquors) that are reclaimed in a pulping liquor recovery furnace and then reused in the pulping process, provided at least 75 percent of the amount accumulated in one year is recycled.

(b) (No change.)

7:26-8.13 Hazardous waste from non-specific sources

Industry EPA Hazardous Waste Number	Hazardous Waste	Hazard Code
F007	Spent cyanide plating bath solutions from electroplating operations	(R,T)
F008	Plating bath sludges from the bottom of plating baths from electroplating operations where cyanides are used in the process	(R,T)
F009	Spent stripping and cleaning bath solutions from electroplating operations where cyanides are used in the process	(R,T)
F010	Quenching bath sludge from oil baths from metal heat treating operations where cyanides are used in the process	(R,T)
F011	Spent cyanide solutions from salt bath pot cleaning from metal heat treating operations	(R,T)
F012	Quenching wastewater treatment sludges from metal heat treating operations where cyanides are used in the process	(T)

7:26-8.15 Discarded commercial chemical products, off-specification species, containers, and spill residues thereof

(a) The following chemicals, manufactured for commercial or manufacturing use, their off-specification species, or their container residues or spill residues are hazardous wastes if and when they are discarded or intended to be discarded, in lieu of their original intended use:

1.-7. (No change in text.)

7:26-9.1 Scope and applicability

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

(c) The standards and requirements of this subchapter do not apply to:

1.-7. (No change.)

8. Any person ***[storing]* *accumulating*** less than 1,001 gallons of waste oil unless the waste oil is a hazardous waste pursuant to 40 CFR 261;

9. The owner or operator of an industrial boiler or industrial furnace burning a hazardous waste, provided the following conditions are met:

i.-vii. (No change.)

[viii. The hazardous waste is stored no longer than 90 days and the requirements of N.J.A.C. 7:26-9.3 are met; and]

***viii. The hazardous waste shall be burned no more than 90 days after it is generated and the following conditions shall be met:**

ADOPTIONS

(1) The waste is placed in containers which meet the standards of N.J.A.C. 7:26-7.2 and which are managed in accordance with N.J.A.C. 7:26-9.4(d);

(2) The date on which each period of accumulation begins is clearly marked and visible for inspection on each container;

(3) The generator complies with the requirements for owners and operators at N.J.A.C. 7:26-9.6 and 9.7 concerning preparedness and prevention, contingency plans and emergency procedures as well as N.J.A.C. 7:27-9.4(g) concerning personnel training.

(4) For waste which is placed in above ground tanks, the following requirements must be met:

(A) Prior to placing the waste in the tank, written approval from the Department must be obtained;

(B) The waste must be managed in conformance with N.J.A.C. 7:26-9.3(b)1-5 and 8 as well as N.J.A.C. (c)9viii(2) and (3); and* ix. The device is not a cement kiln.

10. Persons who recycle hazardous waste on the site where such wastes are generated (see definitions of "recycling" and "on-site" at N.J.A.C. 7:26-1.4) provided:

i. Where the recycled hazardous waste is used as a fuel:

(1)-(4) (No change.)

(5) The generator *[must]* ***shall*** comply with the annual reporting requirements of N.J.A.C. 7:26-7.4(g); and

(6) The recycled hazardous waste is used as a fuel only in an industrial boiler or industrial furnace.

ii. The generator shall comply with the annual reporting requirements of N.J.A.C. 7:26-7.4(g) where the recycled or reclaimed hazardous waste is not a fuel under (c)10i, above; and

iii. The owner or operator has obtained an EPA identification number and has notified the Department of the on-site recycling activities; and

iv. The *[storage]* ***accumulation*** of hazardous waste prior to recycling shall comply with (c)9viii above.

11.-13. (No change.)

14. The owner or operator of a facility whose sole hazardous waste-related activity, other than generation, ***or any activity exempted under this subsection*** is reclamation of precious metals from hazardous wastes, provided the owner/operator of the facility has complied with the requirements of N.J.A.C. 7:26-12.1(e) prior to accepting hazardous waste for precious metal reclamation.

15. The owner or operator of a treatment unit at an authorized facility, provided that the unit is dedicated solely to the reclamation of precious metals (as defined in N.J.A.C. 7:26-1.4) from hazardous wastes, and provided the owner/operator of the facility has complied with the requirements of N.J.A.C. 7:26-12.1(e) prior to accepting waste for precious metal reclamation.

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

(f) The owner or operator of a facility which stores spent batteries before reclaiming them is not required to comply with N.J.A.C. 7:26-9.4(b).

7:26-10.7 Hazardous waste incinerators

(a) This section applies to owners and operators of facilities that incinerate hazardous waste, except as N.J.A.C. 7:26-1.4, 10.1 and 10.2 provide otherwise. The following facility owners or operators are considered to incinerate hazardous waste:

1. Owners or operators of hazardous waste incinerators as defined in N.J.A.C. 7:26-1.4; or

2. Owners or operators who burn hazardous wastes in boilers or in industrial furnaces, unless exempted under N.J.A.C. 7:26-9.1*[(a)9 or 9.1(a)10]**(c)9 or 10*.

3. (No change in text.)

4. (No change in text.)

(b)-(m) (No change.)

7:26-11.5 Hazardous waste incinerators

(a) This section applies to owners and operators of facilities that incinerate hazardous waste, except as N.J.A.C. 7:26-1.4, 10.1 and 10.2 provide otherwise. The following facility owners or operators are considered to incinerate hazardous waste:

1. Owners or operators of hazardous waste incinerators as defined in N.J.A.C. 7:26-1.4; or

2. Owners or operators who burn hazardous wastes in boilers or in industrial furnaces, unless exempted under N.J.A.C. 7:26-9.1*[(a)9 or 9.1(a)10]**(c)9 or 10*.

(b)-(g) (No change from proposal.)

7:26-11.6 Thermal treatment

(a) This section applies to owners and operators of facilities that thermally treat hazardous waste in devices other than enclosed devices using controlled flame combustion, except for those exempted under N.J.A.C. 7:26-10.1(a) or N.J.A.C. 7:26-11.1(b). Thermal treatment in enclosed devices using controlled flame combustion is subject to the requirements of N.J.A.C. 7:26-10.7 or N.J.A.C. 7:26-11.5, if the device is an incinerator.

(b)-(g) (No change in text.)

7:26-12.1 Scope and applicability

(a) (No change.)

(b) The following persons are not required to obtain a permit pursuant to this subchapter to conduct the following activities or construct or operate the following hazardous waste facilities:

1.-6. (No change.)

7. The owner or operator of an industrial boiler or industrial furnace burning hazardous waste provided the following conditions, as well as those set forth at N.J.A.C. 7:26-9.1(c)9, are met:

i.-vii. (No change.)

viii. ***[The hazardous waste is stored no longer than 90 days and the requirements of N.J.A.C. 7:26-9.3 are met]* ***The hazardous waste shall be burned no more than 90 days after it is generated and the following conditions shall be met:****

(1) The waste is placed in containers which meet the standards of N.J.A.C. 7:26-7.2 and are managed in accordance with N.J.A.C. 7:26-9.4(d);

(2) The date on which each period of accumulation begins is clearly marked and visible for inspection on each container;

(3) The generator complies with the requirements for owners and operators at N.J.A.C. 7:26-9.6 and 9.7 concerning preparedness and prevention, contingency plans and emergency procedures as well as N.J.A.C. 7:27-9.4(g) concerning personnel training.

(4) For waste which is placed in above ground tanks, the following requirements shall be met:

(A) Prior to placing the waste in the tank, written approval from the Department shall be obtained;

(B) The waste must be managed in conformance with N.J.A.C. 7:26-9.3(b)1-5 and 8 as well as N.J.A.C. ***7:26-9.1(c)9viii(2) and (3)***; and

ix. The device is not a cement kiln.

8. (No change.)

9. Persons who recycle hazardous waste on the site where such wastes are generated (see definitions of "recycling" and "on-site" at N.J.A.C. 7:26-1.4) provided:

i. Where the recycled hazardous waste is used as a fuel:

(1)-(4) (No change.)

(5) The generator *[must]* ***shall*** comply with the annual reporting requirements of N.J.A.C. 7:26-7.4(g).

(6) The recycled hazardous waste is used as a fuel only in an industrial boiler or industrial furnaces.

ii. The generator *[must]* ***shall*** comply with the annual reporting requirements of N.J.A.C. 7:26-7.4(g) where the recycled or reclaimed hazardous waste is not a fuel under ***[12.1](b)9*[,*]** above.

iii. The owner or operator has obtained an EPA identification number and has notified the Department of the on-site recycling activities.

iv. ***[The owner or operator stores hazardous wastes no longer than 90 days before they are recycled and meets the requirements of N.J.A.C. 7:26-9.3]* ***The accumulation of hazardous wastes prior to recycling shall comply with (b)7viii above*.****

10.-11. (No change.)

(c) (No change.)

(d) The owner or operator of an authorized facility shall ***[be deemed to have a permit-by-rule]* ***not be required to obtain a permit pursuant to this subchapter***** for a treatment unit that is dedicated

solely to reclamation of precious metals from hazardous waste ***or other materials***, provided that all the conditions of ***[N.J.A.C. 7:26-12.1](e) *below*** are met.

(e) The owner or operator of a facility whose sole hazardous waste activity, other than generation ***or any activity exempted under N.J.A.C. 7:26-9.1(c)***, is reclamation of precious metals from hazardous wastes, shall ***[be deemed to have a hazardous waste permit-by-rule] *not be required to obtain a permit pursuant to this subchapter*** provided all of the following conditions are met:

1. The owner or operator submits to the Department the facility name, mailing address, site address, telephone number, and a description of the types and volumes of wastes to be reclaimed;

2. The owner or operator receives an EPA identification number;

3. The owner or operator complies with the manifest requirements of N.J.A.C. 7:26-7.6;

4. The owner or operator submits a facility annual report in accordance with N.J.A.C. 7:26-7.6*[8](f)2;

5. The owner or operator complies with the necessary precautions required by N.J.A.C. 7:26-9.4(e) and inspects the facility in accordance with N.J.A.C. 7:26-9.4(f);

6. The owner or operator complies with the closure requirements of N.J.A.C. 7:26-9.8(b);

7. For facilities that store hazardous waste, the hazardous waste is not stored for longer than 90 days;

8. For facilities that store in containers, the containers are placed in an area designed in accordance with N.J.A.C. 7:26-10.4 and the containers are managed in accordance with N.J.A.C. 7:26-9.4(d);

9. For facilities that store in tanks, the applicable requirements of N.J.A.C. 7:26-10.5 are met. Tanks must be emptied every 90 days in accordance with N.J.A.C. 7:26-9.3(b); and

10. Containers must be labeled with the date on which the facility received the material.

(f) Notwithstanding an owner's or operator's (of a facility or a treatment unit at an authorized facility) compliance with all ***[permit-by-rule]*** conditions set forth in (d) and (e) above, the Department may ***[revoke a permit-by-rule] *terminate eligibility for a partial exemption*** and require that a permit pursuant to (a) above be obtained for the facility or treatment unit if the Department determines at any time that the facility or treatment operation poses a threat to the environment, or the owner or operator cannot be relied upon to operate the facility or treatment unit safely and in conformance with the applicable laws and regulations.

(g) No hazardous waste facility or operation is required to be included in a district solid waste management plan pursuant to the Solid Waste Management Act.

7:26-12.3 Existing facilities

(a)-(h) (No change.)

(i) The amendments to N.J.A.C. 7:26-1.1, 1.4, 1.6, 2.1, 7.5, 8.1, 8.2, 8.13, 8.15, 9.1 and 12.1, effective ***December 21, 1987***, may bring under regulation certain facilities which were not previously regulated. These facilities, if they are to qualify as existing facilities, must have notified the USEPA by April 4, 1985, and have filed a Part A application with the USEPA or State of New Jersey by July 5, 1985. Those affected by these amendments, but not affected by the Federal rules published on January 4, 1985 (50 FR 614), shall, in order to qualify as existing facilities, notify the Department and file the Part A application by (90 days from the effective date of the amendments). The requirements for submitting the Part A application ***by March 21, 1988*** are found at N.J.A.C. 7:26-12.2(d).

(a)

Collector/Hauler Registration and Operating Requirements; Designated Truck Routes

Adopted Amendments: N.J.A.C. 7:26-3.2 and 3.4

Proposed: September 8, 1987 at 19 N.J.R. 1610(a).

Adopted: November 24, 1987 by Richard T. Dewling,

Commissioner, Department of Environmental Protection.

Filed: November 30, 1987 as R.1987 d.535, **without change**.

Authority: N.J.S.A. 13:1D-9 and 13:1E-6.

DEP Docket Number: 040-87-08.

Effective Date: December 21, 1987.

Expiration Date: November 4, 1990.

Summary of Public Comments and Agency Responses:

Notice of the proposed amendments was published on September 8, 1987 in the New Jersey Register at 19 N.J.R. 1610(a). In addition, a notice of the proposed amendments with a copy of the proposed amendments attached was mailed to every solid waste collector/hauler registered with the Division of Solid Waste Management. Both notices invited written comments to be submitted on or before October 8, 1987. Approximately 18 written comments and 15 oral inquiries were received during the comment period. These written and oral comments are summarized below:

COMMENT: Many district solid waste management plans employ Federal interstate highways in designating truck routes. Due to axle weight limitations on the use of Federal interstate highways, solid waste collection vehicles cannot legally use them. This puts the collector/haulers in the position of breaking the law regardless of whether they comply with these proposed amendments or not.

RESPONSE: These rule amendments have Statewide application. Accordingly, questions regarding the legal sufficiency of any particular district solid waste management plan's designated truck route fall beyond the scope of these amendment. Such issues should be properly raised upon the amendment of district solid waste management plans to designate truck routes which employ Federal interstate highways or in any enforcement proceedings relative to this amendment where applicable.

In reviewing future district solid waste management plan amendments prior to Commissioner certification, the Department will consider this comment and attempt to rectify the problem.

COMMENT: How will collector/haulers be notified of applicable truck traffic routes once established?

RESPONSE: Where established as part of a district solid waste management plan pursuant to N.J.S.A. 13:1E-21(b)4, the particular County Board of Chosen Freeholders or the Hackensack Meadowlands Development Commission, as the case may be, will publish public notice and conduct a public hearing pursuant to the procedures set forth at N.J.S.A. 13:1E-23. Where these truck routes have been previously designated in district solid waste management plans, collector/haulers should contact the respective county solid waste coordinators for counties they operate within for further information. Where truck routes have been established as permit conditions for a particular facility, the permit condition further requires that the permittee (facility) disseminate written notices of the truck route to collector/haulers who frequent it.

COMMENT: Who designates these truck routes?

RESPONSE: Either the County Board of Chosen Freeholders or Hackensack Meadowlands Development Commission, as the case may be, by way of amendment to their respective district solid waste management plans or the Department of Environmental Protection as a permit condition for a particular facility, or both.

COMMENT: Contrary to the assertion made in the proposed amendments' summary statement, N.J.S.A. 13:1E-21(b)4 does not require the establishment of truck routes, but rather, requires a survey of proposed traffic routes for purposes of projecting transportation costs recoverable in collector/haulers rates set by the Board of Public Utilities.

RESPONSE: The Department concurs that economic projection of transportation costs is an important purpose of the above referenced provision; however, the Department stands by its assertion that the provision mandates the establishment of collection vehicle traffic routes as a content requirement of district solid waste management plans.

COMMENT: Refuse trucks, like any other vehicle, should be allowed to use any road on which its travel is legally acceptable. The proposed rule amendments unfairly discriminate against refuse vehicles.

RESPONSE: This comment correctly notes that solid waste collection and transfer vehicles are singled out for restricted use by this amendment. The Department does so pursuant to N.J.S.A. 13:1E-21(b)4 which requires truck route designation and pursuant to N.J.S.A. 13:1E-6 which requires the promulgation of standards relative to solid waste facilities which are necessary to protect the public health, safety and the natural environment. Traffic impacts posed by new solid waste facilities can often be substantial and are, therefore, considered an important part of a proposed facility's environmental impact statement (see N.J.A.C. 7:26-1.7(f)3ii(3) and 7:26-2.9(c)3iv(1)). These rule amendments merely provide an enforcement mechanism to ensure that truck routes specified in the permitting or solid waste planning process for purposes of mitigating traffic impacts will be complied with.

ADOPTIONS

COMMENT: Who will enforce these rule amendments?

RESPONSE: As with any other rule promulgated pursuant to the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq., the Department, county health departments and municipal boards of health or their designees may enforce N.J.A.C. 7:26-3.2 and 3.4.

COMMENT: A three-pronged test should be used in considering the necessity of imposing particular truck routes:

1. The affected area must be a densely populated residential area;
2. The area must be environmentally impacted or have the potential for such impact; and
3. The area should be adjacent to the disposal facility.

RESPONSE: The Department designates truck routes as permit conditions for solid waste facilities where:

1. No such route is otherwise designated in the appropriate district solid waste management plan; and
2. Access to the facility by alternative routes will pose substantial traffic and safety impacts upon areas near the facility in terms of a significant degradation in a road's level of service, or avoidable exposure of truck traffic to residential areas.

COMMENT: The rule amendments should include an exception for trucks making their last pickup of the day within a prescribed distance from the disposal facility.

RESPONSE: Truck routes generally prescribe specific routes for refuse trucks enroute from specific towns. They usually employ major road arteries conveniently accessed from various directions. When a collection vehicle makes its last pickup it should proceed directly to the designated artery and on to the facility. The adoption of the exception suggested would be contrary to the intent of these rule amendments where the exception results in the use of residential areas to access a facility. Finally, the exception would make the rule amendments themselves virtually unenforceable.

COMMENT: The proposed rule amendments will increase collector/hauler costs and, therefore, consumer and municipal disposal costs.

RESPONSE: The economic impact statement and regulatory flexibility statement accompanying these rule amendments, when proposed, clearly recognized these potential increased expenses. Balancing these costs against the savings created by fewer accidents in residential areas, less deterioration to several public roads, and the mitigation of other truck traffic impacts, the Department has concluded that these rule amendments will result in a positive net economic impact.

COMMENT: The regulatory flexibility statement accompanying the proposed rule amendments errs in concluding that compliance will not require any "new professional services" because rate relief from increased costs requires petitioning the Board of Public Utilities.

RESPONSE: Rate relief is not a compliance requirement of these rule amendments. Also, traffic routes are designated for new facilities which would have new tariffs and would necessitate petitions for new rates to the Board of Public Utilities by collector/haulers anyway. For this reason, portions of such petitions relating to transportation costs would be incidental.

COMMENT: The economic analysis contained in the economic impact and regulatory flexibility statements accompanying the proposed rule amendments invades the Board of Public Utilities jurisdiction over the economic aspects of solid waste disposal.

RESPONSE: The above-referenced analysis is a legal requirement for all rules proposed by State agencies and complies in all respects with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. Considering the economic impacts of a proposed rule amendment does not constitute an encroachment upon the Board of Public Utilities jurisdiction.

COMMENT: Three commenters endorsed the proposed rule amendments and urged their adoption.

RESPONSE: For the reasons set forth in the summary and impact statements accompanying the proposed rule amendments the Department concurs with the above comment and, therefore, adopts the proposed amendments without change.

Full text of the adoption follows.

7:26-3.2 Registration

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

(d) No person shall engage in the collection or haulage of solid waste in this State if such an operation does not meet the collector/hauler requirements listed in this subchapter. In addition, the registrant and its operators shall comply with any other conditions or limitations which may be specified on the approved registration.

(e)-(h) (No change.)

ENVIRONMENTAL PROTECTION

7:26-3.4 Collector-hauler requirements (General)

(a)-(i) (No change.)

(j) All vehicles used for collection or haulage of solid waste shall, except for operations of their collection service routes, access and exit solid waste facilities in accordance with designated truck routes as specified in either the appropriate district solid waste management plan or the permit for the particular solid waste facility.

(a)

Environmental Cleanup Responsibility Act Rules

Adopted Repeal: N.J.A.C. 7:1-3 and 4

Adopted New Rules: N.J.A.C. 7:26B

Proposed: May 4, 1987 at 19 N.J.R. 681(a).

Adopted: November 30, 1987 by Richard T. Dewling,

Commissioner, Department of Environmental Protection
Filed: November 30, 1987 as R.1987 d.528, **with substantive and technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3(c)).

Authority: N.J.S.A. 13:1K-6 et seq., specifically N.J.S.A. 13:1K-10.

DEP Docket Number: 013-87-04.

Effective Date: December 21, 1987.

Operative Date: January 1, 1988.

Expiration Date: December 21, 1992.

Summary of Public Comments and Agency Responses:

This rule was proposed in the May 4, 1987 New Jersey Register. Public hearings were held on June 4 and 9, 1987. The comment period closed on June 17, 1987.

General Comments

COMMENT: A comment was received that a small transfer exemption should be provided in the rules, conditioned upon the satisfaction of the following: sale price for realty and personality less than a threshold amount; the value of liens on the real estate equal to or in excess of the sales price; the seller is insolvent and has been insolvent for a minimum period of time; the buyer is an industrial establishment; there will be an increase in job availability; and the seller is free of citations for violations of State environmental laws.

RESPONSE: There is no correlation between the requested exemption and the risk posed to public health, safety and the environment. Therefore, the Department has rejected this exemption.

COMMENT: A general comment was received that the rules should include mandated Department response time in order to expedite the ECRA process.

RESPONSE: The Department does not feel it is necessary or appropriate to place specific response time upon itself for the review of various submissions under ECRA. The Department is striving to conduct reviews as rapidly as possible but should not be bound by time frames where protection of the public health and the environment is concerned. The Act imposes no such constraints on the Department with the exception of negative declaration approval at N.J.S.A. 13:1K-10b and cleanup implementation deferral approval at N.J.S.A. 13:1K-11b(1).

COMMENT: A general comment was received that financially sound parties be defined in the rules and that their transactions involving lease terminations where a new tenant is found within two years and sales of vacant portions of property do not constitute ECRA applicable transactions. The definition of "financially sound" would be attributed to an entity having assets of at least \$10,000,000 or purchasing financial devices such as bonds or letters of credit in such amounts.

RESPONSE: The Act contemplates no mechanism for avoiding ECRA responsibilities based solely on the financial status of a party. The Act contemplates remediation of contamination not merely the identification of financially sound parties upon the occurrence of certain transactions.

COMMENT: A general comment suggested that the rules for determining SIC numbers in the Federal Office of Management and Budget SIC manual should be made part of these rules.

RESPONSE: It is unnecessary and inappropriate to incorporate the procedures from the SIC manual into this chapter. The Department does not have control over what changes or when changes may occur to the SIC manual, yet the Act specifies SIC numbers "as designated in the

Standard Industrial Classification Manual . . ." Direct reliance on the SIC manual for rules of application thereof will be administratively more efficient and will preclude the occurrence of inconsistencies between this chapter and the Act where substantive revisions to the SIC manual are effected (as occurred during 1987) prior to the adoption of amendments to this chapter.

COMMENT: A comment suggested that the Department should have mandatory time limits to act on negative declarations and cleanup plans.

RESPONSE: The Department does have a 45 day time limit to act on any negative declaration submitted to the Department pursuant to N.J.S.A. 13:1K-10b and N.J.A.C. 7:26B-5.2(c). Cleanup plans, on the other hand, are complex and, because of great differences in complexity, warrant no fixed time period for review. Where Departmental review is going to take longer than four months, the Department will offer Administrative Consent Order (ACOs) to allow the transaction to proceed prior to full ECRA compliance.

COMMENT: A comment suggested that the Department should consider a system of private licensed engineers to handle routine cleanup matters, such as a spill from a fuel tank.

RESPONSE: The Department has prepared a Draft Sampling Plan Guide and is in the process of developing a Cleanup Plan Guide which together will provide guidance on how routine cleanup matters can be handled directly by the owner or operator or its consultants, if they so choose. Therefore, the Department does not believe it is necessary to license engineers nor is the Department authorized to do so under the Act.

COMMENT: A comment suggested that this chapter should include language stating that "at its discretion the Department may excuse a party from ECRA compliance where the party responsible for the contamination is known and where the Department chooses to undertake enforcement action directly against such party."

RESPONSE: The Department does not agree with this suggestion. ECRA was, by design, a mechanism to obtain remediation by means other than a Department-initiated enforcement action. The Legislature clearly intended that ECRA be a vehicle to clean up the environment without the burden of administrative or civil judicial actions. The Legislature has found and declared that it is necessary that the owner or operator of an industrial establishment submit a negative declaration or cleanup plan as a precondition on any closure or transfer of an industrial establishment. In this way, the Legislature intended to place the cleanup initiative on the owner or operator, rather than on the public.

COMMENT: A general comment stated that the rules should establish a minimal process so that once a site has completed a review under the ECRA, only subsequent activities should be addressed in subsequent ECRA submissions.

RESPONSE: It is not necessary to establish a specific process for handling subsequent transactions at a given site. Once a complete review of an industrial establishment has occurred, ECRA compliance associated with subsequent transactions should proceed relatively rapidly. Reference to the previous submissions, where appropriate, should allow the owner or operator that is subject to the subsequent ECRA trigger to focus its attention on providing the Department with information concerning its operations of the industrial establishment. Any remediation necessary pursuant to the prior ECRA triggers should generally be under way or have been completed.

COMMENT: A comment stated that the summary of the rule proposal should have referenced the Act as N.J.S.A. 13:1K-6 to 13, rather than N.J.S.A. 13:1K-6 et seq., since many people have wrongfully construed sections 14 through 18 as being part of ECRA.

RESPONSE: The "Title of the Act" provisions below N.J.S.A. 13:1K-14 and 13:1K-15 clearly identify statutes that are distinct from ECRA and not supplementary thereto.

COMMENT: A general comment stated that since the Act is undergoing legislative review and possible revision, this chapter should not be adopted until the statutory revisions go into effect.

RESPONSE: At the present time, there are at least three bills that have been introduced in the Legislature which would, if passed, amend ECRA (Senate Bill No. 3625; Assembly Bill No. 4151; and Assembly No. 4582). The Department does not feel it is appropriate to wait for the revisions to the Act to go into effect. In general, there is great uncertainty as to the content and when, if ever, a bill introduced into one chamber of the Legislature would be enacted and go into effect. Delaying the effective date of this chapter, designed to implement the existing Act, would only cause further confusion on the part of the regulated community by not

providing them with the additional guidance contained herein. If and when revisions are made to the Act, necessary amendments to this chapter will be made to implement such statutory revisions.

COMMENT: A general comment claimed that the application forms presently used by the Department are not entirely consistent with the rules and that the Department often considers sections of applications to be incomplete for omission of information that is not required by the Act or the implementing rules. The commenter felt that the applications must be absolutely consistent with the rules and that an application should not be considered incomplete if the application meets the requirements of the rules. The comment further suggested that the application forms be incorporated into the new rules and be presented in the New Jersey Register for public comment.

RESPONSE: The application forms that the Department utilizes have been revised to reflect the changes in the rules and are consistent therewith. The Department is always open to suggestions on how to improve the applications to further clarify them and to improve compliance by the regulated community. The forms are not promulgated as rules in order to allow the making of changes to the forms as rapidly and frequently as necessary.

COMMENT: A general comment was received that the ECRA program duplicates the underground storage tank program that has been enacted by the Legislature and that is in the process of being implemented by the Department. This duplication should be eliminated.

RESPONSE: The underground storage tank program that is being implemented by the Department requires only the registering of underground tanks at this time. No rules regarding the technical aspects of the program have been promulgated. To exempt these tanks from ECRA would allow contamination to be passed on to a subsequent owner or operator without the benefit of remediation pursuant to ECRA. Under ECRA, the subsequent owner or operator benefits from site remediation by the former owner or operator.

COMMENT: A general comment was received that the Department should allow some type of ECRA approval by rule which would apply in situations where the ECRA process is under way and allow additional transactions to be handled by this rule in simplified forms rather than by the drawn out process of a "guarantee Administrative Consent Order (ACO)." The requested provision would allow a party in a second transaction to voluntarily bind itself "jointly and severally with the other parties" to all the requirements imposed on those party(ies) bound as a result of the first transaction.

RESPONSE: The Department has developed a "second sale Administrative Consent Order" (ACO) that deals with this type of situation. This process is not drawn out but, rather, is extremely expeditious in allowing the second sale to occur promptly without requiring the posting of additional financial assurances by the party(ies) to the second transaction where no further remediation is necessary as a result of the current ownership.

7:26B-1.2

COMMENT: A comment suggested the addition of the following to N.J.A.C. 7:26B-1.2:

Public authorities duly vested with the power of eminent domain may propose alternative procedures to be applied to acquisitions necessary for public projects. Said alternate procedures shall substitute for or supplement those herein, provided they meet the objectives of these regulations; are approved by the Department; are reduced to writing in a form of a Memorandum of Understanding; and are made a part hereof by attachment in appendix form.

RESPONSE: "Alternative procedures" are unnecessary because of the availability of Administrative Consent Orders (ACOs).

7:26B-1.3

COMMENT: Several comments were made suggesting that many of the definitions within N.J.A.C. 7:26B-1.3 were unnecessary due to their further detail in subsequent subchapters.

RESPONSE: The definitions are presented in N.J.A.C. 7:26B-1.3 to provide initial guidance and an overview of the structure of the rule. Greater detail providing more specific guidance is provided in subsequent subchapters. Therefore, the Department retains this scheme upon adoption.

COMMENT: A comment was made suggesting the definition of "Act" or "ECRA" be amended to incorporate any future amendments or supplements to the Act.

RESPONSE: The Department retains the proposed definition as it would include all amendments and supplements to the Act.

ADOPTIONS

COMMENT: A comment suggested that the definition of "authorized agent" at N.J.A.C. 7:26B-1.3 should be clarified to state that the authorized agent means the person designated in the General Information Submission (GIS).

RESPONSE: There is no need for this clarification since the GIS forms available from the Department, as well as N.J.A.C. 7:26B-3.2(b)6, clearly request the name of the authorized agent.

COMMENT: Several comments were received requesting clarification of the definition of "authorized agent" to state under what circumstances the authorized agent could represent the owner or operator.

RESPONSE: The Department has changed the definition to make it clear that the authorized agent may represent the owner or operator for matters covered by the Act and this chapter except in the execution and certification of documents as provided by N.J.A.C. 7:26B-1.13.

COMMENT: A comment on N.J.A.C. 7:26B-1.3 suggested that a definition of "authorized officer or management officer" is needed.

RESPONSE: This term is unnecessary, having been deleted from the definition of "authorized agent" at N.J.A.C. 7:26B-1.3.

COMMENT: The Department received a comment that the proposed definition for "cleanup plan" is overly broad in requiring the cleanup plan to address properties contaminated by discharges emanating from the subject industrial establishment. The commenter stated that the Department does not have the statutory authority to require cleanup beyond the industrial establishment's boundary.

RESPONSE: ECRA requires that those owners or operators closing, transferring or terminating operations at industrial establishments verify environmental cleanliness or cleanup any contamination from the industrial establishment prior to the transfer or cessation of operations at the industrial establishment. Often, contamination does not remain confined to the geographic boundaries of a particular property and migrates off-site either through the soils or the groundwater. In order to implement the legislative mandate to remediate contamination "in a rational and orderly way, so as to mitigate potential risks," off-site contamination resulting from activities at the industrial establishment must also be addressed. The most appropriate method to analyze and plan the cleanup of that contamination emanating from the site is to do so at the time that the industrial establishment is performing an ECRA review. Clearly, the Legislature did not intend to merely identify serious contamination emanating from a site during the ECRA review without also fully addressing and remediating that contamination both on and off-site. Failure to so address and remediate the contamination poses risks to public health, safety, and the environment.

COMMENT: A comment noted that the Department has changed the statutory definition of "cleanup plan" at N.J.A.C. 7:26B-1.3 to include "any off-site contamination which has emanated or is emanating from the industrial establishment." The comment suggested that the Department clarify that the word "emanating" is limited to those pollutants or contaminants which escape or were released from the site itself, to distinguish it from a situation in which wastes may have been generated at an industrial facility and transported for disposal elsewhere.

RESPONSE: The term "emanating" does not apply to wastes generated at an industrial establishment and transported elsewhere for disposal.

COMMENT: A comment suggested that the Department should make it clear that a "cleanup plan" may reference, and incorporate by reference, other documents and information already submitted to the Department.

RESPONSE: Persons submitting a cleanup plan may reference other documents reviewed or under review by the Department.

COMMENT: A comment suggested that by including in the definition of "cleanup plan" cleanup of off-site contamination which has emanated from the industrial establishment the Department is not only expanding the scope of ECRA but is adding to its rules an element of subjectivity. The rules do not provide a method for determining whether there is off-site contamination; whether the industrial establishment undergoing a closure which triggers ECRA is responsible for off-site contamination if it is determined that such contamination exists; or to what extent cleanup of the site must include detoxification of off-site soil and/or water.

RESPONSE: The method for determining whether there is off-site contamination must be developed in the sampling plan submitted by the owner or operator of the industrial establishment and subject to review by the Department. The Department reviews any data submitted by the owner or operator to determine the extent and degree of contamination and any further sampling required to further analyze the contamination both on-site and off-site. If the industrial establishment is undergoing a closure which triggers ECRA, it is the responsibility of the owner or operator to determine the extent of any contamination. N.J.A.C.

ENVIRONMENTAL PROTECTION

7:26B-5.3(a)5 provides for inclusion of off-site remediation in the cleanup plan by the owner or operator of the industrial establishment triggering ECRA.

COMMENT: A few comments were received that suggested that the definition of "closing, terminating, or transferring operations" overlapped the applicability provisions at N.J.A.C. 7:26B-1.5. The term should be defined in only one section.

RESPONSE: The definition of "closing, terminating, or transferring operations" clarifies the statutory definition. N.J.A.C. 7:26B-1.5 more fully describes those activities which are included within the phrase.

COMMENT: A comment was received concerning the definition of "closing, terminating, or transferring operations" and N.J.A.C. 7:26B-1.5 as these two provisions affect the applicability of ECRA to lease terminations. The comment stated that there was nothing in the Act subjecting a lease arrangement to the provisions of ECRA and that any cleanup responsibilities involving a lease should be negotiated between the landlord and the tenant.

RESPONSE: The Act addresses cessations of leases in requiring compliance by the operator of an industrial establishment planning to close operations at N.J.S.A. 13:1K-9a. Because lease termination generally results in the cessation of the tenant's operations, the lease termination is subject to ECRA.

COMMENT: Comments suggested that the Department should revise its definition of "closing, terminating, or transferring operations" through deletion of the phrase "termination of a leasehold interest at an industrial establishment by the owner or operator of the industrial establishment." Nothing in the "termination" of a lease necessarily amounts to a closing or transferring of operations. In the alternative, an exemption should be provided where a leasehold interest is renewed by the same tenant at the end of the lease term.

RESPONSE: See the above comment and response. The Department has no intention of requiring ECRA compliance in situations where a lease is terminated but renewed by the same tenant without an interruption of operations at the industrial establishment. The definition has been modified at N.J.A.C. 7:26B-1.3 to clarify the Department's intent and the requested exemption has been specifically provided at N.J.A.C. 7:26B-1.8(a)26 as a transaction not subject to the provisions of this chapter. In other situations, the termination of a lease would also result in the cessation of operations of an industrial establishment.

COMMENT: A comment was received requesting that sale and leaseback arrangements be excluded from the definition of "closing, terminating, or transferring operations."

RESPONSE: A sale and leaseback arrangement involves a change in ownership and is, therefore, subject to the provisions of ECRA.

COMMENT: A comment suggested that the clause "including but not limited to" in line 14 of the definition at N.J.A.C. 7:26B-1.3 of "closing, terminating, or transferring operations" should be deleted because it is unauthorized.

RESPONSE: The clause appears in the statutory definition of "closing, terminating or transferring operations" at N.J.S.A. 13:1K-8b reflecting the statutory intent to have transactions similar to those listed therein subject to the Act.

COMMENT: A comment suggested that a termination of a leasehold is not and should not be considered to fall within the definition of "closing, terminating or transferring operations" unless the leasehold was terminated for a period of two years or more.

RESPONSE: The termination of a leasehold interest of an industrial establishment generally results in a cessation of operations at the industrial establishment as contemplated in the definition of "closing, terminating or transferring operations." If, however, the lease is renewed, the parties thereto remain the same, and operations continue without interruption, the termination of lease will not trigger compliance with the Act and this chapter. See N.J.A.C. 7:26B-1.8(a)26.

COMMENT: A comment suggested that the Department cannot define "closing, terminating, or transferring operations" at N.J.A.C. 7:26B-1.3 to include cessations of "substantially all" the operations of an industrial establishment. N.J.S.A. 13:1K-5(b) does not use the phrase "or substantially all." The introduction of this term introduces an element of uncertainty since "substantially all" is not defined. The comment suggested that if the Department is concerned about the maintenance of a sham operation to avoid compliance with ECRA, the Department could adopt the rules stating specifically that "sham operations will be ignored for purposes of ECRA." In addition, many comments suggested that if "substantially all" were to be used, the term needed to be defined.

RESPONSE: The Department agrees that "substantially all" should be clarified but should not be omitted. Without the "substantially all" criteria, owners or operators could, as a practical matter, cease operations but continue an insubstantial level of activity in order to avoid ECRA. Therefore, the Department retains "cessation of . . . substantially all the operations" in the definition and describes it at N.J.A.C. 7:26B-1.5(b)16 as occurring where there is at least a 90 percent reduction in the number of employees, area of operations, or quantity of output.

COMMENT: A comment stated that the phrase "any changes in operations sufficient to change the primary Standard Industrial Classification number of the industrial establishment from an SIC number that is subject to the Act to one that is not subject to the Act" should be deleted from the definition of "closing, terminating, or transferring operations." The comment stated that this definition could put firms under ECRA when a re-tooling or economic decision merely changes the manufacturing emphasis.

RESPONSE: Changes in operations sufficient to change the primary SIC number of an industrial establishment from an SIC number that is subject to the Act to an SIC number that is not subject to the Act are indicative of a cessation of the primary activity carried on at the facility and, therefore, constitute "closing, terminating, or transferring operations." Further, the requested deletions from the definition would provide a two-stage escape from ECRA for virtually any industrial establishment contemplating closing, terminating, or transferring operations. First, the industrial establishment could change operations so as to no longer have an applicable SIC number. The facility would no longer be deemed an industrial establishment. Second, it could cease operations or be transferred and no longer be subject to the Act or this chapter because it would no longer be deemed an industrial establishment. Consequently, the intent of the Legislature to impose, as a precondition on the closure or transfer of operations, the adequate preparation and implementation of acceptable cleanup procedures could be frustrated merely by a change in operations sufficient to change the primary SIC number to one not subject to the Act.

COMMENT: A comment stated that the definition of "closing, terminating, or transferring operations" at N.J.A.C. 7:26B-1.3, by including "reorganization and liquidation in bankruptcy or insolvency proceedings" as an ECRA trigger, would be in conflict with the exception for "corporate reorganization not substantially affecting ownership" in the event of a Chapter 11 bankruptcy.

RESPONSE: N.J.A.C. 7:26B-1.5(b)7 and 1.6(a)13 have been amended to provide that only upon the filing of a plan of liquidation does a Chapter 11 proceeding trigger compliance with the Act and this chapter.

COMMENT: A comment suggested that the definition of "closing, termination, of transferring operations" including the term "transfer by any means of shares of a corporation which results in a change in a majority interest in the owner or operator" is unclear, impracticable, and unworkable.

RESPONSE: The Department views the change in identity of shareholders of a corporation that results in a change in the person(s) controlling the affairs of the corporation to be a change in the ownership of the industrial establishment and, therefore, constitutes a "closing, terminating or transferring operations".

COMMENT: A comment suggested that the definition of "closing, terminating, or transferring operations" at N.J.A.C. 7:26B-1.3 rephrase "the sale of stock in a form of a statutory merger or consolidation" to "the sale or transfer of stock under such circumstances as it results in a statutory merger or consolidation."

RESPONSE: The phrasing in the proposal is taken directly from the Act and is sufficiently clear.

COMMENT: A comment suggested that the terms "consolidation," "merger" and "dissolution" be treated and defined as they are under New Jersey corporate statutes.

RESPONSE: The terms "consolidation," "merger" and "dissolution" are not expressly defined in the New Jersey Business Corporation Act, N.J.S.A. 14A:1-1 et seq. The definitions for these terms at N.J.A.C. 7:26B-1.3 are, however consistent with those at common law and conform to the procedures for merger and consolidation expressly provided at N.J.S.A. 14A:10-1 and 14A:10-2 and the methods of dissolution expressly provided at N.J.S.A. 14A:12-1.

COMMENT: A comment suggested that the proposed definition of "corporate reorganization not substantially affecting ownership" at N.J.A.C. 7:26B-1.3 is unworkable. Specifically, the Department is without statutory authority to limit this exception to a transaction "which involves

only one corporation" or to a transaction "which merely changes its form" or to a transaction which "results in the same board of directors and stock holders."

RESPONSE: The Department agrees that the phrase "and which involves only one corporation which merely changes its form and results in the same board of directors and stockholders" is overly restrictive in determining those corporate reorganizations "not substantially affecting ownership" and, therefore, has deleted it from the proposal.

COMMENT: A comment suggested that the Department should delete the words "or control" from both the definition of "corporate reorganization not substantially affecting ownership" and from the reference to this term as an operation and transaction not subject to ECRA at N.J.A.C. 7:26B-1.8(a)4 because the Act speaks of transfer of ownership and not transfer of control.

RESPONSE: The Department disagrees and has retained the phrase "or control" in both the definition of "corporate reorganization not substantially affecting ownership" and in N.J.A.C. 7:26B-1.8(a)4. Control means the power or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee. As such, the term has all the trappings of ownership and is sufficiently akin to ownership so that, to the extent the Legislature has found that the rational and orderly transfer of industrial establishments should include an ECRA review and implementation of a cleanup plan where necessary, the same requirements should be imposed upon the owner or operator where there is a change in control. As in the case of actual ownership, changes in control are often accompanied by the exchange of legal consideration and changes in operating and post operating philosophy vis-a-vis environmental concerns.

COMMENT: A comment suggested that the definition of "corporate reorganization not substantially affecting ownership" is unclear and overly narrow. The definition encompasses only a single corporation which merely changes its form and results in the same board of directors and stockholders. This limit precludes "reincorporation" within the proposed definition.

RESPONSE: The Department agrees and has deleted the reference to "only one corporation which merely changes its form and results in the same board of directors and stockholders."

COMMENT: A comment on N.J.A.C. 7:26B-1.3 concerning the definition of "corporate reorganization not substantially affecting ownership" suggested that the Department should address the merger or subsidiaries into parents and the establishment of subsidiaries from parent corporations where the ultimate control has not changed. Specifically, based upon the Department's position that a change in the ownership of a parent is considered a trigger of the statute, the merger by a subsidiary into a parent or the creation of a subsidiary out of a parent should not be subject to the statute.

RESPONSE: The Department disagrees with the assertion that the merger by a subsidiary into a parent or the creation of a subsidiary out of a parent should not be subject to the Act. In both cases, a change in actual ownership and control of the industrial establishment from that existing prior to the transaction is likely. It is possible that in limited circumstances these transactions would qualify as a corporate reorganization not substantially affecting ownership. However, due to the infrequency of such an occurrence, a blanket exemption therefor is inappropriate. An applicability determination would be an appropriate mechanism to determine if the specific transaction were not subject to the Act.

COMMENT: A few comments requested the deletion of the definition of "discharge" because it has no meaning under ECRA and permitted releases should be excluded from the definition of closing. The Act does make use of the term, without defining it, in the definition of "negative declaration."

RESPONSE: A definition of "discharge" was included at N.J.A.C. 7:26B-1.3 to clarify the meaning of the term as used in the chapter. This definition is almost identical to the definition provided in the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq., to promote consistency between ECRA and that act.

COMMENT: A comment on the definition "dissolution of corporate identity" at N.J.A.C. 7:26B-1.3 suggested that the definition is too narrow since there are methods of corporate dissolution which do not affect beneficial ownership or corporate assets.

RESPONSE: The definition of "dissolution of corporate identity" has been amended to take notice that the corporation may still exist as necessary to wind up its affairs. The Act makes no distinction between beneficial and legal ownership in including the term "dissolution of corporate identity" in the definition of "closing, terminating or transferring operations."

COMMENT: Several comments suggested that the definition of "dissolution of corporate identity" should be amended to state that when the corporate dissolution does not affect the actual ownership or operations at an industrial establishment ECRA would not be triggered.

RESPONSE: The comment goes to the issue of applicability of corporate dissolution provided at N.J.A.C. 7:26B-1.5(b)6 and not the definition of "dissolution of corporate identity." When a dissolution of a corporation which directly or indirectly owns or operates an industrial establishment occurs, there is a change in ownership or control of the industrial establishment sufficient to subject the industrial establishment to the Act and this chapter.

COMMENT: One comment suggested that the term "dissolution of corporate identity" should be defined as the filing of a certificate of dissolution followed by a liquidation or distribution of the assets of the corporation. In addition, the comments suggested that the triggering event for the submission of the Initial Notice should be the adoption by the corporation of a plan of liquidation.

RESPONSE: The Department finds no support for further limiting the definition as proposed. The Department agrees that a more precise triggering event should be specified and has, therefore, expanded the provisions at N.J.A.C. 7:26B-1.6(a)2 accordingly by reference to the applicable State statute.

COMMENT: A comment suggested that the definition of "dissolution" at N.J.A.C. 7:26B-1.3 is inconsistent with N.J.S.A. 14A:12-9 which specifically provides that a dissolved corporation shall continue its corporate existence.

RESPONSE: The Department notes that N.J.S.A. 14A:12-9 provides in relevant part that "[e]xcept as a court may otherwise direct, a dissolved corporation shall continue its corporate existence but shall carry on no business except for the purpose of winding up its affairs . . ." and modifies the definition of "dissolution" at N.J.A.C. 7:26B-1.3 accordingly.

COMMENT: One comment suggested that the definition of "hazardous substances" should only encompass those elements and compounds included in the various cited lists and not those compounds or mixtures which themselves may include some amount (often a very small amount) of a hazardous substance.

RESPONSE: The Department disagrees since such an interpretation would allow dilution to render a listed hazardous substance as no longer subject to ECRA and which may continue to cause a public health and environmental concern if discharged or spilled. Provision is made for exemption from the provisions of the Act and this chapter of certain mixtures of hazardous substances as specified at N.J.A.C. 7:26B-10.1(b)1, except as provided at N.J.A.C. 7:26B-1.10.

COMMENT: One comment suggested that the Department simply list the specific laws which designate hazardous waste.

RESPONSE: As administrative rules have the full force and effect of law, N.J.A.C. 7:26-8 is the specific law that designates hazardous wastes.

COMMENT: Comments suggested that the Department should promulgate a comprehensive list of hazardous substances, or modify the definition to only cite N.J.A.C. 7:1E since the other listings are incorporated in the list of Appendix A of N.J.A.C. 7:1E.

RESPONSE: A comprehensive list of hazardous substances has been adopted at N.J.A.C. 7:1E. The definition of hazardous substances in this chapter has been rewritten to be identical with that appearing at N.J.A.C. 7:1E except for the statutory exclusion of sewage and sewage sludge provided at N.J.S.A. 13:1K-8d.

COMMENT: A comment on N.J.A.C. 7:26B-1.3 concerning the definition of an "industrial establishment" suggested that the definition only cover portions of plants with ongoing operations. The comment noted that since vacant land inherently has no SIC code it could be sold without an ECRA trigger under this definition.

RESPONSE: The restriction of the area to be examined pursuant to ECRA of only the portion of an industrial establishment with ongoing operations is inappropriate. Past operations by the existing industrial establishment or previous operations at the site may have resulted in the contamination of now-vacant portions of the industrial establishment. If the Department were to adopt the suggestion, these portions would not be subject to examination and potentially-needed remediation under ECRA. The purpose of ECRA is to ensure that the site of an industrial establishment is not causing contamination of the environment. Therefore, it is necessary to review the entire industrial establishment, not merely those portions of the site with ongoing operations, for compliance with ECRA.

COMMENT: Several comments on the definition of "industrial establishment" at N.J.A.C. 7:26B-1.3 suggested that the physical limits of the industrial establishment needs to be defined more clearly in the definition.

RESPONSE: The Department has modified the definition of "industrial establishment" at N.J.A.C. 7:26B-1.3 to provide additional clarification to the physical limits of an industrial establishment.

COMMENT: A comment suggested the exclusion of the phrase "and determined in accordance with the procedures described in the SIC manual" from the definition of industrial establishment because it appears to encompass facilities such as auxiliaries which the Legislature did not intend to include in ECRA.

RESPONSE: To insure that SIC numbers are established in a consistent manner, the Department requires that SIC numbers be determined in accordance with the SIC manual.

COMMENT: Inclusion of the term "any activity" in the definition of industrial establishment is inappropriate and is so vague and apparently overinclusive as to require that a separate analysis be conducted of each element of an entity's operations at a place of business.

RESPONSE: Based on its statutory interpretation of the 11 sections of ECRA and reading each section in *pari materia*, the Department has determined that the Legislature's intent was to regulate not only geographical "places" but also those activities occurring at those "places".

COMMENT: A comment on the definition of "industrial establishment" at N.J.A.C. 7:26B-1.3 suggested that the SIC major group 48 be excluded.

RESPONSE: All subgroups with SIC code 48 have been exempted. The Department is authorized by the Act to exempt only individual subgroups upon finding that the operations of the industrial establishment do not pose a risk to public health, safety and the environment. Therefore, the SIC major group number 48 will remain in the definition, although all industrial establishments within that major group will be exempt from ECRA.

COMMENT: A comment suggested that an industrial establishment should be defined as a contiguous parcel of land not divided by publicly dedicated streets, easements, or bodies of water.

RESPONSE: Historically, many manufacturing facilities were built on parcels separated by public streets. Many examples exist where an industrial establishment is built on two parcels separated by a public thoroughfare and connected by walkways and railroad tracks. It is clear from an inspection of each site that it was one single industrial establishment. Therefore, the entire facility is reviewed as a single industrial establishment by the Department under ECRA. The Department will continue to interpret the definition of industrial establishment as a place of business or activity not necessarily limited by natural or artificial boundaries having no relevance to the operations conducted thereon. The definition has been supplemented to add clarity to the geographical extent of the industrial establishment.

COMMENT: A comment requested that the word "completed" be deleted from the definition of "Initial Notice".

RESPONSE: The Department retains the proposed definition to clarify and emphasize that an incomplete Initial Notice does not constitute an adequate submission.

COMMENT: Several comments suggested that the definition of "majority interest" should be defined to be 51 percent of the issued and outstanding shares of the corporation entitled to vote on all matters affecting the corporation. Some comments suggested that an attempt to define majority interest as being the holders of 50 percent or less of the issued and outstanding stock if they have control of the organization through any of the three powers enumerated in the definition is unenforceable and would result in delays in determining majority interests. A "bright line", 51 percent test, would avoid this problem.

RESPONSE: The Department retains the proposed definition of majority interest in order to cover those situations where corporate control is exercised by the holder or holders of less than 50 percent of the issued and outstanding shares as may occur where the remaining shares are widely dispersed. Changes in the identity of the holders of such controlling interests are sufficiently akin to an actual change in ownership that, for the purposes of the Act and this chapter, they will be treated as a change in ownership.

COMMENT: A comment suggested that the definition of majority interest mixes the term shareholder and stockholder, which creates confusion.

RESPONSE: Shareholder and stockholder are synonymous. The Department does not believe that the use of both terms creates confusion and, therefore, retains the use of both terms.

COMMENT: A comment suggested that the three criteria listed at N.J.A.C. 7:26B-1.3 to define "majority interest" are irrelevant and contradictory.

RESPONSE: Criteria for defining the term "majority interest" are needed to aid in the determination of when a change of ownership occurs through the sale of stock of any corporation. In many circumstances, one, two or more stockholders may sufficiently control the affairs of a corporation so that the transfer of their shares would constitute, for the purpose of the Act and this chapter, a change in ownership. The Department developed a workable definition for majority interest shareholders to illuminate such control based upon the three criteria listed at N.J.A.C. 7:26B-1.3.

COMMENT: A comment suggested that there was no justification for holding that holders of 50 percent or less of the stock can be holders of the majority interest. In addition, a comment stated that ECRA's application to transfers of 50 percent or less of the shares will create increasing confusion and concern and perhaps litigation about whether transfers by small stockholders violated ECRA.

RESPONSE: The Department does not view the definition of "majority interest" as confusing and lacking justification. Many corporations are controlled by a few individuals who own less than 50 percent of the outstanding stock. They manage the affairs of the corporation and, by virtue of their control of the corporation through the management of the corporation's affairs, possess most of the attributes of ownership of the industrial establishments held by the corporation. If the Department were to develop a "bright line" test of greater than 50 percent, there would be many transfers affecting ownership of industrial establishments that would escape ECRA responsibility through a relatively arbitrary "50 percent rule".

COMMENT: A comment suggested that the definition of "majority interest" at N.J.A.C. 7:26B-1.3 be changed to a definition of controlling interest and that this term be defined as "the shareholder or shareholders holding sufficient voting power in issued and outstanding stock to have the right and power to elect the majority of board of directors of the corporation. Holders of 50 percent or more of the issued or outstanding stock of the corporation shall be presumptively considered holders of controlling interest unless they do not and cannot elect the majority of the board of directors".

RESPONSE: The term "majority interest" and its proposed definition provides sufficient guidance to enable both the Department and the regulated community to detect a change of stock ownership of an industrial establishment.

COMMENT: One comment suggested that the definition of "merger" not include the requirement that the surviving corporation retain its name, because any entity can change its name for any number of reasons having no effect on the financial or other status of the entity.

RESPONSE: The Department agrees and has modified the definition accordingly.

COMMENT: A comment suggested that the definition of "merger" should specifically exclude the absorption of a subsidiary by its parent where there will not be a change in the owner or operator or use of the industrial establishment.

RESPONSE: The Department retains the proposed definition because in the example given there is a change in ownership or control of the industrial establishment from that of corporate subsidiary to corporate parent—two different legal entities.

COMMENT: A comment suggested that the definition of "negative declaration" at N.J.A.C. 7:26B-1.3 improperly includes the requirement for Departmental approval of hazardous substances and waste to remain at the industrial establishment.

RESPONSE: The definition of "negative declaration" at N.J.S.A. 13:1K-8g does not allow for any hazardous substances or waste to remain at the site of the industrial establishment. The Department believes the legislative intent would not be frustrated in allowing hazardous substances and wastes to remain at the industrial establishment in limited circumstances, that is, where the purchaser or transferee assumes ownership and liability for those hazardous substances and wastes (see N.J.A.C. 7:26B-5.2(a)).

COMMENT: One comment stated that the requirement that a negative declaration be an absolute statement as to the occurrence of discharges, the occurrence of any cleanup, and the presence of hazardous substances and wastes, without qualifiers, particularly with respect to property which has a history of industrial operations or on which tenants may have conducted industrial operations, is arbitrary, capricious, and an abuse of discretion.

RESPONSE: Such a statement is required by the act at N.J.S.A. 13:1K-8g.

COMMENT: One comment stated that allowing the person submitting the negative declaration to state his or her source of information, that

is, the person relied upon for the required statement, should clearly be provided for.

RESPONSE: Neither the definition of negative declaration provided at N.J.A.C. 7:26B-1.3 nor the specific requirements for the negative declaration provided at N.J.A.C. 7:26B-5.2 preclude the identification of sources of information that were relied upon in support of the negative declaration.

COMMENT: A comment suggested that the definition of "owner" as any person who "owns" is not very helpful.

RESPONSE: The definition of "owner" is provided at N.J.A.C. 7:26B-1.3 to make it clear that the term applies to both the owner of the "activity" and/or the "place of business". The definition negates the assertion of an owner of real property at which is located an industrial establishment that, as owner of real property, his primary SIC major group number should be 65 (real estate) and, therefore, that the facility is not an industrial establishment. The intent of ECRA was to require compliance by owners of industrial establishments including those who own the real property upon which an industrial establishment lies.

COMMENT: Comments were received to amend the definition of "owner" to specifically exclude a "public authority acquiring property pursuant to the filing of an action in condemnation".

RESPONSE: As set forth in the Act, the burden of compliance falls upon the owner or operator. A public authority in a condemnation proceeding is analogous to the buyer and, therefore, is not subject to ECRA unless it voluntarily assumes such responsibilities. Therefore, the requested change to the definition is not needed.

COMMENT: A comment was made requesting that landlords under a 99-year lease be excluded from the definition of owner.

RESPONSE: The Department does not consider the landlord of property subject to a 99-year lease as the owner of the demised premises. The execution of a 99-year lease, however, is an applicable transaction, as specified at N.J.A.C. 7:26B-1.5(b)18, subjecting the landlord to ECRA.

COMMENT: One comment suggested that the Department's definition of owner was overly broad because it includes the owners of land leased to industrial establishments.

RESPONSE: Owners of industrial establishments are subject to the requirements of ECRA. See, for example, N.J.S.A. 13:1K-9. Since the definition of industrial establishment includes "any place of business", owners of property leased to others are subject to ECRA.

COMMENT: A comment on N.J.A.C. 7:26B-1.3 suggested that the term "operator" be defined as follows: "Operator means any person who owns a controlling interest in the stock or assets of an industrial establishment subject to the Act".

RESPONSE: The suggested definition is unnecessary and is too limiting in that an operator may have no ownership interest in the subject industrial establishment.

COMMENT: A few comments suggested that the Department should define the term "operator" since it is unclear whether the tenant has any responsibility for ECRA compliance as it is not within the ordinary meaning of "owner or operator".

RESPONSE: This term is not defined as the ordinary meaning of the term is intended unless the context clearly indicates otherwise. A tenant that is operating an industrial establishment is an "operator" of that industrial establishment and is, therefore, responsible for ECRA compliance.

COMMENT: A comment suggested changing the definition of "person" in N.J.A.C. 7:26B-1.3 to include the State and any county, municipality, district, public authority, public agency and any other political subdivision or public body in the State.

RESPONSE: The definition of "person" at N.J.A.C. 7:26B-1.3 has been amended to include governmental entities.

COMMENT: A person commented that the sale of assets not used in the operation of the industrial establishment (for example, stock portfolios and similar passive investments) should not trigger ECRA, that is, that the term "sale or transfer of the controlling share of the assets" at N.J.A.C. 7:26B-1.3 not include such assets.

RESPONSE: The assets not used in the operation of the industrial establishment represent assets available for environmental remediation, if necessary. Their sale or transfer may adversely affect the owner's or operator's ability to finance necessary cleanups. Consequently, such sale or transfer will continue to trigger compliance with the Act.

COMMENT: A comment suggested that the phrase "sale of the controlling share of the assets" be rephrased "sale or transfer of the majority of the business assets not in the ordinary course of business".

RESPONSE: The term "sale of the controlling share of the assets" is used in the statutory definition of "closing, terminating or transferring

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operations" at N.J.S.A. 13:1K-8b. The term "sale or transfer of the controlling share of the assets" was defined in the proposal at N.J.A.C. 7:26B-1.3 for purposes of clarity.

COMMENT: Comments suggested that a "sale or transfer of the controlling share of the assets" as set forth at N.J.A.C. 7:26B-1.3 should contain additional guidelines if it is to adequately place owners or operators on notice as to when a triggering event occurs. Specifically, the period of time over which sale or transfer of five percent of the assets constitutes a triggering event should be contained in the definition.

RESPONSE: Where a series of transactions occurs, the relevant time period dates back from the present sale to the latter of (1) the beginning of the current ownership or operation of the industrial establishment or (2) December 31, 1983.

COMMENT: Comments suggested a change in the definition of "sale or transfer of the controlling share of the assets" at N.J.A.C. 7:26B-1.3 to exclude "the transfer of assets requiring board of directors or shareholder approval".

RESPONSE: The reference to the board of directors or shareholder approval has been deleted.

COMMENT: A comment suggested that the definition of "sale or transfer of a controlling share of the assets" is overly broad and vague. The commenter was concerned with the Department's ability to measure "more than 50 percent of assets."

REPOSENSE: This determination will be made on a case-by-case basis by reviewing all pertinent data, particularly financial data regarding assets before and after the series of transactions involved in the short or long term transfer of assets and their relative importance to the overall assets of the owner or operator of the industrial establishment.

COMMENT: A comment suggested that the Department should eliminate from the proposed rules the definition of "sale or transfer of the controlling share of the assets." N.J.A.C. 7:26B-1.5(b)3 should be deleted since the limited number of cases in which New Jersey assets will not suffice to fund remediation of a contaminated site by no means justifies the remarkable restriction on the alienation of personal property and out of state of property which the proposed rules would do.

RESPONSE: The Act, at N.J.S.A. 7:13:1K-8b, includes the "sale of the controlling share of the assets" as an example of a "change in ownership" which, in turn implicates the provisions of N.J.S.A. 13:1K-9b requiring compliance with the Act and this chapter. Therefore, it is necessary to retain the revision on applicability at N.J.A.C. 7:26B-1.3.

COMMENT: A comment recommended that the definition of "SIC" and/or "SIC manual" at N.J.A.C. 7:26B-1.3 expressly exclude any use of the auxiliary establishment rule.

RESPONSE: The legislative intent was for the Department not to develop SIC numbers for industrial establishments but, rather to impose the requirements of the Act only to those facilities falling within the specified SIC major group numbers in accordance with the SIC manual. The SIC manual clearly states that auxiliary establishments have the same SIC number as the establishments they serve. Therefore, if an owner or operator is closing, terminating or transferring operations at an auxiliary research and development laboratory, if the SIC manual defines the research and development laboratory as having a subject SIC number because it is auxiliary to a subject activity, and the laboratory is involved with hazardous substances and wastes, the laboratory would be an industrial establishment for the purposes of the Act. To exclude such auxiliaries, would place the Department in the position of determining SIC numbers for industrial establishments. If the legislative intent was for the Department to determine SIC numbers, the Act would have so provided.

7:26B-1.4

COMMENT: The suggestion at N.J.A.C. 7:26B-1.4 that where a court of competent jurisdiction rules a provision or application of the rule to be unconstitutional or invalid such provision would remain applicable against similarly-situated persons is arbitrary and unreasonable.

RESPONSE: Where there is a judicial determination that a particular provision is invalid or unconstitutional on its face, such determination shall apply only to that provision and shall apply to all parties or factual situations covered by that provision. However, where there is a judicial determination that a particular provision is invalid or unconstitutional only in a particular factual context or only as applied to a particular person, no other provision or other party will be affected by such determination.

7:26B-1.5

COMMENT: Several general comments expressed concern that the Department was including classes of transactions in the proposed rule which were not specifically listed in the Act.

RESPONSE: N.J.S.A. 13:1K-8b defines "closing, terminating or transferring operations" to include "any other transaction or proceeding through which an industrial establishment . . . undergoes change in ownership . . . including but not limited to" (emphasis added) five or six specific occurrences. The list is noninclusive. The Legislative intent was to allow the Department to develop this list based upon its expertise and experience pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., in accordance with the provision at N.J.S.A. 13:1K-10a authorizing the Department to adopt provisions necessary to implement the Act.

COMMENT: Several comments suggested deletion of the phrase "but is not limited to" from the introduction to the list of ECRA-applicable events of N.J.A.C. 7:26B-1.5(b).

RESPONSE: The Department includes the phrase "but is not limited to" in order to encompass other transactions of a similar nature to those listed, that are identical to those listed, but that should be treated in a similar manner in order to preclude ECRA avoidance upon technical distinctions bearing no relationship to environmental concerns properly within the ambit of the Act.

COMMENT: One comment stated that the statute does not authorize blanket coverage of sales of stock. The extension of the concept to any sale of stock and to direct or indirect ownership is unauthorized.

RESPONSE: The sale of stock from one or more persons to others can result in a change of ownership of the industrial establishment. The Act covers all changes of ownership. The changes enumerated after the phrase "including but not limited" are clearly not intended to be an exclusive list.

COMMENT: Numerous comments were received requesting that a sale of the controlling share of the assets be exempt from ECRA where neither beneficial ownership nor use of the industrial establishment is changed as result of the transaction.

RESPONSE: N.J.S.A. 13:1K-8b provides that a "closing, terminating, or transferring operations" occurs when there is a "sale of the controlling share of the assets." The Act makes no provision for exempting this type of transaction where there is a change in the legal interest but no change in the beneficial interest or use of the industrial establishment.

COMMENT: A comment requested that the inconsistency between N.J.A.C. 7:26B-1.5(b)2 and the definition of "majority interest" at N.J.A.C. 7:26B-1.3 be clarified with respect to whether it applies to the underlying person or to the underlying persons holding the majority interest.

RESPONSE: The Department has made this clarification by adding "or persons" to N.J.A.C. 7:26B-1.5(b)2.

COMMENT: Comments suggested that N.J.A.C. 7:26B-1.5(b)3 should be revised since the transfer of personal property or a transfer of property outside New Jersey has little to do with potential sources of contamination in New Jersey. The transfer should not trigger investigation of the real property in New Jersey which would be the thrust of this provision.

RESPONSE: N.J.A.C. 7:26B-1.5(b)3 only applies to a sale or transfer of the controlling share of the assets of an industrial establishment. The provision affects sales outside the State of New Jersey only to the extent that these assets are controlled by the owner or operator of an industrial establishment that is located in New Jersey.

COMMENT: A comment on N.J.A.C. 7:26B-1.5(b)3 asked what the effect would be of changes in the assets in the ordinary course of business prior to the time when the sale or transfer of the controlling share has occurred.

RESPONSE: Changes in the assets in the ordinary course of business do not, in and of themselves, subject the owner or operator of an industrial establishment to the act and this chapter.

COMMENT: Comments suggested that N.J.A.C. 7:26B-1.5(b)3 should be revised to delete the reference to "one or several independent transactions" since this phrase is unauthorized, unnecessary, and will add to the confusion regarding the applicability of ECRA.

RESPONSE: Industrial establishments rarely sell their assets in a single transaction. The Department will review an independent transaction to determine whether it is part of a series of transactions designed to sell or transfer the controlling share of the assets of an industrial establishment. If, for example, an owner or operator is selling no more than 50 percent of the assets of an industrial establishment in order to generate capital to continue the business as a profitable enterprise, the transaction would not be subject to the Act. If, on the other hand, the owner or operator is entering into multiple transactions, no single one involving more than 50 percent of the assets but totaling in the aggregate more than 50 percent, with the intent to either transfer or abandon the industrial establishment, this series of transactions would be subject to ECRA.

COMMENT: A comment was received proposing that the events enumerated in N.J.A.C. 7:26B-1.5(b)4, 5, 11, and 12 not subject the owners or operators to the provisions of the Act or this chapter where sale or transfer is of an undivided interest of 50 percent or less.

RESPONSE: Any sale or transfer of title, either in whole or in part, is covered by the Act as a "change in ownership." See N.J.S.A. 13:1K-8b. The sale or transfer of an industrial establishment, or of any real property of an industrial establishment, regardless of the size of the undivided interest held by the owner or owners, is subject to the provisions of the Act as a change in ownership, since the selling owners share full liability, jointly and severally, for the remediation of any contamination associated with such ownership. Prior to release from such liability, the industrial establishment should undergo an ECRA review and cleanup plan approval supported by adequate financial if necessary.

COMMENT: Several comments were received regarding the applicability of ECRA to the dissolution of a corporation, stating that this trigger was unnecessary and unauthorized by the statute in the case of a dissolution of an intermediate subsidiary which owns an industrial establishment in New Jersey.

RESPONSE: The dissolution of a corporation that owns or operates an industrial establishment, even if the corporation is a subsidiary of another corporation, results in a change of ownership or control of the industrial establishment and, therefore, constitutes a change of ownership subject to the Act.

COMMENT: Several comments recommended that condemnation proceedings should not trigger ECRA regardless of the availability of a Certificate of Limited Conveyance under N.J.A.C. 7:26B-13.

RESPONSE: Condemnation results in a transfer of title and is, therefore, a change in ownership that is covered by the Act. Condemnations directed at an industrial establishment shall remain subject to the Act and this chapter. Some transfers may be accomplished pursuant to Certificates of Limited Conveyances only as provided at N.J.A.C. 7:26B-13.

COMMENT: One comment questioned what the phrase "the sale of an industrial establishment" at N.J.A.C. 7:26B-1.5(b)9 is intended to cover.

RESPONSE: This phrase is included to cover transfers pursuant to foreclosure.

COMMENT: One commenter suggested that the phrase "controlling share of assets" should be clarified.

RESPONSE: See the definition of "sale or transfer of the controlling share of the assets" at N.J.A.C. 7:26B-1.3.

COMMENT: Comments were submitted regarding the clarity and enforceability by the Department of the provision at N.J.A.C. 7:26B-1.5(b)10 that the sale of a controlling interest of a partnership is an ECRA-applicable event.

RESPONSE: The Department has changed this provision to make it clear that, in the case of a partnership, only the sale or transfer of the entire interest of a general partner in a general partnership, a general partner in a limited partnership, or a limited partner, where the limited partner shares liability for the obligations of a limited partnership, would make the transaction subject. This provision is appropriate since each general partner, and in some cases a limited partner, shares full liability, jointly and severally, for the remediation of any contamination associated with the partnership by virtue of the partner's or partnership's being the owner or operator of an industrial establishment.

COMMENT: Several comments suggested that the Department has no authority to cover the sale of stock in a parent corporation or the transfer of a parent corporation where the industrial establishment is owned by its subsidiary.

RESPONSE: The sale of the stock of a parent corporation results in a change of ownership not only of industrial establishments owned by that parent corporation but also of those held by any of its subsidiaries. A different result would allow for ECRA avoidance through the establishment of "shell" subsidiary corporations that never transfer an industrial establishment but are, themselves, transferred with the industrial establishment(s) that they own.

COMMENT: A comment suggested that including the transfer of shares of a corporation which results in a change of the majority interest in the owner or operator among those events which constitutes a change in ownership of the industrial establishment broadens the scope of the Act. ECRA, under the proposed rule, could be triggered based upon relatively minor changes in the ownership of stock despite the fact the use of the site or operator or corporate owner of the establishment would not necessarily change.

RESPONSE: The sale of stock resulting in a change in the person or persons holding the majority interest of the corporate owner of the industrial establishment constitutes an ECRA-applicable transaction. The sale of relatively minor changes in the ownership of stock would result in an industrial establishment being subject to ECRA where the sale results in a change in identity of the majority interest holder. For example, where the corporate owner of an industrial establishment is held by shareholder A who holds 45 percent and shareholder B who holds 55 percent, B's transfer to A of six percent of issued and outstanding stock would subject the corporation to the Act and this chapter. On the other hand, if A held 5 percent and B held 95 percent, B's transfer of 40 percent to A would not, by itself, subject the corporation to the Act and this chapter.

COMMENT: One comment stated that N.J.A.C. 7:26B-1.5(b)5 is vague in utilizing the term "any real property of an industrial establishment".

RESPONSE: The Department retains this term because it is clear that "any real property of an industrial establishment" means the land, and anything permanently affixed thereto, upon which the industrial establishment is situated or, in the case of an activity, upon which the activity occurs.

COMMENT: A comment suggested that N.J.A.C. 7:26B-1.5(b)4 is unnecessary since the sale of an industrial establishment is covered elsewhere in this chapter.

RESPONSE: Since an industrial establishment may be a place of business (that is, piece of realty) or an activity, or both, this provision and N.J.A.C. 7:26B-1.5(b)5 are included to make it clear that the transfer of title to either or both would be ECRA subject transactions.

COMMENT: A comment suggested that the inclusion of a "sale or transfer of stock which results in a change in the person holding the majority interest" at N.J.A.C. 7:26B-1.5(b)2 is an unreasonable extension of the statutory definition of a covered transaction.

RESPONSE: The Act provides that transactions resulting in any change of ownership constitute "closing, terminating or transferring operations" and includes, without limitation, a number of examples. The "sale or transfer of stock which results in a change in the person or persons holding the majority interest" is a change of ownership since the new majority interest shareholder or shareholders effectively own the industrial establishment. Therefore, inclusion of the event described at N.J.A.C. 7:26B-1.5(b)2 is not unreasonable.

COMMENT: A comment suggested that the "sale or transfer of title to an industrial establishment" provided at N.J.A.C. 7:26B-1.5(b)4 should be qualified to state that where only real property is being sold or transferred, some or all of which is leased to an entity which is an industrial establishment, the transaction should not be interpreted to trigger ECRA if there is no independent change in the ownership or operation of the lessee-industrial establishment. To do otherwise is unfair and unreasonable, because the owner of the underlying real property leased to an industrial establishment is not the owner of, but, rather, the lessor to, the industrial establishment.

RESPONSE: The "closing, terminating or transferring of operations" includes both cessations of operations and changes in ownership of the industrial establishment. The industrial establishment is defined as any activity or place of business. The Legislature did not exempt the owner of the real property upon which the industrial establishment is located because he should bear liability for contamination located or occurring on his real property (rather than the buyer) and because the time of such transfer is the rational time for subjecting the property to the Act and this chapter. In fact, N.J.S.A. 13:1K-8 specifically includes the "conveyance of real property" as a change in ownership subjecting the owner thereof to the provisions of the Act. Therefore, the sale or transfer of the real property of an industrial establishment is treated as a change in ownership of the industrial establishment subject to ECRA.

COMMENT: A comment suggested that N.J.A.C. 7:26B-1.5(b)6 should be clarified to state that a corporate dissolution constitutes the closing, terminating or transferring operations only if the dissolution does not constitute a corporate reorganization substantially affecting ownership. Where a subsidiary operation may be two or three layers removed from the parent, dissolution of an intermediary corporation moves the subsidiary closer to the parent and should be considered a corporate reorganization not substantially affecting ownership and thus not subject to ECRA.

RESPONSE: A dissolution in the chain of ownership may result in a change of principals affecting, directly or indirectly, the environmental concerns that attach to the relevant industrial operations. The Depart-

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ment must have the ability in such cases to require that the owner or operator of the industrial establishment comply with the Act and this chapter.

COMMENT: A comment suggested N.J.A.C. 7:26B-1.5(b)7 should be modified to reflect the treatment of bankruptcies under Assembly Bill No. 4151, introduced on May 21, 1987, which would and supplement ECRA.

RESPONSE: The Department has changed this provision to specifically reference the applicable bankruptcy and insolvency proceedings that are triggered at N.J.A.C. 7:26B-1.6(a)13 and 14. (N.J.A.C. 7:26B-1.6(a)13 and 14 reflect the treatment of bankruptcy and insolvency proceedings provided in Assembly Bill No. 4151 as passed in the General Assembly on September 14, 1987).

COMMENT: Comments were received suggesting that the Department make it clear at N.J.A.C. 7:26B-1.5 and 1.6 that limited conveyances are exempt from ECRA under the provisions at N.J.A.C. 7:26B-13.

RESPONSE: Limited conveyances are the sales of small portions of industrial establishments. Because they are sales, they are subject to ECRA and not exempt. N.J.A.C. 7:26B-13 merely allows owners to sell small portions of property without going through the full ECRA process for the entire facility. Therefore, the inclusion of language exempting limited conveyances from ECRA would be inappropriate.

COMMENT: A comment on N.J.A.C. 7:26B-1.5(b)8 and 1.6(a)10 suggested that the responsibility for ECRA compliance in condemnation proceedings be placed on the party seeking condemnation and not on the party whose property is being condemned. The suggestion was based upon the concept that the innocent party should not have the expense of ECRA compliance forced upon it through the condemnation proceeding.

RESPONSE: ECRA specifically requires compliance by the owner or operator of the industrial establishment. Therefore, in condemnation proceedings it is the responsibility of the owner or operator of the industrial establishment to comply with ECRA and obtain a negative declaration or a cleanup plan approval to properly remediate the site. This approach is proper since it is the responsibility of the owner or operator of the industrial establishment to remediate any contamination that may be present at the site regardless of whether ECRA is triggered or not. It is unlikely that the condemnor caused or maintained contamination at the site. The Act intended private party remediation of the site. It would be inappropriate for public moneys expended for acquisition of property in the public interest to also be used for site remediation; that is the responsibility of the condemnee.

COMMENT: Comments suggested that the Department should eliminate the reference to "landlord or tenant" or use the term "owner or operator of an industrial establishment" at N.J.A.C. 7:26B-1.5(b)13 rather than the term "landlord or tenant" which is unauthorized by the statute and which makes the provision overly broad concerning the sale or transfer or termination of the lease which results in a cessation of operations.

RESPONSE: The term "landlord or tenant" has been deleted because it may inappropriately limit the effect of this paragraph.

COMMENT: Several comments challenged the applicability of ECRA to any shutdown for health or safety reasons whenever the Department determines that a health or safety hazard exists due to a significant release of hazardous substances and wastes. The comments stated that the Legislature had intended that such coverage be provided by the Spill Compensation and Control Act (N.J.S.A. 58:10-23.11 et seq.), that N.J.A.C. 7:26B-1.5(b)14 is vague and, that read broadly, the provision could require the triggering of ECRA whenever a shutdown occurs simultaneously with a release of hazardous substances and wastes.

RESPONSE: ECRA specifically states that "closing, terminating or transferring operations" includes "any other transaction or proceeding through which an industrial establishment becomes nonoperational for health or safety reasons." N.J.A.C. 7:26B-1.5(b)14 requires the owner or operator to comply with ECRA only upon a Departmental determination that the events resulting in the nonoperational status of the industrial establishment for health or safety reasons have caused significant discharges or releases. The purpose of this requirement is to authorize the Department to require an ECRA review at the time when a catastrophe has occurred at an industrial establishment having health or safety implications to the employees or residents of the immediate area or impairment of the environment. For example, the Department may require an ECRA review if a cataclysmic fire releases a significant amount of hazardous substances and wastes potentially causing a health or safety problem to the employees or residents of the area or groundwater contamination.

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COMMENT: Comments suggested that N.J.A.C. 7:26B-1.5(b)14 should be amended to state that the closure for health or safety reasons should be for a period of time, (for example, one month, two years), in order to trigger ECRA. To force an owner or tenant through ECRA at the time of a catastrophe is to hit him when he could least afford it.

RESPONSE: N.J.A.C. 7:26B-1.5(b)14 is designed to require an ECRA review at the time an industrial establishment becomes non-operational for health and safety reasons due to an incident causing a significant discharge or release of hazardous substances and wastes. An arbitrary period of non-operational status is not relevant to a determination of applicability of the Act and this chapter to the referenced incident(s) or event(s). The relevant criteria are both the non-operational status for health and safety reasons and the significant discharge or releases of hazardous substances and wastes. Financial well-being is not a statutory criteria to the applicability of ECRA to a specific event occurring at an industrial establishment. In this specific case, compliance with the Act and this chapter is essential to ensure that the public health, safety, and the environment are protected.

COMMENT: Numerous comments were received on N.J.A.C. 7:26B-1.5(b)15iii stating that the provision brings events into the scope of ECRA that were unintended by the Act. Labor problems and/or management decisions which result in a "significant interruption in the continued employment relationship between the pre-cessation work force and the industrial establishment, but that result in a cessation of operations for less than a two-year period, do not constitute "closing, terminating or transferring operations" of an industrial establishment as those terms are defined by the Act. It was suggested, therefore, that this section be deleted.

RESPONSE: The Act states that "closing, terminating, or transferring operations" includes any temporary cessation for a period of no less than two years. N.J.A.C. 7:26B-1.5(b)15 clarifies this phrase. The Department's concern is that an owner will cease operations at an industrial establishment but allege that since the cessation is only a temporary cessation the owner has no ECRA obligation. At the end of the two year time period, the owner would concede that the cessation is no longer temporary. The result would be a two-year delay in remediating potential environmental problems that could adversely impact the public health or the environment. This is unacceptable and, therefore, the Department has provided criteria at N.J.A.C. 7:26B-1.8(a)7 to aid in the determination of the occurrence of a "temporary cessation." Clearly, if the employer severs all relationships with employees, the Department would view this as a significant interruption in the continued employment relationship and therefore would consider it to be a permanent cessation. A strike or temporary layoff of no more than 90 percent of those employed at the industrial establishment would not be considered to be a significant interruption and therefore there would not be an ECRA trigger. See N.J.A.C. 7:26B-1.5(b)16 and 7:26B-1.8(a)7.

COMMENT: A comment on N.J.A.C. 7:26B-1.5(b)16 suggested inserting "a controlling interest in the stock or assets of an industrial establishment or in real property housing" before the words "an industrial establishment."

RESPONSE: This applicability criteria is designated to require compliance with ECRA for any transfer of an industrial establishment to a trust unless the beneficiary is a member of the same family as to the grantor. A transfer of the "majority interest" or "controlling interest in the stock or assets" of the industrial establishment is an applicable event implied in the term "transfer."

COMMENT: A comment suggested that N.J.A.C. 7:26B-1.5(b)16 should be revised to delete the exemption for intra-family transfers. The comment suggested that this was not in line with the legislative intent and the irrelevant considerations of closely held property transfers must not preclude implementation of the Act's salutary public health remedial measures.

RESPONSE: The Department elects to continue to hold that transfers of an industrial establishment to a trust where both grantor and beneficiary are identical or members of the same family are not ECRA-applicable transactions. Although no explicit language exists in the Act, the Department has inferred from the list of transactions set forth at N.J.S.A. 13:1K-8b that the intended transactions subject to the Act are arm's length business transactions, not intra-family transactions.

COMMENT: One comment stated that the listing of execution of a 99-year lease as an ECRA-applicable transaction at N.J.A.C. 7:26B-1.5(b)17 is unauthorized by the Act and would apply to many situations not meant to be covered by the Act.

RESPONSE: Case law supports the position that the execution of a lease for a period of 99 years or longer is equivalent to a change in ownership as the lessee is usually in possession of all the significant incidents of actual ownership. (See, for example, *Lake End Corp. v. Rockaway Twp.*, 185 N.J. Super. 248 (App. Div. 1982) and *Ocean Grove Camp Meeting v. Reeves*, 79 N.J.L. 334 (Sup. Ct. 1910), aff'd 80 N.J.L. 464 (E.&A. 1910).

COMMENT: A comment suggested that the phrase "execution of a lease for a period of 99 years or longer" at N.J.A.C. 7:26B-1.5(b)17 is unclear since it bears no reference to the owner or operator of an industrial establishment.

RESPONSE: This phrase is used here only to identify an applicable transaction subject to the Act. N.J.A.C. 7:26B-1.6(a)1 is modified to include the execution of such leases, since they are equivalent to changes in ownership, and to identify the triggering event therefore.

COMMENT: One comment stated that the required compliance with ECRA at N.J.A.C. 7:26B-1.5(c) by an industrial establishment which ceased operations prior to December 31, 1983 and where there remain hazardous substances or wastes is not authorized by the Act and is therefore unlawful.

RESPONSE: An industrial establishment cannot be construed to have ceased operations before December 31, 1983 unless it has ceased all of its activities involving hazardous substances and wastes including storage. An industrial establishment cannot be considered to have ceased operations if tanks filled with hazardous substances or 55-gallon drums storing hazardous substances and hazardous wastes remain at the facility.

COMMENT: A comment suggested that in reference to N.J.A.C. 7:26B-1.5(c) the Department is taking an inconsistent position on the "closing, terminating or transferring operations." According to N.J.A.C. 7:26B-1.5(b)15, "closing, terminating or transferring operations" occurs when substantially all operations have ceased, resulting in a significant interruption in employment relationships and not when all storage ceases. If, as the Department proposed, "closing terminating or transferring operations" occurs at that point, the criteria should be applied uniformly. It would be inconsistent, arbitrary and capricious for the Department to assert that a facility is not considered "closed" for ECRA purposes where all employment ended before December 31, 1983, but it would be considered "closed" for ECRA purposes if all employment ended today.

RESPONSE: These provisions are not inconsistent given the reasons which support them. With respect to full cessation of employment on or before December 31, 1983, where hazardous substances and wastes remain on the site, it would run counter to the legislative intent to allow a post-December 31, 1983 transfer to occur without first requiring an environmental evaluation and cleanup where indicated in compliance with the Act and this chapter. With respect to a post-December 31, 1983 cessation, allowing an industrial establishment to delay or avoid compliance with the Act and this chapter merely by maintaining a skeleton crew of employees, minimal area of operations, or minimal output would also be contrary to legislative intent.

COMMENT: A comment on N.J.A.C. 7:26B-1.5(c) questioned whether the ongoing storage requirements intended to include spills or only storage associated with some type of container or vessel.

RESPONSE: The ongoing storage criteria include only storage associated with containers, tanks, surface impoundments, or any other structure, vessel, contrivance or unit as specified at N.J.A.C. 7:26B-1.5(c).

COMMENT: A comment on N.J.A.C. 7:26B-1.5(c) suggested that it is unrealistic to determine that an industrial establishment is subjected to ECRA in a situation where the facility ceased operations prior to December 31, 1983 but remain under the same ownership and control and continues to store hazardous substances or wastes if the industrial establishment closes or terminates operations. The comment suggested that the only trigger should be the transferring of ownership of the industrial establishment.

RESPONSE: Even though an industrial establishment may have ceased some of its operations prior to December 31, 1983, the facility has not been fully closed or has had operations fully terminated if hazardous substances and wastes remain stored at that industrial establishment. Therefore, it is within the statutory intent of the Act to require compliance with ECRA when the industrial establishment closes or terminates the storage of hazardous substances and wastes at the industrial establishment on or after December 31, 1983 as well as when a transfer of ownership occurs after that date.

7:26B-1.6

COMMENT: A comment suggested that N.J.A.C. 7:26B-1.6 be revised to clarify that the requirements of this section apply only if the event

is a trigger under N.J.A.C. 7:26B-1.5. Failure to cross reference the two sections creates confusion to which section controls.

RESPONSE: N.J.A.C. 7:26B-1.5(b) lists the applicable events included in the term "closing, terminating or transferring operations." N.J.A.C. 7:26B-1.6(a) lists the actual triggers for GIS submittal in connection with the events listed at N.J.A.C. 7:26B-1.5(b).

COMMENT: A comment on N.J.A.C. 7:26B-1.6(a) suggested that the subsection be revised and narrowed to describe just those particular events which trigger the ECRA notice requirements and not include events which merely describe transactions to which ECRA is applicable. The comment cited as examples, paragraphs 8 and 9 which describe subject transactions not just triggering events.

RESPONSE: The Initial Notice trigger provisions at N.J.A.C. 7:26B-1.6(a) specify the actual events that trigger the requirement to submit the GIS and do not, in and of themselves, specify applicable transactions. The two examples cited in the comment specify the actual trigger during the proceedings specified as applicable transactions at N.J.A.C. 7:26B-1.5(b)1 and 2, respectively.

COMMENT: A number of general comments were received regarding Initial Notice triggers stating that many of the triggers were specified at inappropriate times in the transaction.

RESPONSE: It is the Department's position that the Initial Notice triggers specified in N.J.A.C. 7:26B-1.6 are appropriate for each of the enumerated events. The five-day period allowed for submittal of the Initial Notice is mandated by the Act.

COMMENT: A comment suggested that N.J.A.C. 7:26B-1.6 should state generally that time periods of less than seven days refer only to business days, that the day of event from which the days are counted is not included, and that "submit" means placing in the mail rather than receipt by the Department.

RESPONSE: The "five days" referred to in N.J.A.C. 7:26B-1.6 is five calendar days. The day of the event from which the days are counted is not included when calculating the time frame. (See N.J.A.C. 1:30-1.) "Submit" refers to presenting to the Department rather than to a mail or delivery service and, therefore, connotes receipt by the Department.

COMMENT: A comment on N.J.A.C. 7:26B-1.6(a)4 stated that the paragraph does not specify the particular kind of notice referenced and pointed out that frequently there is no such notice.

RESPONSE: Any notice by the owner or operator of the sale, transfer or termination of any lease of an industrial establishment would constitute the Initial Notice trigger specified at N.J.A.C. 7:26B-1.6(a)4.

COMMENT: A comment suggested that where a facility sells property that is used in a trade or business prior to replacing the property with updated equipment, the statute should not be triggered regardless of whether the sale is a transfer "not in the ordinary course of business."

RESPONSE: Pursuant to N.J.A.C. 7:26B-1.6(a)9, ECRA compliance would not be required in the above example if there were no other transaction occurring that constitutes a change in ownership or operations at the industrial establishment pursuant to the Act and this chapter.

COMMENT: A comment suggested that an opportunity for a hearing upon "receipt of the determination by the Department that an incident or event, or series of incidents or events, has caused significant discharges or releases of hazardous substances and wastes" be provided. The comment also suggested that this provision (N.J.A.C. 7:26B-1.6(a)11) is not authorized by the statute, is overly broad, and unlawful.

RESPONSE: This provision at N.J.A.C. 7:26B-1.6(a)11 is not unlawful since the Act clearly includes "any other transaction or proceeding through which an industrial establishment becomes nonoperational for health or safety reasons" under the term "closing, terminating or transferring operations." The release or discharge of hazardous substances and wastes can, in many instances, be an incident or event resulting in an industrial establishment becoming nonoperational for health or safety reasons. This determination will be made by the Department based upon all relevant and available information including news accounts of the incident and comments by local health officials and employees. Opportunity for an administrative hearing in connection with the Department's determination is not provided by the Act and would likely result in delay in implementation of the Act that would pose further threat to the health and safety to the State's citizenry and environment.

COMMENT: A comment suggested that N.J.A.C. 7:26B-1.6(a)4 be changed so that the public notice of closure be utilized as the triggering event instead of the notice of a lease termination.

RESPONSE: The notice of lease termination may be the only "public" notice of closure and, therefore, submittal of the GIS shall be required within five days thereof.

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COMMENT: One comment stated that the sale of stock in the form of statutory merger or consolidation should not be covered by ECRA.

RESPONSE: The "sale of stock in the form of a statutory merger or consolidation" is a change of ownership expressly covered by the Act at N.J.S.A. 13:1K-8b.

COMMENT: A comment on N.J.A.C. 7:26B-1.6(a)9 requested clarification of the meaning of "a controlling interest of any non-corporate business entity."

RESPONSE: A non-corporate business entity is generally a sole proprietorship or a partnership. In the case of a sole proprietorship, the conveyance of a controlling interest would be any change greater than 50 percent of that held by the sole proprietor. For partnership, the Department has clarified the criteria surrounding a conveyance subject to ECRA at N.J.A.C. 7:26B-1.5(a)10.

COMMENT: A comment stated that the Act does not include as a closure, transfer or termination of operations of an industrial establishment condemnation proceedings, and, therefore, the proposed rules which includes condemnation proceedings is outside the scope of ECRA.

RESPONSE: N.J.S.A. 13:1K-8b provides that "closing, terminating or transferring operations" includes a "change in ownership." The provision continues by providing a non-inclusive list of transactions encompassed by the term "change in ownership." Although not expressly included therein, condemnation must be contemplated by the statutory language used at N.J.S.A. 13:1K-8b and the legislative findings and declarations section, N.J.S.A. 13:1K-7, because it results in a change in ownership.

COMMENT: A comment suggested that in the event the State initiates condemnation proceedings of a contaminated site, the owner/operator of the site should be responsible for cleaning up only the portion being condemned and the cost of the cleanup should be incurred by the State rather than by the owner/operator.

RESPONSE: The suggestion runs counter to the intent of ECRA that private responsible parties would be required to clean their site prior to a transfer of ownership rather than have the public pay for environmental problems incident to private ownership of the industrial establishment. It is inappropriate to segment a cleanup of a portion of an industrial establishment subject to condemnation due to the technical difficulties inherent in designing a segmented remediation scheme.

COMMENT: A comment suggested revising N.J.A.C. 7:26B-1.6(a)10 to read as follows: "receipt by an owner or operator of an offer letter to purchase issued by a condemning authority."

RESPONSE: The Department has amended this provision accordingly.

COMMENT: A comment was received concerning N.J.A.C. 7:26B-1.6(a)10 that it is unreasonable to force an industrial establishment to undergo ECRA several times until a governmental entity makes a fair offer since the negative declaration is only valid for 60 days.

RESPONSE: Although the offer letter from the condemning authority triggers ECRA, the negative declaration would be issued approximately simultaneously or shortly before the taking of title by the condemning authority.

COMMENT: A comment suggested that N.J.A.C. 7:26-1.6(a)4 is unauthorized by the Act.

RESPONSE: The Legislative intent of ECRA is to require the owner or operator of an industrial establishment to submit a negative declaration or to develop and submit a cleanup plan upon the change in ownership or operations of an industrial establishment. The sale, transfer, or termination of a lease is necessarily an element of "closing, terminating, or transferring operations" as defined since this is a cessation of operations at that location by the operator (tenant).

COMMENT: A comment suggested that N.J.A.C. 7:26B-1.6(a)9 is generally not authorized by the Act. This is especially true with respect to noncorporate businesses.

RESPONSE: Each of the transactions mentioned in N.J.A.C. 7:26B-1.6(a)9 constitutes a "closing, terminating or transferring operations." N.J.S.A. 13:1K-8b provides a nonexclusive list of "changes in ownership" that, by implication, include the events listed at N.J.A.C. 7:26-1.6(a)9.

COMMENT: A comment suggested that N.J.A.C. 7:26B-1.6(a)7 provide that, for the tendering of the majority of stock of a corporation, a more suitable trigger for GIS submittal would be the acceptance of a majority interest by the party making the tender offer.

RESPONSE: It is appropriate that the shareholders' performance in response to the offer to purchase shares constitutes the Initial Notice trigger in a tender offer. At this point in the transaction, the purchaser's offer has been accepted and there is sufficient certainty to require GIS submittal. Therefore, no change has been made to N.J.A.C. 7:26B-1.6(a)7.

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COMMENT: Several comments suggested that N.J.A.C. 7:26-1.6(a)10 be revised since an offer letter pursuant to a condemnation proceeding does not necessarily result in a transfer and many times the offer letter results in a voluntary transaction rather than the completion of proceedings in condemnation.

RESPONSE: The offer letter is the only reasonable trigger occurring sufficiently in advance of the actual vesting of title in the public authority, whether pursuant to a voluntary transfer or pursuant to condemnation proceedings, to allow for compliance with the Act. Title vests in the condemnor upon service upon the condemnee of a copy of the declaration of taking and notice of filing thereof and of the deposit of the estimated compensation with the clerk of the court.

COMMENT: Comments suggested that the trigger proposed in N.J.A.C. 7:26B-1.6(a)11 is inappropriate and without statutory support.

RESPONSE: N.J.A.C. 7:26B-1.6(a)11 has been changed to make it clear that the Initial Notice trigger identified is associated with the applicable incident(s) or event(s) at N.J.A.C. 7:26B-1.5(b)14. The Department has clarified its intent in the adoption at N.J.A.C. 7:26B-1.6(a)11 that such trigger would occur only where the industrial establishment has become non-operational for health and safety reasons and the Department has first determined that the incident has caused a significant discharge as described at N.J.A.C. 7:26B-1.5(b)14. This incident(s) or event(s) constitutes a "closing, terminating or transferring operations" as authorized at N.J.S.A. 13:1K-8b.

COMMENT: A comment was received concerning N.J.A.C. 7:26-1.6(a)11 that a unilateral determination of the triggering of ECRA by the Department when there has been a significant discharge or release of hazardous substances or wastes presents unnecessary overlap with the provisions of the Spill Compensation and Control Act.

RESPONSE: There is no unnecessary overlap between this provision and the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq., since it may be appropriate to conduct a review of the entire industrial establishment pursuant to ECRA after there has been a significant discharge or release of hazardous substances and wastes.

7:26B-1.7

COMMENT: One comment suggested that the Department has no authority to hold the transferee liable at N.J.A.C. 7:26B-1.7(b) for ECRA compliance in a hostile takeover scenario.

RESPONSE: History has shown that in cases of hostile takeovers, the transferee, after takeover, dictates action or inaction on the part of the corporation which was taken over and absorbed by the transferee. The transferor ceases to exist as an independent entity and the transferee assumes all of its obligation. Therefore, the person to reasonably look to ECRA compliance is that corporation which now controls the object of the hostile takeover. Consequently, the only way in these circumstances to approach ECRA compliance is that corporation which now controls the object of the hostile takeover. Consequently, the only way in these circumstances to approach ECRA applicability and achieve compliance is to require that the corporation initiating the hostile takeover comply with all ECRA requirements.

COMMENT: The imposition of joint and several liability upon the owner and the operator of an industrial establishment at N.J.A.C. 7:26B-1.7(a), 3.2(e), and 9.2(b) where only one, but not the other, has triggered ECRA compliance is unauthorized by the Act.

RESPONSE: Although the Act does not expressly provide for joint and several liability, nowhere does it impose liability on the owner or operator, but not both, as a result of the actions of the other. In order that compliance proceed upon the closing, terminating or transferring operations without the delay incident to a determination of liability, it is essential that liability be joint and several. Any right to contribution from the noncomplying party is not impaired by these provisions.

COMMENT: Several comments indicated that the Department was overstepping its authority by stating at N.J.A.C. 7:26B-1.7(a) that both the owner and operator of an industrial establishment are strictly liable, jointly and severally, for compliance with ECRA. One comment stated that in the case of leased property, where the landlord has no control at all over the day-to-day operations of an industrial establishment, imposing liability on the landlord goes far beyond the Department's statutory authority.

RESPONSE: Case law has affirmed the Department's position that landlords are responsible for the actions of their tenants. See *State, Dept. of Environmental Protection v. Ventron Corp.*, 94 N.J. 473, 502 (1983). The landlords have been held strictly liable, jointly and severally with their tenants, for compliance with environmental laws. Therefore, the Department retains the proposed language at N.J.A.C. 7:26B-1.7.

COMMENT: A comment suggested that the standards at N.J.A.C. 7:26B-1.7(b) for determining when a tender offer is hostile and when a tender offer loses its hostile character are unclear.

RESPONSE: The Department will review friendly and hostile tender offers on a case-by-case basis using factors such as the public statements of the parties during the proceedings and materials submitted by the parties to determine if the tender offer is hostile. Where a seller (the owner or operator subject to the tender offer) is working with the Department through the tender offer period, then the Department would continue to view the take over as friendly. If during negotiations with the Department the seller is advised by the purchaser to discontinue any contact with the Department, the Department might determine that the tender offer has changed from friendly to hostile and would look to the acquiring corporation for ECRA compliance.

COMMENT: A comment suggested that the Department should add a new provision at N.J.A.C. 7:26B-1.7(c) to the proposed new rules to read as follows: "(c) The provisions of N.J.A.C. 7:26B-1.7, 3.2(d), 3.2(e), and 5.5(d) shall not be read to affect any claim that any person other than the Department may have against any other person other than the Department with respect to any cost or obligations arising under the Act" in order to make it clear that the Department has no interest in affecting rights between private parties one of which has "primary responsibility" for compliance.

RESPONSE: The use of the term "primary responsibility" has been deleted from N.J.A.C. 7:26B-3.2(d) and (e) (adopted at N.J.A.C. 7:26B-3.3). The requirements imposed in the referenced provisions should not, and are not intended to, impair the rights of one private party against another private party. Therefore, the requested provision is unnecessary. 7:26B-1.8

COMMENT: It is inappropriate to list exemptions in N.J.A.C. 7:26B-1.8 since they are clearly not covered by the Act.

RESPONSE: The Department has provided the list of transactions which are not subject to the Act to provide further clarification with respect to the applicability of ECRA. Based upon the content of numerous requests for letters of nonapplicability, it appears that this listing is warranted.

COMMENT: A comment was made suggesting that those sites listed on the National Priorities List should also be exempt from ECRA.

RESPONSE: The commenter has not indicated any express or implied legislative intent to exclude these sites from the requirements of ECRA and, therefore, no such exemption has been provided.

COMMENT: One comment stated that the provision at N.J.A.C. 7:26B-1.8(a) that only those portions of solid or hazardous waste facilities that are "in compliance with" certain plans are exempt from ECRA is contrary to the express statutory language.

RESPONSE: The Department agrees and has deleted the term "in compliance with" from this exemption provision.

COMMENT: A comment suggested that the sale or disposition of assets by a secured party pursuant to N.J.S.A. 12A:9-504 (Section 9-504 of the Uniform Commercial Code) should be listed as a transaction not subject to ECRA at N.J.A.C. 7:26B-1.8.

RESPONSE: The Department disagrees, as there is neither an environmental basis nor express or implied language in the Act to exclude such a transaction. However, since the secured party disposing of the subject assets does not have title to these assets, he or she would not be subject to the Act or this chapter. The party in default would be subject to the Act. A similar result is found where the secured property is realty and the mortgagor defaults on its obligation. The mortgagor, not the mortgagee instituting a foreclosure action, is the party which must comply with ECRA.

COMMENT: A comment suggested that N.J.A.C. 7:26B-1.8(a) be revised to provide that the abandonment of any assets of an industrial establishment by a Trustee in Bankruptcy pursuant to section 554 of the Federal Bankruptcy code (11 U.S.C. 554) is not subject to the Act.

RESPONSE: Inclusion of such a provision is unwarranted. To the extent an action in bankruptcy is included at N.J.A.C. 7:26-1.5(b)7, that action is subject to the Act. See, also, N.J.A.C. 7:26B-1.6(a)13.

COMMENT: A comment requested the exemption of facilities demonstrating compliance with all appropriate permits, closure and post-closure plans, and other rules of the Department for facilities currently undergoing remediation pursuant to the requirements of other environmental programs and statutes.

RESPONSE: Only those portions of solid waste or hazardous waste facilities subject to operational closure or post-closure maintenance requirements as specified at N.J.A.C. 7:26B-1.8(a)1 are not considered industrial establishments for the purpose of the Act and this chapter.

COMMENT: A comment suggested that N.J.S.A. 13:1K-8f does not require a "permit" or "approval" to trigger the exemption of ECRA-regulated facilities. Therefore, the Department should remove the phrase "permit or closure plan approval issued under the following" from N.J.A.C. 7:26B-1.8(a)1.

RESPONSE: The referenced phrase has been removed at N.J.A.C. 7:26B-1.8(a)1.

COMMENT: N.J.A.C. 7:26B-1.8(a)2 should be revised to include auxiliary establishments as not subject to ECRA.

RESPONSE: Central administrative offices were determined to be not subject to ECRA by Department policy in November, 1985, because the Department had neither the resources nor the environmental need to review every central administrative office that was subject to a sale if the only hazardous substance used by the central administrative office was an underground tank similar to the ones used by residential property owners. In contrast, auxiliary establishments may be engaged in operations involving the generation, manufacture, refining, transportation, treatment, storage, handling, or disposal of hazardous substances and wastes in addition to their use of underground storage tanks. The Department will continue to review auxiliary establishments if they have had involvement with hazardous substances or wastes.

COMMENT: The central administrative office provision at N.J.A.C. 7:26B-1.8(a)2 should be expanded. An administrative office located on a separate tax lot and block should be excluded from ECRA regardless of the date of its establishment, regardless of its being central to the operations, and regardless of its functions being "performed centrally and not producing nor providing any services for the general public, other business entities, or the government."

RESPONSE: The Department agrees with most of these suggestions and has amended the proposal at N.J.A.C. 7:26B-1.8(a)2 accordingly. The Department does not agree that a central administrative office should be exempt where separate lots and blocks are or have been established after December 31, 1983 at the site of an existing industrial establishment, since this would allow a transfer of a portion of an existing industrial establishment without any ECRA review.

COMMENT: One comment suggested that a definition of agricultural commodities be included to clarify N.J.A.C. 7:26b-1.8(a)3.

RESPONSE: The Department agrees and has added a definition for this term at N.J.A.C. 7:26B-1.3.

COMMENT: A comment suggested that any corporate decisions which affect the corporate structure rather than actual use or ownership of an industrial establishment should not trigger application of the statute.

RESPONSE: N.J.A.C. 7:26B-1.8(a)4 makes it clear that a "corporate reorganization not substantially affecting the ownership or control of the industrial establishment" is not subject to the Act or this chapter. The term is defined at N.J.A.C. 7:26B-1.3. It should be noted that those corporate reorganizations that do effect changes in the entities controlling the industrial establishment do implicate the Act and this chapter.

COMMENT: A comment suggested that N.J.A.C. 7:26B-1.8(a)6 should be clarified regarding the term "the ordinary course of business."

RESPONSE: The term "in the ordinary course of business" generally means any matter which transpires as a matter of daily custom in business. It is not apparent that further definition is necessary.

COMMENT: A comment stated that N.J.A.C. 7:26B-1.8(a)6 was unclear and that it presumably referred to a sale of inventory or to non-bulk sale transactions.

RESPONSE: N.J.A.C. 7:26B-1.8(a)6 does provide that the sale of inventory or non-bulk transactions are not subject to this chapter.

COMMENT: A comment stated that N.J.A.C. 7:26B-1.8(a)14 should be limited in application to the operation of an industrial establishment since the effective date of ECRA.

RESPONSE: The Department has clarified this issue by adding a new provision at N.J.A.C. 7:26B-1.8(a)15. Except as specified at N.J.A.C. 7:26B-1.8(a)15, land on which there has been no operating industrial establishment on or after December 31, 1983 is not subject to ECRA.

COMMENT: One comment stated that N.J.A.C. 7:26B-1.8(a)14 covering "virgin, undeveloped, and unused land" is ultra vires since it does not exempt lands that are contiguous to an industrial establishment, even though they never have been part of the operation of an industrial establishment, if they are under common ownership with the industrial establishment.

RESPONSE: Land that is contiguous to the area of operations of an industrial establishment and under the control of the same operator or owner is deemed by the Department to be part of the industrial establishment and, therefore, covered by ECRA. Virgin, undeveloped and unused

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land, as used in this provision, means land that has not been or is not part of the industrial establishment and, where it is under the control of the same owner or operator, that is not touching any part of the area of operations of the industrial establishment. The definition of "industrial establishment" at N.J.A.C. 7:26B-1.3 has been modified to clarify the issue of contiguous lands under common ownership.

COMMENT: A comment suggested that N.J.A.C. 7:26B-1.8(a)7 should be amended to read "a cessation for a period of less than two years." The rule as proposed fails to take into consideration unplanned events which might result in temporary cessations for less than two years.

RESPONSE: The word "planned" has been deleted from N.J.A.C. 7:26B-1.8(a)7 so as to broaden this provision to encompass unplanned temporary cessations, however, additional language has been added to make it clear that the provision is not to be construed in derogation of the requirements at N.J.A.C. 7:26B-1.5(b)14 as adopted.

COMMENT: Two comments recommended the deletion of the phrase "no significant interruption in the continued employment relationship between the pre-cessiation work force and the industrial establishment" in the temporary cessation provision at N.J.A.C. 7:26B-1.8(a)7 since ECRA has nothing to do with work-force employment relationships.

RESPONSE: The Department agrees that the required retention of substantially all of the pre-cessiation work force in order to be deemed a temporary closure is too limiting. N.J.A.C. 7:26B-1.8(a)7 has been revised by deleting this phrase and replacing it with three requirements indicative of a cessation that is merely temporary including the retention of at least 10 percent of the pre-cessiation work force.

COMMENT: A comment on N.J.A.C. 7:26B-1.8(b) supported the proposed list of exempt SIC subgroups, in particular the exemption for SIC number 4811, telephone communications.

RESPONSE: The Department acknowledges the comment and appreciates this support for the proposal. It should be noted that the Federal Office of Management and Budget published a revised SIC manual in 1987, which the Department received after proposal of this chapter. This revised manual contains many new SIC numbers for subgroups that were proposed to be exempt. Therefore, the Department has modified N.J.A.C. 7:26B-1.8(b) to reflect the new SIC codes in the revised manual.

COMMENT: A comment on N.J.A.C. 7:26B-1.8(a)10 noted that there are situations in which releases of a contingent or reversionary interest may result in a change of ownership and should be subject to the Act.

RESPONSE: The release of a contingent or reversionary interest generally does not result in an actual transfer of possession or use and, as such, does not constitute a "closing, terminating, or transferring operations" as contemplated by the Act.

COMMENT: A comment recommended that N.J.A.C. 7:26B-1.8(a)8 be expanded by adding the words "sublease or assignment of the lease" after the word "lease".

RESPONSE: A sublease or assignment of the lease may result in the cessation of operations of the lessee and, therefore, trigger compliance with ECRA due to a cessation of operations.

COMMENT: Comments were received requesting that a leveraged buy-out of a subsidiary corporation from its parent corporation be exempt from the ECRA review.

RESPONSE: Any transaction where there is a change in ownership of a subsidiary corporation that owns or operates an industrial establishment directly or indirectly through its subsidiaries, no matter how remote in the chain of corporate ownership, constitutes a change in ownership subjecting the transaction to the provisions of the Act and this chapter.

COMMENT: One comment recommended that N.J.A.C. 7:26B-1.8(a)14 and 1.5(b)5 be rewritten to make clear that property that is contiguous to an industrial establishment and under the same ownership as the industrial establishment but on separate tax lot and block and not an integrated part of the industrial establishment as of December 31, 1983 is not part of the industrial establishment for purposes of ECRA.

RESPONSE: The property defined in the comment is necessarily part of the industrial establishment. To exclude such contiguous property, merely because it is on a separate lot and block could result in the owner or operator transferring this parcel prior to ECRA compliance with respect to that part of the industrial establishment subject to the operations and possibly contaminated, thereby dissipating assets necessary and otherwise available for compliance with the Act.

COMMENT: A comment recommended adding the phrase "execution and delivery of any other document to secure a loan or relinquish a security interest" after the word "loan" at N.J.A.C. 7:26B-1.8(a)16 in order to exempt transfers of title used as collateral for financing.

RESPONSE: The Act carves out no specific exemption for this type of transfer of title.

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COMMENT: The exemption from the Act and this chapter at N.J.A.C. 7:26B-1.8(a)19, 1.8(a)20, and 1.8(a)24 of transfers of industrial establishments by devise or intestate succession, transfers of industrial establishments to family members, and the granting of easements or licenses to clean portions of industrial establishments is ultra vires.

RESPONSE: The Department elects to continue its existing policy to exclude these transactions. Although no explicit language exists in the Act, the list of transactions set forth at N.J.S.A. 13:1K-8b implies that the intended transactions subject to the Act were business transactions, not intrafamilial transactions. With respect to easements or licenses, these transactions do not include a change in ownership intended by the Legislature to be subject to ECRA.

COMMENT: A comment on N.J.A.C. 7:26B-1.8(c)24 suggested that the wording of the exemption indicates that a granting of an easement or licenses to a portion of an industrial establishment which has been used for the generation, etc. of hazardous substances and wastes is subject to ECRA.

RESPONSE: The granting of easements or licenses is not subject to ECRA. Neither of these events was listed at N.J.A.C. 7:26B-1.5. N.J.A.C. 7:26B-1.8(c)24 has been modified to make this determination clear.

COMMENT: A comment suggested that the exemption at N.J.A.C. 7:26B-1.8(a)21 should be deleted as it is not authorized by the Act.

RESPONSE: The transfer of an industrial establishment to a trust is an ECRA-applicable transaction. It is unnecessary to treat any subsequent transfer to a beneficiary pursuant to the terms of the trust as a transaction subject to the Act.

COMMENT: One comment asked whether transfers creating contingent or reversionary interests trigger ECRA.

RESPONSE: In the example given, ECRA is applicable against the owner of the present interest at the time of actual transfer to the holder of the future interest, that is, when the holder of the future interest is vested with possession or other form of actual control.

COMMENT: One comment suggested that N.J.A.C. 7:26B-1.8(a)20 should be expanded to include the person or his or her spouse, and their respective siblings, children, grandchildren, parents and grandparents.

RESPONSE: No reason was given for expanding the intrafamilial exemption and the Department finds no basis therefor.

COMMENT: A comment stated that N.J.A.C. 7:26B-1.8(a)21 should be revised so that a transfer to a trustee is not covered by ECRA.

RESPONSE: The transfer of an industrial establishment to a trustee is a change in legal ownership potentially resulting in a reduction of available assets held by the same legal entity that holds the industrial establishment. Therefore, this transfer will remain subject to ECRA as necessary to provide the necessary assurance of adequate remediation.

COMMENT: A comment suggested that N.J.A.C. 7:26B-1.8(a)24 be revised to include termination of an easement or license.

RESPONSE: The Department agrees and has revised this section to include both the granting and termination of an easement or license.

COMMENT: A comment stated that "mergers and consolidations in which the ultimate persons directly or indirectly owning more than 50 percent of the industrial establishment remains the same" should be exempt from ECRA.

RESPONSE: Where an industrial establishment is owned by a corporate entity that merges into another corporate entity, or where an industrial establishment owned by a corporate entity combines with another corporate entity to form a new corporate entity, there is a change in ownership of the industrial establishment that the Legislature has determined should trigger compliance with the Act and this chapter. This result is necessary as the entity that owned the industrial establishment no longer exists. Naturally, where the surviving corporation in a merger owned the industrial establishment both before and after the merger, ECRA would not be triggered unless there is another applicable event pursuant to N.J.A.C. 7:26B-1.5(b), for example, as described at N.J.A.C. 7:26B-1.5(b)2.

COMMENT: One comment stated that transfers of securities through federally regulated exchanges or markets, whether or not such transfers result in a change of the majority interest, should be exempt from ECRA.

RESPONSE: If majority interest shareholders convey their stock to another person or group, through federally regulated exchanges or markets or otherwise, a change in ownership has occurred subjecting the industrial establishment to an ECRA review. However, minority interest stock trades are not subject to an ECRA review. To the extent that this result might interfere with the pace of such subject transactions, Administrative Consent Order (ACOs) may be available as provided at N.J.A.C. 7:26B-7.1(a)2.

COMMENT: One comment stated that transfers of operations, or the underlying real estate, of an industrial establishment, for which a negative declaration or cleanup plan has been approved during the 24-month period immediately prior to the transfer should be exempt from ECRA provided that the transferor certified to the transferee that there has been no discharge of hazardous substances and wastes at the site by the transferor during that pre-transfer period or that any such discharge is identified with specificity and it is certified that such discharge has been cleaned up in accordance with procedures approved by the Department.

RESPONSE: This suggestion is unauthorized by the Act. The Act limits the negative declaration or cleanup plan approval to a specific transaction. The schedule for submittal of a negative declaration or a cleanup plan to the Department for approval is specified at N.J.S.A. 13:1K-9a(2) and 13:1K-9b(2).

COMMENT: A comment was received that "public utility electric generating stations, switching stations and substations, portions of which are being condemned", should be added to the list of operations or transactions not subject to the Act under N.J.A.C. 7:26B-1.8.

RESPONSE: It is inappropriate to exempt any industrial establishment or portion of an industrial establishment that is being condemned unless there is an environmentally sound basis therefor. The comment offered none. A condemnation is a transfer of ownership and an appropriate ECRA review should be conducted as part of that transfer.

7:26B-1.9

COMMENT: A comment on N.J.A.C. 7:26B-1.9 contends that if the rules were sufficiently precise, applicability determinations would be unnecessary. Furthermore, if there are additional areas of uncertainty, the Department should, under the Administrative Procedure Act, promulgate additional rules rather than try to continue the practice of making policy decisions on individual cases.

RESPONSE: Although this chapter addresses many of the issues regarding the applicable events that would subject an industrial establishment to ECRA, the Department recognizes that some situations will require an independent evaluation of the facts. The provisions for applicability determinations were established to address that eventuality. As experience is gained in implementing this chapter, the Department may revise various provisions in this chapter to address new, recurring specific issues.

COMMENT: A comment stated that N.J.A.C. 7:26B-1.9 is oriented solely toward the actual site and should include the transaction as well. In addition, the comment suggested that the Department does not need to enter a site for transaction applicability determinations.

RESPONSE: N.J.A.C. 7:26B-1.9(a) provides for applicability determinations only with respect to a specific site in order to discourage the submission of hypothetical requests. The applicability determination will also be based upon a specific transaction at the site. Although it will not be necessary to conduct an inspection of the site where the specific transaction is not subject to the Act, in many situations the relevant issues will be the presence or absence of hazardous substances and wastes at the facility. In these cases, it is necessary to enter and inspect the industrial establishment to determine if any hazardous substances and wastes are present.

COMMENT: A comment was received concerning N.J.A.C. 7:26B-1.9(a)2 that public authorities with a power of eminent domain should be given the ability to execute (and thereby expedite) the applicability determination form.

RESPONSE: The Department does not feel it is appropriate to grant this authority to any public agency since the essential information required for an applicability determination is more likely within the knowledge and possession of the owner or operator of the industrial establishment than the potential transferee.

COMMENT: Several comments were received requesting that the Department continue to allow applicability determinations on an anonymous basis, that is, not require submittal of a "completed, executed, and notarized applicability determination form" as specified at N.J.A.C. 7:26B-1.9(c)1.

RESPONSE: Due to its limited time and resources, the Department will no longer accept or respond to applicability determinations based on anonymous or hypothetical situations.

COMMENT: Numerous comments were received requesting that an applicant for an applicability determination be required only to submit that information requested on the Department's form that is applicable to its situation.

RESPONSE: The Department agrees with these comments and only requires applicants to submit that information necessary for the Depart-

ment to render an informed decision regarding an applicability/nonapplicability determination.

COMMENT: A general comment was received that N.J.A.C. 7:26B-1.9 should be amended to identify the submittals required of an owner confronting a recalcitrant tenant who fails to cooperate in providing information with respect to the tenant's activities.

RESPONSE: The owner must submit "a fully completed, executed, and notarized applicability determination form" as specified at N.J.A.C. 7:26B-1.9(a)1 in order to provide the Department with sufficient information upon which to make a determination. Notwithstanding omissions due to the recalcitrance of a tenant, the Department will endeavor to make an applicability determination. To the extent that critical information is lacking, a letter of nonapplicability will not issue. The Department cannot generically identify what items contained in the applicability determination form need not be addressed where recalcitrant tenants are involved.

COMMENT: A comment suggested that N.J.A.C. 7:26B-1.9 should include a requirement that the Department render a decision on nonapplicability within a specific period of time.

RESPONSE: The Department issues letters of non-applicability in a timely manner, generally taking from two to 21 days. Therefore, there is no need for a time requirement to continue the efficient issuance letters of non-applicability. The Act imposes no such requirement on the Department.

7:26B-1.10

COMMENT: A comment on N.J.A.C. 7:26B-1.10 suggested that the fees are not appropriately scaled to the size and complexity of the industrial establishment. A comment suggested that the fee should be more closely tied to acreage, square footage of the industrial establishment, the number of underground storage tanks, or the number of soil samples taken or wells dug.

RESPONSE: The fees are based on the complexity and number of documents reviewed by the Department. The criteria suggested in the comment bear little or no relationship to the department resources dedicated to their review.

COMMENT: Several comments questioned how the Department developed its new fee schedule in N.J.A.C. 7:26B-1.10 and reflected upon the excessiveness of these fees and complexity of the schedule.

RESPONSE: The Department based the new fee schedule upon the report developed by the Office of Management and Budget which completed its study of the ECRA program in November 1986. This report is available for review and may be obtained from the Department at the address given at N.J.A.C. 7:26B-1.11. The fees at N.J.A.C. 7:26B-1.10 reflect the actual costs of administering the program and are as detailed as reasonable considering the diversity and complexity of the services provided.

COMMENT: One comment was received asking whether the Department intended to assess additional fees each time additional data is submitted or whether the fee to be assessed is a one-time fee for each service provided with respect to the site.

RESPONSE: The Department intends to assess a one-time fee for each site for each service listed at N.J.A.C. 7:26B-1.10.

COMMENT: The fees for review of a proposal to test underground tanks and those for review of the tank test results are totally inconsistent with the level of effort required by the Department to conduct such review. There should be no fee to propose tank testing since it is standard requirement of the program and the fee for review of tank tests results should remain at \$50.00 per tank as provided at N.J.A.C. 7:1-4. Only if the tank fails the test and additional samples are warranted would additional fees be warranted. It was suggested that a "per sample" fee assessment was the only equitable approach. If ground water sampling is being conducted in conjunction with the NJPDES program, the fees under ECRA are not warranted because the NJPDES permit carries its own fees. Such double billing on part of the Department would be inappropriate.

RESPONSE: The fee schedule developed for N.J.A.C. 7:26B-1.10 is based upon the information developed by the State Office of Management and Budget. The fees represent the broad categories that the Department addresses. The fees are designed to support the level of effort required in each category established to the extent that such precision is administratively practicable. In the case of underground storage tanks, it is appropriate in many situations for the investigation to be conducted without requesting sampling plan approval from the Department. If contamination is found as a result of that initial investigation, then a sampling plan would be appropriate to determine the extent and degree

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of contamination. Where an investigation revealed no contamination from the underground storage tanks, the SES could be submitted without a sampling plan pursuant to N.J.A.C. 7:26B-3.2(e) if accompanied by the supporting data. In that case only the sampling data review fee would have to be submitted.

A "per sample" fee is inappropriate. Such an approach presents too great an incentive to reduce the number of samples taken in order to reduce the total fees.

If the sampling plan were to include ground water monitoring, the owner or operator would have to pay the appropriate fee therefor only where such monitoring was necessary in addition to that being conducted pursuant to the NJPDES program.

COMMENT: A comment suggested that the fees in section N.J.A.C. 7:26B-1.10 not be applied to other agencies of State government.

RESPONSE: The aforementioned Office of Management and Budget Report did not recommend such a provision. Therefore no fee exemptions are provided for other agencies of State government.

COMMENT: A comment was received concerning N.J.A.C. 7:26B-1.10(c) that the time and effort involved in reviewing a notice would seem to be identical regardless of the size of the business.

RESPONSE: The costs associated with the Initial Notice submitted by a small business are generally less than the costs to review the Initial Notice of other industrial establishments. Therefore, a reduction in the fees as provided at N.J.A.C. 7:26B-1.10(c)1, 3, and 8 is appropriate for those industrial establishments that meet the criteria of a small business.

COMMENT: A comment was received concerning N.J.A.C. 7:26B-1.10(c) that questioned what fee would be applied for the review of "precision test" results. The commenter felt that there should be a provision in the fee schedule for these reviews or specific mention should be made that the Department will conduct such reviews at no charge to the applicant. The commenter asked what fee would be imposed for the historical sampling programs and any analytical results generated as part of a pre-ECRA study of potential liability.

RESPONSE: Any sampling data submitted to the Department will be assessed the sampling data review fee specified at N.J.A.C. 7:26B-1.10(c)2. The fee applies to any of the precision test results or any sampling conducted prior to ECRA that has not previously been submitted to the Department under another regulatory program.

COMMENT: Numerous comments were made regarding the complexity and ambiguity of the definition of "small business" at N.J.A.C. 7:26B-1.10 and the propriety of a two-tier fee system based upon number of employees. Hypothetical questions on application of "small business" criteria were submitted.

RESPONSE: The Department retains its use of the definition of "small business" as used in the New Jersey Regulatory Flexibility Act (P.L. 1986, c. 169) recognizing the legislative intent in that act to minimize adverse economic effects from State regulations, to the extent practicable, on this specific class of New Jersey businesses and also finding that the costs to the program of certain ECRA services listed attributable to this specific class are, in fact, less than the costs attributable to entities not in this specific class. The individual determination as to what constitutes a "small business" will be made as each request for such treatment is submitted to the Department.

COMMENT: A comment was received concerning N.J.A.C. 7:26B-1.10(d) that there was no definition of "independently owned."

RESPONSE: The definition of "small business" provided at N.J.A.C. 7:26B-1.10(d) is taken from the New Jersey Regulatory Flexibility Act, P.L. 1986, c. 169. Its use of the term "independently owned" is not defined therein. However, the term suggests that the business is not subject to control from an outside authority. For example, a subsidiary corporation would not be deemed independently owned.

COMMENT: A comment was made regarding the diminishing effect of any proposed small business reduction in fees with the addition of many new fees.

RESPONSE: The Initial Notice, negative declaration, and limited conveyance review fees for small businesses were reduced because frequently there is less for the Department to review in the case of a small business and, therefore, the costs of provisions of these services are less. The administrative costs of review of contaminated industrial establishments show no tendency to be consistently less in the case of small businesses and, therefore, no reduction in these fees is provided for this class of owners or operators.

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7:26B-1.11

COMMENT: A comment was received questioning the availability of the new ECRA forms for review and whether the Department will accept forms generated outside of the Department.

RESPONSE: In order to obtain the needed information, speed the review process, and keep fees reasonable, the Department will only accept submittals on forms made available by the Department as specified at N.J.A.C. 7:26B-1.11. The Department expects to make these forms available by the effective date of this adoption.

7:26B-1.12

COMMENT: A comment suggested that N.J.A.C. 7:26B-1.12 goes beyond its statutory authority by requiring certain parties to allow the Department to take samples from the site even where these parties are merely requesting a letter of nonapplicability. The provisions should be amended by inserting the phrase "as necessary to verify the accuracy and completeness of the submission" after the word "allow."

RESPONSE: N.J.A.C. 7:26B-1.12(a), as changed in the adoption, requires the person making any submission to the Department to expressly consent in each submission to entry by the Department to inspect the premises, take samples therefrom, etc. However, it would be inappropriate for this chapter to derogate from the statutorily granted authority to enter, inspect, and take samples from any place as provided at N.J.S.A. 13:1D-9d by amending the provisions as requested.

COMMENT: A comment suggested that the entry and inspection of an industrial establishment provided for at N.J.A.C. 7:26B-1.12 should be upon reasonable notice and preferably at a mutually agreed upon time so as not to unnecessarily disrupt business operations.

RESPONSE: The Department will attempt to schedule a site inspection at a mutually agreed upon time after providing reasonable notice to the owner or operator. However, the Department will not, in this chapter, derogate from its broad right to enter, inspect, and take samples as granted at N.J.S.A. 13:1D-9d.

COMMENT: A comment suggested that N.J.A.C. 7:26B-1.12 presents a problem because it places an obligation to assure access on parties who may not have control of the site. The proposed new rule should provide a right of access to both the Department and to any party undertaking ECRA compliance rather than having them rely upon grants of rights of entry for an inspection.

RESPONSE: N.J.A.C. 7:26B-1.12 specifies the responsibilities of those entities that have to comply with ECRA. It is inappropriate to impose requirements on third parties. The right of access by a former owner or operator should be obtained in a separate agreement with the new owner or operator.

COMMENT: A comment suggested that the right to enter and inspect provided at N.J.A.C. 7:26B-1.12(a) should be limited to areas and records deemed necessary for the purposes of the Act and should also be limited to reasonable business hours.

RESPONSE: The Department's inspections under ECRA have been and will generally continue to be limited to the areas necessary for compliance with the Act and be conducted during normal business hours. However, because circumstances may compel deviation from these procedures this chapter will not impair the power granted to the Department at N.J.S.A. 13:1D-9d.

COMMENT: Comments suggested that there should be a provision at N.J.A.C. 7:26B-1.12(c) that the Department must give sufficient notice in order that representatives be coordinated and available and that authorized agents and representatives should be among those identified therein.

RESPONSE: The standard operating procedure of the Department is to schedule the inspections at mutually convenient times with the applicant so that their representatives can be available. Since it is unnecessary for the authorized agent to be present during the inspection, that is, his or her role under this chapter is not to aid the Department during its inspection, the list of parties at N.J.A.C. 7:26B-1.12(c) remains unchanged.

COMMENT: A comment suggested that N.J.A.C. 7:26B-1.12 should require the Department to schedule appointments for inspections of an industrial establishment so that the appropriate technical employees can be made available as required at N.J.A.C. 7:26B-1.12(c).

RESPONSE: The Department, to the maximum extent possible, will schedule appointments for inspections so that these technical employees can be made available. However, in certain cases, such as inspecting a site to determine whether hazardous substances and wastes are used in the operation by those people who are requesting letters of nonapplicability, the Department may inspect on an unscheduled basis even though

these technical employees cannot be available. To limit the Department's ability to conduct unscheduled inspections would risk allowing persons who request letters of nonapplicability based on their not using hazardous substances and wastes to remove these materials from the building prior to the scheduled inspection in order to circumvent compliance with the Act and this chapter.

COMMENT: One comment stated that N.J.A.C. 7:26B-1.12(c) inappropriately requires specific individuals to be available at any time and at significant expense to the applicant.

RESPONSE: The listed individuals must be present during the site inspection to provide guidance and respond to essential questions during the inspection. To the extent practicable, the Department will endeavor to provide advance notice of its inspection.

COMMENT: A comment suggested that N.J.A.C. 7:26B-1.12(b)1 be clarified to state that the Department's entry is only for the purposes of ECRA.

RESPONSE: The Department inspector will be inspecting the facility for the purposes of processing the case through ECRA. However, if information relevant to the administration of other statutes and rules is obtained as a result of that inspection, it will be referred to the appropriate unit(s) in the Department. Adding the language requested in the comment may restrict the Department's ability to make such referrals to such other units and would, therefore, be inappropriate for this Department. See N.J.S.A. 13:1D-9d.

COMMENT: N.J.A.C. 7:26B-1.12 should be revised to reflect that any document submissions include a covenant whereby the owner or operator of the industrial establishment expressly consents to the Department's entry and inspection of the subject premises. Use of the phrase "shall allow . . . to enter the industrial establishment to inspect the site . . ." by seeking to compel future conduct, fails to eliminate the constitutional requirement for an administrative search warrant as the procedural safeguard against the unreasonable exercise of compulsory government inspection power. Only the owner's or operator's express waiver of that constitutional protection by agreeing to a consensual search obviates the mandate to follow the warrant procedures.

RESPONSE: The Department has modified N.J.A.C. 7:26B-1.12 accordingly.

COMMENT: A comment was received concerning N.J.A.C. 7:26B-1.12 that the provision for entry, sampling and inspection, etc., is overly broad and unauthorized by the statute. The comment further stated that even if this provision were lawful, opportunities for split samples and confidentiality claims should be provided and opportunity for the owner or operator to remove any privileged materials prior to inspection or copying of records would be needed.

RESPONSE: Inspections are considered to be an important part of the review of cleanup plans under ECRA. N.J.S.A. 13:1D-9d provides the Department with broad inspection authority to authorize all inspections conducted to implement the Act. N.J.A.C. 7:26B-1.12(a) and (b)1 have been amended to provide for split samples upon the request of the owners or operators. Confidentiality claims may be made as provided at N.J.A.C. 7:26B-8.

COMMENT: A comment suggested that the photographing and sampling activities and Department review of records should be limited to areas of the facility in which hazardous materials and substances are generated, manufactured, refined, transported, treated, stored, handled or disposed.

RESPONSE: The Department has the right under both the Act and N.J.S.A. 13:1D-9d to enter, inspect, and sample on-site areas including areas other than those listed in the above comment, as well as areas off the facility "for the purpose of investigating an actual or suspected source of pollution." Although the Department does not waive its broad right to enter, inspect, and sample, it will generally photograph and sample only those areas of the facility involved in activities likely to result in contamination.

COMMENT: One comment suggested that the Department should be obligated to give duplicates/splits of samples or other materials taken from a site and to give the site owner/operator copies of all tests results and QA/QC data and procedures when the Department conducts an inspection and sampling.

RESPONSE: To the maximum extent possible, the Department will make these materials available to the owner/operator.

COMMENT: One comment suggested that the owner/operator should have no liability for acts and omissions of the Department and its agents while on the site and that the owner/operator would presumably be indemnified by the Department for all such liabilities.

RESPONSE: The right of entry and inspection specified at N.J.S.A. 13:1D-9d specifies no relief from liability during inspection for the owner or operator and makes no provision for indemnification. Naturally, the Act and this chapter in no way derogate from the protection to the owner or operator offered by the provisions of the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et seq.

COMMENT: A comment that the phrase "or who is a party to an ACO" should be deleted from N.J.A.C. 7:26B-1.12(c), because it places an unnecessary burden on a party to an ACO who is not otherwise implementing a cleanup plan.

RESPONSE: Any party to an ACO is liable for complying with the ACO provisions, including satisfaction of N.J.A.C. 7:26B-1.12(c). However, if one party complies by satisfying that subsection, the Department will consider all parties to have complied. This provision was designed to ensure that any person subject to ECRA have the appropriate representatives accompany the Department during its inspection of the industrial establishment. The provision has been clarified to delete the reference to persons "implementing a cleanup plan" and to incorporate general language addressing persons subject to ECRA compliance to cover other activities such as inspections and sampling plan implementation.

7:26B-1.13

COMMENT: N.J.A.C. 7:26B-1.13(b)1 and (d)5i require certification that the information submitted is "true, accurate and complete" and impose harsh penalties for any inadvertent deficiencies in the submittals. Such certification is inappropriate where, in fact, the determination as to truth, accuracy, and completeness is discretionary with the Department.

The information submitted must be obtained through reliance upon other persons and documents. No single person could ever have personal knowledge of all the information frequently required for submittal, particularly where, as is often the case, the information required comes from consultants contracted by the corporate owner or operator. The reason consultants are hired is because the corporate official lacks the actual knowledge required in the submittal.

The required certification for N.J.A.C. 7:26B-1.13(b)1 and (d)5i should be tempered with language such as "to the best of my knowledge." The Act, at N.J.S.A. 13:1K-13c, provides for penalties for false information only where knowingly given or caused to be given, that is, where intent is an element of the violation. For the Department to force applicants to sign this certification is to force the public to commit a crime. The harsh language of these proposed certification provisions is unwarranted in the vast majority of ECRA cases and hurts, rather than helps, the environmental cause of New Jersey.

RESPONSE: It is appropriate that both the "highest ranking corporate, partnership, or governmental officer or official stationed at the site" as provided at N.J.A.C. 7:26B-1.13(b)1 and the "individual . . . having responsibility for overall operation of the site or activity" as provided at N.J.A.C. 7:26B-1.13(d) be held to have personal knowledge as to the truth, accuracy and completeness of all required submittals. Responsibility for the operations at the site and proposed remediation of any contamination present on or emanating from the site must be in some identifiable and responsible corporate, partnership, or governmental officer or official who has personal knowledge of these activities. The Department cannot be required to sanction the unwillingness of the owner or operator of a site to identify an official willing to take responsibility for the operations and remediation of any contamination at that site. Although some of the required information may come from consultants, the signing officer or official has a duty to make such information his personal knowledge prior to submittal to the Department. If necessary, consultants may be required by the owner or operator of the site to indemnify the responsible officer or official for any "inadvertent" errors. Therefore, the Department is unwilling to add such language as "to the best of my knowledge" to these provisions. The Department recognizes that N.J.S.A. 13:1K-13c requires that a violation or direction and authorization of violation of the Act be knowingly made in order to be subject to the prescribed penalties and, therefore, has added the word "knowingly" to the required certification language at N.J.A.C. 7:26B-1.13(b)1 and (d)5i.

COMMENT: The required certification at N.J.A.C. 7:26B-1.13 of both the highest ranking official at the site and a corporate officer of at least the level of vice president is impractical because (1) it is too difficult to meet the five-day limit on GIS submittal even without requiring the sending of the submittal to two locations and (2) often, especially in the case of closure, there is no on-site official (that is, only a security guard remains at the site).

RESPONSE: The owner or operator, while required to submit the GIS within five days of an Initial Notice trigger, generally has notice of the trigger well in advance of its occurrence and certainly in sufficient time to send the GIS to two locations for signature. The Department has modified the rule to allow certification by the corporate, partnership, or governmental officer or official having responsibility for the overall operation of the site or activity and personal knowledge of the facts stated where there is no official stationed at the site meeting the criteria of N.J.A.C. 7:26B-1.13(b)1i.

COMMENT: The president of a large corporation cannot know that the information provided is absolutely true, accurate and complete as required at N.J.A.C. 7:26B-1.13(b)2.

RESPONSE: N.J.A.C. 7:26B-1.13(b)2 does not limit signature of the certification to corporate presidents but provides for signature by "a principal executive officer of at least the level of vice president." Further, the language of the certification requires only the belief that the submitted information is true, accurate and complete based upon "inquiry of those individuals immediately responsible for obtaining the information." Finally, the Department has added the word "knowingly" to the required certification language at N.J.A.C. 7:26B-1.13(b)2 to conform to the statutory language at N.J.S.A. 13:1K-13c.

COMMENT: The certification required at N.J.A.C. 7:26B-1.13(b)2 to be signed by a principal executive officer of at least the level of vice president is unnecessary and should be deleted. The requirement should be flexible enough to allow signature by an authorized corporate officer of a level lower than vice president.

RESPONSE: The Department believes that the required certification at N.J.A.C. 7:26B-1.13(b)2 is not unduly burdensome and that it is necessary to ensure full compliance with the Act and this chapter by the corporate owner or operator by making the high-ranking official liable for submittals on behalf of the corporate owner or operator that are not "true, accurate or complete." Corporate compliance is furthered by placing liability for noncompliance on the shoulders of the highest officials.

COMMENT: Attorneys and environmental consultants should be allowed to be the "duly authorized representative" specified at N.J.A.C. 7:26B-1.13(d)2 of the person required to sign the certification at N.J.A.C. 7:26B-1.13(d)5i.

RESPONSE: The suggested individuals do not bear the same relationship to the corporate owner or operator, and are generally less familiar with and responsible for the day-to-day operations at the site, as the person identified at N.J.A.C. 7:26B-1.13(d)2.

COMMENT: N.J.A.C. 7:26B-1.13(e) is unnecessary as all affidavits are, by definition, required to be notarized. There is no reason why the signatures required at N.J.A.C. 7:26B-1.13(e) in documents other than affidavits should be notarized.

RESPONSE: The Department retains this provision as most of the submittals listed at N.J.A.C. 7:26B-1.13(a) and 1.13(c) are not in the form of affidavits. Those submittals not in the form of affidavits should, at a minimum, be authenticated by notarization.

7:26B-3

COMMENT: A general comment stated that the Department should be mandated in this chapter to conduct the preliminary site inspection within 30 days from receipt of the Initial Notice regardless of whether the notice is considered complete. The comment stated that this would allow cases that did not have any environmental concerns to be cleared out of the system more rapidly.

RESPONSE: The Department has established procedures that allow for the rapid processing of cases with low environmental concern. Mandating that a preliminary site inspection occur in a certain time period regardless of Initial Notice completion is inappropriate since it would remove from the owner or operator any incentive to complete the application as rapidly as possible. Those owners or operators who have completed their Initial Notice in a timely manner are entitled to case assignment and site inspections before an owner or operator who submits an incomplete Initial Notice.

COMMENT: A comment was received concerning N.J.A.C. 7:26B-3.2(a) suggesting that if an owner/operator files the Initial Notice prior to the decision to close or prior to the execution of a contract for sale, then it should be immune from civil penalties and criminal prosecution based upon the information presented in the Initial Notice.

RESPONSE: Neither ECRA nor other State law authorizes the requested provision for immunity from civil penalties or criminal prosecution.

COMMENT: One comment suggested language be added to N.J.A.C. 7:26B-3.2(a) so that the requirement that the "owner or operator who

submits an Initial Notice in anticipation of closing, terminating or transferring operations shall comply with all of the provisions of this chapter, except for the submittal of the sales agreement" not apply to an owner or operator who withdraws from the ECRA review process pursuant to N.J.A.C. 7:26B-3.3.

RESPONSE: The Department agrees with this comment and has modified N.J.A.C. 7:26B-3.2(a) accordingly.

COMMENT: One comment suggested that the copies of the sales agreement should not as specified at N.J.A.C. 7:26B-3.2(b)4 be required in the Initial Notice. Alternatively, the comment suggested that this information not be considered a public record subject to review under the Right-to-Know Law and that no fee for keeping such documents confidential should be assessed under N.J.A.C. 7:26B-1.10(f). The comment also stated that the applicant should be permitted to freely delete confidential information such as price, identity of the parties, etc., without the payment of any fee.

RESPONSE: A copy of the sales agreement is necessary for the Department to ensure that the filing requirements of ECRA are met with regards to time from the signing of the sales agreement to submission of the GIS. To date, no seller has indicated that submittal of the sales agreement has been a problem. The applicant may request confidential treatment of information contained in the sales agreement as specified at N.J.A.C. 7:26B-8.

COMMENT: One comment asked whether N.J.A.C. 7:26B-3.2(a) requires the applicant to provide the Department with a copy of the sales agreement after its execution.

RESPONSE: A copy of the sales agreement is part of the Initial Notice (GIS) that is required pursuant to N.J.A.C. 7:26B-3.2(b)4. However, where the owner or operator files early, the sales agreement may not yet have been negotiated. Under these circumstances only, the sales agreement need not be submitted at the time of filing, but shall be submitted within five days of its execution.

COMMENT: One comment was received concerning N.J.A.C. 7:26B-3.2(b) that requested that the GIS forms be presented for review and comment.

RESPONSE: The forms will be made available at the time of adoption of this chapter. They are not part of this chapter. The Department will accept comments on the forms at any time and will periodically make revisions if they are warranted in order to further the adequate presentations to the Department of necessary information.

COMMENT: A comment was received concerning the Initial Notice submission requirements in N.J.A.C. 7:26B-3 suggesting that the Industrial establishment be defined to include only that portion of a tax lot on which the covered SIC activity occurs.

RESPONSE: The Department position is that an industrial establishment includes all of the contiguous area that is under the same ownership as the operations of the industrial establishment and, therefore, also includes those contiguous areas that may not be specifically dedicated to the operations of an industrial establishment. See definition of industrial establishment as adopted at N.J.A.C. 7:26B-1.3.

COMMENT: One comment requested that the provision in N.J.A.C. 7:26B-3.2(b)1vii obligate the applicant to identify only those ECRA submittals of which he has knowledge.

RESPONSE: This information is easy to obtain and not burdensome to the applicant. Therefore, the provision remains unchanged upon adoption.

COMMENT: A comment received concerning N.J.A.C. 7:26B-3.2(b)6 requested that the Department allow the applicant to designate more than one authorized agent.

RESPONSE: The authorized agent is designated for each ECRA case as the official representative of the owner or operator to whom all correspondence will be directed in satisfaction of any requirements of notice from the Department. Therefore, it is appropriate that only one be designated.

COMMENT: One comment assumed that the provision at N.J.A.C. 7:26B-3.2(b)6 would allow any party who is jointly and severally liable under ECRA to appoint its own authorized agent.

RESPONSE: Only the party responsible for submittal of the Initial Notice, that is, the owner or operator of an industrial establishment subject to the Act and this chapter, is required to specify an authorized agent pursuant to N.J.A.C. 7:26B-3.2(b)6, and it is only the agent specified by this party that satisfies the definition of "authorized agent" as defined at N.J.A.C. 7:26B-1.3. These provisions are not, in and of themselves, intended to preclude other parties from interacting with the Department through their agents.

COMMENT: One comment stated that the required submission of historic information at N.J.A.C. 7:26B-3.2(c)1 placed an unnecessary burden on the regulated community and that the standard "diligent inquiry" is not adequately explained.

RESPONSE: It is necessary to obtain information on past uses of the site to adequately determine the need to investigate potential environmental concerns that may exist at the subject site. Most of this information is readily available through a title search and subsequent inquiry into the operations of the owner or operator revealed by this search. The Department does not feel this requirement imposes an unreasonable burden. The Department has not defined "diligent inquiry" as it intends to rely on the plain meaning of the term.

COMMENT: One comment stated that the information requested within N.J.A.C. 7:26B-3.2(c) is much more extensive than necessary and questioned if all this information was really necessary to make a valid judgement on cleanup activities at a site.

RESPONSE: The Department's experience to date in implementing ECRA indicates that all the information required in the Site Evaluation Submission (SES) of the Initial Notice is necessary to evaluate the extent, if any, of cleanup that is required.

COMMENT: Several comments suggested that the 45-day time period for filing the SES be extended because of delays often encountered in obtaining information on complex sites and/or in retaining outside consultants.

RESPONSE: Previously, N.J.A.C. 7:1-3.7(d) allowed for filing the SES in 30 days. The Department has increased this period to 45 days. Based upon the Department's experience, 45 days is adequate time in which to compile the information required by the SES.

COMMENT: One commenter suggested modifying the phrase "owner or operator" in N.J.A.C. 7:26B-3.2(c) to be "hereinafter referred to as the applicant."

RESPONSE: The Act specifies "owner or operator," at N.J.S.A. 13:1K-9, as the party to notify the Department of its plans to close or sell or transfer operations, that is, to submit the Initial Notice. The Department elects to continue to use the phrase "owner or operator" rather than refer to either the owner or operator as "the applicant."

COMMENT: One comment questioned the rationale for the January 1, 1940 date for documenting site history within N.J.A.C. 7:26B-3.2(c)1.

RESPONSE: This date marks completion of aerial photographs for the entire State. It also reflects a period of increase in the use and type (number of different compounds) of hazardous substances and wastes in the State.

COMMENT: Numerous comments suggested that the information required to be submitted pursuant to N.J.A.C. 7:26B-3.2(c) be qualified "to the extent available from diligent inquiry."

RESPONSE: The Department has modified N.J.A.C. 7:26B-3.2(c)2, 5, 6, 7, and 10 to qualify the required submittals detailing past operations occurring at the site.

COMMENT: A comment was received concerning N.J.A.C. 7:26B-3.2(c)2 that it is unnecessary for the Department to receive a list of permits which the Department has issued or processed.

RESPONSE: This requirement is retained as the owner or operator is in a better position to expeditiously assemble this information for a given industrial establishment.

COMMENT: One comment questioned the need or authority for or relevance of the "list of all Federal and State environmental permits applied for or received, or both, for the site since 1960" as required by N.J.A.C. 7:26B-3.2(c)2.

RESPONSE: This information is needed to identify potential environmental concerns.

COMMENT: One comment suggested that fixed time periods be established under N.J.A.C. 7:26B-3.2(c)2 as an alternative to requesting permits since 1960. A listing of all permits going back a specific number of years should be required instead of all permits "since 1960."

RESPONSE: The Department retains this requirement. The year 1960 was chosen as reasonable. Certain environmental programs were already in place pursuant to various statutes including the State Flood Control Facilities Act, N.J.S.A. 58:16A-1 et seq.; the Air Pollution Control Act, N.J.S.A. 26:2C-1 et seq.; and the Federal Water Pollution Control Act, 33 U.S.C. §§1251 et seq. Further, the Department is directed by the Act to require remediation of all contamination regardless of the date of discharge. In order to comply, the Department must have a complete history of the operations permitted on the site in order to identify likely sources of contamination.

COMMENT: Comments suggested specifying a minimum size, for example, five gallons, for containers to be identified or described pursuant to N.J.A.C. 7:26B-3.2(c)4ii and 8 of the Initial Notice.

RESPONSE: No minimum size for containers is specified, as even small containers may be a cause for environmental concern requiring identification and description in the SES.

COMMENT: One comment suggested adding "if known" after "adjacent land usage" in N.J.A.C. 7:26-3.2(c)4iv.

RESPONSE: The Department intends that "land usage" means the broad category (residential, commercial, industrial, etc.) and, therefore, compliance with this requirement would pose no significant burden. Therefore the phrase "if known" is not added to this provision.

COMMENT: One comment suggested that requiring "a detailed description of all current and all known past operations and processes" is much too burdensome and should be excluded from N.J.A.C. 7:26-3.2(c)5.

RESPONSE: The Department retains this requirement, except for the limitation "to the extent available from diligent inquiry," as this information is needed to identify activities, past and present, involving hazardous substances and wastes at the site. However, the provision has been modified to qualify that historical information must be submitted to the extent it is available from diligent inquiry.

COMMENT: One comment stated there should be no need to include any sanitary waste discharge information in N.J.A.C. 7:26B-3.2(c)7.

RESPONSE: The Department retains this requirement as this information is needed to evaluate separation of industrial from sanitary waste streams and to identify potential discharge sources.

COMMENT: A comment on N.J.A.C. 7:26B-3.2(c)9 suggested that the inventory of hazardous substances and wastes used or generated on an annual basis be limited to a period for the past five years.

RESPONSE: The requirement for an inventory of hazardous substances and wastes addresses the current inventory and what is currently utilized on an annual basis. It was not intended to require a historical submission of hazardous substances and wastes utilized each year. To clarify this requirement the Department has inserted "currently" prior to "used or generated on an annual basis" at N.J.A.C. 7:26B-3.2(c)9.

COMMENT: Only the reporting of non-permitted discharges should be required by N.J.A.C. 7:26B-3.2(c)10 since permitted discharges have already undergone Department scrutiny.

RESPONSE: In order to conduct a thorough review of the site, the Department, through the ECRA process, must evaluate and consider all discharges whether or not such discharges were permitted.

COMMENT: A comment suggested that the Department should amend N.J.A.C. 7:26B-3.2(c)11 to exclude areas already subject to investigation or remediation pursuant to an order or permit condition issued by the Department for the parameters which are the subject of the order or permit condition.

RESPONSE: Duplication of effort, in compliance with the Act, may be avoided by adequately addressing in the ECRA sampling and cleanup plans the work being conducted under an order or permit issued by the Department.

COMMENT: A comment stated that the evaluation of off-site contamination in initial sampling plan required at N.J.A.C. 7:26B-3.2(c)11 is not reasonable. Unless there is evidence of discharge from the site onto adjacent property, there should be no requirement to conduct an evaluation of off-site contamination at the time of the initial sampling plan. The comment also observed that the rules do not address mechanisms for obtaining permission to collect samples and/or install borings or monitoring wells on adjacent property not owned by the industrial establishment.

RESPONSE: N.J.A.C. 7:26B-3.2(c)11 requires submission of a sampling plan for review and approval by the Department. Off-site investigation need be proposed only based upon information and belief of the owner or operator of the industrial establishment that off-site contamination has occurred. If information is gathered which suggests off-site contamination has occurred, the sampling plan shall address or be amended to adequately address this concern. Obtaining permission for off-site investigatory work, after Department approval of the sampling plan, is handled on a case-by-case basis, with the owner or operator of the industrial establishment responsible for securing access from the owners of the property in question.

COMMENT: One comment requested a definition of the term "environmental evaluation measurement plan" used in N.J.A.C. 7:26B-3.2(c)11.

ADOPTIONS

RESPONSE: "Environmental evaluation measurement plan" is continued from N.J.A.C. 7:1-3 which is being repealed concurrently with this adoption. The term includes other types of environmental evaluation that do not include direct sampling of an environmental media. The Department's experience is that the use and understanding of this term has not been a problem.

COMMENT: One comment suggested elimination of the phrase "but not limited to" from N.J.A.C. 7:26B-3.2(c)11.

RESPONSE: The phrase "but not limited to" is necessary in order to include items of information similar to those listed but not presently identified that are or will be necessary for the Department's implementation of the Act.

COMMENT: One comment suggested eliminating "hydrogeologic characteristics" from the sampling plan requirements of the Initial Notice in N.J.A.C. 7:26B-3.2(c)11 unless ground water sampling is proposed or required.

RESPONSE: This information is needed as part of a soil and ground water investigation. If the applicant does not believe it is required for the site in question, proposed N.J.A.C. 7:26B-3.2(f) (adopted at N.J.A.C. 7:26B-3.2(d)) provides relief upon Department approval of a proposal by the owner or operator that no sampling plan be developed or implemented.

COMMENT: One comment expressed confusion with the term "potential environmental concern" used in N.J.A.C. 7:26B-3.2(c)11 iii and asked for clarification.

RESPONSE: The operative word is "potential". It may not be known at the time of the Initial Notice submission whether an area is actually an environmental concern. The sampling plan is designed to examine each area identified as a potential concern in order to determine if remediation is required.

COMMENT: A comment was received concerning N.J.A.C. 7:26B-3.2(c)12 that the description of decommissioning procedures should only be required when an industrial establishment is closing. An additional comment on this section stated that the location of the ultimate disposal facility often cannot be determined until later in the process and closer to the actual decommissioning. Failure to identify the ultimate disposal location should not render the SES incomplete.

RESPONSE: The decommissioning procedures are required any time there is a closing and may also be appropriate in other situations where contamination of the building itself has occurred and remediation is necessary to protect future users of the building. Therefore, it is inappropriate to limit the decommissioning requirement only to industrial establishments that are ceasing operations. The Department would not find that an SES is incomplete if there were a sound basis for why the information could not be provided at the time of SES submittal and the applicant advised the Department that the disposal facility would be identified to the Department immediately upon its selection.

COMMENT: A comment suggested that it is not reasonable to request the information in the SES specified at N.J.A.C. 7:26B-3.2(c)12 concerning the decontamination and decommissioning procedures.

RESPONSE: In some cases it may not be timely to submit a description of the procedures to be used to decontaminate or decommission any equipment or buildings. In these cases, the SES should identify why. However, before the case can be closed, this area of environmental concern needs to be addressed. Therefore, this requirement will remain at N.J.A.C. 7:26B-3.2(c)12.

COMMENT: A comment was received concerning N.J.A.C. 7:26B-3.2(c)11iv(2) asking what the term "analytical laboratory. . . recognized by the Department" means.

RESPONSE: Recognized by the Department means a laboratory that is a State or EPA contract laboratory.

COMMENT: One comment suggested that the sampling information required by N.J.A.C. 7:26B-3.2(c)13 is overly burdensome and will result in re-submission of information already in the possession of the Department.

RESPONSE: The provision of this information to the ECRA program staff is necessary to expeditiously conduct an informed review. Resubmission of information that may already be in the possession of the Department will aid in a quick review of the case and better allow for a timely transaction to occur. Provision is made for contacting the Department for instructions where the information is voluminous.

COMMENT: A comment suggested restricting the ability of the Department to request other information as provided at N.J.A.C. 7:26B-3.2(c)14.

RESPONSE: The Department believes that such language is necessary to provide it with the discretion needed to implement the Act.

ENVIRONMENTAL PROTECTION

COMMENT: One comment requested clarification of the responsibility of a sublessor pursuant to N.J.A.C. 7:26B-3.2(d) under a sublease which predates ECRA.

RESPONSE: The fact that the sublease predated ECRA is irrelevant. A sublessor is both a tenant (of the landlord) and landlord (of the sublessee). In any given transactions subject to ECRA, the sublessor would, therefore, be deemed to be a tenant, a landlord, or both, and sublessor's responsibility for compliance with Initial Notice would follow from such a determination. The proposed provisions at N.J.A.C. 7:26B-3.2(d) have been clarified and moved to N.J.A.C. 7:26B-3.3. In general, as between lessors and lessees the scheme requires submittal of Initial Notice by the party triggering the Act.

COMMENT: A comment received suggested N.J.A.C. 7:26B-3.2(d) be amended so that, where the owner of the real property of an industrial establishment has primary responsibility for submittal of the Initial Notice, the tenant must cooperate or face a penalty.

RESPONSE: The Department has modified the provisions at N.J.A.C. 7:26B-3.2(d) (and moved them to N.J.A.C. 7:26B-3.3) to include a provision that the party not responsible for submittal of Initial Notice shall be responsible for providing all information requested by, and not in possession of, the party making the submission or requested by the Department for the purpose of satisfying the Initial Notice requirement.

COMMENT: One comment suggested moving the provisions at N.J.A.C. 7:26B-3.2(d), dealing with the responsibilities of landlords and tenants in lease situations, to another section to avoid confusion.

RESPONSE: These provisions have been placed in a separate section at N.J.A.C. 7:26B-3.3.

COMMENT: One comment suggested a language change in N.J.A.C. 7:26B-3.2(d)3 such that in bankruptcy proceedings, the operator of the industrial establishment shall have the primary responsibility for submittal of the Initial Notice.

RESPONSE: The Department has revised the provisions at N.J.A.C. 7:26B-3.2(d) (and moved them to N.J.A.C. 7:26B-3.3) so that the party triggering application of the Act and this chapter shall be responsible for submittal of Initial Notice. Where the proceeding or event listed in N.J.A.C. 7:26B-1.6(a)13 is triggered by the landlord or tenant, that party is responsible for Initial Notice.

COMMENT: A comment suggested that N.J.A.C. 7:26B-3.2(e) be limited to the knowledge available to the "other person(s)" liable under the Act.

RESPONSE: The provisions proposed at N.J.A.C. 7:26B-3.2(e) require any other person that is liable under the Act to comply if the person bearing primary responsibility fails to make the necessary submissions required by this chapter. The "other person(s)" would be responsible for submitting all required information except as expressly limited at N.J.A.C. 7:26B-3.2(b) and 3.2(c). N.J.A.C. 7:26B-3.2(d) and (e) have been rewritten for clarity, combined and moved to N.J.A.C. 7:26B-3.3(a). The party responsible for submittal of Initial Notice thereunder can obtain necessary information from the other party to the extent available from diligent inquiry. The Department retains the right to compel any responsible party to comply with the Act.

COMMENT: Several comments questioned the need for full documentation to justify that no sampling need be developed for a site, as required at N.J.A.C. 7:26B-3.2(f), especially if the site is "clean".

RESPONSE: The Department retains this requirement (adopted at N.J.A.C. 7:26B-3.2(d)) as essential in making its determination as to the necessity for such sampling. The owner or operator unwilling to fully document its justification for relief from sampling plan requirements cannot expect the Department to expend effort in making a determination as to the necessity for such sampling.

COMMENT: A comment on N.J.A.C. 7:26B-3.2(f) requested that the phrase "full documentation" be specified, since it would be difficult to speculate as to what would have to be submitted to meet this requirement.

RESPONSE: The owner or operator of an industrial establishment bears the burden of production of adequate documentation to justify its assertion that no sampling plan be required for the site. The term "full documentation" should be self-explanatory, that is, all relevant information supporting the request. To the extent the documentation is inadequate, the Department would be unable to approve the request. This provision has been adopted at N.J.A.C. 7:26B-3.2(d).

COMMENT: A comment suggested that N.J.A.C. 7:26B-3.2(d)3 be revised to state "In the event of an entry of an Order for Relief under Chapter 7 of the Bankruptcy Code, the appointment of a receiver or other liquidating trustee or delivery of a deed of assignment for the benefit of

creditors, as the owner or operator of an industrial establishment, the operator of the industrial establishment shall have the primary responsibility for the submittal of the initial notice".

RESPONSE: N.J.A.C. 7:26B-3.3 clarifies the responsibilities for owners and operators including those responsibilities triggered by the filing of a petition in bankruptcy or a receivership action.

COMMENT: A comment concerning N.J.A.C. 7:26B-3.2(f) stated that the Department cannot reject economic considerations in all cases.

RESPONSE: ECRA is designed to ensure that private persons investigate and, where necessary, remediate environmental contamination. Therefore, absent express statutory language to the contrary, it would not be appropriate to have economic considerations dictate whether a sampling plan need be developed and implemented for an industrial establishment. The last sentence at proposed N.J.A.C. 7:26B-3.2(f) (adopted as N.J.A.C. 7:26B-3.2(d)) has been rewritten to make it clear that economic considerations would be insufficient justification for avoiding the sampling plan and implementation requirements of the SES.

COMMENT: Several comments requested that the Department give reasonable times for the completion of deficiencies as provided within N.J.A.C. 7:26B-3.2(g) (adopted at N.J.A.C. 7:26B-3.2(e)), 4.1(b), and 5.3(c).

RESPONSE: The Department agrees that all time frames must be reasonable in order to be legally enforceable and, therefore, will always endeavor to so require.

COMMENT: A comment concerning N.J.A.C. 7:26B-3.2(h) (adopted at N.J.A.C. 7:26B-3.2(f)) stated that the Department should be required to complete such reviews in an established time frame and recommended a period of 30 days as a maximum.

RESPONSE: It is not appropriate to require a specific time frame for the review of the Initial Notice submissions. Often the reviews are conducted in less than 30 days, however, 30 days cannot be treated as a maximum. There are situations occurring that warrant a review period in excess of 30 days. Although it is anticipated that these situations will be infrequent, placing a mandatory requirement to conduct the reviews within a given period is not appropriate and not required by the Act.

COMMENT: A comment suggested amending N.J.A.C. 7:26B-3.3 (adopted at N.J.A.C. 7:26B-3.4) to give notice that withdrawal of a facility from ECRA will result in referral of that facility to other agencies within the Department for enforcement of any other statutory provisions violated.

RESPONSE: While it is true that such procedure is not unlikely, the inclusion of such a provision in this chapter is not necessary.

COMMENT: One comment recommended that the second sentence of N.J.A.C. 7:26B-3.3 (adopted at N.J.A.C. 7:26B-3.4) be deleted as unnecessary because any applicant has the right of withdrawal regardless of the reason.

RESPONSE: The only acceptable reason for withdrawal from the ECRA process is that ECRA no longer applies. For example, where an Initial Notice was filed in anticipation of execution of a sales contract and the sale "falls through", withdrawal from the ECRA process is appropriate. An affidavit is required in order to ensure that there is a valid reason for not completing the ECRA process.

COMMENT: A comment was received concerning N.J.A.C. 7:26B-3.3 (adopted at N.J.A.C. 7:26B-3.4) that this section should be recorded to clearly identify acceptable reasons for withdrawal from the ECRA process and should include a statement to the effect that cost of complying is not, in and of itself, sufficient reason for withdrawal in the absence of some retraction of the triggering event.

RESPONSE: The section specifically says that a withdrawal can only occur if "the owner or operator does not close, terminate or transfer operations". If the retraction of the triggering event does occur, the owner or operator may withdraw from the ECRA process or continue to proceed through the ECRA review as an early filer. It would be inappropriate to force an owner or operator to continue through the ECRA process if the applicable event never occurred.

COMMENT: A comment was received concerning N.J.A.C. 7:26B-3.4 (adopted at N.J.A.C. 7:26B-3.5) requesting that the Department conduct the site inspection and/or have the file review occur in accordance with a specific schedule, suggesting 45 days from submission of the Initial Notice.

RESPONSE: It is inappropriate to place a specific time requirement for the inspection or file review to occur. The comment did not specify which Initial Notice submission, that is, GIS or SES, should start the suggested 45-day schedule nor did it make allowances for incomplete submissions.

7:26B-4

COMMENT: Numerous comments requested that a hearing provision be added to resolve any disputes between the Department and the applicant over approvals of sampling plans, proposed negative declarations, proposed cleanup plans, and cleanup plan implementation deferrals.

RESPONSE: Procedures to contest or appeal Departmental determination are available pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. and R. 2:2-3(a)(2) of the New Jersey Court Rules, 1969.

COMMENT: A comment was received concerning N.J.A.C. 7:26B-4.1(a) that the Department should issue more than a letter concerning adequacy of the sampling plan and, specifically, should either approve, conditionally approve, or reject the plan with a detailed explanation of what is required to make the plan acceptable. Also, in the latter two cases, a time frame for a meeting with the Department at the applicant's option and for making an appeal should be provided.

RESPONSE: The Department does approve, conditionally approve, or deny a sampling plan. In cases of conditional approvals or denials, the Department provides an explanation of what is required to make the plan acceptable. The Department is receptive to meeting with the owner or operator to discuss the requirements of the Department for a particular case. ECRA does not provide specific procedures for administrative appeal of the Department action taken under the Act. Therefore, appeals may be taken only as provided by the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. and R. 2:2-3(a)(2) of the New Jersey Court Rules, 1969.

COMMENT: One comment recommended that the Department have a maximum of 45 days from submission to determine the adequacy of a sampling plan or grant approval for a cleanup plan.

RESPONSE: Such a time frame is not required by the Act and is not appropriate. The Department is striving to review sampling and cleanup plans as rapidly as possible so that appropriate remediation can commence as soon as a thorough case evaluation is completed.

COMMENT: A comment was received concerning N.J.A.C. 7:26B-4.1(b), 4.3(b), and 5.2(d)1 and 2, that objected to the provision authorizing the Department to impose unilateral time tables without review and comment by the regulated community. The comment further stated that the Department must act reasonably and should be authorized and prepared to grant extensions freely.

RESPONSE: The time tables that the Department would set for revising a deficient plan will be reasonable and will be designed to have the case proceed through the ECRA process as rapidly as possible. The Department is willing to consider extension requests where good cause for granting such an extension is demonstrated.

COMMENT: A comment was received concerning N.J.A.C. 7:26B-4.2(b) that questioned whether sampling conducted "at risk", or prior to ECRA sampling plan approval, will still be allowed without the necessity to comply with the provision of this section.

RESPONSE: N.J.A.C. 7:26B-4.2(b) does not preclude "at risk" sampling prior to ECRA. The sampling data therefrom would be reviewed by the Department.

COMMENT: A comment was received concerning N.J.A.C. 7:26B-4.2(c) stating that in addition to split samples collected by the Department, the Department should supply to the applicant all relevant reports, data, and QA/QC materials on these split samples.

RESPONSE: To the maximum extent possible, the Department will make these materials available to the owner or operator.

COMMENT: A comment was received concerning N.J.A.C. 7:26B-4.3(a) that recommended allowing the owner or operator flexibility to submit results of any sampling not just those samples undertaken pursuant to an approval sampling plan. Furthermore, the comment suggested that any "at peril" sampling results be deemed obtained pursuant to an approved sampling plan thus allowing the Department to move directly into review of the proposed negative declaration or proposed cleanup plan.

RESPONSE: N.J.A.C. 7:26B-4 governs sampling plan approval, sampling plan implementation, and submission of sampling plan results. This subchapter does not prohibit the submission of any sampling obtained "at peril" nor does it prevent the Department from reviewing a proposed negative declaration or proposed cleanup plan that was not based on data obtained from an approved sampling plan. Notwithstanding the above, "at peril" sampling does not constitute compliance with N.J.A.C. 7:26B-3.2(c).

COMMENT: A comment suggested that providing for a "split" sample at N.J.A.C. 7:26B-4.2(c) may be inconsistent with appropriate methodology; all the Department may have is a "duplicate".

ADOPTIONS

RESPONSE: The term "split sample" has a generally understood meaning to indicate that a single sample has been obtained and divided into two separate containers for appropriate analysis and is, therefore, consistent with appropriate methodology.

COMMENT: Several comments suggested that the requirement within N.J.A.C. 7:26B-4.3(a) that sampling plan results be accompanied by a proposed negative declaration, a proposed cleanup plan, or a revised sampling plan is unreasonable.

RESPONSE: This requirement does not preclude discussion between the applicant and the Department on case processing. Sampling results are required to support a request for approval of a proposed negative declaration, support a request for approval of a proposed cleanup plan, or to determine the need for additional sampling. It is much more efficient for the Department to review these proposals at the same time it reviews the sampling results. Therefore the Department will not accept such data, that is, sampling results, unless accompanied by such a request.

COMMENT: One comment questioned whether the requirement set forth within N.J.A.C. 7:26B-4.3(a) was a change from existing policy.

RESPONSE: These provisions are a change from existing policy and are provided for the reason given above.

COMMENT: A comment was received concerning N.J.A.C. 7:26B-4.3(a)3 that the section is not "functional" since in many situations it would be impossible to analyze the results and submit a revised sampling plan within the time frame specified by the Department.

RESPONSE: This section requires the sampling data to be submitted with one of three documents, an appropriate requirement to ensure efficient case processing. If only data is submitted, the Department's review is then inefficiently segmented between a review of the data and a subsequent report. If insufficient timing is a concern, a request can be made to extend the time frame for submission of the sampling data and appropriate report required by this section.

7:26B-5

COMMENT: Numerous comments requested deletion of the requirement at N.J.A.C. 7:26B-5.1(a) that no proposed negative declaration of proposed cleanup plan be submitted until after a preliminary site inspection is conducted.

RESPONSE: This provision does not preclude an earlier submission. It is intended merely as guidance to give the owner or operator the benefit of the information obtained from the Department's inspection. To this end, N.J.A.C. 7:26B-5.1(a) is amended to provide for receipt by the owner or operator of the inspection results. It is intended that this requirement result in the more efficient processing of cases. The Department should not be reviewing proposed negative declarations or cleanup plans prior to its inspection of the site.

COMMENT: One comment suggested that N.J.A.C. 7:26B-5.1(b) be modified to permit the Department to "waive the right of inspection" if it deems it unnecessary.

RESPONSE: The Department retains this provision as it is necessary to inspect every site.

COMMENT: One comment suggested that the Department has overstepped its authority by proposing a new requirement in N.J.A.C. 7:26B-5.2(a) that the purchaser or transferee of an industrial establishment provide the Department with a letter accepting ownership of, and liability for, any hazardous substances and wastes which remain at an industrial establishment. The comment stated that not only is there no statutory authorization for such a requirement, but no purchaser or transferee would sign such a letter.

RESPONSE: The Department has modified the provision to state that if any hazardous substances and wastes are to remain at the industrial establishment "in any containers, tanks, surface impoundments, or any other structures, vessels, contrivances, or units", the purchaser or transferee shall provide the Department with a letter accepting ownership of, and liability for, these hazardous substances and wastes. This avoids the dilemma regarding the acceptance and liability for hazardous substances and wastes in soils or groundwater that is contaminated where such contamination is not known to the transferee and was not detected by the owner or operator at the time of sale or transfer. If the purchaser/transferee is unwilling to sign such a letter all hazardous substances and wastes shall be removed by the owner/operator.

COMMENT: Several comments suggested modifying N.J.A.C. 7:26B-5.2(a) to allow the purchaser or transferee to accept liability for only those hazardous substances and wastes which are known to the purchaser or transferee. This would exclude hazardous substances and

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wastes in the soils or waters of a site. Other comments suggested deletion of the requirement for purchaser acceptance of any remaining hazardous substances and wastes.

RESPONSE: N.J.A.C. 7:26B-5.2(a) has been modified to make it clear that the letter accepting ownership of, and liability for, hazardous substances and wastes was intended only to apply to stored hazardous substances and hazardous wastes and not to apply to substances in the soils or waters at the property. The provision was intended to allow the buyer to accept consignment of these materials for his or her own later use at the site without first requiring their removal in order to obtain Department approval of the proposed negative declaration. The purpose of the letter is to identify the hazardous substances and wastes for both the buyer and the Department. This provision is not intended to, and does not, release the transferee from any environmental liability. All other hazardous substances and wastes present at the industrial establishment shall be remediated through the ECRA process. The provision is not intended to force purchaser's acceptance of hazardous substances and wastes, but merely to provide an optional mechanism for their orderly transfer where their removal would serve no environmental and business purposes.

COMMENT: A comment was received concerning N.J.A.C. 7:26B-5.2 that there should not be an expiration of a negative declaration unless the Department has reason to believe that there has been a change at the facility. An applicant should not have to undergo the ECRA process multiple times because a deal fell through or a closing did not take place.

RESPONSE: The Department feels that a negative declaration should be valid for a limited time period. Where an ECRA review had been completed but the transaction did not proceed, subsequent discharges could occur at the site that might not be remediated unless the Department conducted additional reviews to be completed no more than 60 days prior to the subject transaction.

COMMENT: A comment noted that the language at N.J.A.C. 7:26B-5.2(a), in stating that the proposed negative declaration is an affidavit that the industrial establishment has been cleaned up to the current satisfaction of the Department, could presumably be used against an innocent purchaser in requiring further cleanup of the old contamination.

RESPONSE: The proposed negative declaration language states that any discharge on or from the industrial establishment has been cleaned up to the current satisfaction of the Department. This language is specifically used to state that any cleanup conducted at the industrial establishment meets the requirements and standards of the Department at the time the negative declaration was issued. Although it is possible that new standards may be developed in the future that would be more stringent than those currently in place, it is highly unlikely that the purchaser would be required to conduct further remediation at a site for old contamination, unless there was evidence that the public health and safety or the environment was endangered by the levels of hazardous substances and wastes remaining at the industrial establishment.

COMMENT: A comment was received concerning the last sentence of N.J.A.C. 7:26B-5.2(a) that there are many transactions subject to ECRA in which the corporation directly owning the industrial establishment has not undergone any sale or transfer. In such a case, there would be no transferee to take title to the hazardous substances and wastes because in fact no part of the sale or transfer involves any change in title of the operating assets of the facility.

RESPONSE: Although there may be an ECRA-subject transaction that could take place where there would not be a change in the direct ownership of the industrial establishment, a new transferee, for example, a new parent would be available to provide the Department with a letter accepting liability for the hazardous substances and wastes that are to remain at the industrial establishment. Should this option be unacceptable to the parties to the transaction, the hazardous substances and wastes could be removed from the industrial establishment to comply with the Act and this chapter.

COMMENT: One comment questioned the need for a proposed negative declaration to be in the form of an affidavit as required by N.J.A.C. 7:26B-5.2(a).

RESPONSE: The proposed negative declaration shall be executed and certified in accordance with the provisions at N.J.A.C. 7:26B-1.13 to provide the Department with the greatest assurance as to the veracity of the declaration and to discourage the submittal of inaccurate, incomplete, or otherwise false or misleading information.

COMMENT: A comment suggested that N.J.A.C. 7:26B-5.2(b) required the Department to revisit all cleanups previously approved by the

Department. This increases the uncertainty of all cleanup undertaken under any program, and it would force review pursuant to ECRA of sites cleaned up under other programs.

RESPONSE: The Act required the adequate preparation and implementation of acceptable cleanup procedures as a precondition on any closure, termination or transfer of ownership. Contamination can occur at any time during ownership or operation of the industrial establishment regardless of prior Department approvals. Industrial establishments shall comply with the applicable cleanup standards at the time the property is transferred or when there is a cessation of operations. Consequently, N.J.A.C. 7:26B-5.2(a) requires "that any such discharge on or from the industrial establishment has been cleaned up to the current satisfaction of the Department".

COMMENT: A comment suggested that N.J.A.C. 7:26B-5.2(b) is ambiguous as to whether an owner or operator of an industrial establishment subject to an order, consent order, or permit condition addressing contamination at its site could submit a negative declaration for that industrial establishment prior to completion of all work called for by the order, consent order, or permit condition. The term "cleanup to the current satisfaction of the Department" could mean either that cleanup is proceeding in a manner acceptable to the Department or that cleanup has been completed in a manner acceptable to the Department. The rules should make clear that the Department intends the former interpretation.

RESPONSE: The Department does not intend the former interpretation. An owner or operator of an industrial establishment subject to an order, consent order, or permit condition addressing contamination at its site may not submit a negative declaration for that industrial establishment until the site is free of contamination. The owner or operator may submit a proposed cleanup plan for Department approval that references that work being conducted under the order, consent order, or permit condition and establish financial assurances to guarantee implementation of the cleanup plan subsequent to the sale of the industrial establishment, the cleanup plan to include completion of the remediation that is ordered or that is a permit condition.

COMMENT: One comment suggested language changes to the requirements for proposed negative declaration submission at N.J.A.C. 7:26B-5.2(b) and the requirements for proposed cleanup plan submission at N.J.A.C. 7:26B-5.3(a) identifying previous submittals so that the proposed negative declaration and cleanup plan need not include information contained in prior submittals to the Department.

RESPONSE: The Department agrees and modifies N.J.A.C. 7:26B-5.2(b) and 5.3(a) accordingly.

COMMENT: One comment suggested deleting the requirement for submittal of a description of cleanup actions taken at the industrial establishment as it is both unnecessary and difficult to comply with.

RESPONSE: This provision was included at N.J.A.C. 7:26B-5.2(b)1 so that the Department would have information on cleanups conducted without cleanup plan approval in order to adequately evaluate the site before it can approve the negative declaration.

COMMENT: A comment suggested that the required "itemization of costs incurred" for cleanup actions taken at the industrial establishment be deleted from N.J.A.C. 7:26B-5.2(b)1 as *ultra vires*.

RESPONSE: The Department retains this requirement as necessary for implementation of the Act to develop a record for program improvements, program efficiency and effectiveness, and to measure progress in the cleanup of the environment. Such itemization of costs is necessary to alert the Department as to the adequacy of prior, "at-peril", cleanup actions taken at the industrial establishment.

COMMENT: A comment suggested that N.J.A.C. 7:26B-5.2(c) require the Department to approve or disapprove a proposed negative declaration within 45 days of submission. The comment suggested that the Department should include language that says "in the event the Department does not act on a proposed negative declaration within 45 days of submission, the negative declaration as submitted shall be approved".

RESPONSE: The Act does not provide that where the Department does not act on a proposed negative declaration within 45 days of submission, the negative declaration as submitted shall be approved. Such language would inappropriately constrain the Department, to the detriment of the citizenry and the environment from the transfer of contaminated property without proper remediation where more than 45 days is needed to properly evaluate the proposal. Therefore, N.J.A.C. 7:26B-5.2(c) remains unchanged.

COMMENT: A comment concerning N.J.A.C. 7:26B-5.2(d) stated that the Department should be required to notify, in addition to the owner or operator, all other potentially liable parties of the denial of a negative declaration.

RESPONSE: The Department will notify the authorized agent of the denial of a negative declaration and if the applicant or other parties have requested to be copied on such a determination the Department may, where appropriate, provide additional copies to those parties. For example, it is unnecessary for the Department to always notify other potentially liable parties, since the reason for a denial may not be a major item of deficiency but, rather, an easily corrected administrative error.

COMMENT: Numerous comments pointed out that information requested at N.J.A.C. 7:26B-5.3(a)1, 2, and 9 is vague or duplicative of that required for submittal with the SES.

RESPONSE: The requirements of N.J.A.C. 7:26B-5.3(a)1 are clearly distant from those of the SES. The requirements of N.J.A.C. 7:26B-5.3(a)2 have been amended so as not to be duplicative of the SES. While N.J.A.C. 7:26B-5.3(a)9 has been deleted because it is partially duplicative of what is required pursuant to the SES and the Department has retained its ability to request additional information by changing the lead-in language to N.J.A.C. 7:26B-5.3(a).

COMMENT: A comment on N.J.A.C. 7:26B-5.3(c) suggested that the rules specify a minimum time period for correction of deficiencies. The comment further suggests that for a small site with relatively minor deficiencies a 30-day response period would be appropriate, while for a larger site with more complex cleanup plans a 60-day response period should be established.

RESPONSE: The Department does not feel that it is appropriate that this chapter specify minimum time periods for correcting cleanup plan deficiencies. As different cases will require different time periods to correct deficiencies, it would be in the best interest of all parties to establish time periods on a realistic case-by-case basis. If the industrial establishment is unable to comply within that time period, an extension may be requested.

COMMENT: A comment suggested that N.J.A.C. 7:26B-5.3(a)5 assumes that owners of neighboring properties will cooperate with the owner/operator of the industrial site and will be amenable to allowing owner's or operator's entry for purposes of cleanup of off-site contamination.

RESPONSE: It is the responsibility of the owner or operator of the industrial establishment to obtain permission to enter another person's property for the purposes of sampling and cleanup of contamination which has emanated from the industrial establishment. The authority to allow the owner or operator of an industrial establishment to enter the property of another for this purpose must be obtained cooperatively or otherwise. Where the owner or operator encounters difficulty in gaining access to off-site property, the owner or operator is encouraged to discuss with the Department ways to resolve this matter.

COMMENT: A comment was received concerning N.J.A.C. 7:26B-5.3(a)6 that suggested revising this section to read as follows: "Cleanup levels, criteria, standards of performance, or other measures of compliance with environmental regulations to be achieved for all environmental media consistent with N.J.A.C. 7:26B-11.1".

RESPONSE: The Department has made the requested change to N.J.A.C. 7:26B-5.3(a)6.

COMMENT: Numerous comments received requested that the 60-day period during which a negative declaration is approved be extended at N.J.A.C. 7:26B-5.4. One comment suggested the negative declaration be limited not to a period of time, but rather, to a particular transaction.

RESPONSE: N.J.S.A. 13:1K-9(b)2 provides for negative declaration submittal no more than 60 days prior to transfer of title. N.J.A.C. 7:26B-5.4(d) provides for a single extension of the negative declaration approval for another 60 days.

COMMENT: A comment concerning N.J.A.C. 7:26B-5.4 stated that the requirement to have the owner or operator of the industrial establishment immediately notify the Department of any change in the Initial Notice and request an amended negative declaration is wholly unreasonable since the information in the Initial Notice can be voluminous and only a truly material change, which the rules should describe in detail, ought to trigger a notification requirement. The comment also requested that the rules be clarified so that such a notification is required only if a new or extended negative declaration is needed.

RESPONSE: The negative declaration that is approved by the Department is based upon the statements and submittals of the owner or operator. Therefore, if there is a change in any information, such as, change in the buyer or a subsequent discharge that was not reported on the Initial Notice, the Department's negative declaration approval would no longer be valid. N.J.A.C. 7:26B-5.4 provides a mechanism to obtain an amended negative declaration thereby allowing the subject transaction to proceed without requiring a complete resubmission pursuant to ECRA. The re-

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visions only need to be submitted up until the point that the transaction occurs. If no changes occur from the time of issuance of the negative declaration to the actual transfer, provided that the actual transfer occurs within 60 days, no new information needs to be submitted to the Department.

COMMENT: One comment suggested adding language at N.J.A.C. 7:26B-5.4(a) stating that the subject transaction may proceed upon receipt of the negative declaration approval.

RESPONSE: The Department has added language at N.J.A.C. 7:26B-5.1(c).

COMMENT: One comment suggested adding the term "remedial plan", which can include site stabilization techniques not involving actual cleanup, to the term "cleanup plan" as used within N.J.A.C. 7:26B-5.5.

RESPONSE: A cleanup plan may include this alternative.

COMMENT: A comment on N.J.A.C. 7:26B-5.5(a) suggested that "may" be changed to "shall".

RESPONSE: The Department has made the requested change.

COMMENT: A comment was received concerning N.J.A.C. 7:26B-5.5(e) that an applicant should be able to request a modification of any provision of a cleanup plan, not merely the schedule.

RESPONSE: Neither this section nor any other section prohibits the owner or operator from requesting modifications to the approved cleanup plan. All reasonable requests for modification will be entertained.

COMMENT: A comment received suggested the Department has no authority to require financial assurance in an amount greater than the cleanup plan cost estimate as provided within N.J.A.C. 7:26B-5.5(b).

RESPONSE: The Department did not intend that required financial assurance be provided in an amount greater than the approved cleanup plan cost estimate, but merely that the financial assurances not be less than the cleanup plan cost estimate. The provision for amounts greater than the cleanup plan cost estimate was intended merely to make it clear that where financial assurances are available in amounts only greater or less than those of the cleanup plan cost estimate, those in the amount greater shall be obtained. The Department has clarified its intent by substituting "at least equal to" for "equal to or greater than" at N.J.A.C. 7:26B-5.5(b) and 7:26B-6.1(a).

COMMENT: One comment suggested that if a purchaser assumes responsibility for cleanup plan implementation pursuant to N.J.A.C. 7:26B-5.5(d) and for the financial assurance requirements pursuant to N.J.A.C. 7:26B-6.1(b), then the seller should be expressly relieved of financial obligations under the Act and this chapter.

RESPONSE: The Act imposes responsibility and liability on the owner or operator without providing relief therefrom upon their assumption by a third party.

COMMENT: One comment requested clarification as to when a transfer could take place if the cleanup plan is implemented by a party other than the owner or operator pursuant to N.J.A.C. 7:26B-5.5(d).

RESPONSE: Once a cleanup plan is approved by the Department, the transfer may occur as provided at N.J.A.C. 7:26B-5.1(c). Cleanup plan implementation is not a condition precedent to transfer of the industrial establishment.

COMMENT: A comment suggested that N.J.A.C. 7:25B-5.5(e) be revised to allow the owner or operator of an industrial establishment to modify financial assurance schedules. In addition, the Department should approve or disapprove the modification within 30 days of receipt of the request.

RESPONSE: Reductions in dollar amounts of financial assurances are provided at N.J.A.C. 7:26B-6.2(g), 6.3(g), 6.4(h), and 6.6(e). It would be inappropriate to impose a specific review timetable on the Department since additional information may be required from the owner or operator to justify the request.

COMMENT: A comment questioned the need for the requirement at N.J.A.C. 7:26B-5.6 that the owner or operator submit periodic cleanup plan progress reports in view of Department inspection and approval of cleanup operations.

RESPONSE: Although the Department may inspect each industrial establishment that is subject to a cleanup plan to determine compliance with the cleanup plan, it is essential that the owner or operator participate in evaluating compliance by documenting progress of cleanup implementation.

COMMENT: One comment suggested amending N.J.A.C. 7:26B-5.7(e) by providing for the release of financial assurance in the same letter containing approval of cleanup plan implementation to effect a reduction of paperwork and postage bills for the Department.

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RESPONSE: This inclusion of the release of financial assurance could result in a delay in the issuance of the letter approving the implementation of the cleanup. The referenced provisions would not, however, preclude the Department from including the two documents in the same letter. The Department will determine the most efficient manner in which to achieve the goals of expeditious administration of the Act.

COMMENT: A comment suggested that N.J.A.C. 7:26B-5.8, addressing deferral of cleanup plan implementation, adds a new requirement that financial assurances have to be kept in place throughout the entire period of deferral.

RESPONSE: While it is true that financial assurances must remain in place for the duration of deferral, this provision is not a new requirement. N.J.S.A. 13:1K-11b provides for the deferral of "implementation of a cleanup plan and detoxification of the site", not the release of financial assurances necessary to ensure the eventual cleanup plan implementation and site detoxification. See also, N.J.A.C. 7:26B-5.8(c).

COMMENT: A comment was received concerning N.J.A.C. 7:26B-5.8(a) that the approval for deferral from implementation of a cleanup plan should be mandatory and not discretionary with the Department. The comment also stated that the process outlined in the proposed rules was unworkable and not in accord with statutory intent.

RESPONSE: The approval for deferral of a cleanup plan must be a discretionary action on the part of the Department in order to protect the public health and safety. To make a deferral of the cleanup plan mandatory would remove from the Department its ability to determine whether the site is posing any risk to workers, the general public, or the environment. This is not acceptable. While it is difficult to determine what the comment was addressing when it stated that the process was unworkable, the Department has made a change to N.J.A.C. 7:26B-5.8(e) to allow it more discretion in the granting of a deferral.

COMMENT: One comment suggested that the Department allow the deferral of portions of the cleanup plan pursuant to N.J.A.C. 7:26B-5.8 to provide for cleanup of the most serious or easily correctable problems first.

RESPONSE: N.J.A.C. 7:26B-5.8 implements the deferral provisions of N.J.S.A. 13:1K-11 which address total deferral rather than a phased approach to cleanup plan implementation. The suggestion that cleanup be phased may be appropriate in certain cases and could be addressed in the cleanup plan.

COMMENT: One comment requested clarification at N.J.A.C. 7:26B-5.8 of those circumstances under which a deferral of a cleanup plan would be allowed.

RESPONSE: This is an extremely complex issue, regarding a provision of the Act that the Department has had little experience with to date. The Department will review requests for deferrals on a case-by-case basis due to the potentially wide range of fact situations which may arise.

COMMENT: A comment requested expansion of the term "substantially the same use" as used for cleanup plan implementation deferral at N.J.A.C. 7:26B-5.8(a).

RESPONSE: This term is taken directly from the Act. The Department will determine what constitutes "substantially the same use" on a case-by-case basis.

COMMENT: A comment stated that the seller would not be able to execute an affidavit regarding future uses as required at N.J.A.C. 7:26B-5.8(b).

RESPONSE: This subsection requires that the transferee and transferor state that the industrial establishment shall be subject to substantially the same use by the transferee. This is required by the Act in order to obtain a deferral and only covers the use of the facility by the transferee, not future uses by subsequent owners or operators.

COMMENT: A comment was received concerning N.J.A.C. 7:26B-5.8(c) that the Department should be required to act within 30 days rather than the 60 days in this paragraph.

RESPONSE: The Act requires the Department to take action on a request for deferral within 60 days of certification that the industrial establishment would be subject to substantially the same use.

COMMENT: One comment suggested adding the word "new" before the word "owner" in the first sentence of N.J.A.C. 7:26B-5.8(d).

RESPONSE: Addition of the word "new" would shift compliance responsibility to the transferee. The Act, in providing for deferral in implementing the cleanup plan, does not relieve the transferor from responsibility for compliance with the Act and this chapter.

COMMENT: A comment suggested that N.J.A.C. 7:26B-5.8(d) and (e) which address the deferral of cleanup plan implementation, add as an additional event requiring cleanup plan implementation "a Department

determination that continued deferral of cleanup plan implementation poses a threat of actual or potential harm to the public health or environment". However, the rules do not provide a definition of "a threat of actual or potential harm to the public health or environment".

RESPONSE: The comment misconstrues a condition subsequent (N.J.A.C. 7:26B-5.8(d)) and a condition precedent (N.J.A.C. 7:26B-5.8(e)) for deferral of cleanup plan implementation as an additional event requiring cleanup plan implementation. It is the responsibility of the owner or operator of the industrial establishment to prove that deferral of cleanup plan implementation poses only an insignificant threat of actual or potential harm to the public health or environment as a condition precedent to approval of deferral. N.J.A.C. 7:26B-5.8(e) has been changed to require the proof that deferral poses only "an insignificant threat" instead of "no threat" of actual or potential harm. The Department will review data submitted on a case-by-case basis to determine whether the industrial establishment has made an accurate assessment of the threat of actual or potential harm to the public health or environment. It would not be prudent to define the term "a threat of actual or potential harm to the public health or environment" without due consideration to the specifics of the individual case.

COMMENT: A comment suggested that in order to remedy deficiencies in N.J.A.C. 7:26B-5.8(d) and (e), the additional event triggering remediation of the site be eliminated or, in the alternative, the Department determine that an actual or potential threat of harm to the public health or environment exists and it should be a final agency decision subject to judicial review.

RESPONSE: Judicial review will be available as provided in the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. and R. 2:2-3(a)(2) of New Jersey Court Rules, 1969.

COMMENT: Several comments noted that the requirement at N.J.A.C. 7:26B-5.8(e) that an owner or operator prove that "deferral of a cleanup plan implementation poses no threat of actual or potential harm to the public health or the environment" is too limiting.

RESPONSE: The Department has modified the language at N.J.A.C. 7:26B-5.8(e) by deleting the word "no" and adding the phrase "only an insignificant" before the word "threat". The Department will view deferral requests on a case-by-case basis. In such a review, the relative risk to the public health, safety, and the environment will be evaluated.

COMMENT: A comment recommends replacing the word "proves" in N.J.A.C. 7:26B-5.8(e) with the word "demonstrates".

RESPONSE: Although somewhat synonymous, the term "proves" is intentionally retained in this provision because it connotes a more stringent requirement than "demonstrates".

COMMENT: A general comment was received that the rules should establish a minimal compliance process for those industrial establishments that have gone through a full ECRA process within a specified period of time prior to a subsequent ECRA trigger. In particular, once a site has completed an ECRA review only subsequent activities should be addressed in subsequent ECRA submissions.

RESPONSE: The Department does not feel that it is necessary to establish a specific process for handling subsequent transactions at a given site. Once a complete review of an industrial establishment has occurred, compliance associated with subsequent transactions should proceed relatively rapidly. Referencing the previous submissions, where appropriate, should allow the owner or operator that is subject for the subsequent ECRA trigger to focus its attention on providing the Department with information concerning its operation of the industrial establishment. Any remediation necessary pursuant to the prior ECRA triggers should generally be under way or have been completed.

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COMMENT: A general comment on N.J.A.C. 7:26B-6 suggested that it may be time to rethink the need for financial assurances. An alternative was suggested that would require a non-refundable fee of one percent of the proposed cleanup costs to be placed into a fund to provide the necessary financial assurances and, perhaps, to clean up abandoned sites or sites owned by bankrupt owners and operators.

RESPONSE: The proposed alternative to financial assurances may have merit, however, it is not clear whether the Department has the necessary statutory authority to institute the suggested alternative to the financial assurance requirements specified at N.J.A.C. 7:26B-6 to implement N.J.S.A. 13:1K-9b(3).

COMMENT: Several comments were received regarding the lack of flexibility by the Department concerning financial assurances, N.J.A.C. 7:26B-6.

RESPONSE: The Department allows flexibility by providing for five methods of compliance with the financial assurance requirement. Letters of credit, performance bonds, surety bonds, fully funded trusts, and self-bonding are allowed.

COMMENT: A comment was made suggesting that financial assurance not be required from other agencies of State government.

RESPONSE: The act does not allow the Department's waiving of financial assurance requirements for other agencies of the State.

COMMENT: A comment stated the relationship between N.J.A.C. 7:26B-6 and ACOs was unclear.

RESPONSE: The phrase "as specified in an ACO" was included where appropriate in N.J.A.C. 7:26B-6 to clearly describe the obligation to establish financial assurance under an Administrative Consent Order (ACOs).

COMMENT: A comment stated that most banks would be unwilling to provide letters of credit which authorize the Department to exercise its right to draw upon the letter of credit simply because of the bank's determination not to renew the letter of credit for an additional period as specified at N.J.A.C. 7:26B-6.4(f) and Appendix A.

RESPONSE: To date the Department has not encountered the unwillingness cited in this comment. The Department believes that such a provision is essential to ensure compliance with the Act and this chapter.

COMMENT: Comments were received requesting the deletion of the phrase requiring Departmental approval of the agreement between parties on posting of the financial assurance in N.J.A.C. 7:26B-6.1(b).

RESPONSE: The Department retains this requirement to minimize problems from arising while the subject parties comply with the Act. In the past, problems arose in the posting of the financial assurance which may have been prevented with prior Department approval.

COMMENT: N.J.A.C. 7:26B-6.1(b) should be amended to allow third parties to assume the financial assurance requirements of ACO signatories and to allow the assumption of financial assurance requirements in connection with cleanup plans or ACOs without approval of the Department.

RESPONSE: Assumption of financial assurance requirements of ACO signatories may be allowed as provided at N.J.A.C. 7:26B-7.3(a) and N.J.A.C. 7:26B-6.1(b). The Department will continue to require approval for the assumption of financial assurance in order to maintain consistency and control over the establishment of financial assurances to guarantee site cleanup. Retention of this requirement is necessary to assure the availability of financial resources should the cleanup plan cost estimate prove inadequate and require any subsequent increases.

COMMENT: A comment was received concerning N.J.A.C. 7:26B-6.1(b) that suggested that this section expressly permit assumption of financial assurance obligations in the context of ACOs.

RESPONSE: The Department does allow for the assumption of financial assurance obligations as specified at N.J.A.C. 7:26B-7.3(a). The language at N.J.A.C. 7:26B-6.1(b) also clearly allows this assumption by the transferee under an ACO.

COMMENT: A comment suggested that the cross reference at N.J.A.C. 7:26B-6.1(b) to N.J.A.C. 7:26B-5.5 is in need of clarification.

RESPONSE: N.J.A.C. 7:26B-6.1(b) specifies that the owner or operator or other party to the transfer that assumes such responsibility for cleanup plan implementation as approved by the Department at N.J.A.C. 7:26B-5.5(d), may be responsible for posting the required financial assurances. The cross reference to N.J.A.C. 7:26B-5.5 is appropriate and clear.

COMMENT: A comment was received requesting the Department to extend the 14-day period in N.J.A.C. 7:26B-6.1(a) to obtain and provide financial assurance documents (including self-bonding) to 30 days.

RESPONSE: The Department believes the 14-day period after receipt of written notice of cleanup plan approval is an adequate amount of time to obtain and provide the financial assurance documents under an approved cleanup plan. Contact with a financial institution may be initiated prior to Department approval of the cleanup plan in order to prepare the terms and documents.

COMMENT: A comment suggested the deletion of N.J.A.C. 7:26B-6.2(h), 6.3(h) and 6.4(j) since the provisions are redundant with Appendix A.

RESPONSE: The Department retains these provisions at N.J.A.C. 7:26B-6 to make clear the conditions precedent to cancellation. As the provisions are substantively identical to those found in Appendix A, no confusion should result.

COMMENT: Several comments requested that minor deviations be accepted in Appendix A, the Wording of Instruments Document.

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RESPONSE: The Department provided notice of the required use of the Wording of Instruments Document by including it as part of the proposal. Few comments were received on the Wording of Instruments Document. They are addressed below. In the interest of consistency and uniformity, and to avoid unnecessary delay, the Department chooses not to engage in negotiating the terms of each financial assurance document. Therefore, deviation from the wording provided at Appendix A is unacceptable.

COMMENT: A comment questioned the Department's authority to require a nominal initial payment into the standby trust fund.

RESPONSE: The Department requires a nominal initial payment into the standby trust fund in order to establish the fund and as proof that the trust fund exists. This requirement is consistent with the financial assurance requirements for hazardous waste facilities. See N.J.A.C. 7:26-9.

COMMENT: A comment suggested that Appendix A should be modified so that standby trusts can accept payments to the fund through cash, securities, or other property acceptable to the trustee.

RESPONSE: The Department requires the establishment of a standby trust fund to provide funds to the Department immediately upon default by the owner or operator of the industrial establishment involved in a cleanup to effectuate the cleanup since the owner or operator has defaulted. ECRA is best served by a standby trust fund funded by either cash or securities. Unfortunately, the use of other property acceptable to the trustee may reduce the liquidity necessary for expedited remedial action by the Department. Therefore, modification of Appendix A to include "other property acceptable to the trustee" is unacceptable.

COMMENT: A comment suggested that Section 10 of the Standby Trust Agreement in Appendix A of this chapter should require annual evaluations of the standby trust only after the standby trust is funded.

RESPONSE: Annual evaluations are necessary to evidence the continued existence of a viable standby trust. To the extent that the standby trust is "unfunded", the burden of providing the annual evaluation is small.

COMMENT: A comment suggested that Section 13, line 7, of the Standby Trust Agreement in Appendix A should be corrected to read "and pay over the funds and other property then constituting the fund".

RESPONSE: The phrase "property constituting the Fund" is sufficiently broad to encompass the term "fund".

COMMENT: A comment suggested that Section 19 of the stand by trust agreement of Appendix A must allow for the administration of the trust agreement outside New Jersey although New Jersey law would control interpretation of the terms of the agreement.

RESPONSE: The wording in this choice of laws section does not preclude the administration of the trust agreement outside of the State of New Jersey. It merely requires administration in accordance with the laws of New Jersey.

COMMENT: Numerous comments received stated that the self-bonding provisions promulgated in the N.J.A.C. 7:26B-6.5 are "totally unworkable" and "too stringent".

RESPONSE: The self-bonding provisions were carefully drafted and promulgated to ensure that only those organizations that have the competency, reliability, financial capability, and integrity to meet their obligations can self-bond. The Department needs the same level of assurance under self-bonding that is provided by the other allowable methods of financial assurance to ensure full cleanup plan implementation. Thus, a conservative financial test has been instituted to ensure the availability of funds to complete the cleanup.

COMMENT: A comment suggested that N.J.A.C. 7:26B-6.5 be revised to require the Department to render a decision concerning self-bonding promptly upon request and in no event more than five days after a request.

RESPONSE: A decision will be rendered in a timely manner in order to ensure that financial assurances are in place shortly after the approval of a cleanup plan or as specified in an ACO. Clearly there is adequate incentive for the Department to reach its decision as soon as possible. It is not in the interest of the Department, after having granted cleanup plan approval, to delay the execution of an adequate self-bonding agreement.

COMMENT: A comment suggested provision for confidential treatment of materials submitted in compliance with N.J.A.C. 7:26B-6.5.

RESPONSE: A confidential claim may be made in connection with any information required for submittal pursuant to the Act or this chapter. See N.J.A.C. 7:26-8.

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COMMENT: A comment suggested that N.J.A.C. 7:26B-6.5 should allow a Chapter 11 debtor-in-possession or trustee or a Chapter 7 trustee to avail itself of the self-bonding provisions.

RESPONSE: It is not prudent for the Department to offer self-bonding as a means of assuring cleanup plan implementation or compliance with ACO provisions to parties who are financially unstable since they may not have assets, above those estimated in the cleanup plan, that may be necessary for unforeseen increases in cleanup cost.

COMMENT: A comment was made suggesting that it "may be difficult and unnecessarily expensive" to assemble the financial information required under N.J.A.C. 7:26B-6.5 within the 14-day allotted time period.

RESPONSE: Only where the corporate owner or operator waits until receipt of notice that the cleanup plan is approved will he have only 14 days to submit to the Department the required information. The owner or operator knows of the requirement to obtain financial assurance before cleanup plan approval. It would be prudent for those electing to self-bond to begin assembling the required financial information in anticipation of cleanup plan approval. The Department's granting more than the 14-day period provided at N.J.A.C. 7:26B-6.5(a) may unnecessarily jeopardize full compliance with the Act and this chapter as the subject transaction may proceed upon cleanup plan approval.

COMMENT: A comment requested that the compliance deadline for submitting a renewal of self-bonding information be extended from 90 days to 120 days subsequent to the end of the fiscal year.

RESPONSE: The Department maintains 90 days is a sufficient time to obtain and deliver an audit for renewal of self-bonding.

COMMENT: A comment was made that "there is no legal reason why the self-bonding should be limited to corporate owners or operators".

RESPONSE: At this time, the Department is taking a conservative approach to the self-bonding provisions by making them only available to corporations satisfying the requirements of N.J.A.C. 7:26B-6.5.

COMMENT: A comment questioned why intangible assets are not considered in the self-bonding financial test.

RESPONSE: Intangible assets include assets such as good will and rights to patents or royalties that are too speculative to be relied upon as elements of this conservative financial test.

COMMENT: A comment on N.J.A.C. 7:26B-6.5(d)iii suggested that only cleanups involving hazardous wastes for which financial assurances are required under the Resource Conservation and Recovery Act. (RCRA) be included in the list of approved cleanup or closure plan costs for the corporation.

RESPONSE: Cleanups of other facilities or portions of facilities that are not regulated pursuant to RCRA and that may not involve hazardous wastes need also be included in the analysis of a company's ability to self-bond. Cleanup costs associated with these facilities may be placing a significant burden on the corporation. These costs are relevant in determining the corporation's ability to comply with the self-bonding requirements of N.J.A.C. 7:26B-6.5.

COMMENT: A comment requested that the five percent threshold test established in N.J.A.C. 7:26B-6.5(b) be eliminated entirely because it is not found in the RCRA self-bonding test and serves little purpose here.

RESPONSE: The five percent threshold test was established to further ensure the availability of funds for compliance with the Act. The RCRA self-bonding test was used merely as a model in developing the RCRA self-bonding test and, therefore, need not be identical.

COMMENT: One comment suggested that N.J.A.C. 7:26B-6.5(e) be deleted.

RESPONSE: The Department is dependent, in part, on the review of an independent certified public accountant (CPA) statements as to the adequacy of the corporation to self-bond. The conservative approach justifiably being taken by the Department in agreeing to enter into a self-bonding agreement mandates that the Department be free to disallow the use of self-bonding based upon any adverse qualification expressed by the independent CPA.

COMMENT: Several comments requested that N.J.A.C. 7:26B-6.5(g) should be limited to annual affidavits and N.J.A.C. 7:26B-6.5(h) be limited to submission of readily available information every six months.

RESPONSE: As previously stated, the Department is taking a conservative approach in initiating these self-bonding provisions. Therefore, the time periods promulgated are appropriate for the initial implementation of these provisions.

COMMENT: A comment suggested that companies should be allowed to substitute an investment grade bond rating for the specific tests in N.J.A.C. 7:26B-6.5(b)4.

RESPONSE: It is inappropriate and unnecessary to accept an investment grade bond rating in lieu of the requirements at N.J.A.C. 7:26B-6.5(b)4 to 6.5(b)6 to establish a corporation's qualifications to self-bond pursuant to ECRA. The financial test at N.J.A.C. 7:26B-6.5(b) is specific to satisfying the financial assurance requirements necessary to guarantee implementation of the cleanup plan or other requirements of an ACO. To the extent an investment grade bond rating is as stringent as the financial test, the corporation should be able to meet the requirements of the financial test without difficulty and substitution with an investment grade bond rating is, therefore, unnecessary. To the extent such rating is not as stringent, it may be inadequate and this substitution would be inappropriate.

COMMENT: One comment requested that the requirements at N.J.A.C. 7:26B-6.5(d)1, 2 and 3 be alternative not cumulative, because it is inappropriate to require both an affidavit from a chief executive officer and a certified audit since such a requirement would deny the option of self-bonding to many businesses.

RESPONSE: The Department is taking a fiscally conservative approach to self-bonding at this time. The three requirements in N.J.A.C. 7:26B-6.5(d) remain in place to ensure the availability of adequate resources for cleanup plan implementation.

COMMENT: Several comments requested that the separate comparison report from the certified public accountant should not be required in N.J.A.C. 7:26B-6.5(d)3 where the financial information is obtained directly from the Annual Report.

RESPONSE: The Department will rely, in part, on the independent CPA's opinion on the data supplied by the corporation. It should be understood, however, that two separate certified public accountants need not be used, but that the certified public accountant performing the auditor's report may also certify the comparison report.

COMMENT: One comment stated that the Department's reliance on EPA's RCRA standards is inappropriate since self-bonding may represent a form of relief which the Legislature intended for many companies faced with the burden of ECRA financial assurance.

RESPONSE: The Department's decision to use EPA's RCRA requirements as a model for the ECRA self-bonding provisions is based upon its extensive review and application of these standards to potential self-bonders subject to ECRA. The results of this review satisfied the Department that the proposed self-bonding provisions are both necessary and appropriate and that these provisions do reflect the legislatively-intended relief.

COMMENT: A comment requested that the self-bonding agreement referenced in N.J.A.C. 7:26B-6.5(f) be presented in Appendix A.

RESPONSE: The wording for the self-bonding agreement was not developed at the time this chapter was proposed. However, the Department does not expect to impose substantive requirements not proposed at N.J.A.C. 7:26B-6.

COMMENT: A comment was received concerning N.J.A.C. 7:26B-6.5(j) that the Department's retention of ultimate approval of self-bonding based upon an unspecified "reliability and integrity" review is arbitrary, capricious and unnecessary given the strenuous objective standards which precede it.

RESPONSE: In allowing self-bonding the Department does not require the immediate posting of a recognized instrument of financial assurance. Instead, the Department is relying upon the corporation to provide the financial assurance when required by the Department. The "competency, reliability and integrity" provision at N.J.A.C. 7:26B-6.5(j) provides the Department flexibility to disallow self-bonding where it determines that there is inadequate competency, reliability or integrity.

COMMENT: A comment stated that N.J.A.C. 7:26B-6.5(i) places self-bonding at a distinct disadvantage to other forms of financial assurances since it requires payment on demand for the cost of cleanup.

RESPONSE: The Department, in allowing self-bonding, must be assured that the funds required to implement a cleanup plan are available at any time noncompliance with ECRA occurs. Therefore, it is appropriate to require payment on demand in a self-bonding situation. The "payment-on-demand requirement" ensures remediation in a manner similar to the provisions of N.J.A.C. 7:26B-6.2(e), 6.3(e), 6.4(i) and 6.6(i), under the other options for financial assurances, that also make penal sums or specific performance available to the Department upon demand.

COMMENT: A comment stated that the requirement in N.J.A.C. 7:26B-6.5(d) for the periodic certified affidavit from the chief financial officer and the independent certified public accountant may make the self-bonding provision impractical for parent corporations to act as self-bonders.

RESPONSE: The requirement for periodic certification that the corporation meets or exceeds the financial test criteria specified for self-bonding is necessary. No information was submitted with the comment as a basis for the assertion that the requirement may prevent parent corporations from acting as self-bonders.

COMMENT: A comment on N.J.A.C. 7:26B-6.5(d)1iii suggested that this provision be deleted since it is unnecessary, burdensome and exceeds any financial assurance provision under RCRA.

RESPONSE: The RCRA self-bonding test was used as a model in developing the ECRA self-bonding test. However, additional requirements under ECRA were developed to provide additional assurance of the availability of funds. The Department's position is that the requirement for a corporate resolution that the chief financial officer has continuing authority to make payments for the corporation is instrumental in assuring payment to the Department upon a determination by the Department that the owner or operator has failed to perform as required by the Act and this chapter.

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COMMENT: A comment requested the Department's establishing a procedure whereby a public authority with the power of eminent domain could enter into an Administrative Consent Order (ACO) with the Department without the owner or operator becoming a party to the ACO.

RESPONSE: Since the owner or operator is responsible for compliance with the Act, all ACOs must be signed by the owner or operator. If the public authority wished to take the lead in compliance with ECRA, an ACO could be worded accordingly. In the event that an owner or operator would not be willing to sign an ACO, the public authority could proceed with its acquisition and the owner or operator would be in violation of ECRA. Afterwards, by virtue of its ownership of the facility, the public authority would be in position to enter into an ACO with an appropriate unit of the Department to conduct the necessary investigation and cleanup of its facility.

COMMENT: A general comment was received that N.J.A.C. 7:26B-7 clearly establish that ACOs shall be available as of right under certain conditions, that there shall be only one entity or ordered party with primary responsibility to comply with the ACO, and that compliance by the ordered party shall expressly protect others from possible enforcement actions or penalties.

RESPONSE: Entry into an ACO is discretionary with the Department. The Act does not expressly provide for ACOs and, therefore, the Department believes it essential to continue to exercise its discretion to ensure the meeting of the statutory objectives before entry into an ACO. Although each ACO usually designates one entity that has primary responsibility for compliance, cases may arise where it is appropriate to designate several parties, each strictly liable, jointly and severally, for compliance with the ACO. Compliance by a party to an ACO will not shield others from enforcement if those others have violated ECRA.

COMMENT: Many comments were received requesting a more expansive list of circumstances, including economic calamity, bona fide financial reasons, reviews taking greater than three months, transfers to public authorities, or whenever the Department believes it would be a proper exercise of its discretion, where the Department would enter into an ACO with the owner or operator of an industrial establishment so that the "closing, terminating or transferring operations" may occur prior to approval of a negative declaration or a cleanup plan.

RESPONSE: The Department offers ACOs as a discretionary mechanism to facilitate transactions without sacrificing protection of public health or the environment of New Jersey. There are circumstances where the transaction of business pursuant to an ACO, provided full compliance with the Act and this chapter follows, is appropriate. It is also true that in many circumstances full compliance should be effected without reliance upon ACOs. The owner or operator about to receive a negative declaration not pursuant to an ACO. If necessary, the applicant can begin the ECRA process before a triggering event so that the transaction will not be delayed.

The Department has changed N.J.A.C. 7:26B-7.1(a)3 to provide for the availability of ACOs where the negative declaration or cleanup plan approval would not be granted within four months from Initial Notice submittal. Four months is the period of time for ECRA processing of low environmental concern industrial establishments. In addition, because of the rigid time schedule within which public authorities must pursue acquisitions in order to complete important public projects, ACOs will be available to allow such acquisitions of condemned property to proceed.

ADOPTIONS

It is the Department's position that N.J.A.C. 7:26B-7.1(a) provides it with the necessary discretion to grant ACOs in order to avoid what would otherwise be unavailable adverse economic effects resulting from delaying the occurrence of the ECRA-subject transaction until cleanup plan approval. Therefore, except for acquisitions by condemning authority, no additional events are added to this list as available for ACOs.

COMMENT: A comment suggested that N.J.A.C. 7:26B-7.1(a)2 include a public offering as an event which would justify the issuance of an ACO. The proposed rule is vague and should be redrafted to clearly state that the ACO may be justified where the public offering would operate to trigger ECRA.

RESPONSE: N.J.A.C. 7:26B-7.1(a) authorizes ACOs only in order that the owner or operator of an industrial establishment closing, terminating or transferring operations can achieve compliance with the Act and this chapter. ACOs are not available pursuant to this subchapter where there is no ECRA trigger likely to occur. If the public offering a stock does not result in a transaction which is subject to the Act and this chapter, the Department would not offer an ACO pursuant to N.J.A.C. 7:26B-7.1(a)2. Therefore, the provision remains unchanged.

COMMENT: A comment suggested revision of N.J.A.C. 7:26B-7.1(a) to allow for the issuance of an ACO when a non-ECRA order or permit condition has not proceeded to the point of developing a remediation strategy.

RESPONSE: N.J.A.C. 7:26B-7.1(a) allows for entry into ACOs under certain transactional circumstances. The Department does not envision the need for an ECRA ACO if a remediation strategy is tied to a permit condition since a conditional cleanup plan approval could be issued that would eliminate the need for an ACO. It is likely, however, that given the circumstances in the comment, the estimated time frame to complete the ECRA process will exceed the four month limit specified at N.J.A.C. 7:26B-7.1(c)3. In such cases ACOs may be available solely on the basis of time.

COMMENT: A comment concerning proposed N.J.A.C. 7:26B-7.1(a)8 and 9 (adopted at N.J.A.C. 7:26B-7.1(a)9 and 10) suggested that it is not clear why an ACO would be needed for these cessations of operations. The comment believed that ECRA is a precondition to the ability to consummate a transaction but not a precondition for the ability to cease operations.

RESPONSE: The Act specifically requires that an industrial establishment closing operations shall submit to the Department, upon closing operations or within 60 days subsequent to public release of its decision to close operations, a negative declaration or cleanup plan. If the provision cannot be complied with, it may be necessary for the owner or operator to enter into an ACO to avoid ECRA liability. The need might arise where the tenant has terminated the lease because without an ACO the tenant might not have access to the industrial establishment for that ECRA compliance necessary after actual termination of the lease.

COMMENT: A comment stated that N.J.A.C. 7:26B-7.1 does not have any implied mechanism for a buyer to undertake responsibility for implementing a sampling plan or other requirements other than the cleanup plan pursuant to an ACO.

RESPONSE: N.J.A.C. 7:26B-7.5(b) provides that the Department may enter into an ACO with any other party to the transaction. This provision is provided to allow another party to undertake the responsibility of the owner or operator for compliance with ECRA, including sampling plan implementation. However, the owner or operator will not be relieved of its liabilities pursuant to the Act because of entry into an ACO.

COMMENT: A comment on N.J.A.C. 7:26B-7.1 asserted that the use of an ACO to facilitate a transfer of property allows the Department to dictate the terms of the transfer.

RESPONSE: The ACO is offered by the Department to allow a transfer to occur when requested by the owner or operator pursuant to N.J.A.C. 7:26B-7 in circumstances where compliance with ECRA cannot be obtained within the time frame sought by the transferor or transferee. It is solely within the discretion of the parties to the transfer to seek an ACO. The Department does not impose an ACO on these parties. Compliance through a negative declaration or a cleanup plan accompanied by adequate financial assurances is always available. To the extent an ACO is used, the terms must be conservative and non-negotiable both to assure adequate remediation of contamination and to allow the transfer to proceed on an expedited basis. The Department does not dictate in an ACO the terms of a transfer except as necessary to ensure that the owner or operator complies with ECRA.

COMMENT: A comment on N.J.A.C. 7:26B-7.1(a)2 questioned whether a public offering of securities is an ECRA-subject transaction,

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and, if it is, the comment suggested that it should be listed in the applicability section.

RESPONSE: The public offering of securities may be a subject transaction if it results in a change in the person or persons holding the majority interest of a corporation as specified at N.J.A.C. 7:26B-1.5(b)2, a merger or consolidation as specified at N.J.A.C. 7:26B-1.5(b)1, or as otherwise provided at N.J.A.C. 7:26B-1.5(b).

COMMENT: The ACO provisions at N.J.A.C. 7:26B-7 are deficient because they fail to establish a process for negotiation of a fair and reasonable consent order and a dispute resolution mechanism such as having disputes resolved by administrative law judges in adjudicatory proceedings.

RESPONSE: The Department has received numerous requests for ACOs and has developed a program to process these as rapidly as possible to allow for transactions to proceed in the time frame requested by the owner or operator. To handle the request for an ACO expeditiously, the Department has developed a form ACO in which the negotiation of particular items is inappropriate. To open the process to negotiation would result in significant delays in the processing of requests for ACOs. Having disputes regarding ACOs resolved by an administrative law judge in adjudicatory proceedings is inappropriate for a discretionary document that the Department is not mandated to execute. Should the owner or operator find the terms of the form ACO unpalatable, he or she is always free to elect compliance with the Act through the procedures described in this chapter other than ACOs.

COMMENT: A comment suggested that N.J.A.C. 7:26B-7.1 be revised to allow an owner or operator subject to an insolvency procedure to apply for and be approved for an ACO from the Department.

RESPONSE: No reason has been provided for treating this case differently from other applicable transactions. ACOs may be available under insolvency proceedings to the extent the case also satisfies any of the existing criteria at N.J.A.C. 7:26B-7.1.

COMMENT: One comment requested that the Department be obligated to grant any request for an ACO no later than 30 days after filing an ACO application if any of the specified conditions are present in N.J.A.C. 7:26B-7.1(a).

RESPONSE: With the exception of negative declaration approval (45 days) and cleanup plan implementation deferral approval (60 days), the Act imposes no deadlines on Department action. The need to adequately review submittals designed to guide identification and remediation of contamination makes the imposition of deadlines upon the Department ill-advised. This is certainly the case for ACO applications where, under normal circumstances, the triggering transaction is allowed to proceed prior to the Department's obtaining full site information. It should be noted that the granting of an ACO is discretionary with the Department (see N.J.A.C. 7:26B-7.1(a)).

COMMENT: A comment suggested changing N.J.A.C. 7:26B-7.1(a)6 to read as follows: "If there is a transaction involving one or more industrial establishment(s) or other significant assets in New Jersey, that is part of a transaction involving multiple places of business at least one of which is not located in New Jersey;"

RESPONSE: The adoption has been modified accordingly.

COMMENT: Several comments object to the \$100,000 minimum financial assurance requirement established by the Department as part of the ACO process at N.J.A.C. 7:26B-7.3.

RESPONSE: The financial assurance requirement in an ACO will continue to be conservative, generally greater than the amount specified in cleanup plans. At the time an ACO is signed, the Department has limited information about the site and, therefore, uses a conservative figure to ensure that adequate financing is available to remediate the site. Notwithstanding the above, the \$100,000 is not a minimum since the financial assurance can be lower if justified by sampling data.

COMMENT: A comment on N.J.A.C. 7:26B-7.4(b) suggested that this section be eliminated since it would require a party entering an ACO to subject itself to the possibility of grossly unfair fines with no right to contest them. The comment suggested that it would be preferable to allow one level of quick administrative review of the penalty, without a right to judicial review, to reduce the possibility of an arbitrary fine being imposed.

RESPONSE: The Department feels it is necessary to require substantial stipulated penalties in ACOs since the subject transaction is being allowed to occur without full site review and remediation where necessary. The stipulated penalties, are designed to discourage violation of the ACO and to establish harsh penalties for so doing. Concerning administrative review, an owner or operator may request a meeting with the Department

to determine the basis for the penalty and to explain why, in the specific case at hand, it believes the penalty is excessive. If the owner or operator still disagrees, the owner or operator may have an opportunity to present a defense to a suit brought by the Department to collect the stipulated penalties.

COMMENT: A comment on N.J.A.C. 7:26B-7.3(a) suggested that the estimate of cleanup cost could be based on an outside consultant's estimate rather than the Department's.

RESPONSE: The Department, in allowing a transfer to occur pursuant to an ACO, estimates the amount of financial assurance sufficient to remediate the site if the responsible party fails or is unable to carry out the cleanup. If a consultant's estimate is available, the Department would consider that estimate when setting the financial assurance. However, the Department must retain the right to set the financial assurance amount at a level that it believes necessary to guarantee that public funds will not be needed to remediate the subject site.

COMMENT: One comment requested the right to appeal the financial assurance amount set pursuant to N.J.A.C. 7:26B-7.3(b).

RESPONSE: If the owner or operator does not agree with the amount required as financial assurance in the ACO, the owner or operator need not enter into the ACO; rather, the owner or operator can opt to comply with ECRA prior to closing, terminating or transferring the industrial establishment. There is no right to appeal as an ACO is an option which the owner or operator need not select. Where an ACO is entered into and then violated by failure to provide the financial assurance, stipulated penalties will be collected and the ACO may be declared null and void.

COMMENT: One comment requested N.J.A.C. 7:26B-7.4(a) be deleted since this provision is covered by N.J.A.C. 7:26B-9.

RESPONSE: N.J.A.C. 7:26B-7.4(a) incorporates by reference those penalties listed at N.J.A.C. 7:26B-9 as stipulated penalties and provides that stipulated penalties shall be between \$1000.00 and \$5000.00 for those penalties not listed at N.J.A.C. 7:26B-9. As such, N.J.A.C. 7:26B-7.4(a) is not redundant with N.J.A.C. 7:26B-9.

COMMENT: Several comments opposed the stipulated penalties of not less than \$1,000.00 per day which would be incorporated into ACOs for any violation pursuant to N.J.A.C. 7:26B-7.4.

RESPONSE: These stipulated penalties are set at levels to provide strong disincentives to those responsible parties' failing to comply with their responsibilities under the Act and this chapter.

COMMENT: A comment suggested that N.J.A.C. 7:26B-7.4 be revised to provide that a "Trustee in a bankruptcy proceeding, Assignee for Benefit of Creditors and/or State Court Receiver shall not be required to sign a stipulation to penalties."

RESPONSE: To the extent that the above mentioned parties are not owners or operators, they are not required to sign as the ordered parties to an ACO and, therefore, could avoid liability for any stipulated penalties. However, if these parties enter into an ACO, the stipulated penalties would apply.

COMMENT: A comment on N.J.A.C. 7:26B-7.4(a) suggested that an ACO should contain a force majeure clause so that an owner/operator could be relieved from paying the stipulated penalties specified in the ACO because of delays beyond his control.

RESPONSE: The ACO's that are utilized in the ECRA program contain a force majeure clause. In addition, if a requirement of the ACO cannot be met in time, the Department may consider granting an extension of time if requested and justified by the ordered party.

COMMENT: A comment on N.J.A.C. 7:26B-7.4(b) objected to the requirement that any party to an ACO waive their rights to contest the Department's discretion concerning the amount of stipulated penalties since there is no provision in the Act giving the Department this authority.

RESPONSE: The Department, by allowing a transaction to proceed pursuant to an ACO, must be guaranteed that compliance with the ACO will occur as soon as possible after the transaction. Stipulated penalties provide a strong incentive for compliance. If a waiver of rights to contest the stipulated penalty were not included, hearings on each penalty assessment could be requested and significant delays could occur in the resolution of the case and remediation of the site. Compliance with the Act through pre-transaction negative declaration or cleanup plan approval is always an available alternative should the owner or operator choose not to enter into an ACO and be subject to stipulated penalties.

COMMENT: One comment requested N.J.A.C. 7:26B-7.4(b) be deleted for it is "unconscionable for the Department to require the parties to an ACO to waive constitutionally protected rights." The commenter felt this provision was totally inappropriate given the total lack of any review or appeal procedure in the rules.

RESPONSE: There is no constitutionally-protected interest involved. The language at N.J.A.C. 7:26B-7.4(b) is included in order to avoid the situations such as where a party enters an ACO, agreeing to pay a sum-certain if it violates the ACO, then subsequently violates the ACO and attempts to pay less than the agreed on penalties; where a party agrees up front to pay certain penalties, the only issue on appeal should be whether the violation has occurred; if so, the agreed-upon penalties should be paid. The Department shall continue to include this provision under N.J.A.C. 7:26B-7.4(b) in order to provide certainty in obtaining legislatively mandated compliance with the Act and this chapter in those circumstances where the triggering transaction is allowed to proceed prior to negative declaration or cleanup plan approval.

COMMENT: Several comments suggested that the Department should provide an appeal process whenever the Department refuses to enter into an ACO with an owner or operator applying therefor.

RESPONSE: Appeals from the actions of the Department in implementing the Act may be taken as provided by the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. and R. 2:2-3(a)(2) of New Jersey Court Rules, 1969.

COMMENT: A comment concerning N.J.A.C. 7:26B-7.5 stated that the Department should not require documentary evidence that the person signing on behalf of an entity is authorized to do so but, rather, require a recitation in the ACO that the person signing has all requisite authority to bind that entity.

RESPONSE: The assurances required in connection with an ACO are of critical importance to the ECRA program, since an ACO allows the transaction to occur prior to full ECRA compliance, it is necessary for the Department to be sure that the person signing for the entity is so authorized. The Department does not consider the additional paper work to be unduly burdensome upon the entity requesting the ACO.

COMMENT: A comment suggested that a Trustee in bankruptcy, Assignee for Benefit of Creditors and/or State Court Receiver shall sign an ACO in his fiduciary capacity and shall not be personally liable.

RESPONSE: Any person who signs an ACO with the Department is signing as an ordered party unless otherwise specified by the ACO, and shall, therefore, be personally liable. The comment failed to provide any reason to release the executing party from personal liability as provided for by the Act and this chapter.

COMMENT: Several comments suggested that the Department should delete reference to joint and several liability from the ACO provisions at N.J.A.C. 7:26B-7.5(b) because the requirement is ultra vires and should be imposed only when damages are indivisible.

RESPONSE: Again, the execution of an ACO by the Department is a discretionary act allowing the triggering transaction to occur prior to the Department's obtaining full information on the environmental status of the industrial establishment. All reasonable measures to ensure adequate cleanups, such as the imposition of joint and several liability upon the parties entering into an ACO with the Department, are appropriate to ensure remediation of the site. A sentence has been added to N.J.A.C. 7:26B-7.5(b) to make it clear that the entry of neither an operator nor an owner to an ACO, releases the other from strict liability for compliance with the Act or this chapter.

COMMENT: A comment suggested that the conditions under which the buyer must accept liability for the cleanup plan under N.J.A.C. 7:26B-7.5(b) are prohibitive. The requirement for the buyer to accept full liability, jointly and severally with the owner or operator, is unfair and may penalize the buyer who is providing a means to have a particular site remediated.

RESPONSE: If a buyer is assuming the responsibility to investigate and remediate a site, the Department must have the ability to compel the buyer to undertake the necessary investigation and remediation for the particular site. Otherwise, the buyer could initiate action at the site and then suspend the investigation or cleanup. It would then be necessary for the Department to proceed against the seller. If the buyer is willing to assume the responsibility for compliance with ECRA, he or she shall be strictly liable, jointly and severally, for compliance with this chapter, the Act, and the ACO.

COMMENT: One comment was received stating that the Department should waive any and all rights it may have to void a transaction completed in compliance with the terms of an ACO.

RESPONSE: There is no statutory basis nor proactive environmental reason for the Department to waive its right to void a transaction under an ACO. Indeed, there is a greater need for retaining this right where a transfer occurs pursuant to an ACO rather than pursuant to a negative declaration or a cleanup plan, again, because the Department has not yet obtained full information on the site.

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COMMENT: A comment requested clarification as to the meaning of "or the like" at N.J.A.C. 7:26B-7.5(c) in reference to the type of documentation acceptable to the Department that a person signing on behalf of a corporation has the authority to bind the corporation.

RESPONSE: N.J.A.C. 7:26B-7.5(c) provides two examples, corporate resolution and power of attorney, as examples of the type of documentation the Department is seeking. The Department is willing to accept other documentation that similarly assures that the person signing for the owner or operator has the authority to do so.

COMMENT: A comment suggested that N.J.A.C. 7:26B-7.5(b) be changed to allow the Department, with the consent of the parties, to accept compliance from any party in lieu of a party otherwise designated under the Act or this chapter.

RESPONSE: The Department is willing to enter into an ACO with any party that will guarantee compliance with ECRA. However, it is inappropriate to release any other parties from liability under ECRA. This conservative approach is necessary to ensure that public funds will not be spent in an ECRA case that proceeds under an ACO.

COMMENT: One comment received stated that the Department does not need to state that the owner or operator who enters into an ACO shall provide the Department with appropriate documentation that the purchaser, transferee, mortgagee, or other party to the transaction shall allow Department access to the property.

RESPONSE: The Department finds that this requirement is necessary since, in certain cases, purchasers or other transferees have not allowed the Department or the former seller to enter the property for the purpose of compliance with the Act and this chapter. Therefore, the rule provides for both the Department's and the transferor's right of entry on the application for an ACO to ensure that this situation does not happen in the future.

COMMENT: A comment stated that the purpose and application of N.J.A.C. 7:26B-7.5 is unclear and questioned whether it was the intent of the Department that the applicant for an ECRA ACO sign the document, or that both the owner of the real property and the operator of the industrial establishment sign the ACO.

RESPONSE: The requirement at N.J.A.C. 7:26B-7.5(a) is to have either the owner or operator, or both, sign the ACO in order for the transaction to proceed under the terms of the ACO. The paragraph specifically says "owner or operator" and it is not, therefore, the intention of the Department to require both sign the ACO. N.J.A.C. 7:26B-7.5(b) has been modified to make it clear that regardless of their entry into an ACO, both the owner and operator are strictly liable, jointly and severally. Other parties, as listed in N.J.A.C. 7:26B-7.5(b), may also sign the ACO, and these parties shall then be strictly liable, jointly and severally with the owner or operator.

COMMENT: A comment was received concerning N.J.A.C. 7:26B-7.6(a) that "operator" should be added to the list of parties allowing access by the Department that includes purchaser, transferee, mortgagee or other party to the transaction, and that access should be limited to the purpose of the ACO.

RESPONSE: The Department has added "operator" to the referenced list. Access is to be provided for compliance with ECRA, not solely for the purpose of the ACO. N.J.S.A. 13:1D-9 also grants the Department broad powers to enter and inspect that this chapter should not derogate from. Therefore, access will not be limited to purposes of the ACO.

COMMENT: A comment was received that a new section should be added to N.J.A.C. 7:26B-7 that would address primary and secondary liability in cases where there are multiple party transactions (or successive transactions) and the parties have already allocated costs.

RESPONSE: These are issues to be discussed and decided by such parties, not the Department. ECRA imposes liability only on owners or operators and those who agree, through an ACO, to assume ECRA responsibility. The standard operating procedure of the Department is to specify primary responsibility in an ACO, including multiple party situations, without relieving any party to the transaction from liability. This prioritization is reached through negotiations amongst the parties involved. There is no need to include this procedure in this chapter.

COMMENT: A comment suggested that a new section should be added to N.J.A.C. 7:26B-7 that would provide a provision for successive ACO's, permitting subsequent transactions without duplicating financial assurance.

RESPONSE: In most cases the Department has allowed subsequent transactions to occur under an ACO without duplicating financial assurance. However, it is inappropriate to so specify in this chapter since

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there may be some cases which warrant the posting of additional, not duplicative, financial assurances.

7:26B-8

COMMENT: A comment to N.J.A.C. 7:26B-8.1(d) stated that the reproduction of confidential documents should not be allowed as the greater the number of copies of confidential information made, the more difficult it is to maintain the confidentiality of the information. The comment suggested that the submitter be permitted to highlight the confidential information in such a way that the highlighted material is not reproducible.

RESPONSE: The Department must have the ability to copy confidential information in order to distribute the information to parties that are authorized to receive the confidential material pursuant to N.J.A.C. 7:26B-8. All confidential information will be protected, and distribution will be limited solely to those authorized.

COMMENT: Some comments suggested that the reproduction of confidential documents should not be allowed, fees should not be required, cumulations of data should not be accessible, that the substantial damage standard is too high, and that confidential information should under no circumstances be released.

RESPONSE: Because the Department does not required trade secret information as part of an ECRA review, the Department rarely receives a request for confidential information for any activity conducted pursuant to ECRA. Occasionally, the Department receives requests for confidentiality on stocks sales, mergers, sales agreements, and other business transactions. Therefore, the Department anticipates few requests for confidentiality. The Department included N.J.A.C. 7:26B-8 to offer confidentiality protection to those persons who feel the information that they must submit as part of the ECRA process may be entitled to such protection. The Department feels the fees as adopted are appropriate and accurately reflect the costs of work performed in its review. Data cumulations and their release do not constitute a release of confidential data, often further the remediation efforts of the regulating agencies, and rarely pose a threat of substantial damage to those parties submitting the needed information. The Department will only reproduce confidential documents for good cause as described. The substantial damage criteria in N.J.A.C. 7:26B-8.3(c)3iv is not considered too vague but places the burden of proof rightfully on the person requesting confidential treatment.

COMMENT: A comment concerning N.J.A.C. 7:26B-8.1(a)-(f) stated that the Department could easily reduce its workload and reduce the burden on the regulated community by simply reducing the amount of information requested during the ECRA process.

RESPONSE: The information that is requested by the Department to comply with ECRA is necessary to allow for the proper review of industrial establishments subject to the requirements of the Act and this chapter.

COMMENT: Comments concerning N.J.A.C. 7:26B-8.1(a) stated that the class of material for which a confidentiality claim may be asserted should be broader than therein listed. One comment suggested adding the words "or otherwise confidential at law or in fact." Another suggested adding information regarding the ECRA-subject transaction as a fourth category.

RESPONSE: The language contained in this subsection is sufficiently broad to allow the applicant to request confidentiality for the information submitted pursuant to this chapter, the disclosure of which would be likely to result in substantial damage to the owner or operator. N.J.A.C. 7:26B-8.1(a) has been modified to incorporate this fourth category to the extent it involves specific information other than the actual occurrence and general nature of the trigger.

COMMENT: A comment concerning N.J.A.C. 7:26B-8.2(a) stated that Departmental contractors should be prohibited from access to confidential information unless they have signed a detailed confidentiality agreement and they have no conflict of interest, direct or indirect.

RESPONSE: The Department will release confidential information to a Departmental contractor only as necessary to further remediation efforts of the regulatory agency as provided at N.J.A.C. 7:26B-8.5, 8.6, 8.7 and 8.8, and these provisions address the concern raised in the comment.

COMMENT: A comment concerning N.J.A.C. 7:26B-8.3(b)2 and 3 stated that these provisions should be deleted since there is no provision that authorizes disclosure for these reasons and the standards are inadequate to protect confidential information. The commenter felt that disclosure for these reasons would constitute a taking of property without compensation.

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RESPONSE: N.J.A.C. 7:26B-8.3(b)2 and 3 state when the Department shall act upon a confidentiality claim, not the disclosure of confidential information. Adequate safeguards remain to protect that information entitled to confidential treatment. Disclosure of non-confidential information that the Department deems it is necessary to obtain cannot be considered "a taking."

COMMENT: A comment questioned what "substantial damage" means in N.J.A.C. 7:26B-8.3(c)3iv and requested that "substantial" should be deleted from N.J.A.C. 7:26B-8.4(a)5. The comment stated that any damage should be sufficient to deny disclosure, that such information may be constitutionally protected, and that disclosure on the basis of some rough determination of damage can deprive an applicant of those rights.

RESPONSE: The term "substantial damage" is used in this subchapter to describe the damage to the competitive position of the person submitting information that would result from disclosure of such information by the Department. Illusive damage does not rise to the level of "substantial damage." Further definition is not provided herein at this time in order to allow the case-by-case review by the Department without prejudice to the specific allegations and needs to the person submitting the information.

COMMENT: A comment was received concerning N.J.A.C. 7:26B-8.3(d)2 that "the Act" is undefined in this section.

RESPONSE: The term "the Act" was inadvertently included at N.J.A.C. 7:26B-8.3(d)2 and has been deleted.

COMMENT: A comment on N.J.A.C. 7:26B-8.3(d) suggested that a specific person should be responsible for making a determination concerning a confidential information request. The comment suggested specifying "Commissioner or the Department General Counsel" rather than "Department." The comment further suggested judicial review of the Department's decision should be available within four weeks of the final review.

RESPONSE: The Department will assign this responsibility to an appropriate employee. N.J.A.C. 7:26B-8 provides the necessary guidance for consistent determinations. Judicial review is available only as provided in the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. and R. 2:2-3(a)(2) of the New Jersey Court Rules, 1969.

COMMENT: Comments stated that N.J.A.C. 7:26B-8.4 is grossly over broad, that the Constitution protects a person's privacy interest as well as other interests, and that these provisions fail to protect these interests.

RESPONSE: The Department utilizes these substantive criteria in other regulatory programs. They are neither overly broad nor violate any privacy interest. In any case, judicial review of the agency's determination may be sought.

COMMENT: A comment stated that the standard at N.J.A.C. 7:26B-8.4(a)3 is lax and that information disclosed under ECRA itself could arguably fail this test.

RESPONSE: The information provided to the Department for compliance with ECRA will not be considered in determining whether the owner or operator has satisfied the requirements of N.J.A.C. 7:26B-8.4(a)3.

COMMENT: A comment concerning N.J.A.C. 7:26B-8.5(b) and (c) stated that the owner or operator who supplied the confidential information should be notified by the Department of any other State or Federal agency request for that information at least 30 days before disclosure thereto. The owner or operator should also have an opportunity to object to such disclosure.

RESPONSE: The referenced provisions allow the Department to release confidential information to other public agencies under specified circumstances. The criteria that must be met before a release to another agency afford sufficient protection of confidential information.

COMMENT: Concerning N.J.A.C. 7:26B-8.6, a comment requested that the Department notify the owner or operator who supplied the confidential information at the time that such information is disclosed to a contractor and receive a description of the information disclosed, that there should be a right by the owner or operator to object to such disclosure, and that all originals, in addition to copies, be returned to the Department.

RESPONSE: The release of confidential information to a Departmental contractor is limited as necessary for the contractor to complete the assigned task(s). The Department feels that the constraints placed upon the contractor are such that the confidential information will be protected to the degree possible while still allowing for its necessary release to the contractor. As objections to this release will not be entertained by the Department, it is unnecessary for the Department to notify the owner

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or operator that such information has been given to the contractor. Original documents would not be given to the contractor but would be retained by the Department.

COMMENT: A comment concerning N.J.A.C. 7:26B-8.7(a) stated that consent is only relevant if it comes from the person who asserts the confidentiality claim, rather than merely the owner or operator. A party making a tender offer should be able to request confidential treatment of its required submittals even though it is not an owner or operator.

RESPONSE: The Department would release the confidential information pursuant to N.J.A.C. 7:26B-8.7 only if it obtained written consent from the person who asserted confidentiality. In the example cited, the party making the tender offer would stand in the shoes of the owner or operator.

COMMENT: A comment was received concerning N.J.A.C. 7:26B-8.8 that notice of disclosure should be given to the owner or operator.

RESPONSE: The Department has added a provision for such notice at N.J.A.C. 7:26B-8.8(c).

COMMENT: A comment concerning N.J.A.C. 7:26B-8.9 suggested that a log should be kept of all persons given access to any confidential information.

RESPONSE: The Department will take this suggestion into consideration in its internal security procedures.

COMMENT: A comment suggested that N.J.A.C. 7:26B-8.6 and 8.8 be amended to provide that Department contractors not be provided confidential information. The contractor would not need to know the specifics of a confidential process or trade secret. A "bright line" test for determining when a contractor is entitled to confidential information should be provided.

RESPONSE: The Department would only release the confidential information to a Departmental contractor that would be necessary for the contractor to carry out its assigned tasks. To the extent such information is so necessary, the Department disagrees with the commenter's assertion that the contractor would not need to know the specifics of a confidential process or trade secret. A "bright line" test has been set forth in N.J.A.C. 7:26B-8.8.

COMMENT: A comment suggested that N.J.A.C. 7:26B-8.1(e) and (f) do not appear to be of substantial benefit to the regulatory scheme.

RESPONSE: The procedures outlined at N.J.A.C. 7:26B-8.1(e) and (f) provide an orderly procedure for the submittal and identification of documents considered confidential by the owner or operator.

COMMENT: It is not clear that the Department has staff who are knowledgeable enough to excise enough of the material to protect the confidentiality of the claimant under the provisions of N.J.A.C. 7:26B-8.

RESPONSE: This is not a problem since N.J.A.C. 7:26B-8.1(d) requires that the information for which a confidentiality claim is asserted be identified by the owner or operator.

COMMENT: A comment suggested that N.J.A.C. 7:26B-8.3(b) 2 does not seem necessary as an event that merits determination of confidentiality claim.

RESPONSE: The Department will examine the files occasionally to determine the relative importance of requests for confidentiality. For example, in some cases, the information may be dated and may no longer be entitled to confidential treatment.

COMMENT: A comment suggested that N.J.A.C. 7:26B-8.3(c)3i should be deleted since the time for which confidentiality is requested appears to be of minimal relevance to the determination to grant confidentiality.

RESPONSE: This provision allows the contesting owner or operator to make such a claim to the Department. The submittal of such evidence, however, remains optional with the owner or operator.

COMMENT: A comment suggested that N.J.A.C. 7:26B-8.3(c)3ii and 3iii are restatements of each other.

RESPONSE: These two provisions cover two different actions by the owner or operator. N.J.A.C. 7:26B-8.3(c)3ii covers measures taken by the owner or operator to guard against undesired disclosure of the information to others such as storage of the information by owners or operators in a locked cabinet at the industrial establishment. N.J.A.C. 7:26B-8.3(c)3iii covers whether and to what extent the information has already been disclosed and identifies what precautions the company took in making such disclosures.

COMMENT: A comment stated that N.J.A.C. 7:26B-8.3(c)4 and 6 are unclear because they require timely comments without specifying time limitations.

RESPONSE: The time limit attaching to N.J.A.C. 7:26B-8.3(c)4 and 8.3(c)6 is specified at N.J.A.C. 7:26B-8.3(c)3, that is, 30 days. Extensions

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granted for a good cause, as provided at N.J.A.C. 7:26B-8.3(c)6, will be for so long as appropriate.

COMMENT: A comment suggested that N.J.A.C. 7:26B-8.4, the list of substantive criteria for determining confidentiality, is in the conjunctive. A national security claims would probably not be able to satisfy paragraph (a)5.

RESPONSE: The Department agrees and has modified N.J.A.C. 7:26B-8.4(a)5 accordingly.

COMMENT: N.J.A.C. 7:26B-8.5(c) should provide for pre-disclosure notice to the person making the confidentiality claim.

RESPONSE: Pre-disclosure notice has not been provided for as the criteria for such disclosure do not necessitate comment from the noticed owner or operator.

COMMENT: A comment suggested that N.J.A.C. 7:26B-8.6(a) be revised to conform with N.J.A.C. 7:14A, the rules implementing the NJPDES permit program, in requiring the Department to first make a determination that the disclosure is necessary, then to notify the affected person, and then to provide the affected person with the right to require the agent or contractor to enter into the contract with the affected person to protect the confidentiality of the information. No such private right or protection is provided in this chapter.

RESPONSE: The Department has provided adequate safeguards in releasing confidential information to contractors. The added delay to remediation that would occur by undertaking the suggested additional notice provisions are inappropriate in the ECRA context.

COMMENT: A comment suggested revision of N.J.A.C. 7:26B-8.8 to require the Department to make a formal finding that there is an imminent and substantial danger to public health which this information would alleviate, to define what would constitute such a danger, and to require the person to whom the information is disclosed to take steps to protect its confidentiality.

RESPONSE: It is unclear what the commenter meant by "formal finding." N.J.A.C. 7:26B-8.8(a) does require the Department to first find that disclosure of confidential information would serve to alleviate an imminent and substantial danger to public health. The term is clear on its face and no definition is offered in the comment. The need to disclose confidential information to alleviate an imminent and substantial danger to public health and the environment may, in certain cases, override the need to protect confidentiality.

COMMENT: A comment indicates that N.J.A.C. 7:26B-8.10 provides no remedy which may be exercised by aggrieved owners or operators, and merely provides permissive action by the Department, for the improper dissemination of confidential material.

RESPONSE: There is no private right of action provided by this chapter. However, N.J.A.C. 7:26B-8.10 does not preclude such action.

COMMENT: A comment on N.J.A.C. 7:26B-8.1 suggested that criteria should be established for the determination of confidential information before it is made part of the public record thus permitting the party providing such information with a reasonable means of anticipating which information would remain confidential and which information would be available to the public.

RESPONSE: Substantive criteria and procedural mechanisms for use in confidentially determinations have been provided at N.J.A.C. 7:26B-8.4.

COMMENT: A comment suggested that N.J.A.C. 7:26B-8.3(c) should be amended to require the Department to treat information which it determines is not entitled to confidential treatment as confidential throughout the 30-day period available for contesting the Department determination. If the Department determination is contested by the owner or operator the information shall be confidential throughout the entire review process.

RESPONSE: The information will be treated as confidential information throughout the period of review of the Department's initial determination until the 14th day following receipt by the owner or operator of written notice of the Department's final determination that the information is not entitled to confidential treatment as provided at N.J.A.C. 7:26B-8.3(d)1.

COMMENT: A comment suggested that the phrase "the extent to which the information has been disclosed to others" should be deleted from N.J.A.C. 7:26B-8.3(c)iii so that information of proprietary value to the owner/operator may be protected by the confidentiality provisions of the proposed new rule despite the fact that the information may no longer be technically characterized as a "trade secret" because it is known to some persons outside the developer(s) of the idea.

RESPONSE: The "extent of disclosure" language is retained at N.J.A.C. 7:26B-8.3(c)iii as relevant, although not necessarily dispositive,

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to the Department's review of its initial determination regardless of its effect upon the technical characterization of the information as a trade secret.

7:26B-9

COMMENT: A comment on N.J.A.C. 7:26B-9 suggested that a provision be added which authorizes arbitration of disputes between the regulated community and the Department.

RESPONSE: The Department prefers to rely on the procedures set forth in ECRA, the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and R. 2:2-3(a)(2) of the New Jersey Court Rules, 1969.

COMMENT: Many comments objected to the proposed penalties in N.J.A.C. 7:26B-9 as being extraordinarily high, especially in the case of "paper violations," and recommended that they be reduced or eliminated, particularly those penalties for late notifications and submissions.

RESPONSE: The amounts set forth in the penalty schedule have been established to encourage timely compliance and discourage non-compliance. The amounts are within the maximums set forth at N.J.S.A. 13:1K-13.

COMMENT: A general comment was received concerning N.J.A.C. 7:26B-9 that there is no possible reason that a violation of an ACO requirement should result in a greater penalty assessment than a failure to comply with certain letter requests from the Department, which in turn may result in a greater penalty assessment than a violation of the plain language of the Act itself. There was also a comment concerning N.J.A.C. 7:26B-9.3(d)1 that all three types of violations should be afforded equal weight.

RESPONSE: The violation of an ACO justifies harsher penalties than other violations that could occur under the Act and this chapter, because greater deterrence to violation is indicated where a transfer has been allowed to occur with limited site information and the absence of a potentially necessary cleanup plan. Once the ECRA process has started, necessary information requested by the Department must be submitted in a timely manner especially in the case of cessation of operations. These violations are considered more serious than other violations relating to the plain language of the Act.

COMMENT: A comment suggested that N.J.A.C. 7:26B-9 should be deleted in its entirety as an unwarranted predetermination of the exercise of enforcement discretion allowing a regulated entity to ascertain the cost of non-compliance in advance and thereby determine whether or not it can afford to "purchase" a "license" to violate the law. Moreover, the predetermination of the appropriate enforcement response without the benefit of the totality of actual violation circumstances constitutes an intrinsically under-informed, speculative act that is needlessly premature.

RESPONSE: Any violation of the act will be pursued in order to obtain compliance and, as appropriate, assessed penalties. The penalty amounts contained in this subchapter are to provide notice of the penalties that may be sought for the violations described and are not a predetermination of appropriate enforcement response. Specific circumstances will be considered and may warrant the Department's seeking greater penalties, as provided at N.J.A.C. 7:26B-9.3(f). The fact that some industrial establishments may use this subchapter to balance the cost of noncompliance against the cost of compliance is not a sufficient reason to delete the provisions.

COMMENT: A comment stated that N.J.A.C. 7:26B-9.1(b) should be changed to stay within the scope of the Act by permitting the voiding of sales alone.

RESPONSE: The term "or transfer" has been deleted from N.J.A.C. 7:26B-9.1(b), thereby more closely stating the language of N.J.S.A. 13:1K-13(a).

COMMENT: A comment stated that the Department did not intend, nor is empowered, to abrogate the title secured by a public authority through the filing of a declaration of taking in a condemnation action as provided at N.J.A.C. 7:26B-9.1.

RESPONSE: The Department retains the right to assess penalties and void a sale, regardless of the identity of the parties, as there is no statutory exemption from these enforcement activities based on the identity of the parties. The Department notes that the exercise of its authority to void sales is discretionary.

COMMENT: A comment stated that N.J.A.C. 7:26B-9.2(b) repeated the Act except for improperly substituting "any cleanup plan necessary" for "the cleanup plan."

RESPONSE: The distinction in the referenced language between the Act and this chapter merely clarifies that the owner or operator shall implement any cleanup plan necessary based upon the Department's review of the information submitted and/or otherwise available to it.

COMMENT: A comment concerning N.J.A.C. 7:26B-9.1(a) questioned whether "owner or operator" means "transferor" in accordance with the statutory language at N.J.S.A. 13:1K-13 and suggested that this language should be parallel with that in N.J.A.C. 7:26B-9.2(a).

RESPONSE: The Department did mean transferor in N.J.A.C. 7:26B-9.1(a) and has replaced the term "owner or operator" with "transferor".

COMMENT: A comment concerning N.J.A.C. 7:26B-9.1(b) requested that the phrase "or an ACO" should be deleted.

RESPONSE: Consistent with the intent of N.J.S.A. 13:1K-13, the failure to comply with an ACO by not submitting a negative declaration or a cleanup plan required therein may result in for the voiding of the sale or transfer. Therefore, the above phrase remains in N.J.A.C. 7:26B-9.1(b).

COMMENT: A comment concerning N.J.A.C. 7:26B-9.1(b) requested that the phrase "any real property utilized in connection therewith" should be clarified.

RESPONSE: The referenced phrase refers to the real property upon which the activities of the industrial establishment are conducted. See definition of industrial establishment at N.J.A.C. 7:26B-1.3.

COMMENT: A comment suggested that if the intent of N.J.A.C. 7:26B-9.2(b) is to impose joint and several liability on owners and operators, the word "or" should be replaced with the word "and".

RESPONSE: This Department has modified the provision accordingly.

COMMENT: A comment suggested that N.J.A.C. 7:26B-9.2 be revised to provide that a Trustee in bankruptcy proceeding, Assignee for Benefit of Creditors and/or State Court Receiver shall be liable only for compliance with the provisions of the Act only in his/her fiduciary capacity and only for intentional misconduct, gross negligence or willful misconduct.

RESPONSE: If a Trustee in a bankruptcy proceeding, Assignee for Benefit of Creditors and/or State Court Receiver are responsible for ECRA compliance, their liability for cleanup and removal costs and damages will not be limited by this chapter. To the extent that they are not ordered parties or otherwise subject to the provisions of this Act, they will not be subject to liability for cleanup and removal costs and damages.

COMMENT: A comment suggested that N.J.A.C. 7:26B-9.2 be revised to provide that a Trustee in bankruptcy proceeding, Assignee for Benefit of Creditors and/or State Court Receiver shall be required to furnish such information required under the Act only to the extent such information is provided to him by the owner or operator and contained in books and records of the industrial establishment over which he is appointed.

RESPONSE: The Department will require nothing more of a Trustee in bankruptcy, Assignee for Benefit of Creditors or State Court Receiver than it requires of other owners or operators or other parties signing an ACO.

COMMENT: A comment suggested that N.J.A.C. 7:26B-9.3 creates a new classification of failure to act subject to penalty, namely failure to submit information required by letter of the Department. This class of violation, although not addressed by the Legislature, would allow the Department to establish whatever time frame it felt was appropriate for a response to its letter request for additional information and attach the referenced penalties for failure to respond within that time frame.

RESPONSE: The basis for this regulatory class of violation is the need for the Department to require the submission of specific information or revisions to certain documents within specified time frames in order for cases to proceed in a timely manner to ensure compliance with the Act.

COMMENT: A comment suggested that the fines at N.J.A.C. 7:26B-9.3 are extraordinarily high, especially for inadvertent violations with minimal consequences. The comment suggested that the following sentence be added to N.J.A.C. 7:26B-9.3(a): "The amount of any civil penalty imposed shall be appropriate to the nature of the violation." The comment suggested that N.J.A.C. 7:26B-9.3 be changed to authorize the Department to waive penalties for de minimus violations of the Act or this chapter.

RESPONSE: The specified penalties are well below what the Legislature authorized in setting the penalty figure of "not more than \$25,000.00 for each offense" at N.J.S.A. 13:1K-13a. Since the Department, in its discretion, may compromise and settle any claim for a penalty, which could include tailoring the penalty to the specifics of the violation or the waiver of such penalty, the proposed language remains unchanged.

COMMENT: A comment suggested that N.J.A.C. 7:26B-9.3(c) be changed to be consistent with the Act in applying only to officers or management officials of industrial establishments and to limit any penalties to those provided by the Act.

RESPONSE: The Department agrees with the first part of this comment and has included "of an industrial establishment" after officers and management officials at N.J.A.C. 7:26B-9.3(c) to make it clear that personal liability only attaches to the specified individuals associated with the industrial establishment. The Department, in applying penalties provided by this chapter, is merely applying the penalties provided by the Act. The penalties schedules provided at N.J.A.C. 7:26B-9.2(d)1 and 7.4(a) are authorized by the Act at N.J.S.A. 13:1K-13c and the rule-making authority granted by the Act at N.J.S.A. 13:1K-10. It follows therefrom that these penalty provisions are applicable to both the Act and the provisions of this chapter that implement the Act.

COMMENT: Comments stated that the language at N.J.A.C. 7:26B-9.1(b) and 9.2(a) differs from the specific wording in the Act. The comment suggested that this difference would add to confusion.

RESPONSE: The cited language in this chapter clarifies the statutory intent with respect to voiding of sales or transfers and damages.

COMMENT: A comment suggested revising N.J.A.C. 7:26B-9.3 by stating that a Trustee in bankruptcy proceedings, Assignee for the Benefit of Creditor and/or State Court Receiver shall not be liable for penalties for noncompliance with any of the terms or provisions of the Act.

RESPONSE: To the extent these parties are subject to the Act and this chapter, they will not be released from liability for penalties for non-compliance.

COMMENT: A comment questioned whether the penalties at N.J.A.C. 7:26B-9.3(d)3 and 6 applied to the same violation.

RESPONSE: The two penalty provisions at N.J.A.C. 7:26B-9.3(d)3 and 6 are not identical. The provision at N.J.A.C. 7:26B-9.3(d)3 is for the failure to obtain and maintain the financial assurance instrument in accordance with a cleanup plan approval or ACO. The provision at N.J.A.C. 7:26B-9.3(d)6 is for the failure to immediately fund the standby trust in the event of a default under a cleanup plan approval or ACO.

COMMENT: A few comments were received that suggested that the penalties specified in N.J.A.C. 7:26B-9.3(d) be specified as the maximum to be imposed.

RESPONSE: The penalties listed in N.J.A.C. 7:26B-9.3(d) are neither minimum nor maximum penalties. They are intended to provide notice of the penalties that may be sought for the violations described. The penalties may be compromised to a lower amount than established by N.J.A.C. 7:26B-9.3(d)1. However, if a given case warranted the maximum penalties provided by the statute, that is, \$25,000 for each offense, these, too, could be sought.

COMMENT: A comment suggested that "waive or" be added after "may" at N.J.A.C. 7:26B-9.3(e) to allow the Department greater discretion in assessing penalties.

RESPONSE: The Department's ability to waive claims is included in its right to compromise any claim for a penalty.

COMMENT: One comment suggested that N.J.A.C. 7:26B-9.3(f) only apply to violations of the Act.

RESPONSE: The rules implementing the Act are mandated by the Act and have the full force of law upon adoption. It is, therefore, both reasonable and necessary that violations of the Act or this chapter (including the provisions in an ACO), or both, subject the violator to penalties.

7:26B-10

COMMENT: A comment suggested that the threshold quantities of hazardous substances and wastes under the de minimus quantity exemption in N.J.A.C. 7:26B-10.1 should be increased.

RESPONSE: In order to adequately protect the public health, safety, and environment, the Department is taking a conservative approach in offering the de minimus quantity exemption.

COMMENT: A comment on N.J.A.C. 7:26B-10 suggested that the Department incorporate the de minimus standards into the definitional section without requiring an affirmative procedural obligation to petition for an exemption.

RESPONSE: It is necessary to require a review of an industrial establishment that is petitioning for an exemption from the substantive provisions of the Act and this chapter on the basis of presence of only de minimus quantities of hazardous substances. The review conducted pursuant to N.J.A.C. 7:26B-10.1 is necessary to confirm the assertion that no remediation is necessary at the subject industrial establishment.

COMMENT: Several comments suggested that the de minimus exemption in N.J.A.C. 7:26B-10 was unclear and unreasonably narrow.

RESPONSE: The Department has promulgated this exemption to allow a subject industrial establishment to comply with the Act without a full ECRA review in cases where there is a minimal amount of hazardous substances at the industrial establishment. The exemption must be

restrictive to ensure that no contamination exists either as a result of the site operations of the current owner or operator or the previous owners or operators of the industrial establishment.

COMMENT: A comment on N.J.A.C. 7:26B-10.1(b) stated that there are inconsistencies in the criteria that the Department has articulated. Specifically, one aspect of the test at N.J.A.C. 7:26B-10.1(b)1i is that the total quantity of hazardous substances does not exceed 500 pounds while N.J.A.C. 7:26B-10.1(b)4 allows an establishment to store up to 110 gallons of lubricating and hydraulic oils a volume which may exceed 500 pounds. Inconsistencies also exist between N.J.A.C. 7:26B-10.1(b)4 and 6 which limit both annual usage and current storage and also between N.J.A.C. 7:26B-10.1(b)1i and (b)5 which limit only current storage and N.J.A.C. 7:26B-10.1(b)3 which limits only annual usage. The comment noted the possibility that any facility with a photocopy machine would exceed the five gallon per year limitation on inks in N.J.A.C. 7:26B-10.1(b)3.

RESPONSE: It is necessary to review an industrial establishment's involvement with hazardous substances including both quantities actually at the industrial establishment at the time of application and quantities annually used by the industrial establishment. To do otherwise would allow the industrial establishment the opportunity to avoid full ECRA compliance by removing hazardous substances prior to submitting an application to the Department. It should be noted that N.J.A.C. 7:26B-10.1(b)3 has been amended not to restrict the quantity of ink actually used or to be used copying equipment.

COMMENT: A comment suggested that the de minimus exemption of N.J.A.C. 7:26B-10.1 is too restrictive.

RESPONSE: The Department intends to be restrictive in this area since the de minimus exemption is provided by the Department as relief from ECRA requirements solely for those facilities that, due to the limited use of hazardous substances, are presumed to be environmentally clean, and therefore, pose a de minimus inherent danger of exposing the citizens, property and environment of this State to substantial risk of harm or degradation. The Department intends to monitor the de minimus exemption and may, in the future, provide further relief if such is indicated.

COMMENT: A comment was received concerning N.J.A.C. 7:26B-10.1(b)1i that the term "mixture" be defined in order to clarify the one percent criteria.

RESPONSE: The term "mixture" has its normal meaning unless its usage indicates otherwise and, therefore, does not need to be defined.

COMMENT: A comment concerning N.J.A.C. 7:26B-10.1(b)2 recommended that this section should be deleted. An example was provided to support this comment that the use of one spray can per day to spray a stencil on a finished good would deny the use of the de minimus quantity exemption, merely because the paint is used in the operation.

RESPONSE: The Department does provide for a de minimus exemption for the use of small quantities of paint in the business operations of an industrial establishment at N.J.A.C. 7:26B-10.1(b)3. If larger quantities are being used on an annual basis in an industrial establishment their handling, storage, and disposal may be an environmental concern that would have to be examined under ECRA. N.J.A.C. 7:26B-10.1(b)2 has been modified to clarify the treatment of paints and varnishes under the de minimus quality provisions.

COMMENT: A comment concerning N.J.A.C. 7:26B-10.1(b)4 stated that there was no basis for a usage test if a storage test is met and that 275 gallons is a better figure for both tests.

RESPONSE: The Department, through its experience, has found that lubricating and hydraulic oils pose little environmental concerns where 55 gallons or less are used annually. However, the use or storage of 275 gallons or more would be cause for environmental concern.

COMMENT: Comments concerning N.J.A.C. 7:26B-10.1(b)5 recommended that the quantity specified should be increased to 275 gallons.

RESPONSE: The storage of petroleum products other than the lubricating and hydraulic oils poses serious environmental concern that needs to be examined where more than 11 gallons are stored at the industrial establishment at any one time.

COMMENT: A comment suggested deletion of N.J.A.C. 7:26B-10.1(c) since it poses a severe limitation on an exemption that is already quite limited and the provision is generally irrelevant.

RESPONSE: The Department feels that the restrictions in this subsection are warranted since without these conditions an industrial establishment would not receive a complete review pursuant to ECRA even where environmental damage caused by previous operations had occurred.

COMMENT: A comment suggested that the limitation of the de minimus quantity exemption to two drums of lubricating and hydraulic oils

in inventory and to one drum a year in use appears unnecessarily restrictive. It was suggested that the standard be set at the small quantity levels found in the hazardous waste rules.

RESPONSE: Even the smallest amounts of a hazardous substance trichloroethylene for example, can degrade a potable water supply. Therefore, the Department will retain the present de minimus exemptions for lubricating and hydraulic oils.

COMMENT: A comment suggested that to treat an ECRA-subject business which uses less than the de minimus quantity of hazardous substances and wastes any differently from a high-contaminated non-subject business simply because of the potential acts or omissions of remote predecessors in interest is highly discriminatory, unfair and unnecessary.

RESPONSE: The Act directs the Department to treat industrial establishments differently from other facilities. There is nothing unfair or unnecessary in the Department's decision to impose limited requirements upon those industrial establishments subject to ECRA, but involved in de minimus quantities of hazardous substances, even though the Department has no authority under the Act to impose ECRA requirements on other facilities.

COMMENT: Several comments stated that the quantity of pesticides allowed to be stored or used annually for on-site maintenance under the de minimus quantity exemption should be increased and should not include substances used by exterminators for pest control and by gardeners for lawn and plant applications for gardening purposes.

RESPONSE: The Department agrees to the extent these substances are present in the same form and concentration as packaged for distribution or use by the general public, provided these products are used in a manner similar to that of the general public, and are not designated as "prohibited" or "restricted." The availability of the de minimus quantity exemption with respect to pesticides at N.J.A.C. 7:26B-10.1(b)6 has been modified accordingly.

COMMENT: A comment requested that the Department exempt all hazardous substances and wastes at an industrial establishment which are not related to any manufacturing process.

RESPONSE: This broad class of hazardous substances and wastes has not been exempted because hazardous substances and wastes can create environmental concerns even if not related to any manufacturing process.

COMMENT: A comment recommended that if the total quantity of hazardous substances in a mixture is less than one percent it should be exempt under the provisions of N.J.A.C. 7:26B-10.1.

RESPONSE: A blanket exemption for hazardous substances based on percentage alone is inappropriate. Quantity must be taken into consideration because the presence of large quantities of hazardous substances in any mixture concentration is cause for environmental concern.

COMMENT: A comment concerning N.J.A.C. 7:26B-10.1 stated that the exclusion of a mixture of hazardous substances is unnecessary because no mixtures are lawfully included under ECRA and, that if mixtures were to be lawfully included under ECRA, the calculations and guidelines should be significantly simplified.

RESPONSE: Any mixture containing hazardous substances is subject to ECRA. Otherwise, a hazardous substance could be mixed with a non-hazardous substance and the resultant substance would no longer be considered a hazardous substance. Clearly, this was not intended by the Act. The Department has provided at N.J.A.C. 7:26B-10 clear guidance as to what mixtures may be exempt; thus, any mixtures not exempted by N.J.A.C. 7:26B-10 are subject to ECRA.

COMMENT: A comment requested that the word "or" be included after N.J.A.C. 7:26B-10.1(b)1i and ii.

RESPONSE: The word "or" is implicitly present after these provisions since it is present between N.J.A.C. 7:26B-10.1(b)iii and iv. If any one of the four criteria in N.J.A.C. 7:26B-10.1(b)1 is met, N.J.A.C. 7:26B-10.1(b)1 is satisfied.

COMMENT: A comment stated that there was no basis for the requirement proposed at N.J.A.C. 7:26B-10.1(c)j (adopted at N.J.A.C. 7:26B-10.1(c)1) that the industrial establishment has been and continues to be under the ownership or operation of the sole or original owner or operator of the property from the date of construction of the facility.

RESPONSE: To obtain a de minimus quantity exemption, the applicant need not always be the sole and original owner or operator of the industrial establishment. See N.J.A.C. 7:26B-10.1(c)2 and 3.

COMMENT: A comment stated that there is no particular environmental need for the present owner to be the "sole or original" owner as specified at N.J.A.C. 7:26B-10.1(c)i (adopted at N.J.A.C. 7:26B-10.1(c)1) if the prior uses of the site can be established.

RESPONSE: Although the prior uses of the site may be established, the quantities of hazardous substances and wastes maintained at the site would be more difficult to establish. The Department does allow for any number of prior owners under the circumstances described at N.J.A.C. 7:26B-10.1(c)ii (adopted as N.J.A.C. 7:26B-10.1(c)2) or one prior owner under the circumstances provided at N.J.A.C. 7:26B-10.1(c)iii (adopted as N.J.A.C. 7:26B-10.1(c)3). In order to preclude undetected contamination, the limitations on the availability of the de minimus quantity exemption listed at N.J.A.C. 7:26B-10.1(c) are appropriate.

COMMENT: A comment suggested that the one percent total quantity of hazardous substances stored or handled at any one time, as provided at N.J.A.C. 7:26B-10.1(b)li, be increased to 10 percent.

RESPONSE: No basis was provided in the support of the requested increase. It is the position of the Department that a mixture containing greater than one percent hazardous substances is inappropriate to support a de minimus quantity exemption.

COMMENT: One comment requested that N.J.A.C. 7:26B-10 be deleted in its entirety as ultra vires.

RESPONSE: The provision that certain industrial establishments that have very limited quantities of hazardous substances may undergo a more limited review under ECRA is not prohibited by the Act. The Department, based upon three and one-half years of experience in implementing the Act, is satisfied that the eligibility criteria for the "de minimus quantity exemption" are such that a contaminated industrial site would not be eligible for such an exemption. The exemption is provided as a means to expedite the ECRA process.

COMMENT: A comment suggested that the term "business operations" as used in N.J.A.C. 7:26B-10.1(b)2 and 3 needs to be defined.

RESPONSE: This term is not defined as the ordinary meaning of the term is intended unless the context clearly indicates otherwise.

COMMENT: A comment suggested that fuel tanks in general should be covered under a de minimus quantity exemption, since fuel tanks are regulated under separate legislation.

RESPONSE: The Department will not grant de minimus quantity exemptions to fuel tanks but ECRA staff will coordinate with staff from the Bureau of Underground Storage Tanks to insure adequate, consistent, and non-duplicative review and remediation.

COMMENT: A comment asserts that the limitations at N.J.A.C. 7:26B-10.1(c) are inappropriate in that the provisions in N.J.A.C. 7:26B-10.1(c)1 are unreasonable and those in N.J.A.C. 7:26B-10.1(c)2 are unfair. Where an applicant is able to demonstrate, on the basis of prior uses of the facility, that no other hazardous substances and wastes are present at the site, the de minimus quantity exemption should be available.

RESPONSE: The purpose of the de minimus quantity exemption is to exempt the owner or operator of an industrial establishment from most of the requirements of ECRA without risking the possibility that contamination is present at the industrial establishment. In the example given by the commenter, the owner or operator would be able to proceed through the ECRA process by submittal of a proposed negative declaration on an expedited basis because only de minimus quantities of hazardous substances are present and no evidence exists of contamination from previous operations at the site. Therefore, the Department believes the de minimus quantity exemption provisions are fair and reasonable in protecting the environment while allowing those transactions where the essential criteria are met to proceed rapidly.

COMMENT: A comment was received concerning N.J.A.C. 7:26B-10.1 that requested the basis for the exemptions, since it was felt that they are unduly burdensome and appear to bear little relationship to actual protection of human health and the environment.

RESPONSE: The de minimus quantity exemptions are based upon the Department's experience in implementing ECRA. The quantities designated are likely to present an insignificant threat to public health and the environment. Other exemptions are based upon hazardous substances being used in a manner similar to the general public and, therefore, contributing little additional threat to public health and the environment.

7:26B-11

COMMENT: Numerous comments were received regarding the promulgation of N.J.A.C. 7:26B-11 requesting that the Department adopt minimum standards for cleanup rather than continue to process negative declarations and cleanup plans on a case-by-case basis.

RESPONSE: The Department recognizes the need for cleanup standards and is currently developing these standards. They will be proposed for adoption at N.J.A.C. 7:26B-11 when completed.

COMMENT: A comment was received suggesting N.J.A.C. 7:26B-11 be changed to indicate that remedial activities undertaken pursuant to, and in compliance with, judicial and administrative orders and final permits issued pursuant to other State environmental statutes shall satisfy the requirements of ECRA for the contamination remediated thereby as long as the public health and the environment are protected.

RESPONSE: In many cases, remedial actions undertaken pursuant to other environmental statutes may, in fact, satisfy the requirements of ECRA. However, there may be some cases where this does not occur. For example, due to the changing nature of state-of-the-art cleanup techniques and the evolution of scientific knowledge in environmental matters, actions previously approved by the Department may no longer be sufficient to adequately address the contamination. In these situations, such as these where there is inadequate protection of the environment, public health, safety, and welfare, the Department will utilize its authority under ECRA.

COMMENT: A comment to N.J.A.C. 7:26B-11.1 suggested that the Department provide guidance as to how "location of the industrial establishment, surrounding ambient conditions, and other relevant factors" will be used in evaluating proposed cleanup plans. The comment also raised a series of issues, specifically: how the Department is going to evaluate whether a cleanup plan is practical; will cost alone, be considered or a cost-benefit analysis be performed; will risk assessment be used to determine the goals of the cleanup plan; and to what extent will the ability of the owner or operator to pay be taken into account, not just in establishing cleanup goals, but in setting forth the required schedule. The comment concluded that if general cleanup standards cannot be developed, a framework of criteria to be used in evaluating the effectiveness and practicality of the proposed cleanup plan must be established.

RESPONSE: The Act requires the Department to adopt standards for soil, ground water and surface water quality necessary for the detoxification of the site, taking into consideration the location of the site and surrounding ambient conditions. The Act further specifies that until the minimum standards are adopted, the Department shall review, approve or disapprove negative declarations and cleanup plans on a case-by-case basis. N.J.A.C. 7:26B-11.1 specifies that until the standards are developed, ECRA cases will be reviewed on a case-by-case basis for soil, ground water and surface water quality. The Department is currently developing minimum standards for soil and ground water quality to ensure consistency. These standards will be proposed for adoption when fully developed. In its case by case review, the Department does not limit the cleanup based on cost or ability of the owner or operator to pay. In some cases, a risk assessment approach is utilized.

COMMENT: A comment stated that N.J.A.C. 7:26B-11.1 should not go beyond the Act by covering negative declarations nor substitute the term "cleanup plan" for the word "detoxification" in the Act at N.J.S.A. 13:1K-10. Rather, it would be better to define "detoxification" in this chapter. The comment also suggested that this chapter not broaden the statutory coverage from the "site of an industrial establishment" as provided at N.J.A.C. 7:1-3.15(a) to the "industrial establishment" currently provided at N.J.A.C. 7:26B-11.1.

RESPONSE: The Act at N.J.S.A. 13:1K-10a specifically mandates that the Department shall review, approve or disapprove negative declarations and cleanup plans on a case-by-case basis until minimum standards are developed. Therefore, it is appropriate to cover negative declarations in N.J.A.C. 7:26B-11.1. The Department elects not to define "detoxification" at this time as it may be more appropriate to define that term once the actual minimum standards are developed. The use of the term "industrial establishment" does not broaden the statutory coverage. The term "industrial establishment" encompasses no more than that intended by the Act.

COMMENT: A general comment urged the Department to recognize at N.J.A.C. 7:26B-11 the unique nature of highway projects in their ability to effectively remediate a pollution problem through encapsulation.

RESPONSE: The Department, in the development of its cleanup standards, will examine all feasible options for remediation at a particular site and grant cleanup plan approved to the most appropriate course of action which may include encapsulation.

7:26B-12

COMMENT: Several comments concerning N.J.A.C. 7:26B-12 pointed out the need to clarify the relationship among industrial establishments, hazardous waste facilities, and "hazardous waste management units".

RESPONSE: The Department has deleted the provisions of N.J.A.C. 7:26B-12 and may repropose, and again accept comment on, remediation strategies between ECRA and other State and federal environmental laws

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for those facilities, parts of which are subject to ECRA and parts of which are subject to operational closure and post-closure maintenance requirements of other environmental laws.

COMMENT: A general comment was received that N.J.A.C. 7:26B-12 ought to be broadened to have ECRA coordinated fully with all other environmental programs, not just those for hazardous waste units. The comment specifically requested the Department deem ECRA to be complied with for ground water where a current New Jersey Pollution Discharge Elimination System—Discharge to Ground Water permit contains requirements for investigation and remediation of ground water and for any environmental media addressed by an administrative order (be it unilateral or by consent) for the areas of the facility so addressed.

RESPONSE: The Department does coordinate ECRA with all other environmental programs as necessary. Although in many cases compliance with other environmental programs of the Department may satisfy ECRA, there are some cases where compliance with administrative orders or permits that are, for example, many years old, do not incorporate the current standards of the Department and may be deficient. In situations such as these, ECRA will require compliance with current standards of the Department.

7:26B-13

COMMENT: A comment suggested that N.J.A.C. 7:26B-1.5(b) should be expanded to include language contained in N.J.A.C. 7:26B-13 so that the Act is not made applicable to limited conveyances which are exempt from ECRA under the limited conveyance provision of the proposed rules.

RESPONSE: Certificates of Limited Conveyance do not provide for exemption from the Act. Instead they provide an alternative, from the generally required negative declaration or cleanup plan approval for the entire industrial establishment, that allows for the transfer of small parcels of the real property under the specific conditions listed at N.J.S.A. 7:26B-13.1(b).

COMMENT: A comment suggested that N.J.A.C. 7:26B-13.1 be revised to conform to recently introduced Assembly Bill No. 4151.

RESPONSE: Assembly Bill No. 4151 is one of several bills introduced in the Legislature, none of which has been signed into law. N.J.A.C. 7:26B-13.1 implements the legislative intent of the Act, rather than the intent of those bills.

COMMENT: Several comments suggested that N.J.A.C. 7:26B-13 should be deleted since it goes beyond the legal authority of the Department.

RESPONSE: The Act does not specifically prohibit the transfer of a portion of an industrial establishment. The Department feels that it is appropriate in implementing the Act to allow a portion of an industrial establishment that had little or no opportunity for contamination to be transferred without subjecting the remainder of the industrial establishment to the ECRA review process in those cases where the criteria of N.J.A.C. 7:26B-13 are met. See the comment and response below.

COMMENT: A comment suggested that the limited conveyance provisions at N.J.A.C. 7:26B-13.1 would exclude even those portions of an industrial establishment involved solely in the transportation of hazardous substances and wastes. The comment suggested that this seems unnecessarily restrictive because the Department will be excluding even the road or portion of a road on which hazardous substances and wastes may have been transported.

RESPONSE: The Department's intent is to grant limited conveyances only where no hazardous substances or wastes have been generated, manufactured, refined, treated, stored, handled, or disposed or transported. The Department intended to exclude virtually any part of the industrial establishment that had ever actually been involved with hazardous substances and hazardous waste including transportation, because the potential for latent contamination in or on those parts remains high.

COMMENT: A comment suggested that the limited conveyance provisions in N.J.A.C. 7:26B-13.1 be expanded to also include any portion of an industrial establishment if the site had recently received a negative declaration or a de minimus quantity exemption.

RESPONSE: The recent receipt of a negative declaration or a de minimus quantity exemption approval has little bearing on the concerns addressed under the Certificate of Limited Conveyance. It is, therefore, inappropriate to expand the limited conveyance process to include cases where a negative declaration or a de minimus quantity exemption has been recently approved.

COMMENT: A general comment stated that N.J.A.C. 7:26B-13.1 should be modified to allow for the grant of a Certificate of Limited Conveyance without any ECRA review in the case of a transfer of any

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"virgin" portion of a property where no industrial operations have occurred. Any other portion of the industrial establishment to be conveyed pursuant to a Certificate of Limited Conveyance would undergo an ECRA review only for the portion to be conveyed.

RESPONSE: It is not appropriate to allow any portion of an industrial establishment that was part of the actual operations to undergo a transfer pursuant to a Certificate of Limited Conveyance. Only those portions of the industrial establishment that have not been involved in the actual operations at the site can rapidly be determined not to have contamination and, therefore, qualify for the expedited review associated with the Certificate of Limited Conveyance. Where a portion of the actual operating area needs to be transferred, the entire industrial establishment should be subject to compliance with ECRA, since contamination from this portion may have migrated throughout the entire site. It would be inappropriate to segment the sampling and cleanup plans by subjecting only the portions to be conveyed to compliance.

COMMENT: A comment stated that the Certificate of Limited Conveyance should be granted in any condemnation proceeding for that portion of an industrial establishment subject to condemnation regardless of that portion's prior involvement with hazardous substances and wastes to bring clarity and fairness to the ECRA program and to ensure that needed public works can go forward without substantial and unnecessary delay.

RESPONSE: A change of this nature would allow the transfer of ownership of a contaminated portion of an industrial establishment without cleanup plan submittal or subsequent implementation thereof. Subsequent site remediation, if any, would be segmented between two or more sites, with additional owners or operators, reducing the assurance of protection of the citizens from the threats of environmental contamination through remediation of the entire site.

COMMENT: A general comment concerning N.J.A.C. 7:26B-13 requested that the Department should rule on applications for a Certificate of Limited Conveyance within 30 days.

RESPONSE: The specification of a review period is not appropriate, especially for this new program initiative. The Department will review the applications as rapidly as possible and does not envision significant review periods for the issuance of this certificate.

COMMENT: A few comments requested the deletion of the word "only" in N.J.A.C. 7:26B-13.1(a) because a portion of an industrial establishment may also be conveyed pursuant to a negative declaration, cleanup plan, or ACO.

RESPONSE: The Department agrees and has deleted the word "only" from N.J.A.C. 7:26B-13.1(a).

COMMENT: A few comments were received concerning the amount of an industrial establishment that could be conveyed pursuant to a limited conveyance. Suggestions included 50 percent, any amount (provided the Department is satisfied that the value of the remainder of the industrial establishment is adequate to ensure further cleanup), or that the amount to be conveyed should be based on the corporation's total holdings in the State.

RESPONSE: The concept of the limited conveyance was first requested by the regulated community with a 20 percent limit. It is the Department's position that 20 percent is reasonable and that it would be inappropriate to expand beyond this figure at this time.

COMMENT: A comment suggested that N.J.A.C. 7:26B-13.1(b) be revised as follows: "The sales price [of the real property] to be conveyed, together with the diminution in value of the remaining property, is not more than twenty percent of the total appraised value of the real property of the industrial establishment".

RESPONSE: The Department has amended N.J.A.C. 7:26B-13.1(b) accordingly.

COMMENT: Comments concerning N.J.A.C. 7:26B-13.1(b) suggested that the use of sales price and appraised value for the portion to be conveyed and the total value of the industrial establishment, respectively, be changed to a fixed percentage of acreage of the industrial establishment or that the same monetary evaluation standard be used, that is, either appraised or sale value with appraisal being preferred.

RESPONSE: The Department evaluated many alternatives for the limited conveyance concept and selected the sales price and appraised value approach as being the most appropriate. The fixed percentage of acreage may allow a transfer to occur which would be significantly greater than 20 percent of the value of the industrial establishment and, therefore, not provide for retention by the owner of the industrial establishment of sufficient assets for any subsequent cleanup at the industrial establishment. The use of appraised value for both the entire facility and the

portion to be conveyed is also inappropriate since the appraised value for the portion to be conveyed normally would not be available prior to transfer.

COMMENT: A comment on N.J.A.C. 7:26B-13.1(b)3 requested that additional guidelines be provided concerning the real property which is not a portion of an industrial establishment and which has not been subject to an ECRA regulated use.

RESPONSE: The comment mistakenly infers that the real property to be conveyed is not a portion of the industrial establishment. The portion to be conveyed is, in fact, a part of the industrial establishment, but has not been subject to any of the activities that are listed at N.J.A.C. 7:26B-13.1(b)3. At this time, the Department does not believe that additional guidance is necessary. However, as experience is gained through the implementation of the provisions at N.J.A.C. 7:26B-13.1, additional guidance may be provided through amendment of this chapter.

COMMENT: A comment suggested that it is not clear whether "that has been involved in the generation, manufacture, refining, transportation, treatment, storage, handling or disposal of hazardous substances and waste on-site, above or below ground", as used at N.J.A.C. 7:26B-13.1(b)3, modifies "the real property conveyed pursuant to this subchapter" or "the industrial establishment". From the placement of the clause, it would seem that it modifies "industrial establishment". If this is the case, however, the limited conveyance procedure would not be of significant value to many industrial site owners, because it would not apply if any portion of an industrial site were used for the manufacture, etc., of hazardous substances.

RESPONSE: The referenced clause modifies "the real property conveyed" . . . rather than the "industrial establishment". Further clarity has been provided by deletion of the phrase "is not any portion of the industrial establishment" from N.J.A.C. 7:26B-13.1(b)3.

COMMENT: One comment stated that the condition specified at N.J.A.C. 7:26B-13.1(b)3 would preclude the granting of any Certificate of Limited Conveyance.

RESPONSE: To the extent the condition specified at N.J.A.C. 7:26B-13.1(b)3 relates to "the real property conveyed" (see above comment and response), it is essential to ensure that contaminated portions of an industrial establishment are not transferred under the limited conveyance concept. The limited conveyance provision is designed to allow the transfer of property that is not and has not been used in the operations of the industrial establishment.

COMMENT: A comment suggested that the word "any" be changed to "that" in the first line of N.J.A.C. 7:26B-13.1(b)3 to reflect what the commenter believed to be intended.

RESPONSE: Other changes to N.J.A.C. 7:26B-13.1(b)3 already noted above render this change unnecessary.

COMMENT: A comment recognized that N.J.A.C. 7:26B-13.1(c) prevents the avoidance of compliance with the Act through multiple limited conveyances that would, in the aggregate, exceed 20 percent but questioned why there is no requirement that the owner establish the value of conveyances made subsequent to December 31, 1983 but before the first application for a Certificate of Limited Conveyance.

RESPONSE: Any conveyance of any portion of an industrial establishment prior to the effective date of this chapter, that is, before the availability of a Certificate of Limited Conveyance, would have subjected the entire industrial establishment to compliance with the Act. The limited conveyance procedures are intended to allow conveyances without subjecting the entire industrial establishment to the Act and this chapter, but only where no more than 20 percent is conveyed subsequent to subjecting the entire industrial establishment to the Act and this chapter.

COMMENT: One comment asked how the limited conveyance procedures at N.J.A.C. 7:26B-13.1(c) would apply to multiple transactions given the use of sales price and appraised value.

RESPONSE: N.J.A.C. 7:26B-13.1(c) provides for multiple limited conveyances, provided that the sum of the percentages attributed to each limited conveyance does not exceed 20 percent. This is best illustrated by way of the following example. A first transaction would allow a limited conveyance of eight percent of the value of the industrial establishment; a second transaction occurs at a later point in time which would entail the transfer of five percent of the then current value of the remaining industrial establishment; a third transaction, again at a later point in time, of up to seven percent of the then current value of the remaining industrial establishment would then be allowed pursuant to a Certificate of Limited Conveyance. Eight percent plus five percent plus seven percent do not exceed 20 percent.

COMMENT: A comment stated that the information sought by N.J.A.C. 7:26B-13.1(d)2 was unnecessary.

RESPONSE: This information is necessary to monitor the limited conveyance program over time.

COMMENT: Comments stated that N.J.A.C. 7:26B-13.1(d)3 should be deleted or refer to the "proposed sales" agreement so that compliance with the Act is not triggered by an attempt to obtain the Certificate of Limited Conveyance.

RESPONSE: This information is necessary in order to determine compliance with the 20 percent criteria for a limited conveyance. The owner must submit a sales agreement, not a proposed sales agreement, in order to discourage submission of an artificially low sales price merely to obtain a Certificate of Limited Conveyance. If the buyer and seller are seriously interested in transferring a portion of the industrial establishment, a sales agreement could be entered into contingent upon the receipt of a Certificate of Limited Conveyance.

COMMENT: One comment requested that N.J.A.C. 7:26B-13.1(d)3 be amended to provide for acquisitions by a public authority where no agreement has been reached. Instead of a copy of the sales agreement, the owner would be required to submit an affidavit that the compensation sought would not exceed 20 percent of the current appraised value.

RESPONSE: The Department has modified N.J.A.C. 7:26B-13.1(d)3 accordingly.

COMMENT: A few comments stated that the requirement at N.J.A.C. 7:26B-13.1(d)4 for an affidavit from the owner of an industrial establishment providing the appraised value of the real property was inappropriate.

RESPONSE: The Department agrees that an affidavit is not necessary for the submission of the appraised value. N.J.A.C. 7:26B-13.1(d)4 has been changed to require only that a current appraisal be submitted by the owner or operator applying for the Certificate of Limited Conveyance.

COMMENT: Several comments suggested that it is not clear what is meant by the requirement that the portion of a site to be conveyed "has never been used in the operations of the industrial establishment". One comment stated that presumably a portion of an industrial site left vacant as a buffer zone would meet this qualification, while an area which has been occupied by storage facilities for raw materials or finished products or by equipment or buildings in which manufacturing operations were conducted would not meet this qualification. What is unclear is whether an office building or an employee parking lot which services an industrial establishment in which hazardous materials were manufactured, stored, etc., would be considered to have been used in the operations of the industrial establishment.

RESPONSE: The Department has amended N.J.A.C. 7:26B-13.1(d)5 to specify that the portion to be conveyed has never been "involved in the generation, manufacture, refining, transportation, treatment, storage, handling or disposal of hazardous substances and wastes". The specific example given in the comment does not provide sufficient information regarding the occurrence of the above activities at the office building or parking lot for the Department to determine whether the office building or parking lot meets this criterion.

COMMENT: A comment stated that N.J.A.C. 7:26B-13.1(d)5 should be limited by inserting the words "since the effective date of the Act" at its end.

RESPONSE: The addition of the above language is not appropriate in the context of a limited conveyance. If this language were to be added, only the operations of the current industrial establishment would be reviewed to determine the propriety of issuance of a Certificate of Limited Conveyance. Under ECRA, a review of the site and any previous operations at the site is conducted. There is no environmentally sound basis to view the subject matter of a limited conveyance review solely from the effective date of the Act.

COMMENT: A comment stated that the requirements of N.J.A.C. 7:26B-13.1(d)5 would be virtually impossible to meet since a site may have a significant history of industrial activity. The comment suggested that language be added in the affidavit that the statements are "to the best of knowledge".

RESPONSE: A review of the history of operation at the site through a title search, contact with previous owners or operators identified therein, and, possibly, aerial photographs of the facility would provide the owner or operator with the basis to execute the referenced affidavit.

COMMENT: A comment was received that N.J.A.C. 7:26B-13.1(d)5 is unduly burdensome because if the site is clean it is irrelevant.

RESPONSE: The provision is not unduly burdensome. The provision is necessary in order for a limited conveyance to proceed without an ECRA review being conducted for the entire industrial establishment. If the entire industrial establishment were clean, a negative declaration

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would be rapidly obtainable for the entire site and the sale of any portion of the site would be allowed without the necessity for obtaining a Certificate of Limited Conveyance.

COMMENT: A comment suggested that the affidavit required by N.J.A.C. 7:26B-13.1(d)5 is inconsistent with substantive requirements of N.J.A.C. 7:26B-13.1(a)-(c). The affidavit requires that the portion conveyed "has never been used in the operations of the industrial establishment, whereas the enumerated criteria require that the real property has not been associated with hazardous substances and wastes. The comment suggested that N.J.A.C. 7:26B-13.1(b)3 and (d)5 should be deleted from the adopted rules as the "Department is adequately protected by the 20 percent rule" set forth at N.J.A.C. 7:26B-13.1(b)1.

RESPONSE: The affidavit requirement is consistent with the substantive requirements. In the interest of clarity, however, the wording at N.J.A.C. 7:26B-13.1(d)5 has been changed. The requirements of this chapter are essential to protect the environment.

COMMENT: A few comments stated that the language at N.J.A.C. 7:26B-13.1(e) was not explicit concerning the Department's intent as to when sampling would be required. It was suggested that there must be some evidence of a need for such a sampling plan.

RESPONSE: Sampling would only be required when the Department has reason to believe that contamination may exist. The Department has modified N.J.A.C. 7:26B-13.1(e) accordingly for purposes of clarification.

COMMENT: A comment stated that the requirement of N.J.A.C. 7:26B-13.1(e) that a sampling plan indicate "no contamination" is extremely stringent. The requirement should be tempered by adding "or that any contamination present poses no threat to health or environment, subject to Department approval".

RESPONSE: The above referenced provision does not require sampling plans for all limited conveyances. If the Department determines that the presence of hazardous substances and wastes need to be investigated, a sampling plan may be required. The sampling data obtained from a sampling plan may indicate the presence of hazardous substances and wastes, however, it is the concentration of the hazardous substances and wastes that would dictate whether the area would be considered contaminated. The phrase "no contamination" does not mean the absence of any hazardous substances and wastes. Therefore, no change has been made to N.J.A.C. 7:26B-13.1(e).

7:26B-14

COMMENT: A comment was received suggesting the deletion of N.J.A.C. 7:26B-14.1(b).

RESPONSE: This provision and the following provision at N.J.A.C. 7:26B-14.1(c) are consistent with those contained at N.J.S.A. 13:1K-12.

COMMENT: A comment requested that a new provision be included as N.J.A.C. 7:26B-14.1(e) that would specify the Department's current approach to requiring that a new owner that occupies a site pursuant to an ACO undergo an ECRA proceeding and that the Department justify this requirement or eliminate it.

RESPONSE: The Department does not require an owner merely occupying a site pursuant to an ACO to undergo an ECRA proceeding. The only time a new owner would be required to undergo an ECRA review is if a subsequent transaction subject to the Act and this chapter occurred. The justification for requiring compliance with the Act and this chapter in that case should be self-evident.

COMMENT: A comment stated that N.J.A.C. 7:26B-14.1(b) and (c) should be changed since they appear to extend coverage to the obligations imposed by this chapter where the Act extends such coverage merely to the obligations imposed by the Act.

RESPONSE: This chapter implements the Act. Therefore, it is generally appropriate that provisions applicable to the Act would apply to rules properly promulgated pursuant to the Act.

COMMENT: A comment suggested that a section be added to N.J.A.C. 7:26B-14 to clarify the effective date of the chapter so that it would not be applied retroactively.

RESPONSE: This chapter is effective upon the date of publication of this adoption notice in the New Jersey Register and will become operative as indicated in the adoption heading and as will appear under the chapter heading in the New Jersey Administrative Code at N.J.A.C. 7:26B.

Agency Initiated Changes:

The phrase "change in the majority interest" has been added to the list of exclusions in the definition of "corporate reorganization not substantially affecting ownership" at N.J.A.C. 7:26B-1.3 to make it clear that where there is such a change with respect to an industrial establishment, the corporate reorganization exception to a "closing, terminating, or transferring operations" is unavailable.

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The words "on or" have been added to the definition of "industrial establishment" at N.J.A.C. 7:26B-1.3 in recognition of the Act's having been operative on December 31, 1983 and not January 1, 1984.

The definition of "negative declaration" has been changed at N.J.A.C. 7:26B-1.3 to make it clear that the document must be executed in accordance with N.J.A.C. 7:26B-1.13.

The word "including" has been changed to "excluding" in the definition of the "sale or transfer of the controlling share of assets" at N.J.A.C. 7:26B-1.3 to correct an error in publication of the proposed rule. The conveyance real property is distinguished from the sale or transfer of the controlling share of assets under N.J.S.A. 13:1K-8b.

The term "landfills" has been deleted from N.J.A.C. 7:26B-1.5(c) to reflect the exclusion from the Act, at N.J.S.A. 13:1K-8f, and from this chapter, at N.J.A.C. 7:26B-1.8(a)1, of solid waste facilities subject to operational closure and post-closure maintenance requirements under the statutes listed in these sections.

The phrase "conveyance of title in the absence of an agreement of sale" has been deleted from N.J.A.C. 7:26B-1.6(a)1, because title may not be conveyed prior to the GIS submittal. N.J.A.C. 7:26B-5.1(c) has been added to make it clear that the transfer of title to an industrial establishment prior to approval by the Department of a negative declaration or cleanup plan or the execution of an ACO constitutes a violation of the Act and this chapter.

The term "primarily" has been added to N.J.A.C. 7:26B-1.8(a)3 to make it clear that agricultural commodities production or distribution merely incidental to other subject operations will not result in the operation's being deemed non-subject to the Act.

A new fee category has been added at N.J.A.C. 7:26B-1.10(c)10 to allow the Department to assess a lower fee for an amended ACO than it would charge for a new ACO. This new category reflects the lower Department costs associated with processing ACO amendments.

The fees for confidentiality claims at N.J.A.C. 7:26B-1.10(f) have been modified so that a one-time fee of \$350.00 would cover the costs associated with the claim regardless of the number of pages submitted in connection with that industrial establishment. This change is made to further administrative efficiency for both the owner or operator and the Department.

Changes have been made to N.J.A.C. 7:26B-1.13 to clarify that criminal penalties attach where the person executing the applicable certification makes a written false statement that that person does not believe to be true and to better identify the person required to sign the certification at N.J.A.C. 7:26B-1.13(b)1.

N.J.A.C. 7:26B-3.2(c)2 has been changed to require the name and address of permitting agency to or from which the owner or operator has applied or received environmental permits so that the Department can obtain any necessary information therefrom on an expedited basis.

The submission of the latitude and longitude of the industrial establishment has been added to the requirements of the SES at N.J.A.C. 7:26B-3.2(c)11ii so that the submitted information can be more readily utilized in other Departmental programs. It is not believed that this additional item will prove burdensome.

N.J.A.C. 7:26B-5.2 has been clarified in deleting the reference to "authorized officer of management official of the industrial establishment" as the signatory of the proposed negative declaration and, instead, requiring its execution in conformity with the provisions of N.J.A.C. 7:26B-1.13.

Language has been added to N.J.A.C. 7:26B-5.4(c) to make it clear that compliance with the requirement that the owner or operator request an amended negative declaration will not result in an extension of the original 60-day period during which the negative declaration is effective.

The phrase "the total costs associated with the investigation of the industrial establishment" has been added at N.J.A.C. 7:26B-5.7(b)1 to require the submittal of the investigatory costs associated with compliance with ECRA. This information is necessary so the Department has a basis to compare the actual costs of investigation and remediation with the estimated costs upon which financial assurances are based.

The clause "or financial assurance amount specified is an applicable ACO" has been added to N.J.A.C. 7:26D-6.5 (self-bonding) to provide for these circumstances where ECRA obligations are set forth in an ACO.

The phrase "and a complete SES" was added to the end of N.J.A.C. 7:26B-7.3(b) so that the Department would have both sampling data and the other necessary information contained in the SES, especially the sampling plan, upon which to soundly base its decision as to whether a financial assurance amount of less than \$100,000 would be appropriate.

N.J.A.C. 7:26B-10.1(c)i, ii, and iii have been corrected to read N.J.A.C. 7:26B-10.1(c)1, 2, and 3.

The phrase "and thereafter continued as an industrial establishment" has been deleted from N.J.A.C. 7:26B-10.1(c)2 (proposed as N.J.A.C. 7:26B-10.1(c)ii) as unnecessary. If the facility were no longer an industrial establishment, the current owner or operator would not be subject to the Act and this chapter.

The phrase "or operator" was deleted from N.J.A.C. 7:26B-13.1(d) since an operator would not be able to obtain a Certificate of Limited Conveyance. Operators do not generally have title to the property that would be transferred.

Editorial and typographic changes have been made to the rule for clarity and to correct any inadvertent errors that may have appeared upon publication of the proposal.

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 26A (RESERVED)

CHAPTER 26B ENVIRONMENTAL CLEANUP RESPONSIBILITY ACT RULES

SUBCHAPTER 1. GENERAL INFORMATION

7:26B-1.1 Scope and authority

This chapter constitutes the rules governing the implementation of the Environmental Cleanup Responsibility Act, P.L. 1983 c.330 (N.J.S.A. 13:1K-6 et seq.). The provisions of any law, rule or regulation to the contrary notwithstanding, the closing, terminating, or transferring of operations of an industrial establishment is subject to the provisions of this chapter and the Act.

7:26B-1.2 Construction

This chapter shall be liberally construed to allow the Department to implement fully its statutory functions pursuant to the Act.

7:26B-1.3 Definitions

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

"ACO" means an Administrative Consent Order.

"Act" or "ECRA" means the Environmental Cleanup Responsibility Act, P.L. 1983, c.330 (N.J.S.A. 13:1K-6 et seq.).

"Agricultural commodity" means any plant or part thereof, or animal or animal product, produced by a person (including farmers, ranchers, vineyardists, plant propagators, Christmas tree growers, aquaculturists, floriculturists, orchardists, foresters, or other comparable persons) primarily for sale, consumption, propagation, or other use by man or animals.*

"Authorized agent" means the person authorized to represent the owner or operator, or both, for matters covered by the Act and this chapter*[.] except *[where an authorized officer or management official is required to act pursuant to this chapter]* ***as provided at N.J.A.C. 7:26B-1.13*.**

"Cleanup plan" means a plan for the cleanup of an industrial establishment and any contamination, including any off-site contamination which has emanated or is emanating from the industrial establishment, approved by the Department pursuant to this chapter, as required at N.J.A.C. 7:26B-5.3, including, but not limited to, a description of the location, types, and quantities of any and all hazardous substances and wastes that will remain at the industrial establishment and those hazardous substances and wastes to be removed; a description of the types, volume, and location of any storage vessels, surface impoundments, or landfills or any other structures, vessels, contrivances, or units containing hazardous substances and wastes; recommendations regarding the most practicable method of cleanup; a reasonable time schedule for cleanup plan implementation; and an accurate and detailed cost estimate to implement the cleanup plan. If the evaluation of an industrial establishment for cleanup purposes necessitates additional information, a cleanup plan may also include, at the discretion of the Department, graphic and

narrative descriptions of the geographic, geologic, and hydrogeologic characteristics at the industrial establishment and an evaluation of all residual soil, groundwater, and surface water contamination.

"Closing, terminating, or transferring operations" means ***any one of the following:***

(1) the cessation of all or substantially all the operations of an industrial establishment which involve the generation, manufacture, refining, transportation, treatment, storage, handling, or disposal of hazardous substances and wastes;

(2) any changes in operations sufficient to change the primary Standard Industrial Classification number of the industrial establishment from an SIC number that is subject to the Act to one that is not subject to the Act;

(3) any temporary cessation of all or substantially all the operations at an industrial establishment for a period of not less than two years;

(4) any incident, transaction or proceeding through which an industrial establishment becomes non-operational for health or safety reasons;

(5) termination of a leasehold interest at an industrial establishment by the owner or operator of the industrial establishment ***unless the lease is renewed by the same tenant without a disruption in operations*;**

(6) any change in ownership of the industrial establishment including, but not limited to, transfer by any means of shares of a corporation which results in a change in the majority interest in the owner or operator, the sale of stock in the form of a statutory merger or consolidation, sale of the controlling share of the assets, conveyance of the real property, transfer of real property through condemnation proceedings, dissolution of corporate identity, reorganization and liquidation in bankruptcy or insolvency proceedings, except for corporate reorganization not substantially affecting ownership. See also N.J.A.C. 7:26B-1.5 ***and N.J.A.C. 7:26B-1.8*.**

"Consolidation" means the combination of two or more corporations into a newly created corporation whereby the two or more constituent corporations are extinguished.

"Corporate reorganization not substantially affecting ownership" means the restructuring or reincorporation by the board of directors or the shareholders of a corporation, which does not result in a change of ownership or control, ***change in the majority interest,*** termination of the corporate business, or liquidation and distribution of corporate assets, ***and*** where the purpose is merely to:

(1) correct illegalities or defects in the original ***in*** corporation,

(2) to broaden the scope of the powers of the organization including the amendment as well as extension or revival of charters, or

(3) to place the corporation on a sound management and financial basis that enables it to take care of its obligations*[.] and which involves only one corporation which merely changes its form and results in the same board of directors and stockholders]*.

"Department" means the New Jersey Department of Environmental Protection.

"Discharge" means any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of hazardous substances and wastes into the waters or onto the lands of the State or into waters outside the jurisdiction of the State, when damage may result to the lands, waters, or natural resources within the jurisdiction of the State. The term discharge shall include spills.

"Dissolution of corporate identity" means the termination of the corporation's corporate existence*, **except for the purpose of winding up its affairs,*** including, but not limited to, the ending of the capacity of the corporation to act as such and a liquidation and extinguishment of all legal relations existing with respect to the corporate enterprise.

"GIS" means General Information Submission described at N.J.A.C. 7:26B-3.2.

"Hazardous substances" means *[those elements and compounds, including petroleum and petroleum products including, but not limited to, heating fuels and lubricating oils, which are, or have been, defined as hazardous substances by the Department after public

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hearing, including, but not limited to, the "List of Hazardous Substances" set forth in Appendix A of N.J.A.C. 7:1E, and which shall be consistent to the maximum extent possible with, and which shall include, the list of hazardous substances adopted by the Environmental Protection Agency pursuant to Section 311 of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. §1321) as amended by the Clean Water Act of 1977 (33 U.S.C. §§1251 et seq.) and the list of toxic pollutants designated by Congress or the Environmental Protection Agency pursuant to Section 307 of that Federal act (33 U.S.C. §1317); except that sewage and sewage sludge shall not be considered as hazardous substances for the purposes of the Act and this chapter.]* **any of the substances listed below except sewage and sewage sludge:**

1. Petroleum and petroleum products;
2. All pesticides designated as "prohibited" or "restricted" at N.J.A.C. 7:30 pursuant to the Pesticide Control Act of 1971, N.J.S.A. 13:1F-1 et seq.;
3. Substances designated as hazardous substances by the Environmental Protection Agency pursuant to the Section 311 of the Federal Water Pollution Control Act Amendments of 1972 as amended by the Clean Water Act of 1977, 33 U.S.C. §1321;
4. Substances designated as toxic pollutants by Congress or the Environmental Protection Agency pursuant to Section 307 of the Federal Water Pollution Control Act Amendments of 1972 as amended by the Clean Water Act of 1977, 33 U.S.C. §1317; and
5. Any other substances listed in the list of hazardous substances at Appendix A of N.J.A.C. 7:1E.*

"Hazardous substances and wastes" means hazardous substances, hazardous wastes, or both.

"Hazardous waste" means any solid waste designated as hazardous waste pursuant to N.J.A.C. 7:26-8, or as otherwise provided by Federal or State law.

"Industrial establishment" means any activity *[or]**,* place of business, *[or both,]* ***or real property at which such activity or business is conducted,*** having the primary SIC major group number within 22-39 inclusive, 46-49 inclusive, 51 or 76 as designated in, and determined in accordance with, the procedures described in the SIC manual and engaged in operations ***on or*** after December 31, 1983, which *[involve]* ***involves*** the generation, manufacture, refining, transportation, treatment, storage, handling, or disposal of hazardous substances *[or]* ***and*** wastes on-site, above or below ground unless otherwise provided at N.J.A.C. 7:26B-1.8. ***Except as provided below for leased properties, the industrial establishment includes all of the block(s) and lot(s) upon which the activity or business is conducted and any contiguous block(s) and lot(s) controlled by the same owner or operator. For leased properties, the industrial establishment includes the leasehold and any external tanks, surface impoundments, septic systems, or any other structure, vessels, contrivance, or unit the provides, or is utilized for, hazardous substances and wastes to or from the leasehold.***

"Initial Notice" means both the completed GIS and the completed SES described at N.J.A.C. 7:26B-3.

"Majority interest" means the shareholder or those shareholders holding the majority of issued and outstanding stock who are entitled to (1) have the right and power in the management of the corporation; (2) the right and power to represent the corporation and perform functions which can bind dissenting or minority stockholders; or (3) to elect, appoint, or remove the officers or agents that represent the stockholders and act for the corporation. Holder(s) of 50 percent or less of the issued and outstanding stock of a corporation can be considered holders of majority interest if they have control of the organization through any of the above powers.

"Merger" means the absorption of one corporation by another, the latter retaining its own *[name and]* identity and acquiring the assets, liabilities, franchises and powers of the former, whereby the absorbed corporation ceases to exist as a separate business entity.

"Owner" means any person who owns the real property of an industrial establishment or who owns the industrial establishment.

"Negative declaration" means an affidavit approved by the Department which is executed ***[by an authorized officer or management official of the industrial establishment]* ***and certified in ac-****

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cordance with the provisions at N.J.A.C. 7:26B-1.13* stating that there has been no discharge of hazardous substances and wastes on or from the industrial establishment, or that any discharge on or from the industrial establishment has been cleaned up in accordance with procedures approved by the Department, and that there remain no hazardous substances and wastes at the industrial establishment except those that, upon written Department approval, will remain as part of the normal industrial or commercial operation pursuant to any written agreements, lease arrangements, or other contracts as part of the change in ownership or operation. ***See also N.J.A.C. 7:26B-5.***

"Person" means corporations, companies, associations, societies, firms, partnerships, joint stock companies, ***any state, municipality, commission or political subdivision of any state, any interstate body,*** and individuals.

"Sale or transfer of the controlling share of the assets" means a transfer or sale not in the ordinary course of business of more than 50 percent of the assets, ***[including]* ***excluding*** real property, held by a corporation or partnership or other business entity*[: or the transfer of assets requiring board of directors or shareholder approval]*.**

"SES" means the Site Evaluation Submission described at N.J.A.C. 7:26B-3.2.

"SIC" means Standard Industrial Classification.

"SIC manual" means the most recent edition of the Standard Industrial Classification manual, prepared by the Office of Management and Budget in the Executive Office of the President of the United States.

7:26B-1.4 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 operations to the subchapter, section, subsection, provision, 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.

7:26B-1.5 Applicability

(a) Owners or operators who plan to close, terminate or transfer operations of an industrial establishment shall submit an Initial Notice in accordance with the time requirements set forth at N.J.A.C. 7:26B-1.6.

(b) Unless otherwise provided in this chapter, closing, terminating, or transferring operations includes, but is not limited to, the following events;

1. Sale or transfer of stock in a corporation which directly owns or operates, or indirectly through its subsidiaries, no matter how remote in the chain of corporate ownership, owns or operates, an industrial establishment that results in any form of a merger or consolidation;

2. Sale or transfer of stock in a corporation which results in a change in the person ***or persons*** holding the majority interest of a corporation which directly owns or operates, or indirectly through its subsidiaries, no matter how remote in the chain of corporate ownership, owns or operates an industrial establishment;

3. Sale or transfer of the controlling share of the assets of an industrial establishment, whether in one or several independent transactions;

4. Sale or transfer of title to an industrial establishment unless otherwise provided at N.J.A.C. 7:26B-13;

5. Sale or transfer of title to any real property of an industrial establishment unless otherwise provided at N.J.A.C. 7:26B-13;

6. Dissolution of a corporation which directly owns or operates, or indirectly through its subsidiaries, no matter how remote in the chain of corporate ownership, owns or operates an industrial establishment;

7. ***Certain proceedings or events in connection with a* ***[Receivership]* ***receivership*** action under ***[N.J.S.A. 14A:14-1 et seq.]* ***statutory or common law*** or bankruptcy proceedings under******

chapters 7, 11, or 13 of the Federal Bankruptcy Act, 11 U.S.C., §§101 et seq., by or against the owner or operator of an industrial establishment*, as specified below at N.J.A.C. 7:26B-1.6(a)13 and 14*;

8. Condemnation proceedings directed at an industrial establishment unless the transfer is a limited conveyance as provided at N.J.A.C. 7:26B-13;

9. Sale of an industrial establishment or sale or transfer of the controlling share of the assets of the industrial establishment pursuant to a foreclosure;

10. Sale or transfer of *[the controlling interest of a]* ***the entire interest of any partner in a general* partnership*, the entire interest of a general partner in a limited partnership, or the entire interest of a limited partner in a limited partnership liable for the obligations of a limited partnership as provided at N.J.S.A. 42:2-9, 42:2-11, and 42:2A-27, such partnership or limited partnership* owning or operating an industrial establishment;**

11. Sale or transfer of title to an industrial establishment by exercising an option to purchase;

12. Sale or transfer of title to any real property of an industrial establishment by exercising an option to purchase;

13. Sale, transfer, or termination of a lease which results in the cessation of operations *[by the landlord or tenant]* of an industrial establishment;

14. Any incident or event, or series of incidents or events, as a result of which an industrial establishment becomes non-operational for health or safety reasons, whenever the Department determines that such an incident or event, or series of incidents or events, has caused significant discharges or releases of hazardous substances and wastes;

15. Cessations of all *[or substantially all]* operations at an industrial establishment that are:

i. Permanent; ***or***

ii. For a period of two years or longer*]; or

iii. For a period of less than two years where there is a significant interruption in the continued employment relationship between the pre-cessation work force and the industrial establishment;]**.*

***16. Cessation of substantially all operations so as to result in at least a 90 percent reduction in any of the following:**

i. Number of employees;

ii. Area of operations; or

iii. Quantity of output*;

[16.]**17. Transfer of an industrial establishment to a trust, except where grantor and beneficiary are identical or members of the same family. As used in this paragraph, "family" means an individual's siblings, spouse, children, grandchildren, parents, and grandparents;

[17.]**18. Execution of a lease for a period of 99 years or longer; and

[18.]**19. A change in the primary SIC number of an industrial establishment to a primary SIC number that is not subject to the Act or this chapter.

(c) Any industrial establishment which ceased operations prior to December 31, 1983 and which remains under the same ownership as prior to December 31, 1983, and upon or at which remain containers, tanks, surface impoundments, *[landfills,]* or other types of storage facilities containing hazardous substances and wastes after December 31, 1983 shall be subject to the Act and this chapter upon the closing, terminating, or transferring of operations of the industrial establishment.

7:26B-1.6 Initial Notice triggers

(a) The owner or operator ***of an industrial establishment*** shall submit the GIS of the Initial Notice required by N.J.A.C. 7:26B-3 no more than five days subsequent to any of the following events:

1. The signing of an agreement *[or]* ***of* sale*, or the execution of a lease for a period of 99 years or longer,*** for the industrial establishment or the real property of the industrial establishment *[or the conveyance of title in the absence of an agreement of sale]*;

2. ***[The dissolution of a corporation;]* *The effective time of corporate dissolution as specified at N.J.S.A. 14A:12-8 or upon the filing of a certificate of dissolution in the office of the Secretary of State, whichever occurs first;***

3. The actual closure of all or substantially all of the operations, or the public release by the owner or operator of the decision to close all or substantially all of the operations, of an industrial establishment, whichever occurs first;

4. Notice of the sale, transfer or termination of any lease involving an industrial establishment or the actual sale, transfer, or termination of any lease involving an industrial establishment, whichever event occurs first;

5. A change in the primary SIC number of an industrial establishment to a primary SIC number that is not subject to the Act or this chapter;

6. The exercise of an option to purchase an industrial establishment or the real property of an industrial establishment;

7. The tendering of the majority of stock of a corporation which directly owns or operates, or indirectly through its subsidiaries, no matter how remote in the chain of corporate ownership, owns or operates, an industrial establishment pursuant to a tender offer;

8. Merger or consolidation, or the execution of a merger or consolidation agreement, whichever occurs first, by a corporation which directly owns or operates, or indirectly through its subsidiaries, no matter how remote in the chain of corporate ownership, owns or operates, an industrial establishment;

9. The conveyance, or the execution of an agreement conveying, whichever occurs first, of the majority interest of a corporation, a controlling interest of any noncorporate business entity, or sale of the controlling share of assets of an industrial establishment;

10. Receipt by the owner or operator of an offer letter ***to purchase*** issued *[in connection with a condemnation proceeding]* ***by a condemning authority*;**

11. Receipt of the determination by the Department that ***[an]* *the* incident or event, or series of incidents or events, *rendering the industrial establishment non-operational for health or safety reasons as described at N.J.A.C. 7:26B-1.5(b)14* has caused significant discharges or releases of hazardous substances and wastes;**

12. The permanent or temporary cessation of operations at the industrial establishment under the circumstances set forth at N.J.A.C. 7:26B-1.5(b)15*[:]* and ***16*;**

[13. The bringing of a receivership action by or against the owner or operator pursuant to N.J.S.A. 14A:14-1 et seq. or the filing of a voluntary petition or the granting of an involuntary petition, in accordance with the Federal Bankruptcy Act, 11 U.S.C. §§101 et seq.]

***13. The following proceedings or events in any bankruptcy proceeding:**

i. **The entry of an Order for Relief in bankruptcy pursuant to Chapter 7 of the Federal Bankruptcy Code (11 U.S.C. §§701 et seq.);**

ii. **The filing of a plan of liquidation pursuant to Chapter 11 of the Federal Bankruptcy Code (11 U.S.C. §§1101 et seq.) or Chapter 13 of the Federal Bankruptcy Code (11 U.S.C. §§1301 et seq.); or**

iii. **Events covered by 1 through 12 above or 14 below; and**

14. **The appointment by a court of a receiver or liquidating trustee or execution of a deed of assignment for the benefit of creditors, in connection with dissolution (unless the event at (a)2 above has already occurred), liquidation or insolvency proceedings under statutory or common law as to the owner or operator of an industrial establishment.***

(b) The owner or operator required to submit the GIS shall submit the SES as required in N.J.A.C. 7:26B-3.

7:26B-1.7 Liability for ECRA compliance

(a) Notwithstanding the provisions of N.J.A.C. 7:26B-3.2(d)]* ***3.3*** and 7:26B-5.5(d), both the owner and operator of the industrial establishment shall be strictly liable without regard to fault, jointly and severally, for compliance with the Act and this chapter except as provided in (b) below.

(b) In the case of a hostile tender offer which results in a person obtaining a majority interest or a short form merger, the person initiating the hostile takeover shall be strictly liable without regard to fault, jointly and severally, for compliance with the Act and this chapter.

7:26B-1.8 Operations and transactions not subject to ECRA

(a) Operations or transactions not subject to the provisions of this chapter include, but are not limited to, the following:

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1. Those portions of solid waste or hazardous waste facilities *currently* subject to *an in compliance with* operational closure or post-closure maintenance requirements pursuant to *permit or closure plan approval issued under* the following:

- i. The Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq.;
- ii. The Major Hazardous Waste Facilities Siting Act, N.J.S.A. 13:1E-49 et seq., or
- iii. The Solid Waste Disposal Act, 42 U.S.C. §6901 et seq., the Resource Conservation and Recovery Act of 1976, Pub.L. 94-580, and the Hazardous and Solid Waste Amendments of 1984, Pub.L. 98-616;

2. Any *central administrative* office located on a separate tax lot and block*, established prior to December 31, 1983,* from the industrial establishment it serves and engaged in general administrative, personnel, supervisory, accounting, *personnel**purchasing*, engineering and systems planning, advertising, legal, financial *sales* or *other* related management functions *performed centrally and not producing any products nor providing any services for the general public, other business entities, or the government**;* **provided, this "office" exemption shall not apply where separate lots and blocks are or have been established after December 31, 1983, at the site of an existing industrial establishment*;**

3. Any business entity engaged *primarily* in the production or distribution of agricultural commodities;

4. Corporate reorganization not substantially affecting the ownership or control of the industrial establishment;

5. Any individual stock transaction that does not, or series of stock transactions that do not, change the majority interest in the stock of a corporation that directly owns or operates, or indirectly through its subsidiaries, no matter how remote in the chain of corporate ownership, owns or operates, an industrial establishment;

6. A sale or transfer of assets of an industrial establishment that is in the ordinary course of business;

7. A *planned* cessation *except as provided at N.J.A.C. 7:26B-1.5(b)14* for a period of less than two years of *all or substantially all* operations at an industrial establishment *for maintenance, repairs, modifications, renovations, or normal business cycle furloughs, where there is no significant interruption in the continued employment relationship between the pre-cessation work force and the industrial establishment;* ***that results in a continuation of at least 10 percent of each of the following:**

- i. Number of employees;
 - ii. Area of operation; and
 - iii. Quantity of output*;
8. Execution of a lease for a period of less than 99 years;
9. Transfers made to confirm or correct any deficiencies in the recorded title of an industrial establishment;
10. Transfers releasing a contingent or reversionary interest;
11. Retail gasoline stations with a SIC major group number of 55;
12. Automobile repair and automobile body shops with a SIC major group number of *59**75*;
13. Agricultural land and associated structures;
14. Virgin, undeveloped, and unused land provided no industrial establishment has operated or is operating on the site or any portion of the site;

***15. Land on which there has not been an operating industrial establishment on or after December 31, 1983, except as provided at N.J.A.C. 7:26B-1.5(c)*;**

*15.]***16.* Facilities engaged in the retail sale of fuel oil with a SIC major group number of 59;

*16.]***17.* Execution of any mortgage, filing of any lien, granting of any security interest, assignment of a lease to secure a loan, or refinancing of any debt not including a sale and lease back, by the owner or operator of an industrial establishment;

*17.]***18.* Facilities engaged in the retail sale of goods with a SIC major group number of 52-59;

*18.]***19.* Sale of single and multi-family houses used primarily for residential purposes;

*19.]***20.* Transfer of an industrial establishment by devise or intestate succession;

*20.]***21.* Transfer of an industrial establishment where the transferor or the transferee are members of the same family. As used

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in this paragraph, "family" means a person's siblings, spouse, children, grandchildren, parents, and grandparents;

*21.]***22.* Transfer to a beneficiary pursuant to the terms of a trust;

*22.]***23.* Operations engaged in the wholesale distribution of durable goods with a SIC major group number of *51**50* including, but not limited to, the following:

- i. Motor vehicles and automotive parts;
- ii. Furniture;
- iii. Lumber;
- iv. Metals;
- v. Electrical goods;
- vi. Sporting goods;
- vii. Hardware;
- viii. Machinery; and
- ix. Jewelry;

24. Granting *or terminating* an easement on or a license to *that]* ***any*** portion of an industrial establishment *that is not and has not been involved in the generation, manufacture, refining, transportation, treatment, storage, handling or disposal of hazardous substances and wastes; and]***;

25. Construction loans obtained by the owner or operator of an industrial establishment*; **and**

26. The termination of a lease of an industrial establishment where the lease is renewed by the same tenant without a disruption in operations*.

(b) The following subgroups or classes of operations within those sub-groups in the Standard Industrial Classification major group numbers 22-39 inclusive, 46-49 inclusive, 51 or 76 are exempt from the provisions of this chapter:

SIC INDUSTRY NUMBER	Description
1. *4712	Freight Forwarding]*
4724	Travel Agencies
2. *4722	Arrangement of Passenger Transportation]*
4725	Tour Operators
3. *4723	Arrangement of Transportation of Freight and Cargo]*
4729	Arrangement of Passenger Transportation, Not Elsewhere Classified
4. *4784	Fixed Facilities for Handling Motor Vehicles Transportation, Not Elsewhere Classified]*
4731	Arrangement of Transportation of Freight and Cargo
5. *4811	Telephone Communication (Wire or Radio)]*
4785	Fixed Facilities and Inspection and Weighing Services for Motor Vehicles (Highway bridges, operation of; Toll bridge operation; Toll roads, operation of; Tunnel operation, vehicular; only)
6. *4821	Telegraph Communication (Wire or Radio)]*
4812	Radio Communications
7. 4813	Telephone Communications, Except Radio Telephone
8. 4822	Telegraph and Other Message Communications
*7.]***9.* 4832	Radio Broadcasting
*8.]***10.* 4833	Television Broadcasting
11. 4841	Cable and Other Pay Television Services
*9.]***12.* 4899	Communication Services, Not Elsewhere Classified
*10.]***13.* 4941	Water Supply
*11.]***14.* 4952	Sewage Systems
15. 4953	Refuse Systems (Landfills, sanitary: operations of, only)
*12.]***16.* 4971	Irrigation System
*13.]***17.* 5111	Wholesale Distribution of Printing & Writing Paper
*14.]***18.* 5112	Wholesale Distribution of Stationary Supplies

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*[15.]**19.*	5113	Wholesale Distribution of Industrial & Personal Service Paper
*[16.]	5133	Wholesale Distribution of Woven Fabrics
17.	5134	Wholesale Distribution of Notions & Other Dry Goods)*
20.	5131	Piece Goods, Notions, and Other Dry Goods
*[18.]**21.*	5136	Wholesale Distribution of Men's and Boys' Clothing
*[19.]**22.*	5137	Wholesale Distribution of Women's Children's & Infants' Clothing
*[20.]**23.*	5139	Wholesale Distribution of Footwear
*[21.]**24.*	5141	Wholesale Distribution of Groceries, General Line
*[22.]**25.*	5142	Wholesale Distribution of Frozen Food
*[23.]**26.*	5143	Wholesale Distribution of Dairy Products
*[24.]**27.*	5144	Wholesale Distribution of Poultry Products
*[25.]**28.*	5145	Wholesale Distribution of Confectionery
*[26.]**29.*	5146	Wholesale Distribution of Fish
*[27.]**30.*	5147	Wholesale Distribution of Meats
*[28.]**31.*	5148	Wholesale Distribution of Fresh Fruits and Vegetables
*[29.]**32.*	5149	Wholesale Distribution of Groceries and Related Products, Not Elsewhere Classified
[30.]	5152	Wholesale Distribution of Cotton)
*[31.]**33.*	5153	Wholesale Distribution of Grain
*[32.]**34.*	5154	Wholesale Distribution of Livestock
*[33.]**35.*	5159	Wholesale Distribution of Farm Products, Raw Materials, Not Elsewhere Classified
*[34.]**36.*	5181	Wholesale Distribution of Beer & Ale
*[35.]**37.*	5182	Wholesale Distribution of Wine
38.	5192	Books, Periodicals, and Newspapers
39.	5193	Flowers, Nursery Stock, and Florists' Supplies
*[36.]**40.*	5199	Wholesale Distribution of Nondurable Goods, Not Elsewhere Classified
*[37.]**41.*	7622	Radio and Television Repair Shops
*[38.]**42.*	7631	Watch, Clock & Jewelry Repair
*[39.]**43.*	7699	Repair Shops & Related Services, Not Elsewhere Classified (Only the following repair services under 7699 are exempt from the Act and this chapter. All other repair services under 7699 not listed below remain subject to the Act and this chapter):
i.		Awning Repair
ii.		Bicycle Repair Shops
iii.		Binoculars and Other Optical Goods Repair
[iv.]		Caliper, Gauge and Other Machinists Precision Instrument Repair)
*[v.]**iv.*		Camera Repair
[vi.]		Fountain Pen Repair Shops)
*[vii.]**v.*		Harness Repair Shops
vi*[ii].*		Horseshoeing
*[ix.]**vii.*		Key Duplicating Shops
*[x.]**viii.*		Lawn Mower Repair Shop
*[xi.]**ix.*		Leather Goods Repair Shops
*[xii.]**x.*		Lock Parts Made to Individual Order
*[xiii.]**xi.*		Locksmith Shops
*[xiv.]**xii.*		Luggage Repair Shops
*[xv.]**xiii.*		Musical Instrument Repair Shops
*[xvi.]**xiv.*		Organ Tuning & Repair
*[xvii.]**xv.*		Piano Tuning & Repair
*[xviii.]**xvi.*		Picture Framing to Individual Order (Not Connected with Retail Stores)
*[xix.]**xvii.*		Pocketbook Repair Shops

*[xx.]**xviii.*	Precision Instrument Repair
*[xxi.]**xix.*	Reneedling Work
*[xxii.]**xx.*	Repair of Optical Instruments
*[xxiii.]**xxi.*	Repair of Photographic Equipment
*[xxiv.]**xxii.*	Repair of Speedometers
*[xxv.]**xxiii.*	Rug Repair Shops (Not Combined with Cleaning)
*[xxvi.]**xxiv.*	Saddlery Repair Shops
*[xxvii.]**xxv.*	Scale Service Repair
*[xxviii.]**xxvi.*	Sewing Machine Repair
*[xxix.]**xxvii.*	Tent Repair Shops
*[xxx.]**xxviii.*	Tuning of Pianos & Organs
*[xxxi.]**xxix.*	Typewriter Repair (Including Electric)
[xxxii.]	Umbrella Repair Shops)
*[xxxiii.]**xxx.*	Venetian Blind Repair Shops
*[xxxiv.]**xxxi.*	Window Shade Repair Shops

7:26B-1.9 Applicability determinations

(a) A person may request a determination from the Department concerning the applicability of the Act or this chapter to a specific site by:

1. Submission of a fully completed, executed, and notarized applicability determination form available from the Department, to the address specified at N.J.A.C. 7:26B-1.11;

2. Execution of the applicability determination form by the owner or operator;

3. Submission of the fee set forth at N.J.A.C. 7:26B-1.10 required for applicability determinations; and

4. Granting written permission allowing the Department to enter and inspect the site and operations for which the applicability determination is requested pursuant to N.J.A.C. 7:26B-1.12.

7:26B-1.10 Fee schedule

(a) The owner or operator shall pay all applicable fees required by this section prior to issuance by the Department of any negative declaration approval, sampling plan approval, cleanup plan approval, final site cleanup approval, applicability determination, de minimus quantity exemption, Certificate of Limited Conveyance or ACO, except as provided at *[(c)]***(e)*4i and *[(c)]***(e)*5i below.

(b) All fees required by this section shall be paid by certified check, attorney check, or money order, or by personal check if received 60 days prior to the issuance of any document specified in (a) above. Checks and money orders shall be made payable to "New Jersey Department of Environmental Protection." All fees shall be mailed to the address specified at N.J.A.C. 7:26B-1.11.

(c) Fees for those Departmental services listed below shall be as follows:

	Standard	Small Business
1. Initial Notice Review		
i. Without Sampling Plan	\$ 1,400.00	\$ 250.00
ii. With Sampling Plan that includes only underground storage tank analysis without ground water monitoring	2,400.00	1,250.00
iii. With Sampling Plan other than ii above or iv below	3,900.00	2,750.00
iv. With Sampling Plan that includes any ground water monitoring	5,400.00	4,250.00
2. Sampling Data Review	500.00	500.00
3. Negative Declaration Review	200.00	100.00
4. Cleanup Plan Review		
(based on cost of cleanup)		
i. \$1-\$9,999	500.00	500.00
ii. \$10,000-\$99,999	1,000.00	1,000.00
iii. \$100,000-\$499,999**999*	2,000.00	2,000.00
iv. \$500,000-\$999,999	6,000.00	6,000.00
v. Over \$1,000,000	10,000.00	10,000.00

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5. Oversight of Cleanup Plan Implementation (based on cost of cleanup)		
i. \$1-\$9,999	\$ 500.00	\$ 500.00
ii. \$10,000-\$99,999	1,000.00	1,000.00
iii. \$100,000-\$499,999	6,000.00	6,000.00
iv. \$500,000-\$999,999	8,000.00	8,000.00
v. Over \$1,000,000	10,000.00	10,000.00
6. Applicability Determination	100.00	100.00
7. De minimus Quantity Exemption	250.00	250.00
8. Limited Conveyance Review	500.00	250.00
9. Administrative Consent Orders	1,000.00	1,000.00
10. ACO Amendment	500.00	500.00

(d) Small business means any business which is resident in this State, independently owned and operated and not dominant in its field, and which employs fewer than 100 full time employees.

(e) The schedule for submission of fees shall be as follows:

1. The Initial Notice review fee based upon the applicable sampling plan category shall be submitted with the Site Evaluation Submission (SES).

2. Any sampling data submitted to the Department shall be accompanied by the appropriate fee.

3. Any negative declaration submission shall be accompanied by the appropriate fee.

4. Any draft cleanup plan submitted shall be accompanied by the cleanup plan review fee based upon the estimated cleanup cost contained in the draft cleanup plan.

i. If the approved cleanup plan cost estimate or actual cleanup cost is in a higher fee category, the owner or operator shall submit a payment for the difference in the fees within 30 days of issuance of cleanup plan approval or with the final report on cleanup implementation, whichever is appropriate. If the actual cleanup cost is in a lower fee category, a refund will be issued by the Department within 90 days of issuance of a letter of full compliance.

5. The cleanup plan oversight fee shall be paid within 14 days from the receipt of the Department's cleanup plan approval letter and shall be based upon the estimated cleanup cost contained in the cleanup plan.

i. If the actual cleanup cost is in a higher fee category, the owner or operator shall submit a payment for the difference in the fees with the final report on cleanup implementation. If the actual cleanup cost is in a lower fee category, a refund will be issued by the Department within 90 days of issuance of a letter of full compliance.

6. Any request for an applicability determination shall be accompanied by the appropriate fee.

7. Any request for a de minimus quantity exemption shall be accompanied by the appropriate fee.

8. Any request for a Certificate of Limited Conveyance shall be accompanied by the appropriate fee.

9. Any request for an ACO shall be accompanied by the appropriate fee.

(f) Any owner or operator asserting a confidentiality claim shall submit*[:

1. For the first 50]* ***\$350.00 for any number of* pages *submitted in connection with a single industrial establishment*** for which a confidentiality claim is asserted*[: \$250.00;

2. For each page thereafter: \$1.00.]*

7:26B-1.11 Forms

Any forms, fees or other information required to be submitted by this chapter shall be obtained from and returned to the Department of Environmental Protection, Industrial Site Evaluation Element, CN 028, Trenton, New Jersey 08625. Courier and hand deliveries may be made to 401 East State Street, 5th Floor East, Trenton, New Jersey 08608.

7:26B-1.12 Right of entry and inspection

(a) *[The owner or operator of the industrial establishment making any submission to the Department pursuant to the Act and this chapter shall allow the Department and its authorized representative(s), upon the presentation of credentials, to enter the industrial establishment]* ***The owner or operator of the industrial establishment shall expressly consent in each submittal made to the Department pursuant to the Act and this chapter to entry of the industrial establish-**

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ment by the Department and its authorized representative(s), upon the presentation of credentials,* to inspect the site, buildings and records and to take samples from the site, *in which case the owner or operator shall be provided with split samples upon his or her request,* photograph the site and the buildings, and to make copies of the records.

(b) The buyer or transferee of the industrial establishment that has been sold subsequent to obtaining an approved cleanup plan or Administrative Consent Order from the Department shall:

1. Allow the Department and its authorized representative(s), upon the presentation of credentials, to enter the transferred premises to inspect the site, buildings and records, and to take samples from the site, photograph the site and the buildings and to make copies of the records; ***where the Department takes samples from the site, the buyer or transferee shall be provided with split samples upon his or her request; and***

2. Allow access to *[be]* ***the*** transferred premises by the authorized representative(s) of the seller or transferor to implement a duly approved cleanup plan or comply with the conditions of an ACO.

(c) The owner, operator, or other person *[implementing a cleanup plan]* ***subject to ECRA compliance*** or who is a party to an ACO shall:

1. Have appropriate technical, scientific, and engineering representative(s) accompany the Department and its authorized representative(s) during the inspection; and

2. Provide all assistance through appropriate technical, scientific and engineering representative(s) to the Department and its authorized representative(s) of the Department during any site inspection.

7:26B-1.13 Certification and signatories

(a) The following documents required to be submitted to the Department shall be executed and certified as set forth in (b) below:

1. GIS (see N.J.A.C. 7:26B-3.2);
2. SES (see N.J.A.C. 7:26B-3.2);
3. Corrected information on a GIS or SES (see N.J.A.C. 7:26B-3.2(g);

4. Affidavit of withdrawal (see N.J.A.C. 7:26B-3.*[3]**4*);

5. Affidavit for a negative declaration, changes to an approved negative declaration, and requests for extensions of negative declarations (see N.J.A.C. 7:26B-5.2 and 5.4);

6. Proposed cleanup plan and corrections thereto (see N.J.A.C. 7:26B-5.3);

7. Final cleanup plan report and corrections thereto (see N.J.A.C. 7:26B-5.7);

8. Affidavit for a de minimus quantity exemption, including the transferor's affidavit (see N.J.A.C. 7:26B-10.1); and

9. Application and affidavit for a Certificate of Limited Conveyance (see N.J.A.C. 7:26B-13.1).

(b) All documents listed in (a) above shall contain the following signatures and two-part certification which provides the following:

1. "I certify under penalty of law that the information provided in this document is true, accurate and complete. I am aware that there are significant civil *[and criminal]* penalties for ***knowingly*** submitting false, inaccurate or incomplete information ***and that I am committing a crime of the fourth degree if I make a written false statement which I do not believe to be true.****, including fines or imprisonment, or both.]* I am also aware that if I knowingly direct or authorize the violation of N.J.S.A. 13:1K-6 et seq., I am personally liable for the penalties set forth at N.J.S.A. 13:1K-8."

i. The certification required by *[(a)]***(b)*1 above shall be signed by the highest ranking *[corporate, partnership, or governmental officer or official stationed at the site]* ***individual at the site with overall responsibility for that site or activity*** to which the information pertains. ***Where there is no individual at the site with overall responsibility for that site or activity, this certification shall be signed by the individual having responsibility for the overall operation of the site or activity.***

2. "I certify under penalty of law that I have personally examined and am familiar with the information submitted in this application and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information,

I believe that the submitted information is true, accurate and complete. I am aware that there are significant civil *[and criminal]* penalties for ***knowingly*** submitting false, inaccurate or incomplete information ***and that I am committing a crime of the fourth degree if I make a written false statement which I do not believe to be true.*** *[, including fines or imprisonment, or both.]* I am also aware that if I knowingly direct or authorize the violation of N.J.S.A. 13:1K-6 et seq., I am personally liable for the penalties set forth at N.J.S.A. 13:1K-8."

i. The certification required by (b)2 above shall be signed as follows:

(1) For a corporation, by a principal executive officer of at least the level of vice president;

(2) For a partnership or sole partnership, by a general partner or the proprietor, respectively; or

(3) For a municipality, State, Federal or other public agency, by either a principal executive officer or ranking elected official.

(c) The following documents required to be submitted to the Department shall be executed and certified as set forth in (d) below:

1. Applicability determination form (see N.J.A.C. 7:26B-1.9);

2. Sampling plan results (see N.J.A.C. 7:26B-4.3);

3. Cleanup plan progress reports (see N.J.A.C. 7:26B-5.6);

4. Affidavit from chief financial officer, certified audit of the corporation, certified public accountant report, and self-bonding agreement. (see N.J.A.C. 7:26B-6.5(d), (f) and (g)); and

5. Application for an ACO (see N.J.A.C. 7:26B-7.2).

(d) All documents listed in (c) above shall be signed by a person described in (b)2i above who shall make the certification set forth in (b)2 above, or by a duly authorized ***re***presentative of that person. A person is a duly authorized representative only if:

1. The authorization is made in writing by a person described in (b)2i above;

2. The authorization specifies either an individual or a position having responsibility for the overall operation of the site or activity, such as the position of plant manager, or a superintendent or person of equivalent responsibility (a duly authorized representative may thus be either a named individual or any individual occupying a named position); and

3. The written authorization is submitted to the Department;

4. If an authorization is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of this subsection shall be submitted to the Department prior to or together with any reports, information, or applications to be signed by an authorized representative.

5. A duly authorized person shall make the following certification:

i. "I certify under penalty of law that the information provided in this document is true, accurate and complete. I am aware that there are significant civil *[and criminal]* penalties for ***knowingly*** submitting false, inaccurate or incomplete information ***and that I am committing a crime of the fourth degree if I make a written false statement which I do not believe to be true.*** [, including fines or imprisonment, or both, for violations]*. I am also aware that if I knowingly direct or authorize the violation of N.J.S.A. 13:1K-6 et seq., I am personally liable for the penalties set forth at N.J.S.A. 13:1K-8."

(e) All signatures required by this section shall be notarized.

SUBCHAPTER 2. EXEMPTION PROCEDURES

7:26B-2.1 Procedure for obtaining SIC exemptions from ECRA

(a) Any person may petition the Department in writing for an exemption as a sub-group or class of operations within those subgroups within the Standard Industrial Classification major group numbers 22-39 inclusive, 46-49 inclusive, 51 or 76 from the requirements of the Act and this chapter. In support of the petition, such person shall submit all relevant supporting documentation and any other evidence to the Department.

(b) Upon a finding that a SIC sub-group or class of operations within those subgroups above does not pose a risk to the public health, safety, or the environment, the Department may, in response to an exemption petition or on its own initiative, pursuant to the

Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., exempt the sub-group or class of operations within those subgroups from the provisions of the Act and this chapter through amendment to the list at N.J.A.C. 7:26B-1.8(b).

(c) Exemptions shall not be granted for a specific industrial establishment but shall only be available for a subgroup or class of operations within a subgroup.

SUBCHAPTER 3. INITIAL NOTICE SUBMISSIONS

7:26B-3.1 Pre-Notice filing conference

The Department will, upon request of any owner or operator with an impending transaction or a closing which will render the industrial establishment subject to ECRA, meet with representatives of the owner or operator of the industrial establishment to discuss compliance with the provisions of the Act and this chapter.

7:26B-3.2 Initial Notice requirements

(a) Any owner or operator of an industrial establishment who is closing, terminating, or transferring the industrial establishment may initiate the ECRA process by submitting the General Information Submission (GIS) and the Site Evaluation Submission (SES) described in (b) and (c) below. The owner or operator of the industrial establishment is encouraged to file the GIS and SES prior to the decision to close or terminate operations or execution of an agreement to sell or transfer the industrial establishment. The owner or operator of any industrial establishment who submits an Initial Notice in anticipation of closing, terminating or transferring operations shall comply with all of the provisions of this chapter, except for the submittal of the sales agreement ***unless the owner or operator withdraws from the ECRA review process in accordance with the provisions at N.J.A.C. 7:26B-3.4***.

(b) The owner or operator of an industrial establishment subject to the Act and this chapter shall submit to the Department the GIS of the Initial Notice containing all the information in this subsection, no more than five days subsequent to the occurrence of an ECRA trigger (see N.J.A.C. 7:26B-1.6) and may submit any additional information required in (c) below available at that time. All information shall be submitted in triplicate on GIS forms available from the Department at the address specified at N.J.A.C. 7:26B-1.11. The owner or operator of the industrial establishment shall include the following information on the GIS:

1. Identification of the subject industrial establishment:

i. Name and location of the industrial establishment, including street address, municipality, county and zip code;

ii. Tax block and lot numbers of the industrial establishment;

iii. Applicable SIC number of the subject industrial establishment;

iv. Real property owner, including name, address and telephone number;

v. Business operator of the industrial establishment, including name, address and telephone number;

vi. Business owner of the industrial establishment, including name, address and telephone number; and

vii. Identification of any previous ECRA submissions made for the industrial establishment or any prior industrial establishments occupying any of the same tax block and lot number including date, ECRA case number, and current status.

2. Description of the transaction requiring compliance with the Act and this chapter;

3. The date of public release of the closure or termination decision and a copy of the appropriate public announcement, if any;

4. The date of ***[executive]* *execution*** of the agreement of transfer, sale or option to purchase, the name and address of the other parties to the transfer or sale, and a copy of the agreement of transfer or sale or option to purchase agreement, as applicable;

5. The proposed date for closing, terminating or transferring operations; and

6. The name, address and telephone number of the authorized agent. The owner or operator shall notify the Department in writing of any change of identity, address, or telephone number of the authorized agent. Where the Department is required by this chapter

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to notify or otherwise communicate with an owner or operator, notice to or communication with the authorized agent by the Department shall be sufficient.

(c) The owner or operator of an industrial establishment subject to ECRA and this chapter shall submit to the Department the SES of the Initial Notice containing all the information in this subsection no more than 45 days subsequent to the occurrence of an ECRA trigger (see N.J.A.C. 7:26B-1.6). All information shall be submitted in triplicate on SES forms available from the Department at the address specified at N.J.A.C. 7:26B-1.11. The owner or operator of the industrial establishment shall include the following information on the SES:

1. To the extent available from diligent inquiry, the site history since January 1, 1940 including:

- i. Names of owners and operators;
- ii. Dates of ownership of each owner;
- iii. Dates of operation of each operator;
- iv. Current addresses of each owner and operator; and
- v. Brief description of each past operation conducted.

2. A list of all Federal ***[and]***, State ***and local*** environmental permits ***including, to the extent available from diligent inquiry, permits for all previous owners or operators,*** applied for or received, or both, for the site since 1960, including:

- i. Application date;
- ii. Date of approval, denial, or status of application;
- iii. Reason for denial, revocation or suspension if applicable;
- iv. Permit expiration date;
- v. Permit identification number; ***[and]***
- vi. Reason for permit; ***and***
- vii. Name and address of permitting agency;*

3. Copies of all Departmental or other enforcement actions for violations of any applicable Federal, State or local environmental laws or regulations occurring during the period of ownership of the current owner, and operations by the current operator of the industrial establishment, and a list of each enforcement action including:

- i. Type of enforcement action;
- ii. Date of enforcement action;
- iii. Description of violation; and
- iv. Final resolution or current status of the enforcement action if not resolved;

4. A scaled site map identifying:

- i. All areas in, on, or under the industrial establishment where hazardous substances or wastes have been or currently are generated, manufactured, refined, transported, treated, stored, handled or disposed;
- ii. All containers, tanks, surface impoundments, landfills, septic systems, or any other structure, vessels, contrivance or unit that contain or previously contained hazardous substances and wastes;
- iii. All known areas of discharges that occurred during current and past operations; and
- iv. Property boundaries, site improvements and adjacent land usage;

5. A detailed description of all current and *** , to the extent available from diligent inquiry,*** all ***[known]*** past operations and processes occurring at the industrial establishment designed to guide the Department step-by-step through plant operations, with particular emphasis on areas of the process stream where hazardous substances and wastes are or were generated, manufactured, refined, transported, treated, stored, handled or disposed, at the industrial establishment above and below ground;

6. The current and *** , to the extent available from diligent inquiry, the*** historical means of heating the facility, including dates and description of any fuel oil tank decommissioning;

7. Identification of all current and *** , to the extent available from diligent inquiry, all*** previous sanitary and industrial discharges to a publicly owned treatment works, or community or on-site disposal system, including the dates and nature of such discharges, and the name and address of the public or community collection, disposal or treatment system;

8. A description of the types, ages, dimensions and locations of containers, tanks, surface impoundments, landfills, septic systems or

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any other structure, vessel, contrivance or unit that contain or previously contained hazardous substances and wastes;

9. A complete and current inventory, description and location of hazardous substances and wastes generated, manufactured, refined, transported, treated, stored, handled or disposed at the industrial establishment above and below ground, and a description of the location, types and quantities of hazardous substances and wastes ***currently*** used or generated on an annual basis, and a description of the location, types, and quantities of hazardous substances and waste ***s*** that will remain subsequent to the transfer or sale of the industrial establishment;

10. A detailed description of any known discharge of hazardous substances and wastes that occurred during current and *** , to the extent available from diligent inquiry,*** past operations of the site and *** , to the extent available from diligent inquiry,*** a detailed description of any remedial actions undertaken to handle any discharge of hazardous substances and wastes;

11. A detailed sampling or other environment evaluation measurement plan, including soil, ground water, surface water, sediment, hazardous waste, chip, wipe and air sampling, proposed as appropriate for the industrial establishment by the owner or operator of the industrial establishment for review and approval by the Department. A sampling plan shall be designed to determine the presence of and delineate any contamination, including any off-site contamination which is emanating or has emanated from the industrial establishment. The sampling plan shall take into consideration the site history and the current use and shall include, but not be limited to, the following:

i. Graphic and narrative descriptions of geographic, soil, geologic, and hydrogeologic characteristics of the industrial establishment and any proposed evaluation of all environmental media;

ii. Environmental setting of the industrial establishment including, but not limited to:

(1) A United States Geological Survey quad map marked to identify the specific site location;

*** (2) The latitude and longitude of the industrial establishment to the nearest second;***

*** [(2)]** (3)*** A description of local land use;

*** [(3)]** (4)*** A scaled site map;

*** [(4)]** (5)*** An overview of the history of the industrial establishment as related to intended sampling activities;

*** [(5)]** (6)*** A description of soils, topography and drainage of the industrial establishment; and

*** [(6)]** (7)*** A description of hydrogeology of the area;

iii. A discussion of each area of potential environmental concern including, but not limited to, intended sampling locations, sampling frequency, and analytical parameters;

iv. A description of quality assurance/quality control practices which shall be employed during implementation of the sampling plan including, but not limited to:

(1) Sampling equipment, procedures and sample handling;

(2) The identity of the analytical laboratory, certified in accordance with N.J.A.C. 7:18 or recognized by the Department; and

(3) The identity of the laboratory procedures, methods and detection limits certified in accordance with N.J.A.C. 7:18 or recognized by the Department;

v. A detailed discussion of health and safety practices to be employed during implementation of the sampling plan; and

vi. A schedule of activities, including a schedule for submission of status reports on the progress of sampling and analytical activities leading up to the submittal of sampling results in accordance with N.J.A.C. 7:26B-4.3.

12. A detailed description of the procedures to be used to decontaminate, or decommission, or both, equipment and buildings involved with the generation, manufacture, refining, transportation, treatment, storage, handling, or disposal of hazardous substances and wastes including the name and location of the ultimate disposal facility;

13. Copies of all soil, sediment, chip, wipe, air emission, ground water, and surface water sampling results, including effluent quality monitoring, conducted at the industrial establishment, on-site or off-

site, during the period of ownership by the owner or period of operations by the operator, and a detailed description of the location, methodology, analyses, identity of laboratory, and other factors involved in preparation of the sampling results. If the data would be exceedingly voluminous to submit, contact the Department for instructions; and

14. Other information requested in writing by the Department for the purpose of implementing the Act and this chapter.

*[(d)] In the case of leased property, the owner of the real property of the industrial establishment shall have the primary responsibility for submittal of the Initial Notice except as provided below:

1. If the operator of an industrial establishment plans to close, terminate or transfer its operations at an industrial establishment for which it is the tenant, the operator of the industrial establishment shall have the primary responsibility for submittal of the Initial Notice;

2. If the operator of an industrial establishment gives written notice of termination of the lease agreement, the operator of the industrial establishment shall have the primary responsibility for submittal of the Initial Notice; and

3. If the operator of an industrial establishment files a petition in bankruptcy or brings a receivership action, or if a bankruptcy petition or receivership action is filed against the operator, the operator of the industrial establishment shall have the primary responsibility for the submittal of the Initial Notice.

(e) If the person bearing primary responsibility as set forth in (d) above fails to comply with N.J.A.C. 7:26B-3, the other person(s) liable under the Act and this chapter shall comply.]*

*[(f)]**[(d)]* The owner or operator of an industrial establishment may propose to the Department that no sampling plan need be developed and implemented for the industrial establishment pursuant to N.J.A.C. 7:26B-3.2(c)(1) by providing full documentation of the justification to the Department for review and approval with the SES. *[The Department shall not approve the proposal on the basis of economic considerations.]* ***Economic considerations are not sufficient justification to support a request to be relieved of the requirement to develop, submit, and implement a sampling plan.***

*[(g)]**[(e)]* The Department shall notify the owner or operator of the industrial establishment of any deficiencies in the GIS or SES. The owner or operator of the industrial establishment shall correct the deficiencies within the time frame specified by the Department.

*[(h)]**[(f)]* The Department shall notify the owner or operator of the industrial establishment when the GIS and SES are administratively complete.

***7:26B-3.3 Landlord-tenant responsibility for Initial Notice compliance**

(a) Where the owner of an industrial establishment is a landlord and the operator of an industrial establishment is a tenant, both parties shall be strictly liable without regard to fault, jointly and severally, for compliance with the Act and this chapter. Notwithstanding retention by the Department of the right to compel any liable party to comply with the Act and this chapter, as between the landlord and tenant, the Department shall require compliance with the Initial Notice provisions in accordance with the following:

1. Except as provided below at 2, the landlord shall be responsible for the submittal of Initial Notice, provided the tenant shall be responsible for providing all information, to the extent available from diligent inquiry by the tenant, that is requested by the landlord, but not available from diligent inquiry by the landlord, or all information requested by the Department for the purpose of satisfying the Initial Notice requirements.

2. Where the tenant plans to close, terminate or transfer its operations at an industrial establishment, gives written notice of termination of a lease agreement, files a petition in bankruptcy or brings a receivership action, or if a bankruptcy petition or receivership action is filed against the tenant, the tenant shall be responsible for the submittal of Initial Notice, provided the landlord shall be responsible for providing all information, to the extent available from diligent inquiry by the landlord, that is requested by the tenant, but not available from diligent inquiry by the tenant, or all information requested by the Department for the purpose of satisfying the Initial Notice requirements.*

7:26B-[3.3]3.4* Withdrawal procedure**

If, after filing the GIS or SES, or both, the owner or operator does not close, terminate or transfer operations, the owner or operator may notify the Department and withdraw from the ECRA review process. Notice for such withdrawal ***[must]* *shall*** be in the form of an affidavit stating the reason(s) for the withdrawal and executed ***and certified*** by the owner or operator ***in accordance with the provisions at N.J.A.C. 7:26B-1.13*.**

7:26B-[3.4]3.5* Department inspection and records review**

(a) In accordance with N.J.A.C. 7:26B-1.12, the department shall schedule and conduct site inspections of any industrial establishment submitting an Initial Notice pursuant to this subchapter.

(b) The Department may conduct a review of its records and the available records of the United States Environmental Protection Agency, other State agencies, and the appropriate county and municipal files pertaining to the industrial establishment to confirm and further supplement the information submitted concerning the history, operations and practices of the industrial establishment.

SUBCHAPTER 4. *APPROVAL* IMPLEMENTATION *AND SUBMITTAL* OF *RESULTS FROM THE* SAMPLING PLAN *[COORDINATION]*

7:26B-4.1 Sampling plan approval

(a) After the Department's review of the sampling plan required by N.J.A.C. 7:26B-3, the Department will send a letter to the owner or operator of the industrial establishment concerning the adequacy of the sampling plan submitted pursuant to N.J.A.C. 7:26B-3.2(c)(1).

(b) The owner or operator of the industrial establishment shall develop and resubmit any revision or addendum of a sampling plan required by the Department to the Department for final review and approval in the time frame specified by the department after consultation with the owner or operator.

7:26B-4.2 Sampling plan implementation

(a) After written Departmental approval of the sampling plan and prior to submission of the negative declaration or cleanup plan, the owner or operator of the industrial establishment shall implement the sampling plan for the industrial establishment. The Department will be available to advise the owner or operator or the industrial establishment concerning such plan implementation.

(b) The owner or operator of the industrial establishment shall provide the Department with notice and site access to observe all sampling.

(c) The Department may obtain samples as it determines to be necessary during the implementation of the sampling plan and the owner or operator shall not prohibit or otherwise prevent the Department from taking such samples. The Department shall provide split samples to the owner or operator upon request by the owner or operator of the industrial establishment.

7:26B-4.3 Submission of sampling results

(a) The owner or operator of the industrial establishment shall submit to the Department the sampling results performed in accordance with the approved sampling plan. The results shall be accompanied by:

1. A proposed negative declaration;
2. A proposed cleanup plan; or
3. A revised sampling plan to further delineate the extent and degree of contamination on or from the industrial establishment.

(b) If the Department determines that additional sampling and analysis is necessary, the owner or operator shall complete the additional sampling and analysis in the time frame specified by the Department prior to the approval of its proposed negative declaration or proposed cleanup plan.

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SUBCHAPTER 5. CRITERIA FOR NEGATIVE DECLARATION AND CLEANUP PLAN APPROVAL AND DEFERRAL OF CLEANUP

7:26B-5.1 Timing of cleanup plan or negative declaration submission ***and approval or ACO execution as condition precedent to title transfer***

(a) The owner or operator of the industrial establishment may submit a proposed negative declaration or proposed cleanup plan for review after the Department conducts its preliminary site inspection ***and the owner or operator has received the results therefrom***.

(b) The Department shall not approve any proposed cleanup plan or proposed negative declaration submitted pursuant to this chapter until the requirements of N.J.A.C. 7:26B-3 and 7:26B-4 have been satisfied and an inspection of the industrial establishment has been conducted by the Department.

(c) The owner or operator of an industrial establishment shall not sell or otherwise transfer the industrial establishment until a negative declaration or a cleanup plan has been approved by the Department or an ACO has been executed.

7:26B-5.2 Requirements for proposed negative declaration submission; approval

(a) A proposed negative declaration shall be an affidavit ***[signed by an authorized officer or management official of the industrial establishment]* *executed and certified in accordance with the provisions at N.J.A.C. 7:26B-1.13*** indicating the location, and tax block and lot number of the industrial establishment, transaction, and buyer and seller, if applicable, and stating that there has been no discharge of hazardous substances and wastes on or from the industrial establishment or that any such discharge on or from the industrial establishment has been cleaned up to the current satisfaction of the Department. In the case of a sale or transfer of an industrial establishment, if any hazardous substances and wastes are to remain at the industrial establishment ***in any containers, tanks, surface impoundments, or any other structures, vessels, contrivances, or units***, the purchaser or transferee shall provide the Department with a letter accepting ownership of, and liability for, ***[the]* *these*** hazardous substances and wastes.

(b) ***Unless already submitted in accordance with other provisions of this chapter and identified as to submittal, the* *The* proposed negative declaration shall include the following information*[:]*:**

1. Description of cleanup actions taken at the industrial establishment including, but not limited to, activities involving the removal of hazardous substances and wastes, copies of completed manifest forms, name and address of disposal site utilized, quantities and descriptions of hazardous substances and wastes removed, and itemization of costs incurred;

2. Any sampling results from the detailed soil, ground water, surface water, sediment, hazardous waste, chip, wipe and air sampling prepared by the owner or operator of the industrial establishment, if not submitted previously to the Department; and

3. Any other information required by the Department to review the proposed negative declaration.

(c) The department shall within 45 days of submission of a proposed negative declaration approve or disapprove the proposed negative declaration after evaluation of the proposed negative declaration, the initial notice, inspection reports, existing Departmental records, or any other information available to the Department.

(d) If the proposed negative declaration is disapproved by the Department, the owner or operator or both of the industrial establishment shall be notified by the Department of the reason(s) for disapproval.

1. Any deficiencies in the proposed negative declaration shall be corrected and a revised negative declaration shall be submitted to the Department in the time frame specified by the Department in the disapproval.

2. If the Department determines that a cleanup plan is required, a draft cleanup plan shall be submitted to the Department by the owner or operator for review in the time frame specified by the Department.

7:26B-5.3 Requirements for proposed cleanup plan submission; approval

(a) ***Unless already submitted in accordance with other provisions of this chapter and identified as to submittal, a* *A]* proposed cleanup plan*, including but not limited to the following information*, shall be submitted to the Department for written approval ***[with the following information]*:****

1. A description of the location, types, and the quantities of any and all hazardous substances and wastes that will remain on the industrial establishment and those hazardous substances and wastes to be removed;

2. A description of the types, volume, and location of any containers, tanks, surface impoundments, landfills, or any other structures, vessels, contrivances, or units containing hazardous substances and wastes ***that will remain at the industrial establishment***;

3. The sampling results from the sampling plan prepared by the owners or operators of the industrial establishment;

4. An evaluation of sampling plan findings, migration paths and exposure routes of any discharges of hazardous substances and wastes;

5. An evaluation of remedial measures including proposed actions to remediate any contamination, including any off-site contamination which is emanating or has emanated from the industrial establishment, and recommendations regarding the most practicable method of cleanup;

6. Cleanup levels*, criteria, standards of performance, or other measures of compliance with environmental rules* to be achieved for all environmental media ***consistent with N.J.A.C. 7:26B-1.11 and*** in accordance with the cleanup plan;

7. A schedule of activities for completion of the cleanup including milestones, progress reports from cleanup plan approval through completion and post remediation monitoring; ***and***

8. An accurate and detailed estimate of costs of implementation of proposed cleanup plan including, but not limited to:

- i. Capital costs;
- ii. Operation and maintenance costs;
- iii. Monitoring system costs;
- iv. Laboratory costs;
- v. Engineering, legal and administrative costs; and
- vi. Contingency costs*[: and]*.*

***[9. Additional information required by the Department including, but not limited to:**

- i. Graphic and narrative descriptions of the geographic, geologic and hydrogeologic characteristics at the industrial establishment; and
- ii. An evaluation of all residual soil, ground water, and surface water contamination.]*

(b) The Department shall evaluate the proposed cleanup plan, the Initial Notice, inspection reports, existing Departmental records, and any other information available to the Department prior to approval or disapproval of a proposed cleanup plan.

(c) If the Department disapproves the proposed cleanup plan, the Department shall notify the owner or operator of the industrial establishment of its reasons for disapproval. The owner or operator shall correct any deficiencies in the time frame specified by the Department.

7:26B-5.4 Issuance and duration of negative declaration approval

(a) If the Department determines that the requirements of N.J.A.C. 7:26B-5.2 have been satisfied, the Department will issue a written approval of the negative declaration.

(b) A negative declaration approval shall be effective only for so long as all the information submitted pursuant to N.J.A.C. 7:26B-3.2 remains unchanged but, in any event, shall not be effective for a period to exceed 60 days.

(c) Where there is a change in the information required in the Initial Notice prior to the expiration of the 60-day period, the owner or operator of the industrial establishment shall immediately notify the Department of the change and request an amended negative declaration approval. ***The amended negative declaration approval shall be effective for a period not to exceed the remainder of the original 60-day period.***

(d) Upon submission of an affidavit that there have been no new discharges of hazardous substances and wastes, the Department will grant one extension of the negative declaration approval for a period not to exceed 60 days.

7:26B-5.5 Issuance of cleanup plan approval and implementation

(a) If the Department determines that the requirements of N.J.A.C. 7:26B-5.3 have been satisfied, the Department ***[may]*** ***shall*** issue a written approval of the cleanup plan. ***[The subject transaction may proceed upon receipt of the written cleanup plan approval.]***

(b) Within 14 days after receipt of notice from the Department that the cleanup plan is approved, the ***owner or operator of the*** industrial establishment shall obtain and furnish to the Department financial assurance in conformance with N.J.A.C. 7:26B-6 in an amount ***[equal to or greater than]*** ***at least equal to*** the cleanup plan cost estimate approved by the Department.

(c) Upon receipt of written approval of the cleanup plan from the Department, the owner or operator of the industrial establishment, except as provided in (d) below, shall begin and complete implementation of the cleanup plan according to the schedule for implementation contained therein, unless implementation of the cleanup plan has been deferred pursuant to N.J.A.C. 7:26B-5.8 or the industrial establishment obtains the prior written approval of the Department to modify the schedule in the cleanup plan.

(d) With the approval of the Department, the cleanup plan may be implemented by a purchaser, transferee, mortgagee, or other party to a transfer of an industrial establishment; such party shall be strictly liable, jointly and severally with the owner or operator, for implementation of the cleanup plan.

(e) The owner or operator of an industrial establishment may request a modification of the cleanup plan schedule. The Department shall approve or disapprove the modification within 30 days of receipt of the request.

7:26B-5.6 Cleanup plan progress reports

(a) The owner or operator of the industrial establishment shall submit cleanup plan progress reports to the Department in the time frame specified by the cleanup plan approval letter.

(b) The progress reports shall contain, but not be limited to, the following information:

1. Any changes in the approved cleanup plan schedule;
2. Actual costs of cleanup incurred to date;
3. Completed cleanup work to date;
4. Percent of total cleanup work completed to date; and
5. Cleanup plan work outstanding.

7:26B-5.7 Inspection and approval of cleanup

(a) The Department shall conduct inspections of the industrial establishment that is subject to a cleanup plan to determine compliance with the cleanup plan.

(b) After the cleanup plan is fully implemented, the owner or operator of the industrial establishment shall submit a final report to the Department. The final cleanup report shall:

1. Detail the actual cleanup actions performed*, **the total costs associated with the investigation of the industrial establishment,*** and final cleanup costs;
2. Compare the proposed cleanup actions scheduled in the cleanup plan and actual actions undertaken to perform the cleanup; and
3. Detail dates of cleanup activities, additional sampling results and other pertinent information.

(c) The Department determines that the cleanup plan has not been fully complied with, the owner or operator of the industrial establishment shall correct any deficiencies, and amend the final report, in the time frames specified by the Department.

(d) The Department, upon satisfactory completion of (a) through (c) above and submittal of all fees required by N.J.A.C. 7:26B-1.10, shall notify in writing the owner or operator of the industrial establishment that the cleanup plan has been fully implemented.

(e) The Department shall release the financial assurance required pursuant to N.J.A.C. 7:26B-6 after the letter approving the implementation of the cleanup has been issued.

7:26B-5.8 Deferral of implementation of cleanup plan

(a) If the industrial establishment will be subject to substantially the same use by the purchaser, transferee, mortgagee or other party to the transfer, the owner or operator of the industrial establishment may apply in writing to the Department for approval to defer implementation of the cleanup plan until the use changes or until the purchaser, transferee, mortgagee or other party to the transfer closes, terminates or transfers operations.

(b) The owner or operator of the industrial establishment applying for a deferral as described in (a) above shall submit an affidavit signed by the person(s) identified in N.J.A.C. 7:26B-1.13(d) and an affidavit by the other party(ies) to the transfer and both shall be certified in accordance with N.J.A.C. 7:26B-1.13(d) stating that the industrial establishment shall be subject to substantially the same use by any other party(ies) to the transfer and detailing the proposed operations of that other party(ies).

(c) The Department shall, within 60 days of the owner's or operator's compliance with the financial assurance requirements for the cleanup plan pursuant to N.J.A.C. 7:26B-5.5 and the written certification required in (b) above, either approve, conditionally approve, or disapprove the written certification for the deferral of implementation of the cleanup plan.

(d) If the Department approves the deferral application, the owner or operator of the industrial establishment may defer implementation of the cleanup plan until the use of the industrial establishment changes, until any other party(ies) to the transfer closes, terminates or transfers operations, or until the Department determines that continued deferral of cleanup plan implementation poses a threat of actual or potential harm to the public health or environment.

(e) The Department shall not approve the deferral of cleanup plan implementation until the owner or operator proves to the satisfaction of the Department that the deferral of cleanup plan implementation poses ***[no]*** ***only an insignificant*** threat of actual or potential harm to the public health or the environment.

(f) The Department's authority to defer implementation of the cleanup plan set forth in this section shall not be construed to limit, restrict or prohibit the Department from directing cleanup nor limit the liabilities of the owner or operator or past owners or operators under any other statute, rule or regulation or order, but shall be solely applicable to the obligations of the owner or operator of the industrial establishment pursuant to the Act and this chapter.

(g) If the Department denies a deferral, the owner or operator of the industrial establishment shall immediately implement the cleanup plan pursuant to the provisions of this chapter and the Act.

SUBCHAPTER 6. FINANCIAL ASSURANCE

7:26B-6.1 General requirements

(a) Within 14 days after receipt of written notice from the Department that the cleanup plan is approved*,* or as specified in an ACO, the owner or operator of the industrial establishment shall obtain and provide to the Department financial assurance in the form of a surety bond, performance bond, letter of credit, self bonding, or fully funded trust fund, in accordance with Appendix A of this chapter and in the amount ***[equal to or greater than]*** ***at least equal to*** the cleanup cost estimate in the cleanup plan or the amount specified in an ACO. For a surety bond, performance bond, and letter of credit, a standby trust agreement is also required.

(b) The financial assurance required by this subchapter is the responsibility of the owner or operator of the industrial establishment except that the purchaser, transferee, mortgagee or other parties to the transfer may assume the financial assurance requirements for cleanup as specified in this subchapter upon the Department's prior written approval of any appropriate agreement to be executed between the parties in accordance with N.J.A.C. 7:26B-5.5

7:26B-6.2 Surety bond guaranteeing payment into a standby trust fund

(a) An owner or operator of an industrial establishment may satisfy the requirements of this subchapter by obtaining a surety bond guaranteeing payment into a standby trust fund which conforms to the requirements of this section and by having the bond delivered

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to the Department by certified mail, courier service or hand delivery, within 14 days after receipt of notice from the Department of the cleanup plan approval or as specified in an ACO.

1. The surety company issuing the bond shall, at a minimum, be among those listed as acceptable sureties on Federal bonds in the most recent version of Circular 570 issued by the U.S. Department of the Treasury which is published annually on July 1 in the Federal Register.

(b) The wording of the surety bond shall be identical with the wording in the "Wording of Instruments" document specified in Appendix A of this chapter.

(c) The owner or operator of an industrial establishment who uses a surety bond to satisfy the requirements of this subchapter shall also establish a standby trust fund by the time the bond is submitted to the Department. Under the terms of the surety bond, all payments made thereunder shall be deposited directly into the standby trust fund in accordance with instructions from the Department. The wording of the standby trust fund shall be identical with the wording in the "Wording of Instruments" document specified in Appendix A of this chapter. A copy of the executed trust agreement shall be submitted to the Department with the surety bond. The owner or operator shall establish the trust fund with a nominal initial payment by the time the bond and trust fund agreement are submitted to the Department.

(d) The surety bond shall guarantee that if the Department determines that the owner or operator has failed to perform the obligations of this chapter, the surety shall fund the standby trust fund in an amount equal to the penal sum of the bond.

(e) The surety shall be liable on the bond obligation when the Department determines that the owner or operator has failed to perform the obligations under this chapter as guaranteed by the bond. Following the Department's determination that the owner or operator has failed to perform the obligations under this chapter as guaranteed by the bond, the surety shall deposit the amount of the penal sum of the bond into the standby trust fund.

(f) The penal sum of the bond shall be in an amount equal to or greater than the cost estimate approved by the Department in the cleanup plan or as specified in an ACO.

(g) Whenever the cleanup plan cost estimate increases as specified in N.J.A.C. 7:26B-5 to an amount greater than the amount of the surety bond, the owner or operator shall, within 60 days after the increase, cause the amount of the surety bond to be increased to an amount at least equal to the new estimate and submit evidence of such increase to the Department, obtain additional financial assurance as specified in this subchapter at least equal to the increase, or obtain alternative financial assurance as specified in this subchapter at least equal to the new cleanup plan cost estimate. Whenever the cleanup plan cost estimate decreases, the owner or operator may file a written request to the Department to decrease the amount of the surety bond. Thereafter, the surety bond may be decreased to the amount of the new estimate only upon written approval by the Department to the surety. Notice of an increase or decrease in the amount of the surety bond shall be sent by the surety to the Department by certified mail within 60 days after the change.

(h) The bond shall contain the following provisions concerning cancellation:

1. The surety shall not, in the absence of a request by the owner or operator, cancel or otherwise terminate the bond unless the surety sends a written notice of cancellation by certified mail to the owner or operator and to the Department at least 120 days prior to cancellation.

2. The surety shall not, on the basis of a request from the owner or operator, cancel the bond until it has received written approval of the Department to do so.

(i) Within 30 days after receipt of a notice of cancellation, the owner or operator shall provide alternative financial assurance in accordance with this subchapter. In the event that the owner or operator does not provide alternative financial assurance within 60 days after receipt of the notice of cancellation, the Department may thereafter instruct the surety to place the penal sum of the bond in the standby trust fund.

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(j) The owner or operator shall not cancel the bond until the Department has given written approval to do so.

(k) The Department will return the original surety bond to the issuing institution for termination after:

1. The owner or operator substitutes alternative financial assurance for cleanup of the industrial establishment as specified in this subchapter; or

2. The Department provides written notification to the owner or operator that the owner or operator is no longer required to maintain financial assurance for cleanup of the industrial establishment.

7:26B-6.3 Surety bond guaranteeing performance (performance bond)

(a) An owner or operator of an industrial establishment may satisfy the requirements of this subchapter by obtaining a surety bond guaranteeing performance (a performance bond) which conforms to the requirements of this section and by having the bond delivered to the Department by certified mail within 14 days after receipt of notice from the Department that the cleanup plan is approved or as specified in an ACO.

1. The surety company issuing the bond shall, at a minimum, be among those listed as acceptable sureties on Federal bonds in the most recent version of Circular 570 issued by the U.S. Department of the Treasury which is published annually on July 1 in the Federal Register.

(b) The wording of the performance bond shall be identical with the wording in the "Wording of Instruments" document specified in Appendix A of this chapter.

(c) The owner or operator of an industrial establishment who uses a performance bond to satisfy the requirements of this subchapter shall also establish a standby trust fund by the time the bond is submitted to the Department. Under the terms of the performance bond, all payments made thereunder shall be deposited directly into the standby trust fund, in accordance with instructions from the Department. The wording of the standby trust fund shall be identical with the "Wording of Instruments" document specified in Appendix A of this chapter. A copy of the executed trust agreement shall be submitted to the Department with the performance bond. The owner or operator shall establish the trust fund with a nominal initial payment by the time the bond and trust fund agreement are submitted to the Department.

(d) The performance bond shall guarantee that the owner or operator of an industrial establishment shall perform the cleanup in accordance with the approved cleanup plan.

(e) The surety shall become liable on the bond obligation when the Department determines that the owner or operator has failed to perform the obligations under this chapter as guaranteed by the bond. Following the Department's determination that the owner or operator has failed to perform the obligations under this chapter as guaranteed by the bond, the surety shall implement the cleanup plan or shall deposit the amount of the penal sum of the bond into the standby trust fund.

(f) The penal sum of the bond shall be in an amount equal to or greater than the cost estimate approved by the Department in the cleanup plan or as specified in an ACO.

(g) Whenever the cleanup plan cost estimate increases as specified in N.J.A.C. 7:26B-5 to an amount greater than the amount of the performance bond, the owner or operator shall, within 60 days after the increase, cause the amount of the performance bond to be increased to an amount at least equal to the new estimate and submit evidence of such increase to the Department, obtain additional financial assurance as specified in this subchapter at least equal to the increase, or obtain alternative financial assurance as specified in this subchapter at least equal to the new cleanup plan cost estimate. Whenever the cleanup plan cost estimate decreases, the owner or operator may file a written request to the Department to decrease the amount of the performance bond. Thereafter, the performance bond may be decreased to the amount of the new estimate only upon written approval by the Department to the surety. Notice of an increase or decrease in the amount of the surety bond shall be sent by the surety to the Department by certified mail within 60 days after the change.

(h) The bond shall contain the following provisions concerning cancellation:

1. The surety shall not, in the absence of a request by the owner or operator, cancel or otherwise terminate the bond unless the surety sends a written notice of cancellation by certified mail to the owner or operator and to the Department at least 120 days prior to cancellation.

2. The surety shall not, on the basis of a request from the owner or operator, cancel the bond until it has received the written approval of the Department to do so.

(i) Within 30 days after receipt of a notice of cancellation, the owner or operator shall provide alternative financial assurance in accordance with this subchapter. In the event that the owner or operator does not provide alternative financial assurance within 60 days after receipt of the notice of cancellation, the Department may thereafter instruct the surety to place the penal sum of the bond in the standby trust fund.

(j) The owner or operator shall not cancel the bond until the Department has given written consent to do so.

(k) The surety will not be liable for deficiencies in the performance of cleanup by the owner or operator after the owner or operator has been notified by the Department that the owner or operator is no longer required by this subchapter to maintain financial assurance for cleanup of the facility.

(l) The Department will return the original performance bond to the issuing institution for termination after:

1. The owner or operator substitutes alternative financial assurance for cleanup of the industrial establishment as specified in this subchapter; or

2. The Department provides written notification to the owner or operator that the owner or operator is no longer required to maintain financial assurance for cleanup of the industrial establishment.

7:26B-6.4 Letter of credit

(a) An owner or operator may satisfy the requirements of this subchapter by obtaining an irrevocable standby letter of credit which conforms to the requirements of this section and by having it delivered to the Department by certified mail within 14 days after receipt of notice from the Department that the cleanup plan is approved or as specified in an ACO.

(b) The issuing institution shall be an entity which has the authority to issue letters of credit and whose letter of credit operations are regulated and examined by a Federal or State agency.

(c) The wording of the letter of credit shall be identical to the wording in the "Wording of Instruments" document specified in Appendix A of this chapter.

(d) An owner or operator who uses a letter of credit to satisfy the requirements of this subchapter shall also establish a standby trust fund by the time the letter of credit is submitted to the Department. Under the terms of the letter of credit, all amounts paid pursuant to a draft by the Department shall be deposited promptly and directly by the issuing institution into the standby trust fund. The wording of the standby trust fund shall be identical to the wording in the "Wording of Instruments" document specified in Appendix A of this chapter. A copy of the executed trust agreement shall be submitted to the Department with the letter of credit. The owner or operator shall establish the trust fund with a nominal initial payment by the time the letter of credit and trust fund agreement are submitted to the Department.

(e) The letter of credit shall be irrevocable, issued for a period of at least one year, and shall be automatically extended for a period of at least one year. In the event that the issuing institution is subject to Title 17 of the Revised Statutes of New Jersey, the letter of credit shall not be automatically renewable, but shall be renewable yearly by the owner or operator or alternative financial assurances as specified in this subchapter shall be obtained.

(f) If the issuing institution decides not to extend or renew the letter of credit beyond the then-current expiration date, it shall notify both the owner or operator and the Department by certified mail of that decision at least 120 days before the then-current expiration date. The 120-day period shall begin on the date of receipt by the Department as shown on the signed return receipt.

(g) The letter of credit shall be issued for an amount equal to or greater than the cost estimate approved by the Department in the cleanup plan or as specified in an ACO.

(h) Whenever the cleanup plan cost estimate as specified in N.J.A.C. 7:26B-5 increases to an amount greater than the amount of the letter of credit, the owner or operator shall, within 60 days after the increase, cause the amount of the letter of credit to be increased to an amount at least equal to the new estimate and submit evidence of such increase to the Department, obtain additional financial assurance as specified in this subchapter at least equal to the increase, or obtain alternative financial assurance as specified in this subchapter at least equal to the new cleanup plan cost estimate. Whenever the cleanup plan cost estimate decreases, the owner or operator may file a written request to the Department to decrease the amount of the letter of credit. Thereafter, the letter of credit may be decreased to the amount of the new estimate only upon written approval by the Department to the issuing institution. Notice of an increase or decrease in the amount of the letter of credit shall be sent by the issuing institution to the Department by certified mail within 60 days after the change.

(i) Following the Department's determination that the owner or operator has failed to perform the obligations under this chapter, the Department may draw upon the letter of credit and the issuing institution shall deposit the amount of the letter of credit into the standby trust fund.

(j) The letter of credit shall contain the following provisions concerning cancellation:

1. The issuing institution shall not, in the absence of a request by the owner or operator, cancel or otherwise terminate the letter of credit unless the issuing institution sends a written notice of cancellation by certified mail to the owner or operator and to the Department at least 120 days prior to cancellation.

2. The issuing institution shall not, on the basis of a request from the owner or operator, cancel the letter of credit until it has received the written approval of the Department to do so.

(k) Within 30 days of receipt of a notice of termination or cancellation or the like, the owner or operator shall provide alternative financial assurance as specified in this subchapter. In the event that the owner or operator does not provide alternative financial assurance within 60 days after receipt of the notice, the Department may draw upon the letter of credit, and the issuing institution shall deposit the amount of the letter of credit into the standby trust fund.

(l) The Department will return the original letter of credit to the issuing institution for termination after:

1. The owner or operator substitutes alternative financial assurance for cleanup of the industrial establishment as specified in this subchapter; or

2. The Department provides written notification to the owner or operator that the owner or operator is no longer required to maintain financial assurance for cleanup of the industrial establishment.

7:26B-6.5 Self-bonding

(a) A corporate owner or operator of an industrial establishment may satisfy the requirements of this subchapter by complying with (b), (c), (d), (f), and (j) below within 14 days after receipt of notice from the Department that the cleanup plan is approved or as specified in an ACO.

(b) A corporate owner or operator may qualify for self-bonding only if it meets the following financial test:

1. The approved cleanup plan cost estimate or financial assurance amount specified by an ACO is less than or equal to five percent of tangible net worth;

2. The corporation has net working capital at least six times the approved cleanup plan cost estimate or six times the financial assurance amount specified by an ACO;

3. The corporation has assets located in the United States amounting to at least 90 percent of total assets or at least six times the approved cleanup plan cost estimate or six times the financial assurance amount specified by an ACO;

4. The ratio of net worth to total liabilities is greater than 0.5;

5. The ratio of current assets to current liabilities is greater than 1.5; and

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6. The ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities is greater than 0.1.

(c) A parent corporation may be the self-bonder for a subsidiary only if the parent corporation owns at least 50 percent of the voting stock of the subsidiary corporation, meets the financial test provided at (b) above, and submits the documentation required by (d) below for the parent corporation.

(d) The owner or operator shall demonstrate that the corporation can meet the financial test described at (b) above submitting the following items to the Department:

1. An affidavit from the chief financial officer (CFO) which:
 - i. Certifies that the corporation meets or exceeds the levels of the required financial test as provided for at (b) above and as supported by the corporation's attached independently audited year end financial statements for the corporation's most recently completed fiscal year;
 - ii. Lists all operations in the United States owned or operated by the corporation involved in any form of environmental cleanup or closure and the associated approved cleanup or closure plan costs for these operations; and
 - iii. Contains a corporate resolution stating that the CFO or his or her successor has continuing authority to make payments from the corporation to the Department if the Department determines that the owner or operator has failed to perform the obligations under this chapter.

2. A certified audit, conducted by an independent certified public accountant in accordance with standards established by the American Institute of Certified Public Accountants, documenting the corporation's financial statements for the latest completed fiscal year; and

3. A comparison report from an independent certified public accountant stating:

- i. That he or she has compared the affidavit of the CFO with the independently audited, year-end financial statements for the latest fiscal year and with the financial requirements of the Department's self-bonding policy; and
- ii. That in connection with the comparison at i above, no matters have come to his or her attention which cause him or her to believe that the data specified by the CFO should be adjusted.

(e) If the independent certified public accountant's opinion contained in his or her comparison report on examination of the corporation's financial statements is an adverse opinion or contains a disclaimer of opinion as to the future stability of the corporation, the corporation shall not be allowed to use self-bonding to comply with the financial assurance requirements. The Department may also disallow use of self-bonding based on any other adverse qualifications expressed in the independent certified public accountant's opinion.

(f) The owner or operator shall execute a self-bonding agreement available from the Department.

(g) To continue to utilize self-bonding as a financial assurance mechanism, the owner or operator shall submit the following reports to the Department:

1. An affidavit from the CFO that the corporation meets or exceeds the levels of the required financial test every six months;
2. Every year the company shall renew its self-bonding by complying with (b), (c), (d), above and (j) below within 90 days subsequent to the end of the corporation's fiscal year.

(h) Upon the request of the Department, the corporation shall immediately submit a review of the corporation's financial status to determine the ability of the corporation to continue self-bonding.

(i) Upon determining that the owner or operator has failed to perform its obligations under this chapter, the Department shall give written notice to the corporation, and, within five days of receipt of the notice, the owner or operator shall pay to the Department the current cleanup plan cost estimate ***or financial assurance amount specified in an applicable ACO*.**

(j) In determining whether to accept self-bonding in satisfaction of the financial assurance requirements, the Department may consider the competency*,* reliability and integrity of the corporation and its parent corporation. Notwithstanding the provisions of (a) through (i) above, the Department may disallow the use of self-bonding where it determines that a corporation or its parent corporation lacks adequate competency, reliability or integrity.

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7:26B-6.6 Fully funded trust fund

(a) An owner or operator may satisfy the requirements of this subchapter by establishing a fully funded trust which conforms to the requirements of this section and by having an originally signed duplicate of the trust agreement delivered to the Department by certified mail within 14 days of receipt of notice from the Department that the cleanup plan is approved or as specified in an ACO.

(b) The trustee must be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a Federal or New Jersey agency.

(c) The wording of the fully funded trust agreement shall be identical with the "Wording of Instruments" document specified in Appendix A of this chapter, and shall be accompanied by a certification of acknowledgment as specified in Appendix A of this chapter.

(d) The fully funded trust shall be in an amount equal to or greater than the cost estimate approved by the Department for the cleanup plan or as specified in ACO and for a term not less than the actual duration of cleanup plan implementation.

(e) Whenever the cleanup plan cost estimate increases as specified in N.J.A.C. 7:26B-5 to an amount greater than the amount of the fully funded trust, the owner or operator shall, within 60 days after the increase, cause the amount of the fully funded trust to be increased to an amount at least equal to the new estimate and submit evidence of such increase to the Department, obtain additional financial assurance as specified in this subchapter at least equal to the increase, or obtain alternating financial assurance as specified in this subchapter at least equal to the new cleanup plan cost estimate. Whenever the cleanup plan cost estimate decreases, the owner or operator may file a written request to the Department to decrease the amount in the fully funded trust. Thereafter, the fully funded trust may be decreased to the amount of the new estimate only upon written approval by the Department to the trustee. Notice of an increase or decrease in the amount of the fully funded trust shall be sent by the trustee to the Department by certified mail within 60 days after the change.

(f) The owner or operator, or the trustee, or both, shall not cancel or otherwise terminate the fully funded trust until the Department has given written approval to do so.

(g) The trustee shall release to the owner or operator only such funds as the Department specified in writing.

(h) The trustee will not be liable for deficiencies in the performance of cleanup by the owner or operator after the owner or operator has received written notification by the Department that the owner or operator is no longer required by this subchapter to maintain financial assurance for cleanup of the industrial establishment.

(i) Following a written determination that the owner or operator has failed to perform its obligations under this chapter, the Department may draw on the fully funded trust.

(j) The Department will return the original fully funded trust agreement to the issuing institution for termination after:

1. The owner or operator substitutes alternative financial assurance for cleanup of the industrial establishment as specified in this subchapter; or
2. The Department notifies the owner or operator that the owner or operator is no longer required to maintain financial assurance for cleanup of the industrial establishment.

7:26B-6.7 Standby trust

(a) An owner or operator who uses a surety bond or letter of credit to satisfy the requirements of this subchapter shall also establish a standby trust and deliver a copy of the executed standby trust agreement to the Department by certified mail within 14 days after receipt of notice from the Department of the cleanup plan approval or as specified in an ACO.

(b) The trustee shall be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a Federal or New Jersey agency.

(c) The wording of the standby trust agreement shall be identical with the "Wording of Instruments" document specified in Appendix A of this chapter, and shall be accompanied by a formal certification of acknowledgment as specified in Appendix A of this chapter.

(d) Under the terms of any surety bond or letter of credit, all payments made thereunder shall be deposited by the surety or the issuing institution, as applicable, directly into the standby trust fund in accordance with instructions from the Department.

(e) Where the surety has funded the standby trust or the issuing institution has deposited the amount of the letter of credit into the standby trust fund, the owner or operator shall, within 30 days after Departmental notice of an increase of the cleanup plan cost estimate, additionally fund the standby trust in the amount of the increase. Notice of an increase in the amount of the standby trust fund shall be sent by the trustee to the Department by certified mail within 60 days after the change.

(f) The trustee shall not cancel or otherwise terminate the standby trust until the Department has given written approval to do so.

(g) The Department will send written notification to the trustee releasing the trustee from the obligations of the standby trust agreement after:

1. The owner or operator substitutes alternative financial assurance for cleanup of the industrial establishment as specified in this subchapter; or

2. The Department notifies the owner or operator that the owner or operator is no longer required by this subchapter to maintain financial assurance for cleanup of the industrial establishment.

(h) The Department may draw on the standby trust fund at such time that it is funded by any surety bond or letter of credit.

SUBCHAPTER 7. ADMINISTRATIVE CONSENT ORDERS

7:26B-7.1 Criteria

(a) In the circumstances listed in (a)1 through *[9]**10* below, the Department may, in its discretion, enter into an ACO with the owner or operator of an industrial establishment so that the closing, terminating or transferring of operations may occur provided that compliance with the Act and this chapter is assured as specified in the ACO.

1. If there is a stock tender offer, either friendly or hostile;

2. If there is a public offering of securities traded or to be traded on federally regulated stock exchanges;

3. If the industrial establishment is required to develop a detailed sampling or cleanup plan, or both, and it is determined by the Department that a negative declaration or cleanup plan approval pursuant to N.J.A.C. 7:26B-5 will not be granted within *[six]**four* months from the time the Initial Notice is submitted;

4. If there is a sale or transfer to a New Jersey State, county, or municipal department, agency, or authority with the power of eminent domain;

[4]**5. If the owner or operator demonstrates that bankruptcy or insolvency is likely to occur if this transaction does not take place prior to implementation of the provisions of the Act and this chapter;

[5]**6. If the owner or operator demonstrates that layoffs of employees by either the seller or buyer are likely to occur if the transaction does not take place prior to implementation of the provisions of the Act and this chapter;

[6. If there is a sale involving an industrial establishment in New Jersey that is part of the sale of multiple facilities some of which are outside of New Jersey;]

7. If there is a transaction involving one or more industrial establishment(s) in New Jersey, that is a part of a transaction involving multiple places of business at least one of which is not located in New Jersey;

[7]**8. If financing is provided by the New Jersey Economic Development Authority or other governmental department, authority or agency;

[8]**9. If a tenant requests an ACO due to lease termination by its landlord in which the tenant has fewer than 180 days notice of termination; or

[9]**10. If a landlord requests an ACO due to lease termination by its tenant in which the landlord has fewer than 180 days notice of termination.

(b) The applicant shall demonstrate that the circumstances described in (a) above will occur or have occurred and, therefore, that an ACO is necessary or advisable.

7:26B-7.2 Application forms

The owner or operator of an industrial establishment, or the purchaser, transferee, mortgagee, or other party to the transfer, shall submit an application for an ACO on forms available from the Department and accompanied by fees as described at N.J.A.C. 7:26B-1.10.

7:26B-7.3 ACO financial assurance requirements

(a) The owner or operator of an industrial establishment, or the purchaser, transferee, mortgagee, or other party to the transfer, shall provide financial assurance in accordance with N.J.A.C. 7:26B-6 in an amount equal to or greater than the Department's current estimate of the cost cleanup.

(b) In no case shall the amount of financial assurance for an ACO be less than \$100,000, unless the Department determines the cost of cleanup is less than \$100,000 based upon the submission of sampling data ***and a complete SES***.

7:26B-7.4 Stipulated penalties

(a) All ACOs shall contain a provision for the payment of stipulated penalties in the amounts and for the violations set forth in N.J.A.C. 7:26B-9; for violations of this chapter, the Act, or the ACO which are not listed at N.J.A.C. 7:26B-9, the stipulated penalties shall not be less than \$1000.00 nor more than \$5000.00 per day per violation.

(b) The party(ies) to the ACO shall waive their rights to contest the Department's discretion concerning the amount of stipulated penalties assessed by the Department under stipulated penalty provision of the ACO.

7:26B-7.5 ACO signatories and liability

(a) All ACO's must be signed by the owner or operator of the industrial establishment.

(b) In the Department's discretion, a purchaser, transferee, mortgagee, or other party to the transaction may sign an ACO with the Department and the owner or operator; however, the owner or operator, as well as any other non-Department signatories, shall be strictly liable, jointly and severally, for compliance with this chapter, the Act, and the ACO. ***If the operator signs an ACO and the owner does not, the owner remains strictly liable, jointly and severally, for compliance with ECRA and this chapter, and vice versa.***

(c) If a signatory to an ACO is executing the ACO on behalf of an entity other than that individual, the ACO shall be accompanied by documentary evidence (such as a corporate resolution, a partnership resolution, a power of attorney, or the like) authorizing the signatory to bind the entity to the provisions of the ACO.

7:26B-7.6 Site access

The owner or operator of an industrial establishment who enters into an ACO shall provide to the Department appropriate documentation that the purchaser, transferee, mortgagee*, operator* or other party to the transaction shall allow access by the Department ***and the transferor*** to the industrial establishment for all purposes of the Act and this chapter.

SUBCHAPTER 8. PROTECTION OF CONFIDENTIAL INFORMATION

7:26B-8.1 Confidentiality claims

(a) Any owner or operator of an industrial establishment required to submit any information pursuant to the Act or this chapter which in the owner's or operator's opinion constitutes trade secrets, proprietary information*, **specific information regarding the ECRA-subject transaction other than the fact that an ECRA-subject transaction has occurred and the general nature of such transaction,*** or information related to national security, may assert a confidentiality claim by following the procedures set forth in this subchapter and by paying the fee set forth in N.J.A.C. 7:26B-1.10(f).

(b) Any owner or operator submitting any information to the Department and asserting a confidentiality claim covering any information contained therein shall submit two documents to the Department. One document shall contain all the information required by the Act or this chapter including any information which the owner or operator alleges to be entitled to confidential treatment. The

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second document shall be identical to the first except that it shall contain no information which the owner or operator alleges to be entitled to confidential treatment. The second document can be a photocopy of the first, with the allegedly confidential material blacked out.

(c) The top of each page of the first document containing the information which the owner or operator alleges to be entitled to confidential treatment shall display the heading "CONFIDENTIAL" in bold type, or stamp.

(d) All parts of the text of the first document which the owner or operator alleges to be entitled to confidential treatment shall be underscored or highlighted in a clearly identifiable manner. This manner of marking confidential information shall be such that both the allegedly confidential information and the underscoring or highlighting is reproducible on photocopying machines.

(e) The first document, containing the information which the owner or operator alleges to be entitled to confidential treatment, shall be sealed in an envelope which shall display the word "CONFIDENTIAL" in bold type or stamp on both sides. This envelope, together with the second, non-confidential document (which may or may not be enclosed in a separate envelope, at the option of the owner or operator), shall be enclosed in another envelope for transmittal to the Department. The outer envelope shall bear no marking indicating the confidential nature of contents.

(f) To ensure proper delivery, the complete package should be sent by certified mail, return receipt requested, or by other means which will allow verification of receipt. Ordinary mail may be used, but the Department will assume no responsibility for packages until they are actually received at the address provided at N.J.A.C. 7:26B-1.11.

7:26B-8.2 Access to information; non-disclosure

(a) Until such time as a final confidentiality determination has been made, access to any information for which a confidentiality claim has been made will be limited to Department employees, representatives, and contractors, whose activities necessitate such access and as provided at N.J.A.C. 7:26B-8.5 and 8.8.

(b) No disclosure of information for which a confidentiality claim has been asserted shall be made to any other persons except as provided in this subchapter.

(c) Nothing in this section shall be construed as prohibiting the incorporation of confidential information into cumulations of data subject to disclosure as public records, provided that such disclosure is not in a form that would foreseeably allow persons, not otherwise having knowledge of such confidential information, to deduce from it the confidential information or the identity of the owner or operator who supplied it to the Department.

7:26B-8.3 Confidentiality determinations

(a) Information for which a confidentiality claim has been asserted will be treated by the Department as entitled to confidential treatment, unless the Department determines that the information is not entitled to confidential treatment as provided in this section and N.J.A.C. 7:26B-8.4.

(b) The Department shall act upon a confidentiality claim and determine whether information is or is not entitled to confidential treatment whenever the Department:

1. Receives a request under N.J.S.A. 47:1A-1 et seq. to inspect or copy such information; or
2. Desires to determine whether information in its possession is entitled to confidential treatment; or
3. Desires for any reason in the public interest to disclose the information to persons not authorized by this subchapter to have access to confidential information.

(c) The Department shall make the initial determination whether information is or is not entitled to confidential treatment.

1. If the Department determines that information is not entitled to confidential treatment, it shall so notify the owner or operator who submitted the information.

2. The notice required under this subsection shall be sent by certified mail, return receipt requested and shall state the reasons for the Department's initial determination.

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3. An owner or operator who wishes to contest a determination by the Department shall, within 30 days of notification of the determination, submit evidence to support the owner's or operator's contention that the Department's initial determination was incorrect. The evidence may include, but need not be limited to, a statement indicating:

- i. The period of time for which confidential treatment is desired by the owner or operator (for example, until a certain date, until the occurrence of a specified event, or permanently);
- ii. The measures taken by the owner or operator to guard against undesired disclosure of the information to others;
- iii. The extent to which the information has been disclosed to others, and the precautions taken in connection therewith; and
- iv. The extent to which disclosure of the information would result in substantial damage to the owner or operator, including a description of the damage, an explanation of why the damage would be substantial, and an explanation of the relationship between disclosure and the damage.

4. Failure of an owner or operator to furnish timely comments or exceptions waives the owner's or operator's confidentiality claim.

5. The owner or operator may assert a confidentiality claim to any information submitted to the Department by an owner or operator as part of its comments pursuant to 3 above.

6. The Department may extend the time limit for submitting comments pursuant to 3 above for good cause shown by the owner or operator and upon receipt of a request in writing.

(d) After receiving the evidence, the Department shall review its initial determination and make a final determination.

1. If, after review, the Department determines that the information is not entitled to confidential treatment, the Department shall so notify the owner or operator by certified mail, return receipt requested. The notice shall state the basis for the determination, that it constitutes final agency action concerning the confidentiality claim, and that the Department shall make the information available to the public on the 14th day following receipt by the owner or operator of the written notice.

2. If, after review, the determination is made that information is entitled to confidential treatment, the information shall not be disclosed, except as otherwise provided by *[the Act and]* this subchapter. The owner or operator shall be notified of the Department's determination by certified mail, return receipt requested. The notice shall state the basis for the determination and that it constitutes final agency action.

7:26B-8.4 Substantive criteria for use in confidentiality determinations

(a) When the owner or operator satisfies each of the following substantive criteria, the Department shall determine that the information for which a confidentiality claim has been asserted is confidential:

1. The owner or operator has asserted a confidentiality claim which has not expired by its terms, been waived or withdrawn;
2. The owner or operator has shown that reasonable measures have been taken to protect the confidentiality of the information and that the owner or operator intends to continue to take such measures;
3. The information is not, and has not been, available or otherwise disclosed to other persons without the owner's or operator's consent (other than by subpoena or by discovery based on a showing of special need in a judicial or quasi-judicial proceeding, as long as the information has not become available to persons not involved in the proceeding);
4. No statute specifically requires disclosure of the information; and
5. ***Except for information related to national security, the*** *[The]* owner or operator has shown that disclosure of the information would be likely to cause substantial damage to its competitive position.

7:26B-8.5 Disclosure of confidential information to other public agencies

(a) The Department may disclose confidential information to persons other than Department employees, representatives, and contractors only as provided in this section or N.J.A.C. 7:26B-8.7.

(b) The Department may disclose confidential information to any other State agency or to a Federal agency if:

1. The Department receives a written request for disclosure of the information from a duly authorized officer or employee of the other agency;

2. The request sets forth the official purpose for which the information is needed;

3. The Department notifies the other agency of the Department's determination that the information is entitled to confidential treatment, or of any unresolved confidentiality claim covering the information;

4. The other State or Federal agency has first furnished to the Department a written formal legal opinion from the agency's chief legal officer or counsel stating that under applicable law the agency has the authority to compel the person who submitted the information to the Department to disclose such information to the other agency; and

5. The other agency agrees not to disclose the information further unless:

i. The other agency has statutory authority both to compel production of the information and to make the proposed disclosure; or

ii. The other agency has obtained the consent of the affected owner or operator to the proposed disclosure; and

6. The other agency has adopted regulations or operates under statutory authority that will allow it to preserve confidential information from unauthorized disclosure.

(c) Except as otherwise provided in N.J.A.C. 7:26B-8.7, the Department shall notify in writing the owner or operator who supplied the confidential information of:

1. Its disclosure to another agency;

2. The date on which disclosure was made;

3. The name of the agency to which disclosed; and

4. A description of the information disclosed.

7:26B-8.6 Disclosure of confidential information to contractors

(a) The Department may disclose confidential information to a contractor of the Department when the contractor's activities necessitate such access.

(b) No information shall be disclosed to a contractor unless the contract in question provides that the contractor and the contractor's employees, agents and representatives shall use the information only for the purpose of carrying out the work required by the contract, shall not disclose the information to anyone not authorized in writing by the Department, shall store the information in locked cabinets in secure rooms, and shall return to the Department copies of the information, and any abstracts or extracts therefrom, upon request by the Department or whenever the information is no longer required by the contractor for the performance of the work required by the contract.

(c) Disclosure in violation of this subchapter or the contractual provisions described in (b) above shall constitute grounds for debarment or suspension as provided in "Debarment, Suspension and Disqualification from Department Contracting," N.J.A.C. 7:1-5, in addition to whatever other remedies may be available to the Department at equity or law.

7:26B-8.7 Disclosure by consent

(a) The Department may disclose any confidential information to any person if it has obtained the written consent of the owner or operator to such disclosure.

(b) The giving of consent by an owner or operator to disclose shall not be deemed to waive a confidentiality claim with regard to further disclosures unless the authorized disclosure is of such nature as to make the disclosed information accessible to the general public.

7:26B-8.8 Imminent and substantial danger

(a) Upon a finding that disclosure of confidential information would serve to alleviate an imminent and substantial danger to public health and the environment, the Department may:

1. Prescribe and make known to the owner or operator such shorter comment period (N.J.A.C. 7:26B-8.3(c)4), post-determination waiting period (N.J.A.C. 7:26B-8.3(d)1), or both, as it finds necessary under the circumstances; or

2. Disclose confidential information to any person whose role in alleviating the danger to public health and the environment necessitates that disclosure. Any such disclosure shall be limited to information necessary to enable the person to whom it is disclosed to carry out the activities in alleviating the danger.

(b) Any disclosure made pursuant to this section shall not be deemed a waiver of a confidentiality claim, nor shall it of itself be grounds for any determination that information is no longer entitled to confidential treatment.

(c) The Department will notify the owner or operator of any disclosure made pursuant to this section as soon as is feasible.

7:26B-8.9 Security procedures under ECRA

(a) Submissions to the Department pursuant to the Act and this chapter will be opened only by persons authorized by the Department engaged in administering the Act and this chapter.

(b) Only those Department employees whose activities necessitate access to information for which a confidentiality claim has been made, shall open any envelope which is marked "CONFIDENTIAL" and is addressed as provided at N.J.A.C. 7:26B-1.11.

(c) All submissions entitled to confidential treatment as determined at N.J.A.C. 7:26B-8.3 shall be stored by the Department or its contractors only in locked cabinets.

(d) Any record made or maintained by Department employees, representatives, or contractors which contains confidential information shall contain appropriate indicators identifying the confidential information.

7:26B-8.10 Wrongful access or disclosure; penalties

(a) A person shall not disclose, seek access to, obtain or have possession of any confidential information obtained pursuant to the Act or this chapter, except as authorized by this subchapter.

(b) Every Department employee, representative, and contractor who has custody or possession of confidential information shall take appropriate measures to safeguard such information and to protect against its improper disclosure.

(c) A Department employee, representative, or contractor shall not disclose, or use for his or her private gain or advantage, any information which came into his or her possession, or to which he or she gained access, by virtue of his or her official position of employment or contractual relationship with the Department.

(d) If the Department finds that any person has violated the provisions of this subchapter, it may:

1. Commence a civil action in Superior Court for a restraining order and an injunction barring that person from further disclosing confidential information.

2. Pursue any other remedy available by law.

(e) In addition to any other penalty that may be sought by the Department, violation of this subchapter by a Department employee shall constitute grounds for dismissal, suspension, fine or other adverse personnel action.

(f) Use of any of the remedies specified under this section shall not preclude the use of any other remedy.

SUBCHAPTER 9. VIOLATIONS AND PENALTY PROVISIONS

7:26B-9.1 Voiding of the sale or transfer of an industrial establishment by the transferee or the Department

(a) Failure of the *[owner or operator]* ***transferor*** of an industrial establishment to comply with any of the provisions of the Act or this chapter shall be grounds for the transferee's voiding the sale or transfer of an industrial establishment or any real property utilized in connection therewith.

(b) Failure of an owner or operator of an industrial establishment to submit a negative declaration or cleanup plan pursuant to the provisions of the Act, this chapter, or an ACO shall be grounds for the Department's voiding the sale *[or transfer]* of the industrial establishment or any real property utilized in connection therewith.

7:26B-9.2 Recovery of damages; liability for cleanup and removal costs and damages

(a) The transferee shall be entitled to recover damages from the transferor due to the voiding of the sale.

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(b) Failure to comply with any provisions of the Act or this chapter shall render the owner *[or]* ***and*** operator of an industrial establishment strictly liable, without regard to fault, jointly and severally, for all cleanup and removal costs and for all direct and indirect damages resulting from the failure to implement any cleanup plan necessary.

7:26B-9.3 Civil penalties

(a) Any person who knowingly gives or causes to be given any false information or who fails to comply with the provisions of the Act or this chapter shall be liable for a civil penalty of not more than \$25,000 for each offense. If the violation is of a continuing nature, each day during which it continues shall constitute an additional and separate offense.

(b) Penalties shall be collected in a civil action by a summary proceeding under the Penalty Enforcement Law, N.J.S.A. 2A:58-1 et seq.

(c) Any officer or management official ***of an industrial establishment*** who knowingly directs or authorizes the violation of any provision of the Act or this chapter shall be personally liable for any penalties provided by the Act or this chapter.

(d) The schedule in 1 to 7 below indicates the amounts which the Department may accept for the following violations:

1. Unless otherwise provided in 2 to 7 below:

Days from date required to date received	Notification/ Submissions required by Regulations/ Legislation (per day)	Submissions Required by letter(s) from DEP pursuant to the Regulations/ Legislation (per day)	Violations of any ACO Requirement (per day)
1-14 Days	\$ 250.00	\$ 500.00	\$1,000.00
15-29 Days	500.00	1,000.00	2,000.00
30-44 Days	750.00	1,500.00	3,000.00
45-59 Days	1,000.00	2,000.00	4,000.00
more than 59	1,250.00	2,500.00	5,000.00;

2. Failure to allow the Department access: \$2,500 per day;
3. Failure to secure and maintain the required financial assurance: \$5,000 per day;
4. Failure to implement an approved sampling plan: \$15,000 per day;
5. Failure to implement an approved cleanup plan: \$25,000 per day;
6. Failure to fund the standby trust fund or fully-funded trust fund: \$25,000 per day; and
7. Failure to pay the Department in accordance with N.J.A.C. 7:26B-6.5(i): \$25,000 per day.

(e) In its discretion, the Department may compromise and settle any claim for a penalty pursuant to the Act or this chapter.

(f) Nothing in (d) above shall limit or otherwise prohibit the Department from seeking the maximum penalties provided by the Act for the violations listed in (d) above or for any other violation of the Act, this chapter, or an ACO not listed in (d) above, in a summary action under the Penalty Enforcement Law, N.J.S.A. 2A:58-1 et seq.

SUBCHAPTER 10. DE MINIMUS STANDARDS

7:26B-10.1 De minimus quantity exemption

(a) The owner or operator of an industrial establishment who is granted a de minimus quantity exemption from the Department shall be exempt from the provisions of the Act and this chapter except as provided at N.J.A.C. 7:26B-1.10 based on de minimus quantities of hazardous substances stored or handled at the industrial establishment.

(b) The de minimus quantity exemption shall be granted by the Department only if (c) below and all of the following criteria ***[at 1 to 6 below]*** ***of this subsection*** are met:

1. In the case of a mixture of hazardous substances stored or handled at the industrial establishment:
 - i. The total quantity of hazardous substances stored or handled at any one time is not in excess of one percent of the mixture, with

the total quantity of hazardous substances not in excess of 500 pounds;

ii. Any mixture containing hazardous substance ***s*** is present in the same form and concentration as a product packaged for distribution or use by the general public and this mixture is used by the industrial establishment in a manner similar to that of the general public;

iii. Any mixture containing hazardous substances is used solely in routine office operations; or

iv. Any mixture containing hazardous substances is in final product form for wholesale or retail distribution.

2. Any paints and varnishes containing hazardous substances are used for buildings and grounds maintenance purposes only and are not used as part of the business operations ***except as provided below at 3***;

3. The quantity of paints, inks ***(except those actually used or to be used in office copying equipment*)**, adhesives and varnishes containing hazardous substances that are used annually in the business operations of the industrial establishment amount to five gallons or less;

4. The quantity of lubricating and hydraulic oils used for maintenance purposes shall not be more than 55 gallons per year, and the total quantity present at the industrial establishment shall not be more than 110 gallons at any one time;

5. The quantity of petroleum products, other than lubricating and hydraulic oils, stored at the industrial establishment at any one time shall not be more than 11 gallons; and

6. ***[The quantity of pesticides stored or used annually for on-site maintenance purposes shall not exceed one quart.]*** ***Pesticides are present in the same form and concentration as packaged for distribution or use by the general public, provided these products are used in accordance with the manufacturer's instructions for pesticide application and are not designated as "prohibited" or "restricted" at N.J.A.C. 7:30 pursuant to the New Jersey Pesticide Control Act of 1971, N.J.S.A. 13:1F-1 et seq.***

(c) The de minimus quantity exemption shall be granted only if: ***[i.]**1.*** The owner or operator of the industrial establishment has been and continues to be the sole and original owner or operator of the industrial establishment from the date of construction of the facility on the property;

[ii.]**2. The most recent prior owner of the real property of the industrial establishment received a negative declaration, a cleanup plan approval, or a de minimus quantity exemption from the Department ***[and thereafter continued as an industrial establishment]***; or

[iii.]**3. The owner or operator of the industrial establishment has obtained and submitted to the Department an affidavit from his or her transferor that the transferor was the sole and original owner or operator at the industrial establishment from the date of construction of the facility on the property and that the transferor met the criteria set forth in (b) above, for the entire period of ownership or operation by the transferor.

(d) To apply for a de minimus quantity exemption, the owner or operator shall submit an affidavit on forms available from the Department along with the appropriate fee specified in N.J.A.C. 7:26B-1.10.

SUBCHAPTER 11. ECRA CLEANUP STANDARDS

7:26B-11.1 Standards for detoxification

Until adoption of the minimum standards required pursuant to Section 5(a) of the Act, N.J.S.A. 13:1K-10, the Department shall review, approve or disapprove negative declarations and cleanup plans on a case-by-case basis for soil, ground water and surface water quality necessary for the cleanup of the industrial establishment, including buildings and equipment, to ensure that the potential for harm to public health and the environment is minimized to the maximum extent practicable, taking into consideration the location of the industrial establishment, surrounding ambient conditions, and other relevant factors.

SUBCHAPTER 12. ***[ECRA AND HAZARDOUS WASTE FACILITY COORDINATION]***
(RESERVED)

***[7:26B-12.1 General requirements**

(a) In cases where an industrial establishment is also a treatment, storage or disposal facility for hazardous wastes and is regulated by N.J.A.C. 7:26, the following specifies the requirements for any hazardous waste management units to be included in the ECRA review of the industrial establishment. For the purposes of this subchapter, a hazardous waste management unit is a contiguous area of land on or in which hazardous waste is placed, or the largest area in which there is significant likelihood of mixing hazardous waste constituents in the same area. Examples of hazardous waste management units include a surface impoundment, a waste pile, a land treatment area, a landfill cell, an incinerator, a tank yard and its associated piping and underlying containment system and a container storage area. A container alone does not constitute a unit; the unit includes containers and the land or pad upon which they are placed.

1. If the industrial establishment is closing or terminating operations, the industrial establishment shall close or terminate operations in accordance with N.J.A.C. 7:26 rather than this chapter.

2. If the industrial establishment is transferring ownership without ceasing operations, compliance with the Act and this chapter shall be required for the entire industrial establishment, including any hazardous waste management units thereon.

(b) In cases where an industrial establishment is in the process of implementing an approved corrective action program under 40 CFR 264.100, compliance with the Act and this chapter is not required for any activities at the hazardous waste management units undertaken pursuant to said corrective action.

(c) In cases where an industrial establishment has previously conducted and completed a corrective action program under 40 CFR 264.100, the Department shall determine on a case-by-case basis which requirements pursuant to the Act and this chapter need to be satisfied for the facility.*

SUBCHAPTER 13. LIMITED CONVEYANCE

7:26B-13.1 Certificate of Limited Conveyance

(a) A conveyance of title to a portion of an industrial establishment may be allowed *[only]* pursuant to a Certificate of Limited Conveyance issued by the Department. The granting of a Certificate of Limited Conveyance allows the conveyance to occur without the owner conducting a complete review of the entire industrial establishment pursuant to the Act and this chapter.

(b) The Certificate of Limited Conveyance shall be granted only where:

1. The sales price of the real property to be conveyed*, **together with the diminution in value to the remaining property,*** is not more than 20 percent of the total appraised value of the real property of the industrial establishment;

2. The appraisal has occurred as close to the application for a Certificate of Limited Conveyance from the Department as possible, but in no case more than 60 days prior to submittal of the application for the Certificate of Limited Conveyance;

3. The real property conveyed pursuant to this subchapter *[is not any portion of an industrial establishment that]* ***never*** been involved in the generation, manufacture, refining, transportation, treatment, storage, handling or disposal of hazardous substances and wastes on-site, above or below ground.

(c) The owner(s) may convey any number of parcels of real property provided that the sum of the percentages attributed to each limited conveyance determined in accordance with (b)1 above shall not exceed 20 percent during the period of ownership by the applicant.

(d) To apply for a Certificate of Limited Conveyance the owner or operator shall submit the following to the Department:

1. Appropriate application form available from the Department;

2. A map delineating total area of the industrial establishment as of December 31, 1983, areas previously conveyed pursuant to this limited conveyance provision, and total acreage presently proposed for conveyance;

3. A copy of the sales agreement specifying the agreed upon price for the real property presently proposed for conveyance ***or, in the case of an acquisition by a condemning authority where no agreement has been reached, an affidavit from the owner specifying the compensation, including any damages, sought by the owner and the current appraised value*;**

4. *[An affidavit from the owner of the industrial establishment stating current appraised value]* ***Current appraisal*** of the real property of the industrial establishment;

i. Appraisals shall be conducted by a designated Member, Appraisal Institute (American Institute of Real Estate Appraisers), Senior Real Estate Analyst (Society of Real Estate Appraisers), or Senior Member (American Society of Appraisers);

5. An affidavit that the portion of the industrial establishment to be conveyed has never been ***[used in the operation of the industrial establishment]* *involved in the generation, manufacture, refining, transportation, treatment, storage, handling or disposal of hazardous substances and wastes on-site, above or below ground*;**

6. Copies of all prior Certificates of Limited Conveyance(s) if any, issued for the subject industrial establishment;

7. The fee specified at N.J.A.C. 7:26B-1.10; and

8. Any other information as required by the Department.

(e) The Department may require ***the owner or operator to submit*** a sampling plan for the portion of the industrial establishment proposed for conveyance ***when it has reason to believe that contamination may exist. In cases where a sampling plan has been required,*[. The]* *the*** Department may issue a Certificate of Limited Conveyance only where the results of an approved sampling plan indicate that there is no contamination from hazardous substances and wastes on the portion ***[benig]* *being*** conveyed, or emanating from or that has emanated from the portion to be conveyed, or where the Department has made a determination that no sampling plan is necessary.

SUBCHAPTER 14. ADDITIONAL REQUIREMENTS

7:26B-14.1 Additional requirements

(a) Nothing in the Act or this chapter shall be construed to limit, restrict, or prohibit the Department from directing immediate cleanup under any other statute, rule or regulation.

(b) No obligations imposed by the Act or this chapter shall constitute a lien or claim which may be limited or discharged in a bankruptcy proceeding.

(c) All obligations imposed by the Act or this chapter shall constitute continuing regulatory obligations imposed by the State of New Jersey for the purpose of 11 U.S.C. 362 §(b)(4).

(d) Nothing in the Act or this chapter shall constitute relief, implied or expressed, of the requirements imposed under any other approval, permit or authorization.

APPENDIX A

WORDING OF INSTRUMENTS DOCUMENT
 FOR FINANCIAL ASSURANCE REQUIRED PURSUANT
 TO THE ENVIRONMENTAL CLEANUP
 RESPONSIBILITY ACT
 N.J.S.A. 13:1K-6 et seq. ("ECRA")

LETTER OF CREDIT

A letter of credit, as specified in N.J.A.C. 7:26B-6.4, issued pursuant to ECRA, shall be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted.

Irrevocable Standby Letter of Credit

Richard T. Dewling, Commissioner

New Jersey Department of Environmental Protection
 CN 028

Trenton, New Jersey 08625

ATTN: Assistant Director, Industrial Site Evaluation Element
 RE: ENVIRONMENTAL CLEANUP RESPONSIBILITY ACT
 ECRA CASE # _____

Dear Sir or Madam: We hereby establish our Irrevocable Standby Letter of Credit No. _____ in your favor, at the request and for the

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account of [owner's or operator's of the industrial establishment name and address] up to the aggregate amount of [in words] U.S. dollars _____, available upon presentation by you of (1) your sight draft, bearing reference to this Irrevocable Standby Letter of Credit No. _____, and (2) your signed statement reading as follows: "I certify that the amount of the draft is payable pursuant to the authority of the Environmental Cleanup Responsibility Act, N.J.S.A. 13:1K-6 *et seq.* (P.L. 1983, C. 330) ("ERCA") and the ECRA Regulations, N.J.A.C. 7:26B.

This letter of credit is effective as of [insert month, day, and year] and shall expire on [date at least 1 year later], but such expiration date shall be automatically extended for a period of at least one (1) year on [date] and on each successive expiration date, unless, at least 120 days before the current expiration date, we notify both NJDEP's Industrial Site Evaluation Element, CN-028, Trenton, New Jersey 08625 and [name of owner or operator of industrial establishment] by certified mail that we have decided not to extend this letter of credit beyond the current expiration date. In the event you are so notified, any unused portion of the credit shall be available upon presentation of your sight draft for 120 days after date of receipt by both NJDEP and [name of owner or operator of industrial establishment], as shown on the signed return receipts.

Whenever this letter of credit is drawn on under and in compliance with the terms of this credit, we shall duly honor such draft upon presentation to us, and we shall deposit the amount of the draft directly into the standby trust fund or [name of owner or operator of industrial establishment] in accordance with your instructions.

We certify that the wording of this letter of credit is identical to the wording specified in N.J.A.C. 7:26B (Appendix A), as such regulations were constituted on the date shown immediately below.

[Name of issuing institution] shall not cancel this letter of credit on the basis of a request from [name of owner or operator of industrial establishment] until it has received written authorization from NJDEP.

This irrevocable standby letter of credit is subject to [insert "the most recent edition of the Uniform Customs and Practice for Documentary Credits, published by the International Chamber of Commerce," or "the Uniform Commercial Code"].

Very truly yours,

[Name of Issuing Institution]
[Signature and Title of Official]
[Printed Name of Official's Signature]
[Date]

SURETY BOND

A surety bond guaranteeing payment into a trust fund, as specified in N.J.A.C. 7:26B-6.2, shall be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Financial Guarantee Bond

RE: ENVIRONMENTAL CLEANUP RESPONSIBILITY ACT

Date bond executed: _____

Effective date: _____

Principal: [Legal name and business address of owner or operator of the industrial establishment]

Type of organization [insert "individual," "joint venture," "partnership," or "corporation"]

State of incorporation: _____

[Insert name, current ownership, Standard Industrial Classification number, location of industrial establishment, including lot and block number, municipality and county, and ECRA cleanup amount(s) for each industrial establishment guaranteed by this bond. Indicate NJDEP-approved ECRA cleanup amount]:

Total penal sum of bond: _____

Surety bond number: _____

Know All Persons by These Presents, That we, the Principal and Surety(ies) hereto are firmly bound to the New Jersey Department of Environmental Protection, hereinafter NJDEP, in the above penal sum for the payment of which we bind ourselves, our heirs, executors,

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administrator, successors and assigns jointly and severally; provided that, where the Surety(ies) are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes, each Surety binds itself, jointly and severally with the Principal, for the payment of such sum only as is set forth opposite the name of such Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sum.

* * *

[Next Paragraph For Use by Principal With ECRA Administrative Consent Order Only]

WHEREAS, said Principal has entered into an Administrative Consent Order with NJDEP dated [date], hereinafter "Consent Order", under which Principal has agreed, among other things, to undertake certain actions in order to comply with ECRA with respect to the industrial establishment described above;

WHEREAS, said Principal is required to provide financial assurance in an amount equal to or greater than the cost estimate for implementation of the cleanup plan approved by NJDEP on [date] and required as a precondition to any closure or sale or transfer of an industrial establishment in accordance with the Environmental Cleanup Responsibility Act, N.J.S.A. 13:1K-6 *et seq.*, hereinafter "ECRA", and the ECRA Regulations, N.J.A.C. 7:26B, and

WHEREAS, the condition of this obligation is such that, if the principal shall promptly and faithfully perform its obligations under the provisions of ECRA, then this obligation shall be null and void; otherwise the surety bond shall remain in full force and effect to assure performance of the obligations under ECRA and to otherwise assure and guarantee the performance and implementation of the ECRA cleanup plan approved by NJDEP on [date];

WHEREAS, said Principal shall establish a standby trust fund as is required by N.J.A.C. 7:26B-6.2(c) when a surety bond is used to provide a mechanism for access by NJDEP to assure payment for the implementation of the ECRA cleanup plan approved by NJDEP on [date];

NOW, THEREFORE, the conditions of this obligation are such that if the Principal shall faithfully perform its obligations under ECRA, whenever required to do so, regarding such industrial establishment for which this surety bond guarantees performance, then this obligation shall be null and void otherwise it is to remain in full force and effect.

The Surety(ies) shall become liable on this bond obligation only when the Principal has failed to fulfill the conditions described above. Upon notification by the NJDEP that the Principal has failed to perform as guaranteed by this bond, the Surety(ies) shall place funds in the amount guaranteed for the industrial establishment into the standby trust fund as directed by the NJDEP.

The liability of the Surety(ies) shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall amount in the aggregate to the penal sum of the bond, but in no event shall the obligation of the Surety(ies) hereunder exceed the amount of said penal sum.

The Surety(ies) may cancel the bond by sending notice of cancellation by certified mail to the Principal and to the NJDEP Industrial Site Evaluation Element, CN-028, Trenton, N.J., 08625; provided, however, that cancellation shall not occur during the 120 days beginning on the date of receipt of the notice of cancellation by both the Principal and the NJDEP Industrial Site Evaluation Element, as evidenced by the return receipts, nor shall cancellation occur while a compliance procedure is pending, as defined in N.J.A.C. 7:26B-6.2(h).

The Principal may terminate this bond by sending written notice to the Surety(ies); provided, however, that no such notice shall become effective until the Surety(ies) receive(s) written authorization for termination of the bond by the NJDEP.

In Witness Whereof, the Principal and Surety(ies) have executed this Financial Guarantee Bond and have affixed their seals on the date set forth below.

The persons whose signatures appear below hereby certify that they are authorized to execute this survey on behalf of the Principal and

ENVIRONMENTAL PROTECTION

Surety(ies) and that the wording of this surety bond is identical to the Wording of Instruments document referred to in N.J.A.C. 7:26B-6.2(b) as constituted on the date the bond was established.

Principal

[Signatures(s)]

[Date]

[Name(s)]

[Title(s)]

[Corporate seal]

[Name and address]

State of incorporation: _____

Liability limit: _____

[Signature(s)]

[Date]

[Name(s) and title(s)]

[Corporate seal]

[For every co-surety, provide signature(s), corporate seal, and other information in the same manner as for Surety above.]

Bond premium: _____

PERFORMANCE BOND

A surety bond guaranteeing performance of ECRA cleanup or payment into a standby trust fund, as specified in N.J.A.C. 7:26B-6.3, shall be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Performance Bond

RE: ENVIRONMENTAL CLEANUP RESPONSIBILITY ACT

Date bond executed: _____

Effective date: _____

Principal: [legal name and business address of owner or operator of the industrial establishment]

Type of organization: [insert "individual," "joint venture," "partnership," or "corporation"]

State of incorporation: _____

Surety(ies): [name(s) and business address(es)] _____

[Insert name, current ownership, Standard Industrial Classification number, location of industrial establishment, including lot and block number, municipality and county, and ECRA cleanup amount(s) for each industrial establishment guaranteed by this bond. Indicate NJDEP-approved ECRA Cleanup amount]:

Total penal sum of bond: _____

Surety bond number: _____

Know All Persons by These Presents, That we, the Principal and Surety(ies) hereto, are firmly bound to the New Jersey Department of Environmental Protection, hereinafter NJDEP, in the above penal sum for the payment of which we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally; provided that, where the Surety(ies) are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the Principal, for the payment of such sum only as is set forth opposite the name of such Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of penal sum.

[Next Paragraph For Use by Principal With ECRA Administrative Consent Order Only]

WHEREAS, said Principal has entered into an Administrative Consent Order with NJDEP dated [date], hereinafter "Consent Order", under which Principal has agreed, among other things, to undertake certain actions in order to comply with ECRA with respect to the industrial establishment described above;

WHEREAS, said Principal is required to provide financial assurance in an amount equal or greater than to the cost estimate for implementation of the cleanup plan approved by NJDEP on [date] and required as a precondition to any closure or sale or transfer of an industrial establishment in accordance with the Environmental Cleanup Responsibility Act, N.J.S.A. 13:1K-6 *et seq.*, hereinafter "ECRA" and the ECRA Regulations, N.J.A.C. 7:26B;

ADOPTIONS

WHEREAS, the condition of this obligation is such that, if Principal shall promptly and faithfully perform its obligations under the provisions of ECRA, then this obligation shall be null and void; otherwise the surety bond shall remain in full force and effect to assure performance of the obligations under ECRA and to otherwise assure and guarantee the performance and implementation of the ECRA cleanup plan approved by NJDEP on [date];

WHEREAS, said Principal shall establish a standby trust fund as is required by N.J.A.C. 7:26B-6.3(c) when a surety bond is used to provide a mechanism for access by NJDEP to all or part of such financial assurance required by ECRA to assure performance of the implementation of the ECRA cleanup plan and/or Consent Order approved by NJDEP on [date];

NOW, THEREFORE, the conditions of this obligation are such that if the Principal shall faithfully perform its obligations under ECRA, whenever required to do so, regarding each facility for which this surety bond guarantees performance, then this obligation shall be null and void, otherwise it is to remain in full force and effect.

The Surety(ies) shall become liable on this bond obligation only when the Principal has failed to fulfill the conditions described above. Upon notification by the NJDEP that the Principal has failed to perform as guaranteed by this bond, the Surety(ies) shall either perform the monitoring and cleanup in accordance with the NJDEP-approved cleanup plan [or, if appropriate, delete "NJDEP-approved cleanup plan" and insert "Consent Order"] or place funds in the amount guaranteed for the cleanup of the industrial establishment into the standby trust fund as directed by the NJDEP.

The liability of the Surety(ies) shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall amount in the aggregate to the penal sum of the bond, but in no event shall the obligation of the Surety(ies) hereunder exceed the amount of said penal sum.

The Surety(ies) may cancel the bond by sending notice of cancellation by certified mail to the Principal and to the NJDEP Industrial Site Evaluation Element, CN-028, Trenton, N.J., 08625; provided, however, the cancellation shall not occur during the 120 days beginning on the date of receipt of the notice of cancellation by both the Principal and the NJDEP, as evidenced by the return receipts, nor shall cancellation occur while a compliance procedure is pending, as defined in N.J.A.C. 7:26B-6.3(i).

The Principal may terminate the bond by sending written notice to the Surety(ies); provided, however, that no such notice shall become effective until the Surety(ies) receive(s) written authorization for termination of the bond by the NJDEP.

In WITNESS WHEREOF, the Principal and Surety(ies) have executed this Performance Bond and have affixed their seals on the date set forth below.

The persons whose signatures appear below hereby certify that they are authorized to execute this surety bond on behalf of the Principal and the Surety(ies) and that the wording of this surety bond is identical to the Wording of Instruments document referred to in N.J.A.C. 7:26B-6.3(b).

Principal

[Signatures(s)]

[Date]

[Name(s)]

[Title(s)]

[Corporate seal]

[Name and address]

State of incorporation: _____

Liability limit: _____

[Signature(s)]

[Date]

[Name(s) and title(s)]

[Corporate seal]

[For every co-surety, provide signature(s), corporate seal, and other information in the same manner as for Surety above.]

Bond premium: _____

STANDBY TRUST AGREEMENT

A Standby Trust Fund established pursuant to a Standby Trust Agreement shall be required along with and in addition to financial assurance option selected by the owner or operator of an industrial establishment pursuant to this Wording of Instruments document (see N.J.A.C. 7:26B-6.2(b) for Surety Bond; N.J.A.C. 7:26B-6.3(b) for Performance Bond; and N.J.A.C. 7:26B-6.4(b) for Letter of Credit). NJDEP requires a Standby Trust Agreement for a Standby Trust Fund to provide a mechanism for access by NJDEP to all or part or such financial assurance required by ECRA to assure the successful implementation of any ECRA-cleanup plan approved by NJDEP.

A standby trust agreement for a cleanup plan approval or an Administrative Consent Order shall be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Standby Trust Agreement

RE: ENVIRONMENTAL CLEANUP RESPONSIBILITY ACT

This Standby Trust Agreement, hereinafter "Agreement", entered into as of [date] by and between [name and address of the owner or operator of the industrial establishment], a New Jersey [insert "corporation," "partnership," "association," or "proprietorship"], hereinafter "Grantor" and [name and address of corporate trustee], [insert "incorporated in the State of" or "a national bank"], hereinafter "Trustee".

WHEREAS, the New Jersey Department of Environmental Protection, hereinafter "NJDEP", an agency of the State of New Jersey, has established the Environmental Cleanup Responsibility Act Regulations, N.J.A.C. 7:26B, pursuant to the Environmental Cleanup Responsibility Act, N.J.S.A. 13:1K-6 *et seq.*, hereinafter "ECRA", applicable to the Grantor, requiring that certain procedures be followed by industrial establishments to ensure adequate preparation and implementation of acceptable cleanup procedures as a precondition of any closure or sale or transfer of any industrial establishment in accordance with ECRA.

* * *

[Next Paragraph For Use by Grantor With ECRA Administrative Consent Order Only]

WHEREAS, the Grantor has entered into an Administrative Consent Order with NJDEP dated [date], hereinafter "Consent Order", under which Grantor has agreed, among other things, to undertake certain actions in order to comply with ECRA with respect to the industrial establishment described above;

WHEREAS, the Grantor is required within 14 days of written approval of the ECRA-cleanup plan by NJDEP to provide a surety bond or other financial security pursuant to N.J.A.C. 7:26B-6 in an amount equal to or greater than the cost of said approved cleanup plan;

WHEREAS, The Grantor, acting through its duly authorized officer or management official, has selected the Trustee to be the trustee under this Agreement, and the Trustee is willing to act as trustee.

NOW, THEREFORE, the Grantor and the Trustee agree as follows:

Section 1. Definitions.

As used in this Agreement:

(a) The term "Grantor" means the owner or operator of the industrial establishment entering into this Agreement and any successors or assigns of the Grantor.

(b) The term "Trustee" means the Trustee who enters into the Agreement and any successor Trustee.

Section 2. Identification of Industrial Establishment and Cost Estimates.

This Agreement pertains to the industrial establishments and cost estimates identified on Attachment A. [On Attachment A, for each industrial establishment list the name, cleanup plan cost estimates, current ownership, Standard Industrial Classification number, location of the industrial establishment, including tax lot and block number, municipality and county for which financial assurance is demonstrated by this Agreement.]

Section 3. Establishment of Fund.

The Grantor and the Trustee hereby establish a trust fund, hereinafter the "Fund", for the benefit of NJDEP. The Grantor and the Trustee intend that no third party shall have access to the Fund except as herein provided. The Fund is established initially as consisting of the total sum of [dollar amount] which is acceptable to the Trustee and NJDEP. Such property and any other property subsequently transferred to the Trustee is referred to as the Fund, together with all earnings and profits thereon, less any payments or distributions made by the Trustee pursuant to this Agreement. The Fund shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the Grantor, any payments necessary to discharge any liabilities of the Grantor established by the NJDEP.

Section 4. Payment for ECRA Cleanup.

The Trustee shall make payment from the Fund as the NJDEP Commissioner, or his designee, shall direct, in writing, to provide for the payment of the ECRA cleanup costs of the industrial establishment [as appropriate add "pursuant to the Administrative Consent Order dated [date]" or "covered by the ECRA cleanup approved by NJDEP on [date]"] and this Agreement. The Trustee shall reimburse the Grantor or other persons, as specified by the NJDEP, from the Fund for ECRA cleanup expenditures in such amounts as the NJDEP shall direct in writing. In addition, the Trustee shall refund to the Grantor such amounts the NJDEP specifies in writing. Upon refund such funds shall no longer constitute part of the Fund as defined herein.

Section 5. Payments Comprising the Fund.

Payments made to the Trustee for the Fund shall consist of cash or securities acceptable to the Trustee.

Section 6. Trustee Management.

At such time as the corpus of the Fund is funded, the Trustee shall invest and reinvest the principal and income of the Fund and keep the Fund invested as a single fund, without distinction between principal and income, in accordance with general investment policies and guidelines which the Grantor may communicate in writing to the Trustee from time to time, subject, however, to the provisions of this Section. In investing, reinvesting, exchanging, selling and managing the Fund, the Trustee shall discharge his duties with respect to the Fund solely in the interest of the NJDEP as the beneficiary and with the care, skill, prudence and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims; except that:

(i) Securities or other obligations of the Grantor, or any other owner or operator of the facilities or any of their affiliates, as defined in the Investment Company Act of 1940, as amended, 15 U.S.C. 80a-2(a), shall not be acquired or held, unless they are securities or other obligations of the Federal or a state government;

(ii) The Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent insured by an agency of the Federal or State government; and

(iii) The Trustee is authorized to hold cash awaiting investment of distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

Section 7. Commingling and Investment.

The Trustee is expressly authorized in its discretion:

(a) To transfer from time to time any or all of the assets of the Fund to any common, commingled or collective trust fund created by the Trustee in which the Fund is eligible to participate, subject to all of the provisions thereof, to be commingled with the assets of other trusts participating therein; and

(b) To purchase shares in any investment company registered under the Investment Company Act of 1940, 15 U.S.C. 80a-1 *et seq.* including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the Trustee. The Trustee may vote such shares in its discretion.

Section 8. Express Powers of Trustee.

Without in any way limiting the powers and discretions conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

(a) To sell, exchange, convey, transfer or otherwise dispose of any property held by it, by public or private sale. No person dealing with the Trustee shall be bound to see to the application of the purchase money or to inquire into the validity or expedience of any such sale or other disposition;

(b) To make, execute, acknowledge and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;

(c) To register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with certificates of the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of such securities in a qualified central depository even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository with other securities deposited therein by another person or to deposit or arrange for the deposit of any securities issued by the Federal Government of the United States or any agency or instrumentality thereof, with a Federal Reserve bank, but the books and records of the Trustee shall at all times show that all securities are part of the Fund;

(d) To deposit any cash in the Fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the Federal or State government; and

(e) To compromise or otherwise adjust all claims in favor of or against the Fund.

Section 9. Taxes and Expenses.

All taxes of any kind that may be assessed or levied against or in respect of the Fund and all brokerage commissions incurred by the Fund shall be paid from the Fund. All other expenses incurred by the Trustee in connection with the administration of this Trust, including fees for legal services rendered to the Trustee, the compensation of the Trustee to the extent not paid directly by the Grantor and all other proper charges and disbursements of the Trustee shall be paid from the Fund.

Section 10. Annual Valuation.

The Trustee shall annually, at least 30 days prior to the anniversary date of establishment of the Fund, furnish to the Grantor and to the NJDEP a statement confirming the value of the Trust. Any securities in the Fund shall be valued at market value as of no more than 60 days prior to the anniversary date of establishment of the Fund. The failure of the Grantor to object in writing to the Trustee within 90 days after the statement has been furnished to the Grantor and the NJDEP shall constitute a conclusively binding assent by the Grantor, barring the Grantor from asserting any claim or liability against the Trustee with respect to matters disclosed in the statement.

Section 11. Advice of Counsel.

The Trustee may from time to time consult with counsel, who may be counsel to the Grantor, with respect to any question arising as to the construction of this Agreement or any action to be taken hereunder. The Trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

Section 12. Trustee Compensation.

The Trustee shall be entitled to reasonable compensation from time to time for its services, as agreed upon in writing with the Grantor.

Section 13. Successor Trustee.

The Trustee may resign or the Grantor may replace the Trustee, but such resignation or replacement shall not be effective until the Grantor has appointed a successor trustee and this successor accepts the appointment. The successor trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor trustee's acceptance of the appointment, the Trustee shall assign, transfer and pay over property constituting the Fund. If for any reason, the Grantor cannot or does not act in the event of the resignation of the Trustee, the Trustee may apply to a court of

competent jurisdiction for the appointment of a successor trustee or for instructions. The successor trustee shall specify the date on which it assumes administration of the trust in writing sent to the Grantor, the NJDEP and the present Trustee by certified mail 10 days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this Section shall be paid as provided in Section 3.

Section 14. Successor Grantor.

Sixty days prior to the Grantor ceasing to exist if dissolution is contemplated, the Grantor must notify and provide NJDEP with the names and addresses of any and all successors and assigns along with a notarized acknowledgement from same stating that the successors and assigns assume responsibilities concerning financial assurance.

Section 15. Instructions to the Trustee.

All orders, requests and instructions by the Grantor to the Trustee shall be in writing, signed by such persons as are designated in Attachment B or such other designees as the Grantor may designate by amendment to Attachment B. The Trustee shall be fully protected in acting without inquiry in accordance with the Grantor's orders, requests and instructions. All orders, requests and instructions by the NJDEP to the Trustee shall be in writing, signed by the NJDEP Commissioner or his/her designee and the Trustee shall act and shall be fully protected in acting in accordance with such orders, requests and instructions. The Trustee shall have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the Grantor or NJDEP hereunder has occurred.

The Trustee shall have no duty to act in the absence of such orders, requests and instructions from the Grantor and/or NJDEP, except as provided for herein.

Section 16. Amendment of Agreement.

This Agreement may be amended by an instrument in writing executed jointly by the Grantor or the Grantor's principals, successors, and assigns if Grantor has dissolved, the Trustee and the NJDEP or by the Trustee and the NJDEP if the Grantor ceases to exist and no successors or assigns are named.

Section 17. Irrevocability and Termination.

Subject to the right of the parties to amend this Agreement, as provided in Section 16, this Trust shall be irrevocable and shall continue until terminated at the written agreement of the Grantor, the Trustee and the NJDEP or of the Trustee and the NJDEP, if the Grantor ceases to exist. Upon termination of the Trust, all remaining trust property, less final trust administration expenses, shall be delivered to the Grantor.

Section 18. Immunity and Indemnification

The Trustee shall not incur personal liability of any nature in connection with any acts or omissions, made in good faith, in the administration of this Trust or in carrying out any directions by the Grantor or the NJDEP issued in accordance with the Agreement. The Trustee shall be indemnified and saved harmless by the Grantor or from the Trust Fund, or both, from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct in its official capacity, including all expenses reasonably incurred in its defense in the event the Grantor fails to provide such defense.

Section 19. Choice of Law

This Agreement shall be administered, construed and enforced according to the laws of the State of New Jersey.

Section 20. Interpretation.

As used in this Agreement, words in the singular include the plural and words in the plural include the singular.

The descriptive headings for each Section of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

In Witness Whereof, the parties have caused this Agreement to be executed by their respective officer or management official, duly authorized, and their corporate seals to be hereunto affixed and attested, as of the date set forth below:

ADOPTIONS

[NAME OF GRANTOR]
DATE: _____ BY: _____
TITLE: _____
[NAME OF TRUSTEE]
DATE: _____ BY: _____
TITLE: _____

[Grantor shall attach Attachments A and B.]

CERTIFICATION OF ACKNOWLEDGEMENT

(Grantor)

ECRA Case #: _____
Industrial Establishment: _____
Owner: _____
Operator: _____
Location: _____
Amount of ECRA Cleanup Approval: _____
Amount of ECRA ACO: _____
Financial Assurance Posted: _____
State of _____
County of _____

On the [date], before me personally came [owner or operator of the industrial establishment] to me known, who, being by me duly sworn, did depose and say that she/he resides at [address], that she/he is [title] of [corporation], the corporation described in and which executed the above instrument; that she/he knows the seal of said corporation; that the seal affixed to such instruments is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that she/he signed her/his name thereto by like order.

[Signature of Notary Public]

FULLY FUNDED TRUST

A fully funded trust for a ERCA cleanup plan approval or an ECRA ACO shall be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Standby Trust Agreement

RE: ENVIRONMENTAL RESPONSIBILITY CLEANUP ACT

This Fully Funded Trust, hereinafter "Agreement", entered into as of [date] by and between [name and address of the owner or operator of the industrial establishment], a New Jersey [insert "corporation", "partnership", "association", or "proprietorship"], hereinafter "Grantor" and [name and address of corporate trustee], [insert "incorporated in the State of" or "a national bank"], hereinafter "Trustee".

WHEREAS, the New Jersey Department of Environmental Protection, hereinafter "NJDEP", an agency of the State of New Jersey, has established the Environmental Cleanup Responsibility Act Regulations, N.J.A.C. 7:26B, pursuant to the Environmental Cleanup Responsibility Act, N.J.S.A. 13:1K-6 *et seq.*, hereinafter "ECRA", applicable to the Grantor, requiring that certain procedures be followed by industrial establishments to ensure adequate preparation and implementation of acceptable cleanup procedures as a precondition of any closure or sale or transfer of any industrial establishment in accordance with ECRA.

* * *

[Next Paragraph For Use by Grantor With ECRA Administrative Consent Order Only]

WHEREAS, the Grantor has entered into an Administrative Consent Order with NJDEP dated [date], hereinafter "Consent Order", under which Grantor has agreed, among other things, to undertake certain actions in order to comply with ECRA with respect to the industrial establishment described above;

WHEREAS, the Grantor is required within 14 days of written approval of the ECRA-cleanup plan by NJDEP to provide a surety bond or other financial security pursuant to N.J.A.C. 7:26B-6 in an amount equal to or greater than the cost of said approved cleanup plan;

ENVIRONMENTAL PROTECTION

WHEREAS, The Grantor, acting through its duly authorized officer or management official, has selected the Trustee to be the trustee under this Agreement, and the Trustee is willing to act as trustee.

NOW, THEREFORE, the Grantor and the Trustee agree as follows:

Section 1. Definitions.

As used in this Agreement:

(a) The term "Grantor" means the owner or operator of the industrial establishment entering into this Agreement and any successors or assigns of the Grantor.

(b) The term "Trustee" means the Trustee who enters into the Agreement and any successor Trustee.

Section 2. Identification of Industrial Establishment and Cost Estimates.

This Agreement pertains to the industrial establishments and cost estimates identified on Attachment A. [on Attachment A, for each industrial establishment list the name, cleanup plan cost estimates, current ownership, Standard Industrial Classification number, location of the industrial establishment, including tax lot and block number and municipality and county for which financial assurance is demonstrated by this Agreement.]

Section 3. Establishment of Fund.

The Grantor and the Trustee hereby establish a fully funded trust fund, hereinafter the "Fund", for the benefit of NJDEP. The Grantor and the Trustee intend that no third party shall have access to the Fund except as herein provided. The Fund is established initially as consisting of the total sum of [dollar amount] which is acceptable to the Trustee and NJDEP. Such property and any other property subsequently transferred to the Trustee is referred to as the Fund, together with all earnings and profits thereon, less any payments or distributions made by the Trustee pursuant to this Agreement. The Fund shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the Grantor, any payments necessary to discharge any liabilities of the Grantor established by the NJDEP.

Section 4. Payment for ECRA Cleanup.

The Trustee shall make payment from the Fund as the NJDEP Commissioner, or his designee, shall direct, in writing, to provide for the payment of the ECRA cleanup costs of the industrial establishment [as appropriate add "pursuant to the Administrative Consent Order dated [date]" or "covered by the ECRA cleanup approved by NJDEP on [date]"] and this Agreement. The Trustee shall reimburse the Grantor or other persons, as specified by the NJDEP, from the Fund for ECRA cleanup expenditures in such amounts as the NJDEP shall direct in writing. In addition, the Trustee shall refund to the Grantor such amounts the NJDEP specifies in writing. Upon refund such funds shall no longer constitute part of the Fund as defined herein.

Section 5. Payments Comprising the Fund.

Payments made to the Trustee for the Fund shall consist of cash or securities acceptable to the Trustee.

Section 6. Trustee Management.

At such time as the corpus of the Fund is funded, the Trustee shall invest and reinvest the principal and income of the Fund and keep the Fund invested as a single fund, without distinction between principal and income, in accordance with general investment policies and guidelines which the Grantor may communicate in writing to the Trustee from time to time, subject, however, to the provisions of this Section. In investing, reinvesting, exchanging, selling and managing the Fund, the Trustee shall discharge his duties with respect to the Fund solely in the interest of the NJDEP as the beneficiary and with the care, skill, prudence and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims; except that:

(i) Securities or other obligations of the Grantor, or any other owner or operator of the facilities or any of their affiliates, as defined in the Investment Company Act of 1940, as amended, 15 U.S.C. 80a-2(a), shall not be acquired or held, unless they are securities or other obligations of the Federal or a state government;

ENVIRONMENTAL PROTECTION

(ii) The Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent insured by an agency of the Federal or State government; and

(iii) The Trustee is authorized to hold cash awaiting investment of distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

Section 7. Commingling and Investment.

The Trustee is expressly authorized in its discretion:

(a) To transfer from time to time any or all of the assets of the Fund to any common, commingled or collective trust fund created by the Trustee in which the Fund is eligible to participate, subject to all of the provisions thereof, to be commingled with the assets of other trusts participating therein; and

(b) To purchase shares in any investment company registered under the Investment Company Act of 1940, 15 U.S.C. 80a-1 *et seq.* including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the Trustee. The Trustee may vote such shares in its discretion.

Section 8. Express Powers of Trustee.

Without in any way limiting the powers and discretions conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

(a) To sell, exchange, convey, transfer or otherwise dispose of any property held by it, by public or private sale. No person dealing with the Trustee shall be bound to see to the application of the purchase money or to inquire into the validity or expedience of any such sale or other disposition;

(b) To make, execute, acknowledge and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;

(c) To register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with certificates of the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of such securities in a qualified central depository even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository with other securities deposited therein by another person or to deposit or arrange for the deposit of any securities issued by the Federal Government of the United States or any agency or instrumentality thereof, with a Federal Reserve bank, but the books and records of the Trustee shall at all times show that all securities are part of the Fund;

(d) To deposit any cash in the Fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the Federal or State government; and

(e) To compromise or otherwise adjust all claims in favor of or against the Fund.

Section 9. Taxes and Expenses.

All taxes of any kind that may be assessed or levied against or in respect of the fund and all brokerage commissions incurred by the Fund shall be paid from the Fund. All other expenses incurred by the Trustee in connection with the administration of this Trust, including fees for legal services rendered to the Trustee, the compensation of the Trustee to the extent not paid directly by the Grantor and all other proper charges and disbursements of the Trustee shall be paid from the Fund.

Section 10. Annual Valuation.

The Trustee shall annually, at least 30 days prior to the anniversary date of establishment of the Fund, furnish to the Grantor and to the NJDEP a statement confirming the value of the Trust. Any securities in the Fund shall be valued at market value as of no more than 60 days prior to the anniversary date of establishment of the Fund. The failure of the Grantor to object in writing to the Trustee within 90 days after the statement has been furnished to the Grantor and the NJDEP shall constitute a conclusively binding assent by the Grantor, barring the Grantor from asserting any claim or liability against the Trustee with respect to matters disclosed in the statement.

Section 11. Advice of Counsel.

The Trustee may from time to time consult with counsel, who may be counsel to the Grantor, with respect to any question arising as to the construction of this Agreement or any action to be taken hereunder. The Trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

Section 12. Trustee Compensation.

The Trustee shall be entitled to reasonable compensation from time to time for its services, as agreed upon in writing with the Grantor.

Section 13. Successor Trustee.

The Trustee may resign or the Grantor may replace the Trustee, but such resignation or replacement shall not be effective until the Grantor has appointed a successor trustee and this successor accepts the appointment. The successor trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor trustee's acceptance of the appointment, the Trustee shall assign, transfer and pay over property constituting the Fund. If for any reason, the Grantor cannot or does not act in the event of the resignation of the Trustee, the Trustee may apply to a court of competent jurisdiction for the appointment of a successor trustee or for instructions. The successor trustee shall specify the date on which it assumes administration of the trust in writing sent to the Grantor, the NJDEP and the present Trustee by certified mail 10 days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this Section shall be paid as provided in Section 3.

Section 14. Successor Grantor.

Sixty days prior to the Grantor ceasing to exist if dissolution is contemplated, the Grantor must notify and provide NJDEP with the names and addresses of any and all successors and assigns along with a notarized acknowledgment from same stating that the successors and assigns assume responsibilities concerning financial assurance.

Section 15. Instructions to the Trustee.

All orders, requests and instructions by the Grantor to the Trustee shall be in writing, signed by such persons as are designated in Attachment B or such other designees as the Grantor may designate by amendment to Attachment B. The Trustee shall be fully protected in acting without inquiry in accordance with the Grantor's orders, requests and instructions. All orders, requests and instructions by the NJDEP to the Trustee shall be in writing, signed by the NJDEP Commissioner or his/her designee and the Trustee shall act and shall be fully protected in acting in accordance with such orders, requests and instructions. The Trustee shall have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the Grantor or NJDEP hereunder has occurred.

The Trustee shall have no duty to act in the absence of such orders, requests and instructions from the Grantor and/or NJDEP, except as provided for herein.

Section 16. Amendment of Agreement.

This Agreement may be amended by an instrument in writing executed jointly by the Grantor or the Grantor's principals, successors, and assigns if Grantor has dissolved, the Trustee and the NJDEP or by the Trustee and the NJDEP if the Grantor ceases to exist and no successors or assigns are named.

Section 17. Irrevocability and Termination.

Subject to the right of the parties to amend this Agreement, as provided in Section 16, this Trust shall be irrevocable and shall continue until terminated at the written agreement of the Grantor, the Trustee and the NJDEP or of the Trustee and the NJDEP, if the Grantor ceases to exist. Upon termination of the Trust, all remaining trust property, less final trust administration expenses, shall be delivered to the Grantor.

Section 18. Immunity and Indemnification.

The Trustee shall not incur personal liability of any nature in connection with any acts or omissions, made in good faith, in the administration of this Trust or in carrying out any directions by the Grantor or the NJDEP issued in accordance with the Agreement. The Trustee shall be indemnified and saved harmless by the Grantor or from the Trust Fund, or both, from and against any personal liability to which the Trustee may be subjected by reason of any act

ADOPTIONS

or conduct in its official capacity, including all expenses reasonably incurred in its defense in the event the Grantor fails to provide such defense.

Section 19. Choice of Law

This Agreement shall be administered, construed and enforced according to the laws of the State of New Jersey.

Section 20. Interpretation.

As used in this Agreement, words in the singular include the plural and words in the plural include the singular.

The descriptive headings for each Section of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

In Witness Whereof, the parties have caused this Agreement to be executed by their respective officer or management official, duly authorized, and their corporate seals to be hereunto affixed and attested, as of the date set forth below:

[NAME OF GRANTOR]

DATE: _____ BY: _____

TITLE: _____

[NAME OF TRUSTEE]

DATE: _____ BY: _____

TITLE: _____

[Grantor shall attach Attachments A and B.]

ENVIRONMENTAL PROTECTION

CERTIFICATION OF ACKNOWLEDGEMENT

(Grantor)

ECRA Case #: _____

Industrial Establishment: _____

Owner: _____

Operator: _____

Location: _____

Amount of ECRA Cleanup Approval: _____

Amount of ECRA ACO: _____

Financial Assurance Posted: _____

[Total amount received in the form of _____]

State of _____

County of _____

On the [date], before me personally came [owner or operator of the industrial establishment], to me known, who, being by me duly sworn, did depose and say that she/he resides at [address], that she/he is [title] of [corporation], the corporation described in and which executed the above instrument; that she/he knows the seal of said corporation; that the seal affixed to such instruments is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that she/he signed her/his name thereto by like order.

[Signature of Notary Public]

EMERGENCY ADOPTION

TREASURY-TAXATION

(a)

DIVISION OF TAXATION

Homestead Rebate Act

Extension of Time to File Homestead Rebate Claim

Adopted Emergency Amendment and Concurrent Proposal: N.J.A.C. 18:12-7.12

Emergency Rule Adopted: November 30, 1987 by
John R. Baldwin, Director, Division of Taxation,
Department of Treasury.
Gubernatorial Approval (see N.J.S.A. 52:14B-(c)): December 1,
1987.

Emergency Rule Filed: December 2, 1987 as R.1987 d.537.

Authority: N.J.S.A. 54:4-3.80 and 54:50-1.

Emergency Amendment Effective Date: December 2, 1987.

Emergency Amendment Expiration Date: January 31, 1988.

Concurrent Proposal Number: PRN 1987-536.

Submit written comments by February 3, 1988 to:

John R. Baldwin
Director
Division of Taxation
50 Barrack Street—CN 240
Trenton, NJ 08646

On November 30, 1987, John R. Baldwin, Director of the Division of Taxation in the Department of the Treasury, pursuant to the authority of N.J.S.A. 54:4-3.80 and 54:50-1 and the applicable provisions of the Administrative Procedure Act, and upon certification by the Governor of the State of New Jersey that an imminent peril exists (see N.J.S.A. 52:14B-4(c)), adopted an emergency amendment to N.J.A.C. 18:12-7.12

concerning an extension of time to file an Application for Homestead Rebate.

The agency emergency adoption and concurrent proposal follows:

Summary

To respond to the imminent peril, N.J.A.C. 18:12-7.12 has been amended on an emergency basis to ensure that approximately 200,000 persons be given additional time to file an Application for Homestead Rebate. Without this adoption, a large number of persons would forfeit their right to a homestead rebate. This additional time is given to people who for some reason did not file their application prior to December 1, 1987.

Social Impact

This emergency adoption will affect approximately 200,000 property owners who failed to file a timely application for homestead rebate.

Economic Impact

The economic impact upon the general treasury of the State of New Jersey will approximate 200,000 applications. The total amount of money involved could reach \$40 million at a maximum but should be somewhat less.

Regulatory Flexibility Statement

The rule will not result in any change in existing reporting, recordkeeping or other compliance requirements for small businesses under state tax law, therefore, a regulatory flexibility analysis is not required.

Full text of the emergency adoption and concurrent proposal follows (additions indicated in boldface **thus**).

18:12-7.12 Extension of filing date

(a)-(k) (No change.)

(l) **The time for property owners to file their applications for a homestead rebate payable in 1988 pursuant to P.L. 1976, c.72, including applications by shareholders in cooperative associations and those residing in properties of certain mutual housing corporations, has been extended to March 1, 1988.**

MISCELLANEOUS NOTICES

ENVIRONMENTAL PROTECTION

(a)

DIVISION OF COASTAL RESOURCES

Petition for Rulemaking Disturbances in Wetlands

Take notice that the Department of Environmental Protection has received a petition for rulemaking from Neil Yoskin, Esq., requesting the Department to set forth in the New Jersey Administrative Code its requirements for mitigation of disturbances in wetlands within the 100 year flood plain.

Mr. Yoskin claims that the Department currently requires mitigation for disturbances that are less than one acre and that this requirement contradicts the Department's grant of certification to the U.S. Army Corps of Engineers under Section 401 of the Federal Clean Water Act. The petitioner has requested that the Department adopt a rule which either complies with the grant of certification or codifies the mitigation requirement.

This petition was received by the Department on October 21, 1987. In accordance with the requirements of N.J.A.C. 1:30-3.6(a) and (b), the Department gives notice that this petition will be granted. The Department, in this issue of the New Jersey Register, is proposing new rules, pursuant to the Freshwater Wetlands Protection Act, to codify its wetlands mitigation requirement.

HEALTH

(b)

Availability of Grants

Directory of Department of Health Grant Programs

Take notice that, in compliance with P.L. 1987, ch. 7, the Department of Health hereby publishes notice of grant availability in the **Directory of Department of Health Grant Programs**. Copies of the Directory can be obtained by contacting the Office of Grant Evaluation and Review, Financial and General Services Program, Department of Health, at 609-588-7448.

LAW AND PUBLIC SAFETY

(c)

STATE BOARD OF MEDICAL EXAMINERS

Petition for Rulemaking Advertising and Solicitation Practices N.J.A.C. 13:35-6.10

Petitioners: Chiropractic Legal Action Committee

Authority: N.J.S.A. 52:14B-4(f).

Take notice that on October 12, 1987 petitioners filed a petition with the State Board of Medical Examiners requesting an amendment to the Board of Medical Examiners' advertising regulation.

Specifically, petitioners are requesting an amendment to delete in its entirety N.J.A.C. 13:35-6.10(c)11. This paragraph prohibits licensees from any advertising which contains any statement offering gratuitous services or the substantial equivalent thereof. Petitioners further request that the following provision be added as subsection "o" of N.J.A.C. 13:35-6.10:

N.J.A.C. 13:35-6.10(o): In any advertisement for a free, discounted fee or reduced fee service, examination, or treatment, the following statement shall appear in capital letters clearly distinguishable from the rest of the text: THE PATIENT AND ANY OTHER PERSON RESPONSIBLE FOR PAYMENT HAS A RIGHT TO REFUSE TO PAY, CANCEL PAYMENT, OR BE REIMBURSED FOR PAYMENT FOR ANY OTHER SERVICE, EXAMINATION, OR THE TREATMENT WHICH IS PERFORMED AS A RESULT OF AND WITHIN 72 HOURS OF RESPONDING TO THE ADVERTISEMENT FOR THE

FREE, DISCOUNTED FEE, OR REDUCED FEE SERVICE, EXAMINATION OR TREATMENT.

Petitioners state that the Chiropractic Legal Action Committee is made up of licensed chiropractors "who want the opportunity to advertise in a manner consistent with the proposed promulgated rule so as to educate the public on the theories of chiropractic practice and the benefits to be derived from that mode of treatment". Petitioners further state that "the proposed safeguards [would] assure that there is no overreaching", and that the proposed rule is in line with recent pronouncements of both the New Jersey Supreme Court and the United States Supreme Court.

After due notice this petition will be considered by the State Board of Medical Examiners pursuant to N.J.S.A. 52:14B-4(f).

TREASURY-GENERAL

(d)

DIVISION OF BUILDING AND CONSTRUCTION

Architect-Engineer Selection

Notice of Assignments—Month of November

Solicitations of design services for major projects are made by notices published in construction trade publications and newspapers and by direct notification of professional associations/societies and listed, pre-qualified New Jersey consulting firms. For information on DBC's pre-qualification and assignment procedures, call (609) 984-6979.

Last list dated November 9, 1987.

The following assignments have been made:

DBC No.	PROJECT	A/E	CCE
P520	Testing/Inspection Services Rehabilitation of Stony Lake Dam Stokes State Forest Sussex County, NJ	Certified Testing Labs, Inc.	\$3,000 Services
A548	Asbestos Remediation Review L & I Education Buildings Trenton, NJ	O'Brien & Gere Engineers, Inc.	\$14,600 Services
1024	Asbestos Removal Kendall Hall Trenton State College Trenton, NJ	Gaudet Associates, Inc.	\$275,000
T200	Dome Type Salt Storage Building DOT Maintenance Facility Jersey City, NJ	Thomas E. Torricelli, AIA	\$80,000
E183	Exterior Painting Various Buildings Katzenbach School for the Deaf	Matthew L. Rue, AIA	\$33,000
T199	Sanitary Sewer Line NJ DOT Maintenance Facility Totowa, NJ	Clinton Bogert Assoc.	\$70,500
P468	Testing/Inspection Services Parking Facilities & Site Work Heislerville Wildlife Management Area	Testwell Craig Testing Labs., Inc.	\$3,000 Services
C324-02 (Revised)	Willow Hall Renovations Ancora Psychiatric Hospital Hammononton, NJ	The Tarquini Organization	\$18,480 Services
F043	Facility Consultant-FY 88 Ramapo College of NJ Mahwah, NJ	Goldberg Associates, PA	\$30,000 Services
F044	Facility Consultant-FY 88 Ramapo College of NJ Mahwah, NJ	Barrett Associates, Inc.	\$30,000 Services
F045	Facility Consultant-FY 88 Glassboro State College Glassboro, NJ	Thomas Tyler Moore Associates	\$10,000 Services
W028	Facility Consultant-FY 88 Dept. of Environmental Protection	David V. Abramson & Associates	\$25,000 Services
M763	Asbestos Removal 19 Cottages, 12 Steam Line Manholes & Power House Woodbridge Developmental Center Woodbridge, NJ	Biospherics, Inc.	\$198,000

TREASURY-GENERAL

MISCELLANEOUS NOTICES

COMPETITIVE PROPOSALS

	Biospherics, Inc.	\$40,000 Lump Sum	
	Testwell Craig Labs, Inc.	\$58,500 Lump Sum	
	Northeastern Analytical Corp.	\$71,710 Lump Sum	
I021	Asbestos Removal	Biospherics, Inc.	\$260,000
	Webster Hall		
	Montclair State College		
	Upper Montclair, NJ		

COMPETITIVE PROPOSALS

	Biospherics, Inc.	\$33,000 Lump Sum	
	Northeastern Analytical Corp.	\$36,640 Lump Sum	
	O'Brien & Gere Engineers, Inc.	\$54,500 Lump Sum	
P552	Regional Office Building	The Tarquini	\$500,000
	Winslow Wildlife Management Area	Organization	
	Winslow Township, NJ		

COMPETITIVE PROPOSALS

The Tarquini Organization	11.4%	
Lammy & Giorgio, PA	12.0%	
Ambruster/Grana Associates	14.98%	
New Rehabilitation/Recreation/ Administration Facility;		
Demolition of Main Building		
Vineland Memorial Home		
Vineland, NJ		
	Sullivan Assoc., Inc.	\$4,000,000

COMPETITIVE PROPOSALS

Sullivan Associates, Inc.	5.40%
Vaughn Organization, PC	5.965%
The Lisiewski Group	6.60%
The Tarquini Organization	6.95%

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 November 2, 1987 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(d).

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 adoption of the rule and its chronological ranking in the Registry. As an example, R.1987 d.1 means the first rule adopted in 1987.

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 number and 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: OCTOBER 19, 1987.

NEXT UPDATE WILL BE DATED NOVEMBER 16, 1987.

Note: If no changes have occurred in a Title during the previous month, no update will be issued for that Title.

N.J.R. CITATION LOCATOR

If the N.J.R. citation is between:	Then the rule proposal or adoption appears in this issue of the Register	If the N.J.R. citation is between:	Then the rule proposal or adoption appears in this issue of the Register
18 N.J.R. 2409 and 2472	December 15, 1986	19 N.J.R. 1121 and 1258	July 6, 1987
19 N.J.R. 1 and 164	January 5, 1987	19 N.J.R. 1259 and 1352	July 20, 1987
19 N.J.R. 165 and 260	January 20, 1987	19 N.J.R. 1353 and 1474	August 3, 1987
19 N.J.R. 261 and 324	February 2, 1987	19 N.J.R. 1475 and 1588	August 17, 1987
19 N.J.R. 325 and 392	February 17, 1987	19 N.J.R. 1589 and 1676	September 8, 1987
19 N.J.R. 393 and 430	March 2, 1987	19 N.J.R. 1677 and 1758	September 21, 1987
19 N.J.R. 431 and 476	March 16, 1987	19 N.J.R. 1759 and 1858	October 5, 1987
19 N.J.R. 477 and 586	April 6, 1987	19 N.J.R. 1859 and 1926	October 19, 1987
19 N.J.R. 587 and 672	April 20, 1987	19 N.J.R. 1927 and 2086	November 2, 1987
19 N.J.R. 673 and 794	May 4, 1987	19 N.J.R. 2087 and 2224	November 16, 1987
19 N.J.R. 795 and 898	May 18, 1987	19 N.J.R. 2225 and 2324	December 7, 1987
19 N.J.R. 899 and 1006	June 1, 1987	19 N.J.R. 2325 and 2510	December 21, 1987
19 N.J.R. 1007 and 1120	June 15, 1987		

N.J.A.C. CITATION

ADMINISTRATIVE LAW—TITLE 1

1:1-8.2	De novo review by OAL and previous hearing record
1:1-9.1	Scheduling of prehearing conferences
1:1-14.4	Failure to appear at proceeding
1:1-14.5	Ex parte communications and agency heads
1:1-14.10	Decision to grant requests for interlocutory review where agency head is board or commission: proposal withdrawn
1:1-14.10, 18.1, 18.4	Interlocutory review of certain issues
1:1-19.1	Settlement terms and consent of agency head
1:1-21.6	Exceptions in uncontested cases
1:5-1.1	Council on Affordable Housing hearings: correction
1:30-1.2, 2.8	Use of appendices

PROPOSAL NOTICE (N.J.R. CITATION)

19 N.J.R. 1761(a)
19 N.J.R. 1591(a)
19 N.J.R. 1591(b)
19 N.J.R. 1761(b)
19 N.J.R. 1591(c)
19 N.J.R. 1592(a)
19 N.J.R. 1593(a)
19 N.J.R. 1593(b)
19 N.J.R. 675(a)

DOCUMENT NUMBER

R.1987 d.519
R.1987 d.463
R.1987 d.506

R.1987 d.462
R.1987 d.461
R.1987 d.464

ADOPTION NOTICE (N.J.R. CITATION)

19 N.J.R. 2388(a)
19 N.J.R. 2131(a)
19 N.J.R. 2388(b)
19 N.J.R. 2327(a)
19 N.J.R. 2131(b)
19 N.J.R. 2131(c)
19 N.J.R. 2131(d)
19 N.J.R. 1917(a)

(TRANSMITTAL 1987-4, dated October 19, 1987)

AGRICULTURE—TITLE 2

2:71-2.4, 2.5, 2.6	"Jersey Fresh" raspberry standards
2:76-7	Review of nonagricultural development projects in agricultural areas

19 N.J.R. 1593(c)
19 N.J.R. 1009(a)

R.1987 d.442
R.1987 d.482

19 N.J.R. 1987(a)
19 N.J.R. 2132(a)

(TRANSMITTAL 1987-7, dated October 19, 1987)

BANKING—TITLE 3

3:1-1.1	Maximum interest rate on first mortgages on residences with one to six units
3:1-14	Revolving credit equity loans
3:2-1.1, 1.2, 1.3, 1.4	Advertising by financial institutions
3:6-4	Banks and savings banks: action upon detection or discovery of crime
3:6-9	Capital stock savings bank: change in control
3:10-8, 9	Banks and savings banks: mortgage loan practices
3:11-12	Commercial loans by savings banks
3:18-10	Secondary mortgage loan licensure
3:23-2.1	Secondary mortgage loan licensure
3:27-6, 7	Savings and loan associations: mortgage loan practices
3:38-4, 5, 7	Mortgage bankers and brokers: loan practices

19 N.J.R. 2089(a)
19 N.J.R. 1594(a)
19 N.J.R. 1355(a)
19 N.J.R. 1595(a)
19 N.J.R. 1762(a)
19 N.J.R. 1356(a)
19 N.J.R. 1679(b)
19 N.J.R. 1929(a)
19 N.J.R. 1929(a)
19 N.J.R. 1358(a)
19 N.J.R. 1360(a)

(TRANSMITTAL 1987-6, dated October 19, 1987)

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4:1-16.1-16.6, 24.2	Repeal (see 4A:8)
4:1-17, 18, 20, 26	Repeal (see 4A:6-1, 2, 3, 4, 5)
4:1-19, 21.1, 21.3-21.5	Repeal (see 4A:10)
4:2-16.1, 16.2	Repeal (see 4A:8)
4:2-17, 18, 20, 26	Repeal (see 4A:6-1, 2, 3, 4, 5)
4:3-16.1, 16.2	Repeal (see 4A:8)
4:3-17, 20	Repeal (see 4A:6-1, 2, 3, 4, 5)

19 N.J.R. 1363(a)
19 N.J.R. 1764(a)
19 N.J.R. 1366(a)
19 N.J.R. 1363(a)
19 N.J.R. 1764(a)
19 N.J.R. 1363(a)
19 N.J.R. 1764(a)

R.1987 d.435

19 N.J.R. 1987(b)

N.J.A.C. CITATION		PROPOSAL NOTICE (N.J.R. CITATION)	DOCUMENT NUMBER	ADOPTION NOTICE (N.J.R. CITATION)
4:3-19	Repeal (see 4A:10)	19 N.J.R. 1366(a)	R.1987 d.435	19 N.J.R. 1987(b)
4:4	Repeal (see 4A:6-6)	19 N.J.R. 1774(a)		

(TRANSMITTAL 19873-3, dated October 19, 1987)

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4A:6-1, 2, 3, 4, 5	Leaves, hours of work, employee development	19 N.J.R. 1764(a)		
4A:6-6	Awards Program	19 N.J.R. 1774(a)		
4A:8	Layoffs	19 N.J.R. 1363(a)		
4A:10	Violations and penalties	19 N.J.R. 1366(a)	R.1987 d.435	19 N.J.R. 1987(b)

(TRANSMITTAL 1987-1, dated October 19, 1987)

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5:11-1.2, 2.1	Relocation assistance: lawful occupancy; eligibility	19 N.J.R. 1596(a)	R.1987 d.518	19 N.J.R. 2388(c)
5:11-3.5	Relocation assistance: scheduling of payments	19 N.J.R. 1930(a)		
5:12-1.1, 2.1, 2.4	Homelessness Prevention Program: eligibility for temporary assistance	19 N.J.R. 1777(a)		
5:13	Limited dividend and nonprofit housing corporations and associations	19 N.J.R. 1861(a)		
5:14-1.1-1.4, 2.1-2.3, 3.1-3.23, 4.1-4.6	Neighborhood Preservation Balanced Housing Programs	19 N.J.R. 589(a)		
5:18-2.4, 2.5, 2.6, 2.8	Uniform Fire Code: life hazard uses; annual registration fees	19 N.J.R. 1680(a)	R.1987 d.508	19 N.J.R. 2266(a)
5:19	Continuing care retirement communities: disclosure requirements	19 N.J.R. 597(a)		
5:23-1.1, 3.10, 4.40, 5.2, 5.4, 5.18, 5.20, 5.21-5.26	UCC: local agency classification; appeal boards; licensing	19 N.J.R. 1264(a)	R.1987 d.509	19 N.J.R. 2270(a)
5:23-2.38, 3.11, 7.2, 7.3, 7.100-7.116	Barrier free subcode: recreation standards	19 N.J.R. 1270(a)		
5:23-3.2	Uniform Construction Code: commercial farm buildings	19 N.J.R. 1778(a)		
5:23-3.2	Commercial farm building subcode: public hearings	19 N.J.R. 1862(a)		
5:23-3.18	Energy Subcode: checkmetering in multifamily buildings; lighting efficiency in existing buildings	19 N.J.R. 1862(b)		
5:23-4.20, 8.17	Uniform Construction Code: inspection fees	19 N.J.R. 1684(a)	R.1987 d.490	19 N.J.R. 2134(a)
5:23-8	Asbestos Hazard Abatement Subcode	19 N.J.R. 902(a)	R.1987 d.525	19 N.J.R. 2389(a)
5:26-2.3, 2.4	Planned real estate development: plan review fees	19 N.J.R. 1684(a)	R.1987 d.490	19 N.J.R. 2134(a)
5:80-21	Housing and Mortgage Finance: single family loans	18 N.J.R. 2238(a)		
5:80-26	Housing resale and rental affordability control	19 N.J.R. 802(a)		
5:92-1.3, 6.1	Council on Affordable Housing: rehabilitation component and credits	19 N.J.R. 1863(a)		
5:92-5.14, 12.11	Council on Affordable Housing: low and moderate income split; rental surcharge	19 N.J.R. 1597(a)		
5:92-16	Council on Affordable Housing: accessory apartments	19 N.J.R. 2089(b)		
5:100-2.5	Failure to report suspected abuse or exploitation of institutionalized elderly	19 N.J.R. 1686(a)		
5:100-2.5	Failure to report suspected abuse or exploitation of institutionalized elderly: extension of comment period	19 N.J.R. 2090(a)		

(TRANSMITTAL 1987-8, dated October 19, 1987)

DEFENSE—TITLE 5A

(TRANSMITTAL 1, dated May 20, 1985)

EDUCATION—TITLE 6

6:20-3.1	Sending and receiving districts: determining tuition rates	19 N.J.R. 1598(a)		
6:31-1	Bilingual education	19 N.J.R. 1126(a)	R.1987 d.523	19 N.J.R. 2397(a)
6:46	Local area vocational school districts and private vocational schools	19 N.J.R. 1368(a)	R.1987 d.434	19 N.J.R. 1989(a)
6:64	County and local library services	19 N.J.R. 1931(a)		
6:79-1	Child nutrition programs	19 N.J.R. 1599(a)	R.1987 d.524	19 N.J.R. 2399(a)

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ENVIRONMENTAL PROTECTION—TITLE 7

7:1-3, 4	Environmental Cleanup Responsibility Act rules	19 N.J.R. 681(a)		
7:1G-2.1, 2.2, 4.1, 4.2, 5.4	Worker and Community Right to Know: hazardous substances and materials	19 N.J.R. 438(a)		
7:1G-2.1, 2.2, 4.1, 4.2, 5.4	Worker and Community Right to Know: extension of comment period	19 N.J.R. 2234(a)		
7:1G-3.2, 5.2, 7	Worker and Community Right to Know: assessment of civil administrative penalties for nondisclosure of information	19 N.J.R. 703(a)		
7:1G-3.2, 5.2, 7	Worker and Community Right to Know: extension of comment period	19 N.J.R. 2234(b)		
7:2-11	Natural Areas System	18 N.J.R. 2349(b)	R.1987 d.533	19 N.J.R. 2409(a)

N.J.A.C. CITATION		PROPOSAL NOTICE (N.J.R. CITATION)	DOCUMENT NUMBER	ADOPTION NOTICE (N.J.R. CITATION)
7:7-2.1, 2.3	Coastal Permit Program: CAFRA exemptions; waterfront development	19 N.J.R. 807(a)		
7:7-2.2	Monmouth County wetlands maps	18 N.J.R. 2162(a)	R.1987 d.446	19 N.J.R. 1999(a)
7:7-2.2	Coastal wetlands maps for Gloucester County	19 N.J.R. 2090(b)		
7:7E-7.4, 8.11	Coastal resources and development: high rise structures; public access to Hudson River waterfront	19 N.J.R. 1034(a)		
7:7F	Shore Protection Program	19 N.J.R. 2091(a)		
7:8	Storm water management	19 N.J.R. 2227(a)		
7:8-1.3, 1.7, 2.1, 2.2, 2.6, 3.4, 3.6	Stormwater management	19 N.J.R. 488(a)	R.1987 d.513	19 N.J.R. 2276(a)
7:9-1	Sewer systems and wastewater treatment plants	19 N.J.R. 2227(b)		
7:9-15.6	Phase II lake restoration projects: State funding level	19 N.J.R. 909(a)	R.1987 d.447	19 N.J.R. 2000(a)
7:10-10.2, 11.2, 15	Safe Drinking Water Program fees	19 N.J.R. 1381(a)		
7:10-16	Maximum Containment Levels (MCLs) for hazardous contaminants in drinking water	19 N.J.R. 2228(a)		
7:10-16.13, 16.14, 16.15	Hazardous contaminants in drinking water: pre- proposal concerning short-term action levels, sampling response levels, and unregulated and total volatile organics	19 N.J.R. 2231(a)		
7:11-1	Use of Water Supply Authority property	19 N.J.R. 1274(a)		
7:12	Classification of shellfish growing waters	19 N.J.R. 1129(a)	R.1987 d.488	19 N.J.R. 2136(a)
7:13-7.1	Redelineation of Hackensack River in Oradell	19 N.J.R. 1935(a)		
7:13-7.1(b)	Redelineation of Jumping Brook in Neptune	19 N.J.R. 2233(a)		
7:13-7.1(d)	Redelineation of Raritan River and Peters Brook: reproposed	19 N.J.R. 167(b)		
7:13-7.1(d)	Flood plain delineations in Passaic-Hackensack and Raritan basins	19 N.J.R. 489(a)	R.1987 d.489	19 N.J.R. 2150(a)
7:13-7.1(d)	Redelineations along Green Brook, Union County	19 N.J.R. 1384(a)	R.1987 d.487	19 N.J.R. 2151(a)
7:13-7.1(d)	Redelineation of Big Bear Brook, Mercer County	19 N.J.R. 1933(a)		
7:13-7.1(d)	Redelineation of Carter's Brook, Middlesex County	19 N.J.R. 1933(b)		
7:13-7.1(d)	Redelineation of Lawrence, Ireland, Mae, Harry's and Oakeys brooks in Mercer and Middlesex counties	19 N.J.R. 1934(a)		
7:14A-1, 2, 3, 5, 10, 12	New Jersey Pollutant Discharge Elimination System	18 N.J.R. 2085(a)	R.1987 d.458	19 N.J.R. 2152(a)
7:14A-1, 2, 3, 5, 10, 12	New Jersey Pollutant Discharge Elimination System: comment period extended	18 N.J.R. 2411(a)		
7:14A-1.9, 12	Sewer connection bans	18 N.J.R. 2163(a)	R.1987 d.445	19 N.J.R. 2000(b)
7:14A-1.9, 12	Sewer connection bans: extension of comment period	19 N.J.R. 263(b)		
7:14A-6.4	Groundwater monitoring parameters for hazardous waste facilities	19 N.J.R. 1863(b)		
7:14A-8	NJPDES permit program: public notice and comment	19 N.J.R. 1864(a)		
7:14A-11.1	Hazardous waste management: public access to records and information	19 N.J.R. 1869(a)		
7:14B	Underground storage tanks	19 N.J.R. 1477(a)	R.1987 d.531	19 N.J.R. 2417(a)
7:22-3.4, 3.6-3.11, 3.13, 3.32, 4.4, 4.6-4.11, 4.13, 4.32, 5.11	Wastewater Treatment Financing Program	19 N.J.R. 1600(a)		
7:22-9	Wastewater treatment: contract awards to small, female, and minority-owned businesses	19 N.J.R. 1604(a)		
7:25-6	1988-99 Fish Code	19 N.J.R. 1385(a)		
7:25-18.5	Drifting and anchored gill net seasons; netting mesh in staked gill net fishery	19 N.J.R. 1609(a)		
7:26-1.1, 1.4, 1.6, 2.1, 7.5, 8.1, 8.2, 8.13, 8.15, 9.1, 10.7, 11.5, 11.6, 12.1, 12.3	Solid waste defined; hazardous waste recycling	19 N.J.R. 1035(a)	R.1987 d.534	19 N.J.R. 2426(a)
7:26-1.4, 8.2, 8.3, 8.5, 8.12, 8.14, 9.4, App. A, 12.1, 12.3, 12.5, 12.12	Hazardous waste management	19 N.J.R. 1936(a)		
7:26-1.9, 12.2, 17	Hazardous waste management: public access to records and information	19 N.J.R. 1869(a)		
7:26-2.13	Solid waste facilities: recordkeeping	19 N.J.R. 171(a)		
7:26-3.2, 3.4	Compliance with designated truck routes by solid waste registrants and operators	19 N.J.R. 1610(a)	R.1987 d.535	19 N.J.R. 2434(a)
7:26-6.5	Interdistrict and intradistrict solid waste flow: Hunterdon, Morris, Ocean and Warren counties	19 N.J.R. 1142(a)		
7:26-6.5	Interdistrict and intradistrict solid waste flow: Cumberland and Gloucester counties	19 N.J.R. 1481(a)		
7:26-8.13, 8.15, 8.16	Hazardous waste criteria	19 N.J.R. 1278(a)	R.1987 d.486	19 N.J.R. 2165(a)
7:26-8.14	Ethylene bisdithiocarbamic acid (EBDC) production	19 N.J.R. 1938(a)		
7:26-8.19, 10.6	Hazardous waste management: approval of alternate test methods; surface impoundments	19 N.J.R. 1482(a)	R.1987 d.514	19 N.J.R. 2278(a)

N.J.A.C. CITATION		PROPOSAL NOTICE (N.J.R. CITATION)	DOCUMENT NUMBER	ADOPTION NOTICE (N.J.R. CITATION)
7:26-9.1, 9.3, 10.4, 10.8, 11.4, 12.1, 12.2	Hazardous waste management	18 N.J.R. 2356(a)	R.1987 d.532	19 N.J.R. 2424(a)
7:26-9.1, 9.3, 10.4, 10.8, 11.4, 12.1, 12.2	Hazardous waste management: extension of comment period	19 N.J.R. 263(c)		
7:26-12.2	Hazardous waste facilities: application signatories	19 N.J.R. 11(b)		
7:26-14.1, 14A	Resource Recovery and Solid Waste Disposal Facility Loans	19 N.J.R. 828(a)		
7:26-15	Recycling Grants and Loans Program	18 N.J.R. 2358(a)	Expired	
7:26B	Environmental Cleanup Responsibility Act rules	19 N.J.R. 681(a)	R.1987 d.528	19 N.J.R. 2435(a)
7:27-16.1, 16.3	Stage II recovery of gasoline vapors	19 N.J.R. 1938(b)		
7:28-3	Registration of ionizing radiation-producing machines and radioactive materials	19 N.J.R. 836(a)	R.1987 d.485	19 N.J.R. 2167(a)
7:28-4	Naturally-occurring and accelerator-produced radioactive materials: handling and use	19 N.J.R. 1041(a)	R.1987 d.483	19 N.J.R. 2171(a)
7:28-5	Designation of controlled areas for use of radiation and radioactive materials	19 N.J.R. 839(a)	R.1987 d.484	19 N.J.R. 2180(a)
7:29B	Determination of noise from stationary sources	19 N.J.R. 1483(a)		
7:29B	Determination of noise from stationary sources: extension of comment period	19 N.J.R. 2092(a)		
7:31-1, 2, 3, 4	Toxic Catastrophe Prevention Act program	19 N.J.R. 1687(a)		
7:31-1, 2, 3, 4	Toxic Catastrophe Prevention Act program: extension of comment period	19 N.J.R. 2092(b)		
7:30	Pesticide Control Code	19 N.J.R. 1611(a)		
7:50	Pinelands Comprehensive Management Plan	18 N.J.R. 2239(a)	R.1987 d.436	19 N.J.R. 2010(a)

(TRANSMITTAL 1987-10, dated October 19, 1987)

HEALTH—TITLE 8

8:31B-3.7, 3.17, 3.27, 3.51, 3.55, 3.73, 4.42	Hospital reimbursement for existing capital indebtedness	19 N.J.R. 1145(a)		
8:31B-3.24, 3.51, 3.71, 3.73	Hospital reimbursement: indirect costs	19 N.J.R. 1147(a)		
8:31B-3.38	Apportionment of full financial elements	19 N.J.R. 1279(a)		
8:31B-4.38	Hospital reimbursement: uncompensated care coverage for outpatient dialysis	19 N.J.R. 2092(c)		
8:33E-1.1, 1.2, 1.3	Certificate of Need: cardiac diagnostic facilities	19 N.J.R. 1282(a)		
8:33E-2.2, 2.3, 2.4	Certificate of Need: cardiac surgery centers	19 N.J.R. 1283(a)		
8:33F-1.2, 1.4	Back-up and acute hemodialysis treatment: annual inpatient admissions for applicant hospital	19 N.J.R. 2093(a)		
8:33G-3.11	Long-term care beds for former psychiatric hospital patients	19 N.J.R. 614(a)		
8:33H-2.1, 3.1, 3.3, 3.5	"Specialized" long-term care; licensure track records; location of residential health care facilities	19 N.J.R. 1149(a)	R.1987 d.453	19 N.J.R. 2181(a)
8:33L	Home Health Agency Policy Manual: Certificate of Need review	19 N.J.R. 1483(c)	R.1987 d.452	19 N.J.R. 2184(a)
8:43E-1	Certificate of Need policy manual for health care facilities and services	19 N.J.R. 1872(a)		
8:43E-2	Psychiatric inpatient beds: adult open acute	19 N.J.R. 1873(a)		
8:43E-3	Psychiatric inpatient screening beds	19 N.J.R. 1875(a)		
8:43E-4	Children's acute psychiatric beds	19 N.J.R. 1876(a)		
8:43E-4	Child and adolescent acute psychiatric beds	19 N.J.R. 2094(a)		
8:43E-5	Intermediate adult and special psychiatric beds	19 N.J.R. 1877(a)		
8:61-2	Retrovir (AZT) reimbursement program	Emergency (expires 12-6-87)	R.1987 d.437	19 N.J.R. 2067(a)
8:65-7.14	Controlled substances: Schedule III and IV prescription refills	19 N.J.R. 1612(a)		
8:71	Interchangeable drug products (see 19 N.J.R. 641(a), 880(a), 1314(a), 1644(b), 2279(a))	19 N.J.R. 13(a)	R.1987 d.522	19 N.J.R. 2402(a)
8:71	Interchangeable drug products (see 19 N.J.R. 1312(b), 1644(a), 2278(b))	19 N.J.R. 615(a)	R.1987 d.520	19 N.J.R. 2400(a)
8:71	Interchangeable drug products (see 19 N.J.R. 2279(b))	19 N.J.R. 1488(a)	R.1987 d.521	19 N.J.R. 2401(a)
8:71	Interchangeable drug products: public hearing	19 N.J.R. 1878(a)		

(TRANSMITTAL 1987-9, dated October 19, 1987)

HIGHER EDUCATION—TITLE 9

9:1-7	Fraudulent academic degrees	19 N.J.R. 1284(a)	R.1987 d.430	19 N.J.R. 2053(a)
9:2-8	Petitions for rulemaking	19 N.J.R. 913(a)	R.1987 d.429	19 N.J.R. 2053(b)
9:6A	State college personnel system	19 N.J.R. 1613(a)		
9:7-2.3	Student assistance and foreign nationals	19 N.J.R. 2101(a)		
9:7-2.6	Independent student status	19 N.J.R. 2101(b)		
9:7-2.10, 2.11	Tuition Aid Grant benefits	19 N.J.R. 1153(a)	R.1987 d.440	19 N.J.R. 2054(a)
9:7-9.9, 9.11, 9.12	Congressional Teacher Scholarship Program	19 N.J.R. 2102(a)		
9:7-9.9, 9.11, 9.12, 9.15	Congressional Teacher Scholarship Program	19 N.J.R. 1154(a)	R.1987 d.441	19 N.J.R. 2055(a)

N.J.A.C. CITATION		PROPOSAL NOTICE (N.J.R. CITATION)	DOCUMENT NUMBER	ADOPTION NOTICE (N.J.R. CITATION)
9:9-1.12, 1.13, 1.16 9:9-3.5 9:11-1.3, 1.4	Repayment of student loans: nonconverted accounts Capitalization of PLUS loan interest Educational Opportunity Fund: eligible non-citizens; independent student status	19 N.J.R. 1619(a) 19 N.J.R. 498(b) 19 N.J.R. 2234(c)	R.1987 d.456	19 N.J.R. 2187(a)
9:11-1.4	Educational Opportunity Fund: student dependency status defined	19 N.J.R. 266(a)	R.1987 d.491	19 N.J.R. 2281(a)
9:11-1.5 9:11-1.7	EOF: financial eligibility for undergraduate grants Equal Opportunity Fund grants: graduate awards	19 N.J.R. 499(a) 19 N.J.R. 1879(a)	R.1987 d.492	19 N.J.R. 2282(a)

(TRANSMITTAL 1987-8, dated October 19, 1987)

HUMAN SERVICES—TITLE 10

10:4	Communication with communities regarding development of group homes	19 N.J.R. 1976(a)		
10:8	Personal needs allowance for indigent persons in State and county institutions	19 N.J.R. 617(a)		
10:49-1.3-1.6	HealthStart: comprehensive maternity and pediatric care services	19 N.J.R. 1978(a)		
10:49-1.4	Outpatient hospital services for Medically Needy	19 N.J.R. 1388(a)		
10:50-1.1-1.5, 2.3-2.8, 3.1, 3.2	Livery service for ambulatory Medicaid patients	19 N.J.R. 2103(a)		
10:51-1.6, 1.11, 1.16, 1.18, 3.5, 3.10, 3.14, 5.14, 5.18	Pharmacy Manual: payment limits for Medicaid and PAAD reimbursement	Emergency (expires 12-24-87)	R.1987 d.494	19 N.J.R. 2203(a)
10:51-1.17	Medicaid and PAAD: legend drug dispensing fee	19 N.J.R. 1711(a)	R.1987 d.530	19 N.J.R. 2402(b)
10:52-1.6, 1.8	Outpatient hospital services for Medically Needy	19 N.J.R. 1388(a)		
10:52-1.7	HealthStart	19 N.J.R. 1978(a)		
10:53-1.5, 1.7	Outpatient hospital services for Medically Needy	19 N.J.R. 1388(a)		
10:53-1.6	HealthStart	19 N.J.R. 1978(a)		
10:54-1.1, 1.2	HealthStart	19 N.J.R. 1978(a)		
10:58-1.2, 1.3	HealthStart	19 N.J.R. 1978(a)		
10:60-2.2	Personal care assistance services	19 N.J.R. 1489(a)	R.1987 d.451	19 N.J.R. 2188(a)
10:61-2.4, 2.5	Independent laboratories: standardized claim form	19 N.J.R. 1779(a)		
10:64-1.4, 2.1, 2.2, 2.5, 2.6, 3.5	Hearing aid providers: standardized claim form	19 N.J.R. 1779(a)		
10:66-1.3, 1.6	HealthStart	19 N.J.R. 1978(a)		
10:66-3.2	Personal care assistance services	19 N.J.R. 1489(a)	R.1987 d.451	19 N.J.R. 2188(a)
10:69C	Statewide Respite Care Program	19 N.J.R. 1712(a)		
10:81-7.46	PAM: reporting criminal offenses	19 N.J.R. 1389(a)	R.1987 d.449	19 N.J.R. 2056(a)
10:81-8.22, 14.20	PAM: extension of Medicaid benefits to certain employed persons	Emergency (expires 12-24-87)	R.1987 d.495	19 N.J.R. 2206(a)
10:81-8.23	Medicaid Special: pregnancy examinations	19 N.J.R. 1490(a)	R.1987 d.455	19 N.J.R. 2189(a)
10:81-11.4	PAM: recovery of child support overpayments	19 N.J.R. 1171(a)	R.1987 d.467	19 N.J.R. 2189(b)
10:81-11.7	Child support enforcement program	19 N.J.R. 1879(b)		
10:81-11.18	PAM: child support guidelines	18 N.J.R. 2178(a)	R.1987 d.498	19 N.J.R. 2282(b)
10:82-1.3, 4.16	ASH: household defined; court-ordered support	19 N.J.R. 31(b)		
10:82-2.6	Initial eligibility in AFDC	19 N.J.R. 1781(a)		
10:82-4.15	Lump sum income and AFDC eligibility	19 N.J.R. 1782(a)		
10:82-5.10	Emergency Assistance in AFDC program	19 N.J.R. 1171(b)	R.1987 d.466	19 N.J.R. 2190(a)
10:85-2.7	GAM: reporting criminal offenses	19 N.J.R. 1393(a)	R.1987 d.448	19 N.J.R. 2056(b)
10:85-3.5	GAM: monthly case reviews	19 N.J.R. 2111(a)		
10:85-4.6	Emergency Assistance in GA program	19 N.J.R. 1715(a)		
10:85-4.8	GAM: funeral and burial expenses	19 N.J.R. 1619(b)		
10:87-5.9	Food Stamps eligibility: income exclusion and utility allowance payments	19 N.J.R. 1986(a)		
10:87-12.1, 12.2	Food Stamp Program: income deductions and maximum coupon allotments	19 N.J.R. 1916(a)	R.1987 d.529	19 N.J.R. 2402(c)
10:89-2.2, 2.3, 3.2, 3.3, 3.4, 3.6, 4.1	Home Energy Assistance program	Emergency (expires 12-27-87)	R.1987 d.496	19 N.J.R. 2208(a)
10:90	Monthly Reporting Policy Handbook	19 N.J.R. 1517(a)	R.1987 d.454	19 N.J.R. 2193(a)
10:121A	Adoption Agencies: Manual of Standards	19 N.J.R. 1519(a)	R.1987 d.505	19 N.J.R. 2288(a)
10:124	Children's shelter facilities and homes	19 N.J.R. 1394(a)	R.1987 d.504	19 N.J.R. 2300(a)
10:131	Adoption Assistance and Child Welfare Act of 1980	19 N.J.R. 1285(a)	R.1987 d.503	19 N.J.R. 2301(a)

(TRANSMITTAL 1987-9, dated October 19, 1987)

CORRECTIONS—TITLE 10A

10A:3-4.1	Off-duty carrying of firearms	19 N.J.R. 1717(a)	R.1987 d.515	19 N.J.R. 2302(a)
10A:4-1.2	Girl's Unit at Skillman: disciplinary process	19 N.J.R. 1531(a)	R.1987 d.526	19 N.J.R. 2403(a)
10A:4-9.18	Inmate discipline: suspending sanctions	19 N.J.R. 1717(b)		
10A:6	Inmate access to courts	19 N.J.R. 914(a)	R.1987 d.444	19 N.J.R. 2057(a)
10A:8	Inmate orientation and handbook	19 N.J.R. 1531(b)	R.1987 d.459	19 N.J.R. 2194(a)
10A:9-2.1	Inmate reception classification process	19 N.J.R. 1395(a)	R.1987 d.460	19 N.J.R. 2195(a)
10A:9-4.5	Inmate classification: increasing custody status	19 N.J.R. 1782(b)		
10A:9-4.5	Reduction of inmate custody status	19 N.J.R. 2235(a)		
10A:10-6.3, 6.6	International transfer of inmates	19 N.J.R. 1620(a)		
10A:16-2.11	Pregnancy testing of new inmates	19 N.J.R. 1396(a)	R.1987 d.443	19 N.J.R. 2060(a)

(CITE 19 N.J.R. 2506)

NEW JERSEY REGISTER, MONDAY, DECEMBER 21, 1987

N.J.A.C. CITATION		PROPOSAL NOTICE (N.J.R. CITATION)	DOCUMENT NUMBER	ADOPTION NOTICE (N.J.R. CITATION)
10A:71-3.2, 3.4, 3.18-3.23, 3.25-3.28, 3.30, 3.43, 6.9	Parole Board rules	19 N.J.R. 1396(b)		

(TRANSMITTAL 1987-6, dated October 19, 1987)

INSURANCE—TITLE 11

11:1-25	Official department mailing list: address information	19 N.J.R. 2236(a)		
11:3-22.3	Submission of automobile coverage option survey	19 N.J.R. 2237(a)		
11:3-23	Dangerous drivers or drivers with excessive claims	19 N.J.R. 1880(a)	R.1987 d.527	19 N.J.R. 2403(b)
11:4-2	Replacement of life insurance policy	19 N.J.R. 1286(a)		
11:4-18.3, 18.5, 18.10	Individual health policies: loss ratio standards	19 N.J.R. 1620(b)		
11:4-28	Group coordination of health care benefits	19 N.J.R. 845(a)		
11:5-1.23	Full cooperation among real estate brokers and waiver of cooperation	19 N.J.R. 1621(a)		
11:5-1.23	Real estate licensee's obligation to disclose certain information concerning a property and to submit to a seller all written offers: pre-proposal	19 N.J.R. 2238(a)		
11:5-1.25	Sale of interstate real properties: advertisements	19 N.J.R. 1718(a)		
11:5-1.27	Real estate brokers pre-licensure course	19 N.J.R. 1051(a)		
11:13	Commercial lines insurance	19 N.J.R. 1783(a)	R.1987 d.512	19 N.J.R. 2302(b)
11:17-1, 2, 5	Insurance producer licensing: pre-proposed new rules	19 N.J.R. 2112(a)		

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LABOR—TITLE 12

12:15-1.3	Unemployment compensation and temporary disability: 1988 maximum weekly benefits	19 N.J.R. 1622(a)	R.1987 d.468	19 N.J.R. 2196(a)
12:15-1.4	Unemployment compensation: 1988 taxable wage base	19 N.J.R. 1623(a)	R.1987 d.469	19 N.J.R. 2196(b)
12:15-1.5	Unemployment compensation: 1988 contribution rate for governmental entities	19 N.J.R. 1624(b)	R.1987 d.473	19 N.J.R. 2196(c)
12:15-1.6	Base week earnings for claim eligibility	19 N.J.R. 1623(b)	R.1987 d.470	19 N.J.R. 2196(d)
12:15-1.7	Alternate earnings test	19 N.J.R. 1623(c)	R.1987 d.471	19 N.J.R. 2196(e)
12:18-2.13	Temporary Disability: approval of private plan coverage	19 N.J.R. 2238(b)		
12:60	Prevailing wages for public works	19 N.J.R. 345(b)		
12:100-2.1, 4.2, 5.2, 6.2	Public employees and hazardous waste operations	19 N.J.R. 1533(a)	R.1987 d.439	19 N.J.R. 2060(b)
12:100-4.2	Public employee safety and health: exposure to benzene	19 N.J.R. 2239(a)		
12:100-5.2, 6.2, 7	Public employees and exposure to toxic and hazardous substances	19 N.J.R. 267(a)		
12:110	Public employee occupational safety and health	19 N.J.R. 1941(a)		
12:190	Explosives	19 N.J.R. 1883(a)		
12:235-1.6	Workers' compensation: 1988 maximum weekly benefit	19 N.J.R. 1624(a)	R.1987 d.472	19 N.J.R. 2197(a)

(TRANSMITTAL 1987-3, dated October 19, 1987)

COMMERCE AND ECONOMIC DEVELOPMENT—TITLE 12A

(TRANSMITTAL 1987-2, dated September 21, 1987)

LAW AND PUBLIC SAFETY—TITLE 13

13:1-4.6	Police training: instruction in radar operation	19 N.J.R. 2123(a)		
13:21-21	Auto body repair facilities	19 N.J.R. 1624(c)		
13:27-3, 4	Architectural practice; definitions	19 N.J.R. 1783(b)		
13:27-5.8	Architects and certified landscape architects: licensing examination fees	19 N.J.R. 2123(b)		
13:27-8.14	Advertising by persons not certified as landscape architects	19 N.J.R. 400(a)	R.1987 d.480	19 N.J.R. 2197(b)
13:29-5	Board of Accountancy: Quality Enhancement Program	19 N.J.R. 2240(a)		
13:30-8.17	Designation of dentist of record for patient in multi-dentist facility	19 N.J.R. 1629(a)		
13:32-1	Rules of Board of Examiners of Master Plumbers	19 N.J.R. 1630(a)	R.1987 d.481	19 N.J.R. 2197(c)
13:33-1.41	Ophthalmic dispensers and technicians: Board of Examiners fees	19 N.J.R. 2242(a)		
13:35-1.5	Participation in medical residency programs	19 N.J.R. 2243(a)		
13:35-3.11	Post-graduate training of graduates of foreign medical schools	19 N.J.R. 1534(a)		
13:35-6.7	Medical examiners board: prescribing of amphetamines and sympathomimetic amine drugs	19 N.J.R. 1786(a)		
13:35-8	Hearing aid dispensers	19 N.J.R. 1949(a)		
13:36-2.1	Qualification as mortuary science intern	19 N.J.R. 2245(a)		
13:37-12.1	Board of Nursing fee schedule	19 N.J.R. 1886(a)	R.1987 d.536	19 N.J.R. 2405(a)
13:39	Board of Pharmacy rules	19 N.J.R. 1952(a)		
13:40-5.1	Corner markers and ultimate user of land survey	19 N.J.R. 1631(a)		
13:42-1.1, 3.1	Board of Psychological Examiners: oral examination process	19 N.J.R. 2246(a)		

N.J.A.C. CITATION		PROPOSAL NOTICE (N.J.R. CITATION)	DOCUMENT NUMBER	ADOPTION NOTICE (N.J.R. CITATION)
13:42-1.2	Board of Psychological Examiners: application, examination and licensure fees	19 N.J.R. 1632(a)		
13:44B-1	Compensation of professional and occupational licensing board members	19 N.J.R. 444(a)	R.1987 d.438	19 N.J.R. 2060(c)
13:44C	Practice of audiology and speech-language pathology	19 N.J.R. 1412(a)		
13:45A-12	Sale of dogs and cats	19 N.J.R. 853(a)		
13:45A-21, 22	Sale of Kosher food and food products	19 N.J.R. 1060(a)	R.1987 d.450	19 N.J.R. 2060(d)
13:45A-24	Sale of gray market merchandise	19 N.J.R. 179(a)		
13:45A-25.1	Sellers of health club services: registration fee	19 N.J.R. 1967(a)		
13:46-8.3, 8.12, 8.13	Boxing rules	19 N.J.R. 1787(a)		
13:46-12.13	Boxing show hygiene	19 N.J.R. 1886(b)		
13:47C-2.1	Meat, poultry, fish and shellfish sold by net weight	19 N.J.R. 1787(b)		
13:47C-2.5	Weights and measures: ready-to-eat foods	19 N.J.R. 2124(a)		
13:70-1.30	Thoroughbred racing: horsemen associations	19 N.J.R. 1418(a)		
13:70-20.11	Thoroughbred racing: entering or starting nerved horses	19 N.J.R. 1788(a)		
13:70-20.11	Thoroughbred racing: correction to proposal concerning nerved horses	19 N.J.R. 2124(b)		
13:71-1.25	Harness racing: horsemen associations	19 N.J.R. 856(a)		
13:71-20.23	Harness racing: nerving and registration of nerved horses	19 N.J.R. 2125(a)		
13:75-1.6	Violent crimes compensation: eligibility of claims	19 N.J.R. 1967(b)		
13:76-1.3, 3.1, 3.2, 5.1	Arson investigation training	19 N.J.R. 1788(b)		
13:77	Equitable distribution of forfeited property to law enforcement agencies	19 N.J.R. 1534(a)		

(TRANSMITTAL 1987-10, dated October 19, 1987)

PUBLIC UTILITIES—TITLE 14

14:3-7.12A	Residential electric and gas service during heating season	18 N.J.R. 2315(a)	R.1987 d.516	19 N.J.R. 2405(b)
14:10-1.16	Uniform system of accounts for telephone companies	19 N.J.R. 1789(a)		
14:11-6	Interest on fuel clause overrecoveries	19 N.J.R. 1967(c)		
14:18-3	Cable TV: pre-proposal for telephone service standards	19 N.J.R. 2125(b)		

(TRANSMITTAL 1987-6, dated September 21, 1987)

ENERGY—TITLE 14A

14A:3-4.1-4.6	Energy subcode	19 N.J.R. 433(b)	R.1987 d.387	19 N.J.R. 1793(a)
14A:3-7	Individual electric metering in residential buildings: repeal	19 N.J.R. 2247(a)		
14A:3-7, 9	Repeal (see 5:23-3.18)	19 N.J.R. 1862(b)		
14A:4-1.1-3.1	Solar energy property tax exemptions	19 N.J.R. 433(b)	R.1987 d.387	19 N.J.R. 1793(a)
14A:22-1.2, 2.1, 3.1, 3.2, 3.8, 4.1, 5.1, 8.1	Commercial and apartment conservation service program	19 N.J.R. 2247(b)		

(TRANSMITTAL 1987-3, dated September 21, 1987)

STATE—TITLE 15

15:10-6	Voting accessibility for elderly and handicapped	19 N.J.R. 2249(a)		
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(TRANSMITTAL 1987-1, dated February 17, 1987)

PUBLIC ADVOCATE—TITLE 15A

(TRANSMITTAL 1987-1, dated April 20, 1987)

TRANSPORTATION—TITLE 16

16:25	Utility accommodation on highway rights-of-way	19 N.J.R. 1064(a)		
16:25A	Soil erosion and sediment control on DOT projects	19 N.J.R. 2126(a)		
16:28-1.10, 1.18, 1.120	Speed rates along U.S. 46 in White Township, Route 34 in Matawan, and Route 38 in Burlington County	19 N.J.R. 1968(a)		
16:28-1.25, 1.79, 1.80	Speed limits along Routes 23 and 94 in Hamburg, Route 172 in New Brunswick	19 N.J.R. 1887(a)		
16:28-1.57	School zones along U.S. 30 in Lindenwold and Laurel Springs	Emergency (expires 12-24-87)	R.1987 d.493	19 N.J.R. 2211(a)
16:28A-1.5, 1.36, 1.38, 1.45	Parking restrictions along Routes 5, 57, 71, and 94	19 N.J.R. 1632(b)	R.1987 d.479	19 N.J.R. 2198(a)
16:28A-1.7, 1.15, 1.18, 1.22, 1.32	Parking restrictions along U.S. 9, Routes 23, 27, 31, and U.S. 46	19 N.J.R. 1633(a)	R.1987 d.478	19 N.J.R. 2199(a)
16:28A-1.7, 1.61	Parking restrictions along U.S. 9 in Middle Township and U.S. 9W in Tenaflly	19 N.J.R. 2253(a)		
16:28A-1.11, 1.33, 1.61	No parking zones along Routes 21 in Newark, 47 in Franklin, and U.S. 9W in Alpine	19 N.J.R. 1888(a)		
16:28A-1.15, 1.19	No parking zones along Route 23 in Pequannock and Route 28 in Garwood	19 N.J.R. 1889(a)		
16:28A-1.25, 1.33, 1.34, 1.100	Restricted parking on Routes N.J. 35 in Seaside, N.J. 47 in Glassboro, N.J. 49 in Salem, and N.J. 50 in Upper Township	19 N.J.R. 2127(a)		

(CITE 19 N.J.R. 2508)

NEW JERSEY REGISTER, MONDAY, DECEMBER 21, 1987

N.J.A.C. CITATION		PROPOSAL NOTICE (N.J.R. CITATION)	DOCUMENT NUMBER	ADOPTION NOTICE (N.J.R. CITATION)
16:29-1.18	No passing zones along Route 154 in Cherry Hill	19 N.J.R. 2253(b)		
16:30	Pre-proposal: Exclusive bus lane on Routes 3 and 495	19 N.J.R. 1421(b)		
16:30-4.2	Bicycle restrictions along Route 88 in Point Pleasant	19 N.J.R. 2254(a)		
16:30-9.1, 9.2	Restrictions on Morgan Bridge along Route 35, Middlesex County, and Veterans Memorial Bridge along Route 88, Point Pleasant	19 N.J.R. 2254(b)		
16:31-1.24	No left turn on Route N.J. 82 in Union	19 N.J.R. 2128(a)		
16:44-1.1	Contract administration: composition of Pre-qualification Committee	19 N.J.R. 1634(a)	R.1987 d.499	19 N.J.R. 2303(a)
16:56-4.1, 11.2	Airport safety improvement aid	19 N.J.R. 1634(b)	R.1987 d.465	19 N.J.R. 2200(a)

(TRANSMITTAL 1987-9, dated October 19, 1987)

TREASURY-GENERAL—TITLE 17

17:1-1.10	Positive or negative balances in retirement accounts	19 N.J.R. 2129(a)		
17:2-3.3	PERS: contributory insurance rate	19 N.J.R. 1636(a)	R.1987 d.510	19 N.J.R. 2303(c)
17:2-4.4	Public Employees' Retirement System: accrual of loan interest	19 N.J.R. 194(a)	R.1987 d.511	19 N.J.R. 2303(d)
17:4-7.1	Police and Firemen's Retirement System: transfer of service credit	19 N.J.R. 2255(a)		
17:9-6.1	State Health Benefits Program: coverage after retirement	19 N.J.R. 1636(b)	R.1987 d.497	19 N.J.R. 2303(b)
17:20-4	Licensure as ticket sales agent of State Lottery	19 N.J.R. 1969(a)		
17:20-7	Payment of State Lottery prizes	19 N.J.R. 1889(b)		
17:30	Urban Enterprise Zone Authority: comment period reopened	19 N.J.R. 354(a)		
17:32	State Planning Rules	19 N.J.R. 1971(a)		

(TRANSMITTAL 1987-8, dated August 17, 1987)

TREASURY-TAXATION—TITLE 18

18:2-2	Post tax amnesty	19 N.J.R. 2255(b)		
18:3-2.1	Tax rate on wine produced from New Jersey grapes	19 N.J.R. 1181(a)	R.1987 d.475	19 N.J.R. 2200(b)
18:5-3.6	Purchase of cigarette revenue stamps	18 N.J.R. 2378(b)	Expired	
18:5-12.2	Post tax amnesty	19 N.J.R. 2255(b)		
18:7-3.15, 11.12, 13.1, 13.7, 13.12, 13.13, 14.1, 14.3, 14.7, 14.13-14.17, 14.20	Post tax amnesty	19 N.J.R. 2255(b)		
18:8-4.5, -8	Post tax amnesty	19 N.J.R. 2255(b)		
18:9-8.5-8.7	Post tax amnesty	19 N.J.R. 2255(b)		
18:12-7.4	Homestead rebate and residents of continuing care retirement communities	19 N.J.R. 1637(a)	R.1987 d.477	19 N.J.R. 2201(a)
18:12-7.12	Homestead rebate: extension of filing deadline	Emergency	R.1987 d.537	19 N.J.R. 2498(a)
18:12A-1.6, 1.20	Filing cross-petition of appeal with county tax board	19 N.J.R. 2264(a)		
18:15-1.1	Woodland management plan: correction to proposal	19 N.J.R. 1640(a)		
18:15-1.1, 2.7-2.14	Farmland assessment: woodland in agricultural use	19 N.J.R. 1538(a)	R.1987 d.507	19 N.J.R. 2304(a)
18:15-1.1, 2.7-2.14	Woodland in agricultural use: operative date	19 N.J.R. 1640(b)		
18:18-8.11, 12.5, 12.7	Post tax amnesty	19 N.J.R. 2255(b)		
18:22-2.4, 8.4	Post tax amnesty	19 N.J.R. 2255(b)		
18:24-7.8	Sales of motor vehicles to military personnel stationed in State	19 N.J.R. 1181(b)	R.1987 d.474	19 N.J.R. 2201(b)
18:26-8.4, 9.8	Post tax amnesty	19 N.J.R. 2255(b)		
18:35-1.9, 1.18, 1.19, 1.20	Post tax amnesty	19 N.J.R. 2255(b)		
18:35-1.13	Sale of principal residence	19 N.J.R. 1182(a)	R.1987 d.476	19 N.J.R. 2201(c)
18:37-2.1, 2.2, -3, -4	Post tax amnesty	19 N.J.R. 2255(b)		
18:38	Litter control tax	19 N.J.R. 400(b)		

(TRANSMITTAL 1987-5, dated September 21, 1987)

TITLE 19—OTHER AGENCIES

19:4-6.28	Rezoning in Little Ferry	19 N.J.R. 53(b)		
19:4-6.28	Rezoning in East Rutherford	19 N.J.R. 1975(a)		
19:9-1.6	Sleeping in parked vehicles	19 N.J.R. 1637(b)		
19:9 Exh. A	Prequalification of bidders for widening contracts	19 N.J.R. 2129(b)		
19:17-2.1, 3.1-4.5	PERC Appeal Board procedure: rescheduled public hearing	19 N.J.R. 404(a)		
19:25-19.3	Personal financial disclosure: reporting of earned income	19 N.J.R. 1541(a)		

(TRANSMITTAL 1987-6, dated October 19, 1987)

TITLE 19 SUBTITLE K—CASINO CONTROL COMMISSION/CASINO REINVESTMENT DEVELOPMENT AUTHORITY

19:40-1.2	Affiliation and slot machine mix	19 N.J.R. 1890(a)		
19:45-1.1	Affiliation and slot machine mix	19 N.J.R. 1890(a)		
19:45-1.2, 1.46	Reporting of complimentary items and services	19 N.J.R. 1975(b)		
19:45-1.17	Storage of emergency drop boxes	19 N.J.R. 1290(a)	R.1987 d.457	19 N.J.R. 2202(a)

N.J.A.C. CITATION		PROPOSAL NOTICE (N.J.R. CITATION)	DOCUMENT NUMBER	ADOPTION NOTICE (N.J.R. CITATION)
19:45-1.33	Accuracy procedures for currency counting machines	19 N.J.R. 923(a)	R.1987 d.428	19 N.J.R. 2065(a)
19:45-1.33, 1.42, 1.43	Count times for cash and coin	19 N.J.R. 2265(a)		
19:46-1.32	Affiliation and slot machine mix	19 N.J.R. 1890(a)		
19:47-1.11	Rules of the games: craps	19 N.J.R. 1542(a)		
19:47-5.3	Roulette and "no more bets" procedure	19 N.J.R. 1638(a)		
19:47-8.2	Big Six minimum wagers	19 N.J.R. 858(b)	R.1987 d.433	19 N.J.R. 2066(a)
19:53-1.3, 1.13	Casino licensee's EEO/AA office	19 N.J.R. 1638(b)		
19:53-1.5	Pre-proposal: Affirmative action employment goals for handicapped or disabled persons	19 N.J.R. 1182(a)		
19:54-2.2	Affiliation and slot machine mix	19 N.J.R. 1890(a)		

(TRANSMITTAL 1987-7, dated October 19, 1987)

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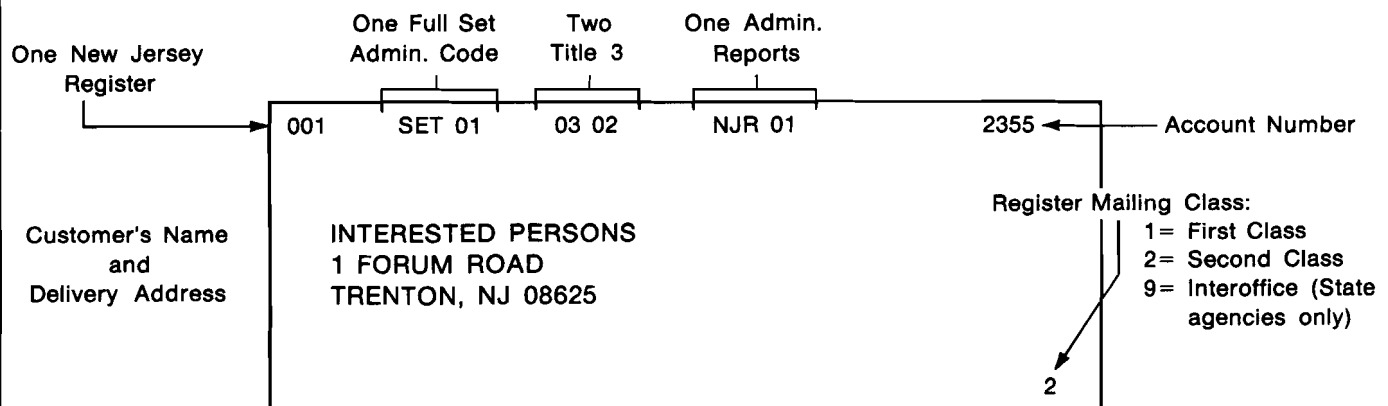
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