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(Includes adopted rules filed through May 13, 1988)

MOST RECENT UPDATE TO NEW JERSEY ADMINISTRATIVE CODE: MARCH 21, 1988
See the Register Index for Subsequent Rulemaking Activity.

NEXT UPDATE: SUPPLEMENT APRIL 18, 1988

RULEMAKING IN THIS ISSUE

RULE PROPOSALS

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INTERESTED PERSONS

Interested persons may submit, in writing, information or arguments concerning any of the rule proposals in this issue until **July 6, 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.

RULEMAKING IN THIS ISSUE—Continued

RULE ADOPTIONS

MISCELLANEOUS NOTICES

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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

AGRICULTURE

(a)

DIVISION OF DAIRY INDUSTRY
Sale of Milk in New Container Sizes
Proposed Repeal: N.J.A.C. 2:48-3.

Authorized By: Arthur R. Brown, Jr., Secretary, Department of Agriculture.
Authority: N.J.S.A. 4:12A-1 et seq., specifically 4:12A-20.
Proposal Number: PRN 1988-284.

Submit comments by July 6, 1988 to:
Woodson W. Moffet, Jr., Director
Division of Dairy Industry
New Jersey Department of Agriculture
CN 332
Trenton, New Jersey 08625

The agency proposal follows:

Summary

During late 1972, at a time when the Division of Dairy Industry fixed minimum prices for milk sold in New Jersey, the Division Director adopted rules at N.J.A.C. 2:48-3 which prevented the sale of milk in a container size for which no prices had been established. The rules provided for a hearing to establish a price for any new container.

On November 1, 1980, the rule fixing minimum prices for milk sold in New Jersey was repealed (see 12 N.J.R. 686(b)), but N.J.A.C. 2:48-3, requiring a hearing before a new container size is sold in New Jersey, was not, but should have been, repealed.

An inquiry from an interested party was received by the Director concerning whether sales of milk may be made in New Jersey in two container sizes which were not in use at the time N.J.A.C. 2:48-3 was adopted. Since the subchapter was not repealed, the inquirer was advised of the existence of the rules and told that steps would be taken immediately to repeal them. This repeal will clarify the Division's intent to not limit container sizes.

Social Impact

No adverse social impact will result from the proposed repeal of N.J.A.C. 2:48-3. The repeal will clear the way for milk containers of sizes not now marketed to be sold in New Jersey, potentially benefiting the dairy industry, retailers and consumers.

Economic Impact

The proposed repeal will have a potentially positive impact on the market for fluid milk as the way will now be open for additional milk container sizes to be offered for sale in New Jersey.

Regulatory Flexibility Statement

The proposed repeal will have a positive impact on both large and small businesses in the fluid milk marketplace, since such businesses will now be able to sell milk in containers which have not been marketed in prior years.

Full text of the proposed repeal can be found in the New Jersey Administrative Code at N.J.A.C. 2:48-3.

(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 and 2.5.

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 1988-290.

Submit comments by July 6, 1988 to:
Robert C. Fringer, Director
Division of Regulatory Services
New Jersey Department of Agriculture
CN 330
Trenton, New Jersey 08625
Telephone: (609) 292-5575

The agency proposal follows:

Summary

The proposed amendments to the voluntary "Jersey Fresh Logo" program were developed at the request of farmers to add herbs, leeks and big Boston lettuce to the program. In addition, for parsley, a pack of 60 bunches per bushel is proposed.

The proposed amendments to the rules for the voluntary "Jersey Fresh Logo" quality grading program were developed to aid packers to allow them to participate in the Jersey Fresh program. Uniform high grade products have greater acceptance by the consumer and ultimately increase the demands for the superior quality of these New Jersey grown products.

Social Impact

The people affected by these amendments will be the packers using the logo and 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 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. The packers' cost for the rubber stamp is $75.00 the first year and $50.00 thereafter.

Regulatory Flexibility Statement

The proposed amendments primarily affect farmers, most of which are small businesses; however, the amendments do 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.

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, **herbs (fresh), leeks, big Boston lettuce,** iceberg lettuce, nectarines, okra, common green onions, parsley, peaches, sweet peppers, sweet potatoes, white potatoes, raspberries, romaine, summer squash, fall and winter 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:

1.-.10 (No change.)

11. Herbs (fresh) shall be clean, have characteristic color and shall not be affected by discoloration, wilting, freezing, mechanical damage or by other means. Herbs shall be free from decay. All containers shall be new. In order to allow for variations incident to proper grading and handling, the following tolerances, by weight, are provided: five percent in any lot which fail to meet the requirements, including therein not more than one-half of one percent affected by decay. Individual packages in a lot may contain not more than double the tolerance specified, provided that at least one defective specimen may be permitted in any package and, provided further, that the average for the entire lot is within the tolerance specified.

12. Big Boston lettuce shall be U.S. No. 1 grade, or better. The heads shall be fairly uniform in size. The containers shall have a tight pack, provided the heads are not individually packaged. All containers shall be new.

Recodify existing 11. as **13.** (No change in text.)

14. Leeks shall be fairly clean, tops and bulbs shall be characteristic color. Tops and bulbs must not be affected by discoloration, wilting, freezing, mechanical damage or by other means. Plants shall be free from decay. If tops are trimmed, it must be done so as not to materially affect the appearance of the individual plant. In order to allow for variations incident to proper grading and handling, the following tolerances, by count, are provided: ten percent for plants in any lot which fail to meet the requirements, including therein not more than one percent for plants affected by decay. Individual packages in a lot may contain not more than one and one-half times the tolerance specified, provided that the average for the entire lot is within the tolerance specified. All containers shall be new.

Recodify existing 13. through 15. as **15. through 17.** (No change in text.)

[16.] **18.** Parsley shall be U.S. No. 1 grade. **The pack shall be for 60 bunches per bushel.** All containers shall be new.

Recodify existing 17. through 25. as **19.-27.** (No change in text.)

COMMUNITY AFFAIRS

DIVISION OF HOUSING AND DEVELOPMENT

The following proposal are authorized by Leonard S. Coleman, Jr., Commissioner, Department of Community Affairs.

Submit comments by July 6, 1988 to:
Michael L. Ticktin, Esq.
Administrative Practice Officer
Department of Community Affairs
CN 802
Trenton, NJ 08625

(a)

Uniform Construction Code
One and Two Family Dwelling Subcode
Proposed Amendment: N.J.A.C. 5:23-3.21

Authority: N.J.S.A. 52:27D-124.
Proposal Number: PRN 1988-276.

The agency proposal follows:

Summary

This proposed amendment incorporates into the State Uniform Construction Code 1987 and 1988 amendments made to the 1986 edition of the Council of American Building Officials (CABO) One and Two Family Dwelling Code.

CABO, which is referenced in the Building Officials and Code Administrators International Building Code (BOCA) which New Jersey has adopted as its model code, with amendments, is amended annually and reissued every three years. The amendment process of which New Jersey is a part, is conducted at a national public forum which enables the codes to rapidly respond to building technology.

Social Impact

This proposed amendment serves the purpose of protecting public health, safety and welfare through efficient and effective use of available materials and current construction technology. The amendment will impact on those involved in the construction or alteration of one and two family dwellings.

Economic Impact

The economic impact of changes to the CABO code is limited because the code is merely an option for those building or altering one and two family dwellings. Such persons may, according to state law, meet the State Uniform Construction Code based on the Building Officials and Code Administrators National Building Code (BOCA/1987) instead.

In general, changes may affect property owners, builders, and row material and component manufacturers who supply the building trade. In some instances, the new code provisions may result in savings and in other instances costs may increase. It is impossible to anticipate these economic impacts as the future extent and type of building in the State cannot be precisely forecasted.

Regulatory Flexibility Statement

There is no identifiable impact on small business as a result of these proposed amendments. A greater latitude with respect to permissible stair shape should prevent some manufacturers from having to retool and should, therefore, result in a saving.

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

5:23-3.21 One and two family dwelling subcode

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

(c) The 1987 and 1988 amendments to "The CABO One and Two Family Dwelling Code/1986" are adopted with the following modifications:

1. Section R-109.3 is deleted.

2. The amendments to chapters 20, 22, 23 and 24 are deleted.

(b)

Uniform Construction Code
Asbestos Hazard Abatement Subcode
Proposed Amendments: N.J.A.C. 5:23-8.1, 8.2, 8.4 through 8.22
Proposed New Rules: N.J.A.C. 5:23-8.3, 8.16, 8.23 and 8.24
Proposed Repeal: N.J.A.C. 5:23-8.15

Authority: N.J.S.A. 52:27D-124 and 34:5A-32
Proposal Number: PRN 1988-277.

The agency proposal follows:

Summary

The Department of Community Affairs, in cooperation with the Departments of Health and Labor, seeks to modify the existing Asbestos Hazard Abatement Program rules at N.J.A.C. 5:23-8. Asbestos, a material used in buildings to provide fire protection, has been found to create a health hazard in certain situations in which its fibers can get into the air.

Since the work of asbestos removal or containment necessarily involves alteration or repair of buildings, it must be done in accordance with the State Uniform Construction Code (N.J.A.C. 5:23). The proposed amendments and new rules implement United States Environmental Protection Agency regulation 40 CFR 763. Proposed N.J.A.C. 5:23-8.23 mandates the use of Transmission Electron Microscopy (TEM) for local education agencies according to the aforementioned regulations. The proposed new rules also address the removal of non-friable asbestos-containing material for both interior spaces and the exterior of buildings in N.J.A.C. 5:23-8.24.

Additionally, N.J.A.C. 5:23-8.16 (Duties of the asbestos safety technician) has been substantially revised and portions now appear in a new section, N.J.A.C. 5:23-8.23 (Air monitoring methodology).

Other amendments to N.J.A.C. 5:23-8 are proposed to improve the rules based upon experience of the past year and since the last amendments, those of December 21, 1987.

N.J.A.C. 5:23-8, which concerns asbestos abatement, contains rules which deal with the authorization of asbestos safety control monitor firms, certification of asbestos safety technicians, permits, fees, licenses, certifications, required reports and documentations, inspection requirements, air monitoring, enforcement responsibilities and safe work practices. These rules will apply to educational facilities and public buildings, as defined in N.J.A.C. 5:23-8.2.

Social Impact

With the amendments to N.J.A.C. 5:23-8, the Department will continue to implement an asbestos removal and containment program that will protect the health and welfare of people using those educational facilities and public buildings subject to these rules in which asbestos is now present.

Economic Impact

The proposed amendments and new rules will impose no costs other than those already imposed by the Federal government through 40 CFR 763. However, the procedure contained in the Federal regulation for asbestos removal will clearly impose costs upon property owners that would not otherwise exist. These costs will vary in proportion to the size of the building area affected, the amount of asbestos to be removed, and the complexity of the removal job, and the air analysis method used for the final clearance level of the work area.

Regulatory Flexibility Statement

There will be a minor increase in the reporting requirements for all asbestos abatement businesses covered by the proposed amendments. However, since, to the Department's knowledge, all of these businesses would be deemed to be small businesses for purposes of the Administrative Procedure Act, no differential treatment for small businesses and non-small businesses is possible and, even if it were, such treatment would not be warranted since asbestos removal is a matter directly affecting health, safety and welfare of the public and must be accomplished in the most efficient manner possible and in accordance with Federal rules.

Full text of the proposed repeal may be found in the New Jersey Administrative Code at N.J.A.C. 5:23-8.15.

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

5:23-8.1 Title; scope; intent

(a) This part of the regulations, adopted pursuant to [c.217,] P.L. 1975, **c.217,** 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, **c.217,** 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. (No change.)

ii. Copies of N.J.A.C. 12:120 may be obtained from the New Jersey Department of Labor, Division of Workplace Standards, CN 054, Trenton, New Jersey 08625-0054. **These rules provide that any asbestos abatement project must be conducted by a licensed contractor pursuant to the referenced rules, including projects involving buildings and structures which are not within the scope of this subchapter.**

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. 13:1D-9, 13:1E-1 et seq. [and] **These rules** are cited as N.J.A.C. 7:26[-1 et seq.].

i. (No change.)

3. All samples collected and submitted for analysis for asbestos pursuant to this subchapter shall be analyzed for asbestos in accordance with N.J.A.C. 5:23-8.23.

(b) (No change.)

(c) This subchapter, which pertains to [E]educational [F]facilities **and public buildings** 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. **This subchapter controls the removal of asbestos from a building. A construction permit for renovation or demolition shall be required pursuant to N.J.A.C. 5:23-2 for any other work performed subsequent to the asbestos abatement project.**

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] **project** 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] **project** 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] **project** takes place within the building or any part of the building.

3. This subchapter shall apply to exterior portions of buildings, such as: exterior hallways connecting buildings; porticos; mechanical system insulation; cooling towers; and steam or other service tunnels serving or connecting buildings. These exterior spaces are to be considered, for the purposes of obtaining a construction permit pursuant to this subchapter, a single homogeneous area for purposes of removal project design.

4. Projects involving the removal of non-friable, miscellaneous asbestos-containing material for interior spaces are under the jurisdiction of this subchapter when the method chosen to remove the non-friable material will cause the building environment to become contaminated with airborne fibers such as grinding the surface of vinyl floor tiles. Removal shall be in accordance with N.J.A.C. 5:23-8.24.

(d)-(e) (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.

. . .

"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 (cummingtonite-grunerite); **anthophyllite; tremolite and actinolite.**

. . .

"Construction permit for asbestos abatement" means required official approval to commence any asbestos hazard abatement [job] **project.** This permit is issued by the administrative authority having jurisdiction.

. . .

"Decontamination unit" means serial arrangement of rooms or spaces for the purpose of separating the work [site] **area** from the building environment upon entering the work [site] **area** 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 reentry shall be .010 fibers/cc.]

. . .

"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.] **the treatment of asbestos-containing materials with a material that surrounds or embeds asbestos fibers in an adhesive matrix to prevent the release of fibers, as the encapsulant creates a membrane over the surface (bridging encapsulant) or penetrates the material and binds its components together (penetrating encapsulant).**

"Enclosure" means [an impermeable barrier (made of wood, metal, etc.) placed around asbestos-containing material.] **the construction of an airtight, impermeable, permanent barrier around asbestos-containing material to control the release of asbestos fibers into the air.**

. . .

"Engineering controls" means all methods used to maintain low work [site] **area** fiber counts, including air management and barriers to assure public safety.

"EPA" means the United States Environmental Protection Agency.

"Friable" means any material applied to ceilings, walls, piping, duct work, etc., which when dry may be crumbled, pulverized, or reduced to a powder by [moderate] hand pressure.

. . .

"Large asbestos hazard abatement [job] **project**" 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.

"Local education agency" means any local educational agency as defined in Section 198 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 3381); the owner of any nonpublic, nonprofit elementary, or secondary school building; or the governing authority of any school operated under the defense dependents' education system provided for under the Defense Dependents' Education Act of 1978 (20 U.S.C. 921 et seq.).

"Minor asbestos hazard abatement [job] **project**" 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] **project**.

"Miscellaneous asbestos-containing material" means interior building material on structural components, structural members or fixtures such as vinyl flooring, ceiling tiles, transite and asbestos cement board, and fire-resistant gaskets and seals but does not include surfacing material or thermal system insulation.

. . .

"Non-friable" means material in a building which when dry may not be crumbled, pulverized, or reduced to powder by hand pressure.

"PCM" means Phase Contrast Microscopy.

. . .

"Public building" means any building or structure or part thereof, whether owned, leased or otherwise used, in which any public employees of the State, any county or any municipality including any department, division, bureau, board, council, agency or authority of the State, county or municipality, or of any special district, authority, bi-state or multi-state agency, are regularly present for purposes of work or training.

"Removal" means the taking out or the stripping of asbestos-containing material from a building or structure.

"Repair" means returning damaged asbestos-containing material to an undamaged condition or to an intact state using recommended work practices so as to prevent the likelihood of fiber release.

. . .

"Small asbestos hazard abatement [job] **project**" 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.

. . .

"Surfacing asbestos-containing material" means material in a building that is sprayed-on, troweled-on, or otherwise applied to surfaces, such as acoustical plaster on ceilings and fireproofing materials on structural members, or other materials on surfaces for acoustical, fireproofing or other purposes.

"TEM" means Transmission Electron Microscopy.

"Thermal system insulation" means material in a building applied to pipes, fittings, boilers, breeching, tanks, ducts, or other interior structural components to prevent heat loss or gain, or water condensation, or for other purposes.

. . .

5:23-8.3 Pre-project procedures

Before an asbestos abatement project begins, the owner shall ensure that all surfaces in the work area have been HEPA vacuumed and wet-wiped in order to remove any dust which is asbestos-containing material and might therefore interfere with the final inspection and final air clearance level needed to reoccupy the building. The surfaces to be cleaned shall include, but not be limited to, all horizontal and vertical surfaces and such inside spaces as room ventilators, storage lockers, and utility and storage closets. The cleaning shall be accomplished by trained employees of the building owner as delineated in this subchapter before the asbestos abatement project begins or it shall be made part of the scope of work of an asbestos abatement project to be completed by the licensed contractor.

5:23-[8.3]**8.4** Enforcement; licensing; special technical services

(a) (No change.)

(b) Except as is otherwise provided in **(b)**1[.] below, the joint regulations adopted by the New Jersey Departments of Health and Labor, which are cited as N.J.A.C. 8:60 and N.J.A.C. 12:120, respectively, provide the licensing requirements of contractors who perform any of the functions of application, enclosure, removal or encapsulation.

1. Rules concerning licenses are as follows:

i. A licensed contractor shall be required for a large asbestos hazard abatement [job] **project** or a small asbestos hazard abatement [job] **project**.

ii. A licensed contractor shall not be required for a minor asbestos hazard abatement [job] **project**.

(c) (No change.)

5:23-[8.4]**8.5** Minor asbestos hazard abatement [job] **project**

(a) Minor asbestos hazard abatement [job] **project**, as defined in N.J.A.C. 5:23-8.2, involves asbestos abatement work which may be [made] **performed** 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 **also** be considered a minor asbestos hazard abatement [job] **project. Examples of minor work include, but are not limited to, corrective action which includes removal, repair, encapsulation and enclosure of asbestos-containing insulation on pipes, beams, walls or ceilings, etc.; incidental disturbance or routine maintenance activities which may involve or be near to asbestos-containing material; clean up of asbestos debris from a floor; and maintenance activities which may include the removal of small quantities of asbestos-containing material, if required in the performance of another maintenance activity not intended as asbestos abatement, or minor repair to damaged insulation which do not require removal.**

1. (No change.)

(b) [This] **Minor asbestos hazard abatement** 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 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. **Any public employee physically involved in maintenance or abatement activities of asbestos-containing material, and who may thus be exposed to airborne fibers, shall wear a powered air purifying respirator (PAPR).**

(c) Work practices used either singly or in combination to effectively reduce asbestos exposure during small maintenance and renovation operations shall employ wetting methods, glove bags, and mini-enclosures as may be appropriate.

1. Preparation of the area before renovation or maintenance activities, regardless of the abatement method that will be used, shall include the wet-wiping and HEPA vacuuming of all objects that are to be removed from the work area to protect them from asbestos contamination. Objects that cannot be removed shall be wet-wiped, HEPA-vacuumed and covered completely with a minimum of two layers of six mil polyethylene plastic sheeting before the work begins.

2. Wetting methods requirements are as follows:

i. Wetting methods shall be used whenever asbestos-containing materials are disturbed.

ii. Asbestos materials shall be wetted using amended water or another wetting agent applied by means of an airless sprayer to minimize the disturbance of asbestos-containing material. Asbestos-containing material shall be wetted from the initiation of the maintenance or renovation operation that disturbs asbestos-containing material and the wetting agents shall be used continually throughout the work period to ensure that any dry asbestos-containing material exposed in the course of the work is wet and remains wet until final disposal.

3. Glove bag work practices requirements are as follows:

i. The glove bag procedures delineated in N.J.A.C. 5:23-8.14 shall be followed when removing asbestos-containing material from pipes, pipe fittings and elbows.

4. Mini-enclosures requirements are as follows:

i. In order to reduce the size of the containment area, a mini-enclosure may be built around a work area. This might appropriately be done, for example, when the removal of asbestos is from a small ventilation system or from a short length of duct in which a glove bag is either not large enough or not of the proper shape to enclose the work area. Such enclosures shall be constructed of a minimum of two layers of six mil polyethylene plastic sheeting and shall be small enough to restrict entry into the asbestos work area to one worker. For example, a mini-enclosure can be built in a small utility closet when asbestos-containing material is to be removed from it.

ii. A mini-enclosure is not required for incidental disturbance of asbestos-containing material.

iii. The enclosure shall be constructed using the following steps:

(1) Affixing plastic sheeting to the walls with spray adhesive and/or high quality duct tape;

(2) Covering the floor with plastic and sealing the plastic covering of the floor to the plastic on the walls; and

(3) Sealing any penetrations which may occur due to pipes, electrical conduits and the like with a minimum of two layers of six mil polyethylene plastic sheeting and tape.

iv. The construction of a small change room (approximately three feet square) shall be made of a minimum of two layers of six mil polyethylene plastic sheeting supported by at least two by four inch lumber. The change room shall be adjacent to the mini-enclosure and is necessary to allow persons who enter to vacuum off and remove disposable protective coveralls, before leaving the work area.

[(c)]**(d)** Specific records of each minor asbestos hazard abatement [job] **project** 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 work [site] **area** within the building.

ii.-vii. (No change.)

2. A copy of this information shall be sent to the administrative authority having jurisdiction each time a minor asbestos hazard abatement [job] **project** takes place.

(e) A certificate of occupancy or completion is not required for a minor asbestos hazard abatement project.

5:23-[8.5]**8.6** 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] **a recommendation** in writing from the asbestos safety control monitor firm [, and]. **Any variation** 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 [d]**D**epartment, and obtained by the authorized asbestos safety control monitor firm. The [New Jersey] Department[s] 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 [d]**D**epartment along with the number of intended occupants and their purpose, location within the building and **the** 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.

i. The fee for an application for a variation shall be $325.00 and shall be paid by check or money order, payable to the "Treasurer, State of New Jersey".

(b) (No change.)

5:23-[8.6]**8.7** Construction permit for asbestos abatement

(a) It shall be unlawful to undertake a large or small, but not a minor, asbestos hazard abatement [job] **project** unless the owner **of the facility**, or an authorized representative on behalf of the owner, first files an application in writing with the administrative authority having jurisdiction and obtains the required permit. This permit shall serve as notice for public record in the office of the administrative authority having jurisdiction. All work shall be monitored and controlled by the [A]**a**sbestos [S]**s**afety [C]**c**ontrol [M]**m**onitor, who will advise the administrative authority having jurisdiction of its findings. All asbestos abatement work shall be conducted in unoccupied buildings, unless the work area can be properly separated and sealed off from the occupied portion of the building as approved by the New Jersey Departments of Community Affairs and Health (and New Jersey Department of Education for public school projects). The type of asbestos abatement work to be performed and the amount of asbestos to be removed, encapsulated, enclosed or repaired shall be the governing factor in determining whether it is considered a large asbestos hazard abatement [job] **project**, a small asbestos hazard abatement [job] **project** or a minor asbestos hazard abatement [job] **project**.

1. (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, **which shall be** prepared by the New Jersey Department of Health, **or by a** county or local department of health or a private [business entity] **individual** [authorized by the New Jersey Department of Health] **who has received accreditation under the United States Environmental Protection Agency's Model Accreditation Program as referenced in 40 CFR 763. The accreditation will be issued by an EPA-approved training agency, and that accreditation will include the place of training, accreditation number and expiration date. Accreditations are issued for one year. This assessment shall be required** unless the requirement for an assessment has been waived **in writing by the New Jersey Department of Health;**

iii. The name and address of the private air monitoring firm, hired by the building owner, **who** shall act as the [A]**a**sbestos [S]**s**afety [C]**c**ontrol [M]**m**onitor authorized by the New Jersey Department of Community Affairs [who will] **and shall** be responsible for continuously monitoring the asbestos abatement project;

iv. Plans and specifications (not less than three sets) indicating: the scope of the proposed work; **whether the project is a small or large asbestos hazard abatement project; listing the total amount of square and/or linear footage of asbestos-containing material to be abated;**[, and] the provisions proposed to contain the asbestos-containing material during abatement work showing but not limited to separation barriers, primary seal/critical barriers, **and the** route of travel of removing asbestos waste from the work [site] **area**[,]; a copy of the site plan; and a floor plan indicating exits.

v. Documentation that all buildings, except as approved by the **Department after consultation with the** New Jersey Department of Health[,] **or** Education [or Community Affairs], as appropriate, will be unoccupied at the time an asbestos abatement [job] **project** takes place. A building may be occupied only if the work area can be properly separated and sealed off from the occupied portion of the building **and a variation for occupancy is obtained from the Department pursuant to N.J.A.C. 5:23-8.6.**

vi.-vii. (No change.)

viii. The method of air analysis used pursuant to N.J.A.C. 5:23-8.23 for determining the final clearance level in order to reoccupy the building.

3. (No change.)

(c) The issuance of a construction permit for asbestos abatement shall be subject to the following:

1. (No change.)

2. The described work and containment measures **shall** conform to the requirements of this subchapter and the requirements of any other applicable law or [regulation] **rule** adopted or enforced by any other State agency;

3.-5. (No change.)

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

(f) The owner or his **or her** agent shall notify the [d]**D**epartment 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 [d]**D**epartment. 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] **Code Services**
Asbestos [Hazard Abatement Section] **Safety Unit**
CN 805
Trenton, N.J. 08625-0805

(g) The owner or his **or her** agent shall notify the [U.S. Environmental Protection Agency] **following** in writing 10 days prior to the start of the asbestos abatement project.

1. Notification shall be sent to:

i. U.S. Environmental Protection Agency
Asbestos NESHAPs contact
Air and Waste Management Division
USEPA
26 Federal Plaza
New York, New York 10007; **and**

ii. New Jersey Department of Community Affairs
Bureau of Code Services
Asbestos Safety Unit
CN 805
Trenton, N.J. 08625-0805

5:23-[8.7]**8.8** Inspections; violations

(a) Pre-commencement inspections shall be conducted as follows:

1. Notification in writing to the Asbestos Safety Control Monitor shall be made by the applicant or contractor to request a pre-commencement inspection at least 48 hours in advance of the desired date of inspection. This inspection shall be requested each time another work[site] **area** is started in a multi-phase project.

2. The [A]**a**sbestos [S]**s**afety [T]**t**echnician, or another certified asbestos safety technician designated by the asbestos safety control monitor, shall ensure that:

i. The [job site] **work area** is properly prepared and that all containment measures are in place pursuant to this subchapter;

ii.-iii. (No change.)

iv. The contractor has a list of emergecny telephone numbers at the [job site] **work area** which shall include the [A]**a**sbestos [S]**s**afety [C]**c**ontrol [M]**m**onitor 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. If all is in order, the [A]**a**sbestos [S]**s**afety [T]**t**echnician, or another certified asbestos safety technician designated by the asbestos safety control monitor, shall issue a written notice to proceed with the asbestos removal in the field. If the [job site] **work area** is not in order, then any needed corrective action must be taken before any work is to commence. Conditional approvals shall not be granted.

4. The Department reserves the right to make a pre-commencement inspection in addition to the required pre-commencement inspection conducted by the asbestos safety technician before a written notice to proceed is issued.

(b) Progress inspections shall be conducted as follows:

1. Primary responsibility for ensuring that the asbestos abatement work progresses in accordance with this subchapter rests with the [A]**a**sbestos [S]**s**afety [T]**t**echnician. This [A]**a**sbestos [S]**s**afety [T]**t**echnician shall continuously be present to observe the progress of work and perform required inspections and tests.

2. If the [A]**a**sbestos [S]**s**afety [T]**t**echnician observes irregularities at any time, the [A]**a**sbestos [S]**s**afety [T]**t**echnician shall direct such corrective action as may be necessary. [If the contractor fails to take the corrective action required, or if the contractor or any of their employees habitually and/or excessively violate the requirements of any regulation, then the Asbestos Safety Technician shall order the work stopped in writing. If the contractor fails to comply with the order, then the asbestos safety technician shall notify the administrative authority having jurisdiction who shall issue a Stop Work Order to the contractor, have the work site secured until all violations are abated and assess a penalty of $500 which shall not be waived or settled for any reason].

3. (No change.)

(c) Clean-up inspections shall be conducted as follows:

1.-2. (No change.)

3. The [A]**a**sbestos [S]**s**afety [T]**t**echnician, or another certified asbestos safety technician designated by the asbestos safety control monitor, shall ensure that:

i. The work [site] **area** has been [properly] **thoroughly** cleaned and is free of **all** visible asbestos-containing material **and dust; and**

ii. (No change.)

4. If all is in order, the [A]**a**sbestos [S]**s**afety [T]**t**echnician, or another certified asbestos safety technician designated by the asbestos safety control monitor, shall issue a written notice of authorization to remove barriers from the [job site] **work area**.

(d) Final inspections shall be conducted as follows:

1. Upon notice by the owner or by the contractor and [at least] **within** 48 hours after the removal of the critical barriers, a final inspection shall be made to ensure the absence of any visible signs of asbestos or asbestos-containing materials and that all removed asbestos and asbestos contaminated materials have been properly disposed of off-site in accordance with the [regulations] **rules** of the New Jersey Department of Environmental Protection, N.J.A.C. 7:26[-1 et seq.], **which is referenced in N.J.A.C. 5:23-8.15.**

[NOTE: A vehicle registered by the New Jersey Department of Environmental Protection shall be used.]

2. The Department reserves the right to make a final inspection in addition to the required final inspection conducted by the asbestos safety technician before a certificate of occupancy is issued by the administrative authority having jurisdiction.

(e) Department inspections shall be conducted as follows:

1. The Department shall make unannounced periodic inspections of any [job-site] **work area** involving asbestos abatement work.

(f) Violations: The [A]**asbestos** [S]**safety** [T]**technician** shall ensure that the work conforms to this subchapter. If it is found that the asbestos abatement work is being conducted in violation of this subchapter, the [A]**asbestos** [S[]**safety** [T]**technician** shall [in writing order the work stopped] **direct such corrective action as may be necessary**. If the contractor fails to comply with [the order] **the corrective action required, or if the contractor or any of their employees habitually and/or excessively violate the requirement of any rule**, then the asbestos safety technician shall **order, in writing, that the work be stopped. If the contractor fails to comply with the order, then the asbestos safety technician shall** notify the administrative authority having jurisdiction who shall issue a stop work order to the contractor, have the work area secured until all violations are abated, and assess a penalty of $500.00 which shall not be reduced or settled for any reason.

5:23-[8.8]**8.9** 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 [d]**Department** may prescribe and shall be accompanied by the required fee as provided for in this subchapter.

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 [C]**completion** requirements are as follows:

1. (No change.)

2. Within 5 days of completion of an asbestos hazard abatement [job] **project**, the owner/agent shall file for a certificate of completion from the asbestos safety control monitor.

3. (No change.)

4. A certificate of completion shall be issued only if:

i.-iii. (No change.)

iv. **An acceptable** [F]**final** air monitoring level [of .010 fibers per cc or lower] has been attained **pursuant to N.J.A.C. 5:23-8.23 and submitted in writing.**

5:23-[8.9]**8.10** Fees

(a) (No change.)

(b) The authorization and reauthorization fees for the [A]**asbestos** [S]**safety** [C]**control** [M]**Monitor** are [defined] **delineated** in N.J.A.C. 5:23-[8.17]**8.18**.

(c) The application fee for certification as an asbestos safety technician is delineated in N.J.A.C. 5:23-8.19.

5:23-[8.10]**8.11** Precautions and procedures during a large asbestos hazard abatement [job] **project**

(a) Protective clothing and equipment for asbestos abatement shall be subject to the following requirements:

1. The contractor shall provide the required respirators and make available protective clothing to all who may inspect or visit the [job site] **work area**;

2.-9. (No change.)

10. Air shall flow into the work [site] **area** through all openings, including the decontamination chamber and waste exit ports, and any areas in the work [site] **area** 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] **at** the [job site] **work area**.

(b) Decontamination procedures are as follows:

1. (No change.)

2. The decontamination areas shall consist of the following:

i. (No change.)

ii. Shower room: This is a separate room used for transit by cleanly dressed people entering the [job site] **work area** from the clean room and for showering by them after they have undressed in the equipment room. This is a contaminated area.

iii. (No change.)

3. The contractor in order to prevent contamination of the environment shall be responsible for controlling access at the work [site] **area** and shall maintain a daily log of personnel entering the work area. A list of names of workers shall be posted with their start and stop times for each day. In addition, the contractor shall assure that all who enter the work area (hereafter referred to as person) shall observe the following work area entry and exit procedures:

i.-viii. (No change.)

4. The contractor shall assure that filters in dual cartridge type respirators used during the preparation phase of the [job] **project** shall be removed, wetted and discarded as contaminated waste. A new filter shall be in place in the respirator prior to reuse. For powered air purifying respirators or supplied air respirators, the manufacturer shall be consulted about the proper decontamination sequence.

5.-6. (No change.)

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

(g) Final clean-up work of the work area shall be conducted as follows in the order listed:

1.-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 tests 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 HEPA air filtration units to filter the air.]

Recodify 8. through 10. as **7. through 9.** (No change in text.)

5:23-[8.11]**8.12** Precautions and procedures during a small asbestos hazard abatement [job] **project**

(a) Small asbestos hazard abatement [jobs] **projects** 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] **rules** 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.] **pursuant to N.J.A.C. 5:23-8.23.**

1. (No change.)

(b) The following minimum level of precautions and procedures shall be employed:

1. The contractor shall provide the required respirators and protective clothing to all who may inspect or visit the [job site] **work area.**

2. (No change.)

3. **Prior to the start of the project adequate warning signs of asbestos dust hazard shall be posted outside of all work areas where work on asbestos-containing materials will be conducted.** 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 to be uncontaminated. The work area shall then be sealed off from the surrounding area with polyethylene sheeting having a thickness of [6] **six** mil. The material and building conditions involved in each [job] **project** need to be evaluated carefully to develop a proper enclosure;

4. Only personnel essential to **the** asbestos abatement [work] **project** shall be present in the work area. This may necessitate that the work not be done during normal work hours, so as to avoid exposure to people who usually occupy the area;

5.-14. (No change.)

(c) Asbestos repair [jobs] **projects** in tunnels, crawl spaces and plumbing access spaces are likely to present unique conditions which will require modifications of the recommended procedures described in this section. In all instances, every effort should be made to minimize airborne fibers and contamination of surrounding areas by enclosing the work area effectively.

(d) (No change.)

5:23-[8.12]**8.13** 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.-viii. (No change.)

ix. Sealants used in **the** encapsulation **shall not alter the existing fire rating and** 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 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.] **Enclosure constitutes construction of a permanent (that is, for the life of the building), air-tight, impact-resistant, solid structure of new construction materials which must be built around the asbestos covered pipe or structure to prevent the release of asbestos-containing materials into the area beyond the enclosure and to prevent these materials from casual contact during future maintenance operations. The enclosure shall not alter the existing fire rating and 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.**

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. Before constructing the enclosure, all electrical conduits, telephone lines, recessed lights, and pipes in the area shall be moved to ensure that the enclosure will not have to be reopened later for routine or emergency maintenance. If for any reason, lights or other equipment cannot be moved, removal of the asbestos-containing materials rather than enclosure shall be the appropriate control method to use;

ii. Enclosure walls shall be made of tongue and groove boards, boards with spine joints, or gypsum boards having taped seams. All joints between the walls and ceiling of the enclosure shall be caulked to prevent the escape of asbestos fibers;

iii. The underlying structure must be able to support the weight of the enclosure. Suspended ceilings with laid-in panels do not provide air-tight enclosures and shall not be used to enclose structures covered with asbestos-containing materials;

[i.] **iv.** (No change in text.)

[ii.] **v.** Power drills [used to install anchors] or other tools which may disturb asbestos containing material shall be equipped with or used in conjunction with HEPA vacuum filters;

Recodify iii. and iv. as **vi. and vii.** (No change in text.)

[v.] **viii.** Enclosures for asbestos-containing materials shall be identified by signs, labels, color coding or some other mechanism to warn persons who may be required to disturb the enclosure that asbestos is present; **and**

[vi.] **ix.** (No change in text.)

5:23-[8.13] **8.14** Glove bag technique

(a) (No change.)

(b) The preparation of the work area for glove bag removal shall include the following:

1. A minimum of two persons [are required to] **shall** perform a glove bag removal project. A third person may be required to conduct air monitoring [and] **or** assist with supplies.

2.-3. (No change.)

(c) (No change.)

(d) Removal procedures shall be conducted as follows:

1. A visual inspection of the pipe where the work will be performed shall be made to determine if any damaged pipe covering (broken lagging, hanging etc.) exists. If there is, the pipe shall be wrapped in polyethylene plastic and fully secured with duct tape. This procedure will prevent high airborne fiber concentrations from occurring during the glove bag work caused by pipe lagging, hanging several feet or even several yards away which may be jarred loose by the activity. [Debris] **All dust and debris** on the floor and other surfaces which has accumulated **due to the asbestos abatement project** and contains asbestos [must] **shall** be cleaned up as necessary. If the pipe is undamaged, one layer of duct tape shall be placed around the pipe at each end of where the glove bag will be attached. This permits a good surface to which to seal the ends of the glove bag, and it minimizes the chance of releasing fibers when the tape at the ends of the glove bag is peeled off at the completion of the [job] **project**.

2.-4. (No change.)

5. Place the glove bag around the section of pipe to be worked on and staple the top together through the reinforcing duct tape. Staple at intervals of approximately one inch. Next, fold the stapled top flap back and tape it down with a strip of duct tape. This should provide an adequate seal along the top. Next, duct tape the ends of the glove bag to the pipe itself previously covered with plastic or duct tape (see [step](**d**)1 above). **The bottom seam of the glove bag shall be sealed with high quality duct tape or equivalent to prevent any leakage from the bag that may result from a defect in the bottom seam.**

6.-23. (No change.)

24. Asbestos-containing material shall be disposed of as specified in N.J.A.C. 5:23-[8.14]**8.15.**

25. (No change.)

5:23-[8.14] **8.15** (No change in text.)

5:23-8.16 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 or she shall inform the Department who his or her employer is at the time of his or her application for certification, and shall notify the Department in writing within 10 working days of any change in status or employer. He or she shall have access to all areas of the asbestos removal project at all times and shall continually inspect and monitor the performance of the contractor to verify that said performance complies with this subchapter while work is in progress. The asbestos safety technician shall be on site from the initial preparation of the work area through the approved final visual inspection.

(b) The asbestos safety technician shall direct the actions of the contractor verbally and in writing to assure compliance. The asbestos safety technician shall require that all workers present a valid work permit issued by the New Jersey Department of Labor before entering the work area. The asbestos safety technician shall have the authority to test the seal of the respirator of each person who enters the work area to ensure a proper fit. In matters of gross negligence and/or flagrant disregard for the safety of others, including the possibility of contaminating the building environment and the appearance of an emergent unsafe condition at the work area, the asbestos safety technician shall direct such corrective action as may be necessary. If the contractor fails to take the corrective action, or if the contractor or any of his or her employees habitually and/or excessively violate the requirements of any regulation, the asbestos safety technician shall

order, in writing, that the work be stopped. If the contractor fails to comply with the order, the asbestos safety technician shall notify the administrative authority having jurisdiction who shall issue a Stop Work Order to the contractor and have the work area secured until all violations are abated.

(c) Upon receipt of testing results indicated that concentractions above the acceptance criteria pursuant to N.J.A.C. 5:23-8.23 have occurred outside the containment barriers during the abatement project, the asbestos safety technician shall immediately direct corrective action and verbally report these results within 24 hours to the contractor, the owner and the abatement project designer. Such verbal notification shall be followed by written notification to the contractor, the owner and the abatement project designer. A copy shall be sent to the administrative authority having jurisdiction and the Department within three business days from receipt of the results.

(d) The asbestos safety technician shall keep an up-to-date and comprehensive daily log of on-site activities. One section of the log shall contain observations concerning contractor compliance with activities required under this subchapter listing all deficiencies encountered. In addition, the log shall list the names of each person entering the work area. The log shall be kept at the job site and shall be made available upon request at all times to the owner, the abatement project designer and to appropriate local and State agencies.

(e) The asbestos safety technician shall prepare a comprehensive final report to include 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.

(f) During the removal phase the duties of the asbestos safety technician shall be as follows:

1. Air monitoring outside the work area shall be provided throughout removal operations to ensure that no outside contamination is occurring, pursuant to N.J.A.C. 5:23-8.23;

2. If the contractor's barriers or other control methods are observed to malfunction, and if the contractor does not immediately correct the problems upon notification, the asbestos safety technician shall inform the administrative authority having jurisdiction who shall take immediate measures needed to ensure corrective action. In such a situation, sampling of a minimum of three additional samples per day shall be performed by the asbestos safety technician;

3. A series of smoke tests shall be performed by the asbestos safety technician at the decontamination unit entrance to ensure continuous air pressure differential. This test shall be performed before each work shift and every four hours thereafter until the work stops;

4. 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 shall inform the owner, contractor and the abatement project designer 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 who shall take necessary measures to ensure corrective action;

5. The asbestos safety technician shall test and record the air flow of the air pressure differential units at the beginning of every shift and every four hours thereafter to insure a complete air change or total air filtration within the work area once every 15 minutes to effectively reduce the work area fiber count;

6. A record shall be maintained in the daily log of all on-site observations, inspections and required activities of the contractor, asbestos safety technician and the owner;

7. The asbestos safety technician shall supervise the removal of all asbestos waste from the work area to ensure that it takes place in one of the following manners:

i. Direct removal by a collector/hauler registered with the New Jersey Department of Environmental Protection; or

ii. Indirect removal by placement in a locked and secure container, for temporary storage, awaiting the New Jersey Department of Environmental Protection registered waste hauler.

(g) The asbestos safety technician shall perform post-removal air testing in accordance with the following procedures:

1. Within 48 hours after clean-up for post-removal air testing, and before the removal of critical barriers, a thorough and complete visual inspection and a final air test shall be performed. This test is required to establish safe conditions for the removal of critical barriers and to permit the beginning of reconstruction activity, if required. Sufficient time following clean-up activities shall be allowed so that all surfaces shall be dry during monitoring. Air pressure differential filtration units shall be in use during monitoring. Post-removal testing shall begin when all work area surfaces are completely dry.

2. Aggressive air sampling shall be employed using propeller-type fans and 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. Prior to air monitoring, floors, ceilings, and walls shall be swept with the exhaust of a one-horsepower leaf blower. Particular attention shall be made to insure that areas which would be subject to dead-air conditions are swept. The fans shall have blades with a radius of at least one foot and shall be capable to creating a minimum air velocity of 500 feet per minute. These fans may be of the oscillating type. Stationary fans shall be placed at a height of two meters (approximately 79 inches) in locations which will not interfere with air monitoring equipment. Fan air shall be directed at the ceiling and shall be operated at low speed. One fan shall be used for each 10,000 cubic feet of the work area. The sampling pump and sampling media shall be placed 20 to 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 fourth by the EPA. Their use should be restricted to general occupancy areas that are contained, and they should not be used in any space with an open dirt, sand or gravel floor.

3. Evaluation criteria: If test results exceed the value delineated in N.J.A.C. 5:23-8.23, the asbestos safety technician, or his or her employer, shall so inform the contractor, the owner and the abatement project designer. 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) Final inspections shall be conducted by the asbestos safety technician as follows:

1. Upon notice by the owner or agent and after the removal of the critical barriers, a final inspection shall be conducted to ensure the absence of any visible signs of asbestos, or asbestos-containing material or work related materials; and

2. The asbestos safety technician shall ensure that all asbestos waste and asbestos-contaminated waste have been removed from the work area in a registered vehicle by a registered waste hauler.

5:23-[8.16] **8.17** (No change in text.)

5:23-[8.17] **8.18** Asbestos [S]safety [C]control [M]monitor

(a) The [d]Department shall authorize the establishment of an asbestos safety control monitor:

1.-2. (No change.)

3. Following a determination by the [d]Department that an application is complete and suitable for processing, the [d]Department shall review and evaluate the information contained in the application and such other information as the [d]Department shall deem necessary to enable it to make an accurate and informed determination of approval or disapproval. Within 30 days following the receipt of a completed application, the [d]Department shall make its determination as to whether authorization as an asbestos safety control monitor shall be granted or denied, and shall notify the applicant. In the event of denial, the [d]Department shall provide the applicant with a written explanation of the reasons therefore and provide for a hearing pursuant to N.J.A.C. 5:23-[8.20] **8.21**

4. The authorization application shall contain information relating to:

i.-ii. (No change.)

iii. The applicant shall indicate the type of analysis done (for example, NIOSH 7400) and the laboratory(**ies**) that do the procedures. If the applicant does its own lab [work] **analysis,** then it shall list the **type of** equipment used and the personnel using it, with their qualifications. All laboratories shall participate in the Proficiency Analytic Testing Program conducted by the National

Institute for Occupational Safety and Health and in the U.S. Environmental Protection Agency Asbestos Bulk Sample Analysis Quality Assurance Program [;] . **Laboratories shall be enrolled in the American Industrial Hygiene Association Proficiency Analytical Testing Program for PCM. The TEM analysis, laboratories shall certify that the analysis they performed was according to the protocol listed in Appendix A to Subpart E which is referenced in section N.J.A.C. 5:23-8.23;**

iv.-viii. (No change.)

5.-6. (No change.)

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

5:23-[8.18] **8.19** Asbestos [S]safety [T]technician: [C]certification requirements

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

(d) Any candidate for certification as an asbestos safety technician shall submit an application to the [d]**D**epartment accompanied by the required application fee established in (i) below. The requirements for certification as an asbestos **safety** technician are as follows:

1. At least two years of college in academic sciences, that is, biology, chemistry, industrial hygiene, environmental science, or related fields; or one year experience which included performing environmental assessment activities may be substituted for this education requirement; **or one year experience monitoring asbestos abatement if an industrial hygienist certified by the American Industrial Hygiene Association;**

2.-3. (No change.)

4. Successful completion of a special course for [A]asbestos [S]safety [T]technicians approved by the New Jersey [State] Department of Health.

5. Successful passing of a special [E]examination for [A]asbestos [S]safety [T]technicians approved and administered by the **New Jersey** Department of Health (**pursuant to N.J.A.C. 12:120-6.12 and 8:60-6.12**).

(e)-(i) (No change.)

5:23-[8.19]**8.20** (No change in text.)

5:23-[8.20]**8.21** (No change in text.)

5:23-[8.21]**8.22** Demolition

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

(c) The permit for the removal of asbestos shall be obtained in the following manner:

1. A [P]plan [R]review must be conducted by the administrative authority having jurisdiction. The following shall be available for the plan review:

i. An asbestos hazard assessment prepared by the New Jersey Department of Health, **or by a** county or local [health] department **of health**, or a private [business entity] **individual** [, authorized by the New Jersey Department of Health] **who has received accreditation under the United States Environmental Protection Agency's Model Accreditation Program as referenced in 40 CFR 763. The accreditation will be issued by an EPA approved training agency, and that accreditation will include the place of training, accreditation number and its expiration date; accreditations are issued for one year. This assessment shall be required** unless the requirement for an assessment has been waived by any of the above. This requirement can be met by removing all suspect material as asbestos-containing waste.

ii. Uncertified plans and specifications **as follows:**

[(1) Site plan or sketch indicating adjacent buildings in the immediate area;

(2) Floor plan of building to indicate the scope of the work;

(3) Specifications; describe scope of work, removal procedures, and waste disposal;

(4) On large asbestos hazard abatement jobs as defined in this subcode a written release of the plans and specifications by a person, with technical knowledge of the project and designated by the owner to act in his behalf shall be required;]

(1) Plans and specifications (not less than three sets) indicating: the scope of the proposed work; whether the project is a small or large asbestos hazard abatement project; listing the total amount of square and/or linear footage of asbestos-containing material to be abated; the provisions proposed to contain the asbestos-containing material during abatement work showing, but not limited to, separation barriers, primary seal/critical barriers, route of travel of removing asbestos waste from the work area; a copy of the site plan; and a floor plan indicating exits.

Recodify (5) and (6) as **(2) and (3)** (No change in text.)

2. The plans and specifications will be released in writing by the [administrative authority having jurisdiction] **asbestos safety control monitor.** [The written release of plans and specifications will allow the owner to obtain bids on the asbestos removal part of the demolition project].

3. The issuance of a construction permit for asbestos abatement shall be subject to the following:

i. A written release of the plans and specifications by the [administrative authority having jurisdiction] **asbestos safety control monitor;**

ii.-vi. (No change.)

(d) (No change.)

(e) Air monitoring samples during removal shall be required for a large asbestos abatement [job] **project,** and a small asbestos abatement [job] **project** if it has been determined by the asbestos safety control monitor to be required during the plan review. Final air samples after removal will be required for large and small asbestos abatement [jobs] **projects** [only unless this is changed during the plan review].

1. Results of .020 fibers/cc or less shall be attained **by phase contrast microscopy (PCM)** prior to demolition;

2.-3. (No change.)

5:23-8.23 Air monitoring methodology

(a) All air sampling specified in this section shall be performed by the asbestos safety technician in accordance with the procedures specified in this subchapter and shall be analyzed by a laboratory pursuant to 40 CFR 763.90.

1. For phase contrast microscopy (PCM) analysis, laboratories shall be enrolled in the American Hygiene Association Proficiency Analytical Testing Program.

2. For transmission electron microscopy (TEM) analysis, laboratories shall certify that the analysis they performed was according to the protocol listed in Appendix A to Subpart E of 40 CFR 763.

(b) Air sampling outside the work area while abatement is in progress shall comply with the following procedures:

1. A minimum of three samples per day shall be collected. One stationary sample shall be collected at the decontamination unit entrance/exit and two samples collected adjacent to the work area but remote from the decontamination unit entrance. In the selection of adjacent areas to be monitored, preference shall be given to rooms adjacent to critical barriers and/or work area. Testing results shall not indicate concentrations above 0.01 fibers per cubic centimeter have occurred outside the containment barrier or above 0.02 fibers per cubic centimeter within the clean room of the decontamination chamber during the abatement project.

2. Pumps shall be calibrated before and after sampling and a record kept of this calibration.

3. Analysis shall be by PCM or TEM.

i. PCM analysis shall be by the methodology specified by NIOSH 7400.

ii. TEM analysis shall be by the methodology specified by 40 CFR 763 Appendix A to Subpart E.

4. Maximum turnaround time from sample collection through data reporting shall be:

i. PCM analysis method: 24 hours; and

ii. TEM analysis method: 72 hours.

(c) Final clearance level, sampling and analysis method for small and large asbestos abatement projects and local education agencies, as defined in section N.J.A.C. 5:23-8.2, shall be performed as follows:

1. Samples collected within the affected work area shall be analyzed by TEM except as delineated below:

i. Until October 7, 1989, an owner or his or her agent may analyze air monitoring samples collected for clearance purposes by PCM to confirm completion of an asbestos abatement project that is less than or equal to 3,000 square feet or 1,000 linear feet.

ii. From October 8, 1989 to October 7, 1990, an owner or his or her agent may analyze air monitoring samples collected for clearance purposes by PCM to confirm completion of an asbestos abatement project that is less than or equal to 1,500 square feet or 500 linear feet.

iii. After October 8, 1990, an owner or his or her agent may analyze air monitoring samples collected for clearance purposes by PCM to confirm completion of an asbestos abatement project that is less than or equal to 160 square feet or 260 linear feet (small asbestos hazard abatement project).

iv. To determine the amount of asbestos-containing material pursuant to this section, the owner or his or her agent shall add the total square or linear footage of asbestos-containing material within the containment barriers used to isolate the work area for the asbestos abatement project. Contiguous portions of material subject to such project conducted concurrently or at approximately the same time within the same building shall not be separated to qualify for the exceptions delineated above.

(d) Final clearance level, sampling and analysis method for small and large asbestos abatement projects for all other buildings pursuant to this subchapter except for local education agencies, as defined in N.J.A.C. 5:23-8.2, shall be as follows:

1. Samples collected within the affected work area space may be analyzed by PCM to confirm completion of an asbestos abatement project.

(e) For TEM, the project shall be considered complete when the results of samples collected in the affected work area comply with 40 CFR 763.90 and Appendix A to Subpart E.

(f) For PCM, the project shall be considered complete when the results of samples collected in the affected work area show that the concentration of fibers for each of the five samples is less than or equal to a limit of quantitation for PCM of 0.01 fibers per cubic centimeter.

(g) When the air analysis results for projects covered by this subchapter 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 HEPA air filtration units to filter the air.

5:23-8.24 Removal of non-friable asbestos-containing material

(a) This section applies to all interior building, non-friable, miscellaneous asbestos-containing material.

1. When the removal method will cause the building environment to become contaminated with airborne fibers caused by a combination of mechancial and manual tasks, such as grinding the surface of vinyl floor tiles, then complete separation of the worksite from the rest of the building shall be required and the precautions and procedures during a large asbestos hazard abatement project as delineated in N.J.A.C. 5:23-8.11 shall be followed. A construction permit for asbestos abatement pursuant to this subchapter shall be required.

2. When the removal method will not contaminate the building environment with airborne fibers, such as when an electric heating appliance is used to loosen vinyl floor tiles, then general isolation of the work area from the surrounding environment, safe work practices and proper clean-up procedures, including having access to shower facilities after performing the asbestos-related work, shall be required. A contractor licensed by the New Jersey Department of Labor shall be required pursuant to N.J.A.C. 12:120 to perform this work. A construction permit pursuant to N.J.A.C. 5:23-2 shall be required.

(b) The disposal of non-friable asbestos-containing waste shall conform to the requirements specified in N.J.A.C. 5:23-8.15.

(c) Exception: This section shall not apply to non-friable asbestos-containing material found on the exterior of the building such as asbestos siding, transite and asbestos cement board, asbestos roof shingle, felts and built up roofing materials. Safe work practices shall be employed to minimize asbestos fiber exposure during the tear-off period and, in particular, for asbestos shingle roofs, work precautions described in the National Institute for Occupational Safety and Health (NIOSH) Health Hazard Evaluation Report No. HETH 84-321 shall be followed. A construction permit pursuant to N.J.A.C. 5:23-2 shall be required. Disposal of this waste shall be in accordance with N.J.A.C. 5:23-8.15.

(a)

Administrative Rules
Lease Termination Because of Disabling Illness or Accident

Proposed New Rules: N.J.A.C. 5:29-2.1 and 2.2

Authorized By: William M. Connolly, Director, Division of Housing and Development, Department of Community Affairs.

Authority: N.J.S.A. 46:8-9.3.

Proposal Number: PRN 1988-268.

The agency proposal follows:

Summary

N.J.S.A. 46:8-9.2 requires the Director of the Division of Housing and Development to provide a form to be used by tenants who are entitled to terminate the lease on their residence because they cannot continue to pay the rent by reason of a disabling illness or accident that has caused a loss of income. The form is required by statute to include a physician's certification that the lessee or spouse of the lessee is unable to continue to engage in gainful employment, proof of loss of income, and proof that any pension, insurance or other subsidy to which the lessee or spouse is entitled is insufficient to supplement the income of the lessee or spouse so that the rent can be paid and that the income is necessary for the payment of the rent. The statute further provides that, in any case in which this statutory right is invoked, the termination is effective as of the 40th day after the lessor's receipt of the notice and that the unit must be vacated, and possession given to the lessor, at least five working days prior to the termination date. The provisions of this statute do not apply to any lease the terms of which explicitly provide otherwise.

The purpose of these proposed new rules is to implement the provisions of the statute as described above and promulgate the prescribed form.

Social Impact

Promulgation of the required form by rule will make it easier for tenants to take advantage of their rights under N.J.S.A. 46:8-9.2.

Economic Impact

To the extent that tenants avail themselves of their rights under N.J.S.A. 46:8-9.2, they will be able to relieve themselves of the burden of rentals they can no longer afford to pay without the risk of being held liable for the unpaid balance for the term of the lease. Conversely, landlords will not be able to recover this unpaid balance.

Regulatory Flexibility Statement

Since N.J.S.A. 46:8-9.2 applies equally to properties that are owned by persons qualifying as "small businesses" and those that are not, there is no basis for any differential treatment of small businesses in the proposed rule.

Full text of the proposed new rules follows.

SUBCHAPTER 2. LEASE TERMINATION BECAUSE OF DISABLING ILLNESS OR ACCIDENT

5:29-2.1 Right to terminate a lease because of disabling illness or accident

(a) Pursuant to N.J.S.A. 46:8-9.2, a lease for a term of one or more years of a property that has been leased and used by the lessee solely for the purpose of providing a dwelling place for him or herself, or the lessee and his or her family, may be terminated prior to the expiration date thereof if the lessee or his or her spouse, or both, suffer a disabling illness or accident, unless the terms of the lease explicitly provide otherwise.

(b) Notice of termination shall be given by the lessee (tenant) to the lessor (landlord) on the form prescribed in N.J.A.C. 5:29-2.2.

(c) Termination shall take effect on the 40th day following receipt by the lessor of the notice and rent shall be paid up to that date.

(d) The property shall be vacated and possession shall be given to the lessor at least five working days prior to the 40th day following receipt by the lessor of the notice.

5:29-2.2 Form of notice

(a) A notice of lease termination given by a tenant pursuant to N.J.S.A. 46:8-9.2 shall be in the following form:

NOTICE OF LEASE TERMINATION

Name of Tenant ______________________

Property Address ______________________

Apartment Number (if applicable) ______________________

To the Landlord of the above dwelling unit:

This is to notify you that, in accordance with N.J.S.A. 46:8-9.2, I am terminating my tenancy as of the 40th day following your receipt of this notice by reason of:

____ a disabling illness

____ a disabling accident

suffered by:

____ me

____ my spouse

____ both me and my spouse.

Date: __________ Signature ______________________

CERTIFICATION OF TREATING PHYSICIAN

I hereby certify that I am a physician who is currently treating ______________________, whom I find to be unable to continue to engage in gainful employment.

Date: __________ Signature ______________________

PROOF OF LOSS OF INCOME AND INSUFFICIENCY OF CURRENT INCOME

STATE OF NEW JERSEY

COUNTY OF ______________________

______________________, of full age, being duly sworn, upon his/her oath, deposes and says:

1. As of ______________________, 19____, my income (including any spouse's income) was reduced from $ __________ per __________ to $ __________ per __________ as a result of:

____ a disabling illness

____ a disabling accident

suffered by:

____ me

____ my spouse

____ both me and my spouse.

2. The total amount of all pensions, insurance and other subsidies to which I and/or my spouse am/are entitled is $ __________. This amount is insufficient to supplement my/our income, which is necessary for the payment of the rent on our dwelling unit, so that this rent can be paid.

Signature ______________________

Sworn and subscribed before me

on ______________, 19____.

____
Notary Public of NJ

(b) Copies of this form may be obtained from:

Office of Landlord-Tenant Information
Division of Housing and Development
Department of Community Affairs
CN 809
Trenton, NJ 08625

(a)

NEW JERSEY COUNCIL ON AFFORDABLE HOUSING

Substantive Rules: Regional Contribution Agreements (RCAs)

Proposed Amendment: N.J.A.C. 5:92-11.2

Authorized By: James L. Logue III, Chairman, New Jersey Council on Affordable Housing.

Authority: N.J.S.A. 52:27D-301 et seq.

Proposal Number: PRN 1988-278.

Submit comments by July 6, 1988 to:

Douglas V. Opalski, Executive Director
New Jersey Counsel on Affordable Housing
CN 813
Trenton, NJ 08625-0813

The agency proposal follows:

Summary

The Council on Affordable Housing is proposing amendments to regulate the use of excess funds in a regional contribution agreement and to amend its rule on age restricted units.

The terms of a regional contribution agreement are negotiated between willing sending and receiving communities. These agreements are reviewed by the Council and the New Jersey Housing and Mortgage Finance Agency. During this review, there have been several negotiated agreements where the communities have negotiated more money than appears necessary to implement the RCA. While the Council recognizes the importance of planning for contingencies and inflation, the Council is concerned over the use of these potential excess funds.

The Council believes that excess funds should be returned to the sending community; used to produce other low and moderate income housing units; or used for capitol expenditures ancillary to or benefiting low and moderate income households. Therefore, the Council is proposing a new subsection (g) to N.J.A.C. 5:92-11.2. Such a restriction is consistent with N.J.S.A. 52:27D-312(f), which allows RCA funds to be used to compensate or partially compensate the receiving municipality for infrastructure or other costs generated to the receiving municipality by the development.

With regard to age restricted units, on November 19, 1986 the Council on Affordable Housing adopted N.J.A.C. 5:92-14.3, allowing municipalities to "age restrict no more than 25 percent of their fair share obligation as calculated after credits have been granted, less any units transferred under a Regional Contribution Agreement." Although the rule did not require age restriction to be limited to the elderly, the Council clearly had senior citizens in mind. The 25 percent standard was selected because it approximated the needs for low and moderate income senior citizen households as depicted by 1980 United States Census Data. Therefore, in adopting the rule, the Council felt it was recognizing the special needs of an "at risk" group without sacrificing the housing needs of the young couples and families.

Recently, it has come to the Council's attention that N.J.A.C. 5:92-14.3 does not regulate housing units transferred via a regional contribution agreement. Thus, as written, the rule allows a sending community to age restrict 25 percent of the housing units within its borders and for all the units the sending community transfers to be age restricted. Since a community may transfer up to 50 percent of its obligation, it is possible that up to 62.5 percent of the municipal fair share may be age restricted.

This was not the Council's intent when it adopted N.J.A.C. 5:92-14.3. Such a restriction would unduly limit housing opportunities for the vast majority of low and moderate income households not consisting of senior citizens. Therefore, the Council is proposing a new subsection (h) to N.J.A.C. 5:92-11.2. This amendment allows transferred units to be aged restricted provided that the sum of newly constructed age restricted units in the sending and receiving communities does not exceed 25 percent of

the sending community's fair share as calculated after credits and adjustments have been granted, less any units transferred under a regional contribution agreement. The amendment does not regulate rehabilitation of existing age restricted units in the sending and receiving communities.

Social Impact

The proposed amendment regulating excess funds in a regional contribution agreement will have a positive impact in that it requires excess funds not returned to the sending community to be directed to the benefit of low and moderate income households. The proposed amendment regulating age restricted units will have a positive social impact in that it provides municipalities with the ability to safeguard the special needs of an "at risk" group without sacrificing the housing needs of young, couples and families.

Economic Impact

The proposal on age restricted units will have no economic impact. The proposal on excess funds will have a positive impact in that it requires all transferred funds to be expended on capital improvements benefiting low and moderate income households.

Regulatory Flexibility Statement

The proposed amendment on age restricted units imposes no recording, recordkeeping, or other compliance requirements on small businesses, since it regulates age restriction of housing units by the sending and receiving communities. The proposed amendment regulating excess funds will benefit contractors who construct housing and/or infrastructure for low and moderate income households, some of which may meet the definition of a small business in the Regulatory Flexibility Act; no compliance requirements are imposed on such businesses.

Full text of the proposal follows (additions shown in boldface **thus**).

5:92-11.2 Terms

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

(g) Sending and receiving communities shall, as part of their contract negotiations, determine the use of transferred funds that may be in excess of what is required to implement the RCA. Such funds shall either be: returned to the sending community; and/or utilized by the receiving community to produce additional low and moderate income housing units or for a capital expenditure ancillary to or benefiting low and moderate income households. The specific use of excess funds by the receiving community need not be specified in the RCA contract but shall be subject to Council approval.

(h) Housing units transferred via a regional contribution agreement may be age restricted provided that the sum of newly constructed age restricted units created in the sending and receiving communities does not exceed 25 percent of the sending community's fair share obligation as calculated after credits and adjustments have been granted. This restriction shall not apply to the rehabilitation of existing age restricted units in either the sending or receiving community.

EDUCATION

(a)

STATE BOARD OF EDUCATION

Special Education Pilot Project Moderate Behavior Handicap Class Types

Proposed Amendment: N.J.A.C. 6:28-11.12

Authorized By: Saul Cooperman, Commissioner, Department of Education; Secretary, State Board of Education.

Authority: N.J.S.A. 18A:1-1, 18A:4-15, 16, 23 and 24, 18A:46-1 et seq. and 18A:7A-(5)i.

Proposal Number: PRN 1988-267.

Submit comments by July 6, 1988 to:
Irene Nigro, Rules Analyst
New Jersey Department of Education
CN 500
225 West State Street
Trenton, New Jersey 08625

The agency proposal follows:

Summary

The purpose of this proposed amendment to N.J.A.C. 6:28-11.12 is to correct a printer's error regarding the maximum class size and staff/pupil ratio required for moderate behavior handicap class types under the Special Education Pilot Project (Project) now underway in 13 local school districts.

As proposed and adopted in the New Jersey Register (see 20 N.J.R. 14(a) and 20 N.J.R. 796(a), respectively), N.J.A.C. 6:28-11.12(e)5 and 6 mandate a maximum class size of 10 and a staff/pupil ratio of 1:10 for moderate behavior handicap class types. However, this number and ratio were printed in error. The maximum class size for this class type should be eight and the staff/pupil ratio 1:8. This number and ratio were agreed to by the affected local school districts prior to the submission of the Project's proposed new rules for publication in the New Jersey Register, contained in the Notice of Proposal filed with the Office of Administrative Law and adopted by the State Board of Education on March 11, 1988.

Social Impact

The proposed amendment will apply only to those 13 districts which are involved in the Project during the 1988-1990 school years. Those districts agreed to all aspects of the Project's rules prior to their proposal, including the maximum class size and staff/pupil ratio contained in this amendment.

Economic Impact

No major economic impact is expected as a result of this proposed amendment, which can be implemented with existing staff. Funding for the districts involved in the project will continue under the current procedures.

Regulatory Flexibility Statement

The proposed amendment imposes no reporting, recording or compliance requirements on small businesses, since the amendment impacts only on 13 New Jersey public school districts and their pupils.

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

6:28-11.12 Full-time class types

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

(e) Moderate behavior handicap class types shall meet the following requirements:

1.-4. (No change.)

5. Maximum class size shall be [10] **8** for both elementary and secondary.

6. Staff/pupil ratio shall be [1:10] **1:8** for both elementary and secondary.

7. (No change.)

(f)-(o) (No change.)

ENVIRONMENTAL PROTECTION

(b)

DIVISION OF WATER RESOURCES

Licensing of Operators of Industrial Wastewater Treatment Systems

Proposed Amendments: N.J.A.C. 7:10-13.2, 13.10 and 13.13

Authorized By: Richard T. Dewling, Commissioner, Department of Environmental Protection.

Authority: N.J.S.A. 58:11-64 et seq., particularly 58:11-66 and 67, N.J.S.A. 58:10A-1 et seq.

DEP Docket Number: 018-88-05.

Proposal Number: PRN 1988-301.

Submit comments by July 6, 1988 to:
Roger S. Haase, Esq.
Office of Regulatory Services
Department of Environmental Protection
CN 402
Trenton, New Jersey 08625

The agency proposal follows:

Summary

On June 18, 1984, the New Jersey Department of Environmental Protection ("Department") promulgated rules implementing the new Water Supply and Wastewater Operators Licensing Act, N.J.S.A. 58:11-64 et seq. These new rules, known as "Water Supply and Waste-Water Collection and Treatment Systems: Examining and Licensing of Operators", are codified at N.J.A.C. 7:10-13 ("Rules"). With these rules, the Department, for the first time, created classes of licenses for industrial wastewater treatment systems. These new classes of licenses allow a licensee holding the appropriate class license to be the licensed operator of any industrial wastewater treatment system with an equal or lower classification. In order to obtain this desired job flexibility, the Department combined all types of industrial wastewater treatment into four classes and created four corresponding licenses.

In creating the four classes of license, the N1, or lowest class license, became too complex for the potential licensed operators of industrial wastewater treatment systems which consisted of only an oil water separator or sedimentation unit. To alleviate this complexity, the Department is now proposing to create the NS license which would be available to anyone who wanted a license which only allowed that person to be the licensed operator at industrial wastewater treatment systems solely consisting of a gravity oil water separator or sedimentation unit. The eligibility requirements for the NS license and the N1 license would be the same, but the tests for each class license would be appropriately different. N1 licensees would continue to be allowed to be the licensed operator at industrial wastewater treatment facilities classified as N1 or NS.

The Department is proposing a definition of "oil water separator" and "sedimentation unit" in N.J.A.C. 7:10-13.2 and is proposing the requirements for the NS license in N.J.A.C. 7:10-13.13. Additionally, the Department is proposing to delete the two year time frame for obtaining a full time licensed operator at Class 3 and Class 4 treatment systems from N.J.A.C. 7:10-13.10(c)1, since the time period has passed.

Social Impact

The proposed amendments will have a beneficial social impact. The amendments will provide more flexibility for an industrial wastewater treatment system permittee having an oil water separator or sedimentation unit in obtaining a licensed operator. The permittee will have the option of hiring an N1 class operator or an NS class operator under the amended rules for gravity oil water separator or sedimentation unit treatment systems. Obtaining a license to operate such treatment systems will be less burdensome to the individual permittees and applicants than under present requirements.

Economic Impact

The proposed amendments will neither increase nor decrease the cost of the license fees. The proposed amendments, however, have a positive economic impact. The owners of treatment systems consisting of only an oil water separator or sedimentation unit may not have to employ operators outside of their companies. They may be able to use their existing employees who qualify for the NS license for this purpose, thereby, providing an opportunity for financial savings.

Environmental Impact

The proposed amendments will have a positive environmental impact. The number of licensed operators for treatment systems consisting of an oil water separator or sedimentation unit should increase. Having a separate specific classification should encourage potential operator applicants to focus on the specific information and knowledge needed to operate these systems properly. The examinations will be specific to these systems. These amendments should result in better supervised and operated systems, which in turn should result in higher water quality for potable and recreational purposes.

Regulatory Flexibility Statement

These proposed amendments would apply to industrial wastewater treatment systems consisting solely of a gravity oil water separator or sedimentation unit. It is estimated that of the total number of industrial wastewater treatment systems impacted by these amendments, 150 are "small businesses" as defined in the New Jersey Regulatory Flexibility Act (P.L. 1986, c. 169). The purpose of these proposed amendments is to make it easier for system owners to comply with the Department's licensing requirements without diminishing environmental protection. The amendments will make it easier for employees at industrial wastewater treatment systems consisting solely of an oil water separator or sedimentation unit to become licensed to operate those facilities. In accordance with the New Jersey Regulatory Flexibility Act, the Department has determined that these proposed amendments would not impose additional reporting, recordkeeping, financial or other compliance requirements on these small businesses.

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

7:10-13.2 Definitions

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

...

"Oil water separator" means an industrial wastewater treatment system designed for the removal of insoluble oils or floating grease by gravity means.

...

"Sedimentation unit" means any industrial wastewater treatment system at which wastewater is only physically, not chemically, treated to reduce suspended solids including a clarifier, settling tank, lagoon, basin or pond, detention basin or pond, or sedimentation basin or pond.

...

7:10-13.10 Licensed operator required, penalties

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

(c) Each class 3 treatment system and class 4 treatment system shall have the appropriate full-time licensed operator. In addition, class 4 treatment systems should have a licensee possessing any valid treatment license within the appropriate system classification, physically present at the treatment system during that portion of each 24 hour period when the licensed operator is not present.

[1. Those Class 3 and Class 4 treatment systems not presently employing a full time licensed operator shall have 2 years from the effective date of this subchapter to obtain an appropriate full time licensed operator.]

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

7:10-13.13 Conversion of licenses [in effect on the effective date of these rules]

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

[(c) The department shall begin accepting applications for the new industrial wastewater treatment system licenses on January 1, 1985. The closing date for applications to take the first set of examinations for the new industrial wastewater system licenses shall be February 28, 1985.

1. The department shall continue to accept applications for examination for the NN license until September 30, 1984]

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

(d) Any person eligible to apply for a N1 license, pursuant to N.J.A.C. 7:10-13.15(c), who is employed by an industrial wastewater treatment system consisting only of a gravity oil water separator or sedimentation unit may apply, pursuant to N.J.A.C. 7:10-13.6, to take an examination for a NS license instead of a N1 license.

(e) Any person who successfully passes the examination for a NS license may only become the licensed operator at a Class 1 industrial wastewater treatment system consisting only of a gravity oil-water separator or sedimentation unit.

Recodify existing (e) through (i) as **(f) through (j)** (No change in text.)

HEALTH

(a)

HOSPITAL REIMBURSEMENT
Procedural and Methodological Regulations
Proposed Amendment: N.J.A.C. 8:31B-3.45

Authorized By: Molly Joel Coye, M.D., M.P.H., Commissioner, Department of Health (with the approval of the Health Care Administration Board).

Authority: N.J.S.A. 26:2H-1, et seq.; specifically 26:2H-5b and 26:2H-18d.

Proposal Number: PRN 1988-269.

Submit written comments by July 6, 1988 to:
Pamela S. Dickson, Assistant Commissioner
Health Planning and Resource Development
New Jersey State Department of Health
CN 360, Room 601
Trenton, NJ 08625-0360

The agency proposal follows:

Summary

The Department of Health proposes to delete the requirement for the submission of Uniform Bill-Patient Summaries beginning in the first quarter of 1988. The Department proposes that hospitals now do so on or before the first quarter of 1990. The action to delay the submission of Uniform Bill-Patient Summaries from on or before the first quarter of 1988 to on or before the first quarter of 1990 has been proposed to allow the Department additional time to review and evaluate factors related to the processing of submission of Uniform Bill-Patient Summaries.

Social Impact

The Procedural and Methodological rules will be consistent with the Hospital Reporting of Uniform Bill-Patient Summaries rules at N.J.A.C. 8:31B-2, thereby providing consistency in requirements on the regulated group.

Economic Impact

Hospitals will not at this time incur any additional expense which might result from this additional reporting requirement. The economic impact of the requirement which is proposed to take effect on or before the first quarter of 1990 cannot be determined at this time.

Regulatory Flexibility Statement

The proposed rules apply only to the hospitals that have rates established by the Hospital Rate Setting Commission. Each of these hospitals employs more than 100 full time employees and, therefore, do not fall in the category of small business as defined in Section 2 of New Jersey Regulatory Flexibility Act (P.L. 1986, c.169).

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

8:31B-3.45 Uniform bill-case mix determination-financial reports

(a) Hospitals shall submit to the Department through the UB-PS Intermediary(ies) and within 90 days of the end of the calendar quarter, information on all inpatients discharged for the quarter containing final diagnoses and such other patient specific information as set forth in the Rule on Hospital Reporting of Uniform Bill-Patient Summaries. The net cost to the hospital of any information provided to the Department by a UB-PS Intermediary for a hospital under a memorandum of understanding developed under N.J.A.C. 8:31B-2.1 of the Rule on Hospital reporting of Uniform Bill-Patient Summaries shall be considered by the Commission in the Preliminary Cost Base established for the hospital. Beginning on or before the first quarter of [1988] **1990** hospitals shall also submit Uniform Bill-Patient Summaries on all outpatients containing final diagnosis or reason for visit (as defined by the Department), for each outpatient. Included with such reporting shall be a statement of gross revenue by revenue center for patients discharged in the quarter (including in-house accounts of the previous period but excluding in-house accounts of the current quarter) for inpatient, emergency service, clinic, home health, outpatient dialysis, ambulatory surgery, same day psychiatry, and private referred patients. UB-PS records not received by the Department within the time frames specified may not be included in the hospital's Final Reconciliation unless the hospital pays to the Commission a fine as specified in the Uniform Bill-Patient Summary (inpatient) Regulation, section IV-E. This decision will be at the discretion of the Commission.

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

HUMAN SERVICES

(b)

DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES
Home Care Services Manual
Personal Care Assistant Services; Fees
Proposed Amendment: N.J.A.C. 10:60-2.2

Authorized By: Drew Altman, Commissioner, Department of Human Services.

Authority: N.J.S.A. 30:4D-6b(16), 7a, b, c; 30:4D-12; 42 CFR 440.170(i).

Proposal Number: PRN 1988-298.

Submit comments by July 6, 1988 to:
Henry W. Hardy, Esq.
Administrative Practice Officer
Division of Medical Assistance
and Health Services
CN-712
Trenton, NJ 08625

The agency proposal follows:

Summary

This proposal amends the personal care assistant service section of the Home Care Services Manual (N.J.A.C. 10:60-2.2). More specifically, the amendments pertain to Medicaid reimbursement. The current rule contains all inclusive maximum rates for personal care assistant services, the initial nursing assessment visit and the personal care assistant nursing reassessment visit. This proposal will increase the all inclusive maximum rate. The proposal also increases the rates for services provided on an hourly or half-hourly basis, on weekdays, weekends and holidays. The rate increase also covers both individual and group rates. The proposal also increases the initial nursing assessment visit and the nursing reassessment visit to a standardized fee of \$35.00 per visit. The complete scope of the fee increase appears in the text of the rule.

Social Impact

The proposal's impact is primarily economic rather than social. However, there are Medicaid patients who need personal care assistant services in community settings. The fee increase should help insure the continuity and availability of these services.

This proposal also impacts on community homemaker/home health agencies that provide personal care assistant services. However, the impact will be more economic than social.

Agencies under contract to the Division of Mental Health and Hospitals are not covered by this fee increase.

Economic Impact

The estimated cost of the fee increase will be approximately \$1,256,664 (federal-state share combined) for State Fiscal Year 1989.

There is no cost to the Medicaid patient for personal care assistant services.

The economic impact on providers will vary, depending on the number of Medicaid patients who receive services. Providers will be entitled to be reimbursed up to the new maximum rates contained in this rule.

Regulatory Flexibility Analysis

This rule impacts on small businesses, such as homemaker/home health agencies. However, this rule does not impose any additional reporting, recordkeeping or other compliance requirements. Medicaid providers are already required to maintain sufficient records to indicate the recipient to whom the service was rendered, the date of service, nature of the service, etc. (see N.J.S.A. 30:4D-12).

There are no capital costs associated with this proposal.

Therefore, the Division does not believe a regulatory flexibility analysis is required because this rule only increases reimbursement for existing procedure codes.

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

10:60-2.2 Personal care assistant service

(a)-(e) (No change.)

(f) Reimbursement:

1. The following are all inclusive maximum rates for personal care assistant services, the initial nursing assessment visit and the personal care assistant nursing reassessment visit. No direct or indirect cost over and above these established rates will be considered for reimbursement. A provider may not charge the New Jersey Medicaid Program in excess of present charges for other payors. For reimbursement purposes a weekend means a Saturday or Sunday; a holiday means an observed agency holiday which is also recognized as a Federal or State holiday.

i. Personal care assistant services are limited to a maximum of 25 hours per week at a reimbursement rate up to [$9.00] **$11.00** per hour weekday for the individual patient. Code No. Z1600; and

ii. Up to [$4.50] **$5.50** per half-hour weekday for individual patient. Code No. Z1611; and

iii. Up to [$6.76] **$8.00** per hour weekday for a group rate (two or more patients, with a maximum of eight patients in the same residential setting at the same time). Code No. Z1605; and

iv. Up to [$3.38] **$4.00** per half-hour weekday for a group rate (two ro more patients, with a maximum of eight patients in the same residential setting at the same time). Code No. Z1612; and

v. Up to [$10.00] **$14.00** per hour weekend, holiday for individual patient, Code No. Z1614; and

vi. Up to [$5.00] **$7.00** per half-hour weekend, holiday for individual patient, Code No. Z1615; and

vii. Up to [$7.76] **$9.00** per hour weekend, holiday for a group rate (two or more patients, with a maximum of eight patients in the same residential setting at the same time). Code No. Z1616; and

viii. Up to [$3.88] **$4.50** per half-hour weekend, holiday for a group rate (two or more patients, with a maximum of eight patients in the same residential setting at the same time). Code No. Z1617; and

ix. Up to [$28.00] **$35.00** may be billed for an initial nursing assessment visit. Code No. Z1610; and

x. Up to [$20.00] **$35.00** may be billed for a nursing reassessment visit. Code No. Z1613.

(a)

DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

Long Term Care Services Manual
Patients' Personal Needs Allowance
Proposed Amendment: N.J.A.C. 10:63-1.11
Proposed Repeal and New Rule: N.J.A.C. 10:63-1.19

Authorized By: Drew Altman, Commissioner, Department of Human Services.

Authority: N.J.S.A. 30:4D-3i, 6a(4)(a)b(14); 30:4D-6a, 6.8; 30:4D-7a, b, c; 30:4D-12; 30:13-1, 3a, 5a; 42 CFR 435.725, 832.

Proposal Number: PRN 1988-27.

Submit comments by July 6, 1988 to:
Henry W. Hardy, Esq.
Administrative Practice Officer
Division of Medical Assistance and Health Services
CN-712
Trenton, NJ 08625

The agency proposal follows:

Summary

This proposal concerns the Medicaid patients' personal needs allowance (PNA) in long term care facilities (LTCF). The statutory authority cited above includes both New Jersey Medical Assistance and Health Services Act (N.J.S.A. 30:4D-1 et seq.) and the Nursing Home Responsibilities and Rights of Residents (N.J.S.A. 30:13-1 et seq.). Federal regulations require that all patients have PNA funds which are to be used to purchase personal comfort items such as cosmetics, clothing, television sets or radios, and to make contact with family. PNA funds must not be used for equipment, items or supplies which are furnished by the LTCF and included in their per diem rate. Examples of items provided by the LTCF are set forth in the text of the proposal (see N.J.A.C. 10:63-1.19(d)3i).

The amount of PNA is $35.00 per month as established by State law (N.J.S.A. 30:4D-6a). If the Medicaid patient has available income, the $35.00 PNA is deducted from this income. If the Medicaid patient has no income, he or she receives $35.00 per month. ($25.00 is supplied by SSI—Supplemental Security Income—and $10.00 is issued by the State).

The proposal also describes the appropriate uses of PNA funds. The Division believes the rights and responsibilities of the patient, the family, the LTCF, and the State should be clearly set forth.

It is the right of every resident of a nursing home, that is, LTCF, to manage his or her own financial affairs unless he or she or his or her guardian authorizes the administrator of a nursing home to manage his or her financial affairs. Such authorization must be in writing and must be attested by a witness who is unconnected with the nursing home (N.J.S.A. 30:13-5a). Long term care facilities are not required to manage a patient's PNA funds. However, if the LTCF accepts fiduciary responsibility for a patient's PNA funds, there are certain procedures which must be followed. These mandatory procedures are set forth in the proposed text of the rule (N.J.A.C. 10:63-1.19(f)). The LTCF must have a uniform accounting system which insures that PNA funds are segregated from those of the facility. The facility is required to make at least a quarterly accounting to the patient of any financial transactions on behalf of the patient.

In the event a family member wishes to use PNA funds to purchase a personal comfort item for the patient, the family member must have written authorization from the patient. The family member must either accept a check or sign a petty cash voucher.

Patients are allowed to accumulate PNA funds up to the current resource limit of $1800. However, the LTCF should inform the patient when the accumulated PNA funds reach approximately $1500 so that the patient can take appropriate action to retain Medicaid eligibility. The patient may purchase personal comfort items or may reduce excess PNA funds by applying some of the accumulated PNA toward past expenditures paid for his or her care by the New Jersey Medicaid Program.

The patient may also use accumulated PNA funds to retain his or her bed in the LTCF. New Jersey law currently provides for a 10 day "bed hold" when a patient is admitted from an LTCF to a general or psychiatric hospital. During this 10 day statutory period, the Medicaid program shall certify the facility's eligibility to receive payment (N.J.S.A. 30:4D-6.8). However, some patients' hospitalizations may go beyond the 10 day period. Therefore, the patient may use his or her accumulated PNA funds to reserve the bed in the LTCF. This aspect of the proposal is a recent development in response to the "bed hold" provision of the law.

The proposal also describes the procedures for patients who have been discharged or transferred. (Please refer to the proposed text at N.J.A.C. 10:63-1.19(f)11). The LTCF shall provide the patient with a final accounting statement and a check for the balance of PNA funds within seven working days. If a patient is transferred from one LTCF to another LTCF, the PNA funds may be transferred directly to the receiving LTCF. However, the patient, or authorized representative, must provide written authorization and must be given an accounting.

The requirements concerning PNA funds of deceased Medicaid patients have been developed in much more detail in this proposal. Within 10 days after death of the Medicaid patient, the LTCF must provide written notice regarding the existence of PNA funds to both the County Welfare Agency or the Board of Social Service (CWA/BSS) and the individual identified by the patient as the person to contact. The LTCF must exercise all reasonable efforts to locate the family or an interested person.

If there is no claim by the CWA/BSS, the LTCF may issue a check to the executor(trix) or administrator(trix) upon presentation of a letter of administration from the County Surrogate's Office, or an affidavit of administration.

If there is no claim by either the CWA/BSS or the executor/administrator, the LTCF may directly reimburse the funeral director for reasonable funeral expenses from the PNA funds.

If no claim is made to the LTCF within 90 days of death, the LTCF must forward a check to the Bureau of Administrative Control (BAC) within the Division of Medical Assistance and Health Services.

If a claim is received by the LTCF after the PNA funds have been forwarded to BAC and within five years of the Medicaid patient's death, the claim must be referred to BAC for processing. If the LTCF receives a claim after five years, the claim must be referred to the Bureau of the Budget within the New Jersey Department of the Treasury.

Any transactions involving distribution of a deceased Medicaid patient's PNA funds must appear on the LTCF's record for audit purposes.

Social Impact

The proposal impacts on all Medicaid patients residing in LTCFs. These patients are entitled to receive $35.00 per month PNA funds for their personal needs. The proposal impacts on any authorized representative who has permission to handle a patient's PNA funds.

The proposal also impacts on all LTCFs that participate in the New Jersey Medicaid Program. Those LTCFs that act in a fiduciary relationship by handling the patient's PNA funds must follow the procedures set forth in this proposal. All LTCFs must follow the procedures pertaining to PNA funds of discharged, transferred, or deceased patients.

Economic Impact

Medicaid patients are entitled to $35.00 per month PNA as provided by the State law cited above. Medicaid patients are also required to contribute toward the cost of nursing home care from their available income.

There should be virtually no economic impact on LTCFs. Items purchased from PNA funds would not be entered on the LTCF cost report and would not be used to compute the per diem rate. LTCFs may incur administrative costs to the extent they are responsible for managing a patient's PNA funds, but these would be necessary to fulfill statutory requirements.

There is no additional cost to the Division because the procedures for monitoring appropriate usage of PNA funds, and for making recoveries when necessary, are already in place.

Regulatory Flexibility Statement

The proposed amendments will affect all long term care facilities, some of which are small businesses as defined in N.J.S.A. 52:14B-16 et seq.

The Division believes that the paramount interest is to protect the health, safety and welfare of Medicaid patients in LTCFs; therefore, any small businesses among the LTCFs should not be exempt from compliance with the rules.

Medicaid providers are required to keep sufficient records to indicate medical treatment provided to a patient and any additional information as may be required by regulation (N.J.S.A. 30:4D-12(d)). In addition, nursing homes (LTCFs) are already responsible for maintaining records of patients' personal property (N.J.S.A. 30:13-3a). The Division does not believe that LTCFs will incur any capital costs as a result of this proposal.

Full text of the proposed repeal can be found in the New Jersey Administrative Code at N.J.A.C. 10:63-1.19.

Full text of the proposed amendment and new rule follows (additions shown in boldface **thus**; deletions shown in brackets [thus]).

10:63-1.11 Medicare/Medicaid

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

(d) When Medicare benefits are terminated or exhausted because of coverage limitations, Medicaid may be billed on behalf of eligible recipients provided that:

1. (No change.)

2. No payment is received from any other source, including third-party insurance or from the relatives of the recipient or the recipient except as stated below.

i. Any [regular] income received by the recipient (e.g., pension, Social Security, etc.) as [a] determined by the County Welfare Agency **(CWA)/Board of Social Services (BSS)** and reported on form **PA-3L,** Statement of Income Available for [Long-Term Care] **Medicaid** Payment [PA-3L] (Exhibit No. 27), shall be used to offset Medicaid per diem payments except for [a $25.00] **the** Personal Needs Allowance (PNA)[,] and any other deductions allowed for maintenance of a home, spouse, or dependents.

ii. (No change.)

iii. [Note:] Acceptance by a provider of payment to supplement Medicaid reimbursement constitutes a violation of New Jersey Medicaid Progrm regulations. Additionally, separate charges for care and services listed in [Section 3 of this subchapter] **N.J.A.C. 10:63-1.3** are also prohibited.

3. (No change.)

(e)-(h) (No change.)

10:63-1.19 Utilization of patient's income for Personal Needs Allowance (PNA) and cost of care in the long-term care facility

(a) Use of available income: After provision for the patient's Personal Needs Allownce (PNA) is met and then after provision for other allocations such as maintenance of spouse and/or dependent's/home are satisfied, the remainder of the Medicaid eligible patient's income must be applied to the cost of care in LTCFs which include per diem, bed reserve, etc.

1. The amount of income which must be collected by the LTCF from the patient, patient's family or Representative Payee (if any) will be established in the process of determining eligibility and identified by form PA-3L, Statement of Income Available for Medicaid Payment, issued by the CWA/BSS. The LTCF is responsible for collecting all of the patient's income to offset Medicaid's payment.

2. LTCFs must notify the CWA/BSS immediately whenever there is a change/difference in any source of income as well as when any assets or resources come to the attention of the LTCF.

3. Voluntary contributions: The New Jersey Medicaid Program encourages families or any other concerned individual(s) to make voluntary monetary contributions to the State of New Jersey on behalf of Medicaid patients. Inquiries should be directed to the Division of Medical Assistance and Health Services, Bureau of Administrative Control.

(b) Personal Needs Allowance: For all institutionalized aged, blind, and disabled individuals who are eligible for Medicaid (including blind or disabled children), a designated amount of income as determined by federal or State law (N.J.S.A. 30:4D-6a) must be protected for personal needs allowance.

1. Certain individuals in a LTCF have no income or insufficient income to provide a PNA. These individuals should be encouraged to apply for an SSI benefit which would provide PNA. The CWA/BSS does not issue PA-3L's for those recipients who only receive an SSI check.

2. Once the LTCF initiates billing for a Medicaid patient, that Medicaid patient must be considered a Medicaid patient for the full term of stay in a Long-Term Care Facility (that is, until death or physician discharge) unless the patient loses eligibility during the stay or the patient or authorized representative submits to the MDO, prior to death or discharge, a notarized statement to terminate benefits.

i. After a patient dies or is discharged, under no circumstances must that patient's Medicaid billing status be terminated prior to the date of death or discharge for the purpose of avoiding utilization of available income against the cost of care.

(c) Accumulation of Personal Needs Allowance shall be as follows:

1. Each Medicaid eligible patient residing in a LTCF is permitted to accumulate a sum of money from the PNA which, when combined with other resources retained by or for the person, does not exceed the maximum resource standard in N.J.A.C. 10:71-4.5.

i. To protect the patient's eligibility, the facility should closely monitor the PNA account when the accumulated funds reach $1500. If the PNA is in excess of the resource standard, the patient should be advised of his or her right to reduce the excess monies for personal needs. It is also requested that the LTCF advise the patient and/or authorized representative that the patient may be terminated from Medicaid coverage unless the amount in excess of the resource standard is expended.

ii. The patient may choose to reduce excess PNA by applying some of the accumulated PNA toward past expenditures paid for his or her care by the Medicaid Program. Checks payable to the "Treasurer, State of New Jersey", may be directed to the Chief, Bureau of Administrative Control, Division of Medical Assistance and Health Services, CN-712, Trenton, N.J. 08625.

(d) Standards for proper use of PNA are as follows:

1. The PNA is intended to meet the personal needs of a patient residing in a LTCF. The funds must be used as the patient wishes, with the hope that the patient will be encouraged to maintain an interest in life and a sense of personal dignity. PNA is not intended to be applied against outstanding balances for cost of care.

2. The LTCF must permit the patient and/or authorized representative reasonable access to the PNA. Purchases must be considered as personal property, properly labeled and recorded for the patient to take along when discharged or transferred to another living arrangement. In most instances, good judgment will dictate the appropriate use of PNA; however, should there be a need for clarification in an individual case, the matter may be referred to the Director of the Medicaid District Office serving the LTCF.

3. A patient has the unquestionable right to manage his or her own PNA but may prefer to have the LTCF handle the monies on his or her behalf. A facility assuming this responsibility must adhere to the policies dictating proper utilization of the patients' personal monies as outlined below. It must be clearly understood that PNA must not be used to obtain services or items which are considered part of the institution's allowable cost and which are eligible for the per diem reimbursement.

i. The basic items that facilities must make available for patient use and which are covered within the per diem include, but are not limited to, the following:

(1) Soap, facial tissues, towels, washcloths, shaving materials (lotion, razor, razor blades), combs, shampoo, toothbrush, tooth paste, laundry services and denture cleaner.

(2) Medical equipment such as wheelchairs, geri-chairs, crutches, canes, walkers, commodes;

(3) Electricity, T.V. antenna hook-up, mandated T.V. rental;

(4) Basic furnishings for the facility such as chairs, tables, fan, bedspread, curtains.

ii. Examples of items not included in the per diem reimbursement are:

(1) Small purchases: deodorant; cosmetics; electric shavers; hair spray; special lotions, powders, soaps, shampoo; hair or clothes brushes; tobacco; and candies, etc. Particular brand-name items requested by the patient, even though similar items are supplied by the facility, may be purchased with PNA.

(2) Personal items: Articles of clothing, jewelry, watches, accessories, haircuts, beauty parlor services, newspapers, and magazines, etc.

(3) Personalization of living area; The patient may use PNA money to make his or her living area more "home-like" with a colorful bedspread, rug, pictures, personally-owned chair, chest, etc., of a type not furnished by the facility.

(4) Contacts with the community: Home visiting, luggage for a home visit, trips to special events or places of interest, long distance telephone calls, personal stationery, postage stamps, gifts for the family, etc.

(5) Recreation and hobbies: Games, photographic materials, aquariums, plants, radios, recorders, television sets, etc.

(e) Bed reserve using PNA: The PNA may be used to continue a bed reserve if a patient transferred to a hospital is unable to return within the 10-day bed reserve period reimbursed by the New Jersey Medicaid Program; however, this is permissible only when a request, in writing, is made by the patient or authorized representative to the LTCF.

(f) Uniform Accounting System: Although a LTCF is not obligated to accept fiduciary responsibilities for a Medicaid patient's PNA, it provides the most accessible means for a patient to have use of his or her personal money. In order to ensure fiscal accountability for these funds, a uniform accounting system is required of a LTCF assuming this fiduciary responsibility. A regular checking or savings account must be opened by the facility to segregate the PNA from the operating funds of the facility. The Division recommends that a direct deposit system be utilized. The following aspects of the PNA accounting system are monitored by the Division through both the Periodic Medical Review and the auditing processes.

1. The facility must have a written statement signed by the patient and/or authorized representative indicating that the patient's choice is for the facility to handle his or her PNA. This responsibility must be met even if the facility is the representative payee. The authorization must be in writing and must be attested by a witness who is not connected with the nursing home, its operations, its staff personnel and the administration thereof, in any manner whatsoever.

2. The facility must develop written policies and procedures for the handling and disposition of the PNA and must give a copy to the patient and/or authorized representative. This responsibility must be met even if the facility is the representative payee.

3. A general ledger control account must be established to record the total amount of PNA held in escrow by the facility.

4. A subsidiary ledger must be established whereby each patient's deposits and disbursements are recorded and the total of the patient's balances reconciled to the general ledger control account each month.

5. When recording the patient's income in a cash receipts journal, the PNA must be segregated from the available income applied to the cost of the patient's care. Within five days of receipt, the PNA must be deposited directly into the regular checking or savings account restricted for PNA. The general ledger control account must reflect a credit posting to indicate the total PNA received during the month. Each patient's subsidiary ledger account must also be posted to record the deposits to the appropriate account.

6. To facilitate the patient's access to the PNA, a portion of the total cash may be transferred periodically from the segregated checking/savings account to a petty cash fund.

7. In compliance with federal and State regulations, the facility must submit, at least quarterly, for review by the patient and/or authorized representative a detailed written account of any financial transactions made on behalf of the patient.

8. A family member must have authorization in writing from the patient for a specific amount before funds are disbursed from the PNA. A family member who requests the patient's PNA must either accept a check or sign a petty cash voucher for cash.

9. When drawing checks or cash to make disbursements from the patient's PNA account, either an original invoice or a signed receipt from the patient or an authorized representative must be retained by the facility and referenced to the patient's account. The receipt must stipulate the use of the funds or specify the items purchased.

10. When the facility draws checks on behalf of a patient or reimburses the petty cash fund, disbursements of PNA must be segregated from the operating expenses of the facility. At the end of each month, the general ledger control account must be charged for the total PNA disbursed and each patient's subsidiary ledger account must reflect the monthly disbursements on that patient's behalf.

11. Accumulated interest from an interest bearing account is the property of the patient.

12. Upon discharge or transfer to another LTCF or other place of residence, the facility must provide the patient with a final accounting statement and a check in the amount of the patient's close-out balance within seven working days of the transfer; however, a patient transferred to another LTCF must have the option of authorizing the facility in writing to transfer any balance to the patient's account at the new facility. The transfer of a PNA account from one facility to another must be documented in writing with a copy given to the patient and/or authorized representative. A patient discharged or transferred has a right to the return of his or her personal property, that is, television, radio, etc.

i. If a patient is discharged to a hospital and the hospital stay extends beyond the 10 day bed reserve period, the procedure outlined above must be followed.

13. Unclaimed PNA funds left behind by a discharged patient who cannot be located or where the authorized representative cannot be located, must be forwarded within 90 days to the Bureau of Administrative Control, CN 712, Trenton, New Jersey 08625.

14. Within 10 days after the death of a Medicaid patient, whether death occurred in the LTCF, in a hospital, or otherwise, that is, during a period of therapeutic leave, the LTCF must send a written notice regarding the existence of PNA funds both to the County Welfare Agency/Board of Social Services and the individual identified by the patient as the person to contact. A LTCF must exercise all reasonable efforts to locate and notify family, representative payee or interested person acting on behalf of the deceased Medicaid patient.

i. The facility must advise the contact person/responsible person that any claims made for PNA funds must be directed to the LTCF. When no CWA/BSS claim exists, the executor(trix) or administrator(trix), upon presentation of a letter of administration from the County Surrogate's Office, must be issued a check made payable to the estate of the deceased Medicaid recipient for the PNA funds. A check for the funds must not be issued, unless a Surrogate's letter is presented. The only exception to the requirement for the Surrogate's letter is when a recipient dies intestate, leaving no surviving spouse, and the total value of the estate is less than $5,000; then an affidavit of administration in accordance with N.J.S.A. 3B:10-4 is acceptable.

ii. If there is an outstanding funeral bill which is deemed reasonable and there is neither a claim by the CWA/BSS nor an executor/administrator, the LTCF may directly reimburse the funeral director from the PNA funds.

iii. If no claim is made to the LTCF within 90 days of death, a check made payable to the "Treasurer, State of New Jersey" must be forwarded to the Bureau of Administrative Control, CN-712, Trenton, New Jersey 08625. The following information must be included:

(1) An identification of the funds as unclaimed PNA funds of the deceased Medicaid recipient:

(2) Recipient's name;

(3) HSP (Medicaid) Case Number;

(4) Date of death; and

(5) Amount enclosed for that recipient.

iv. If a claim is received by the LTCF after the PNA funds have been forwarded to the Bureau of Administrative Control and within five years of the Medicaid recipient's death, the claim must be referred to the Bureau for processing. After five years, all claims received by the LTCF must be referred to the State Treasurer.

v. Any transactions involving distribution of a deceased Medicaid recipient's PNA funds must appear on the LTCF's records for audit purposes.

(g) Questions regarding Personal Needs Allowance administration (that is, procedures, policy, use, etc.) should be directed to the Director of the Medicaid District Office serving the LTCF.

(a)

DIVISION OF PUBLIC WELFARE

Assistance Standards Handbook
Emergency Assistance

Proposed Amendment: N.J.A.C. 10:82-5.10

Authorized By: Drew Altman, Commissioner, Department of Human Services.

Authority: N.J.S.A. 44:7-6 and 44:10-3, and 45 CFR 233.120.

Proposal Number: PRN 1988-289.

A public hearing concerning this proposal will be held on June 21, 1988 at the following location and times:

War Memorial Ballroom
West Lafayette Street Entrance
Trenton, New Jersey
12 Noon-4:30 P.M.
6:00 P.M.-8:00 P.M.

Individuals interested in testifying at the hearing must advise the Division of Public Welfare, Mercerville, New Jersey by telephone at (609) 588-2294 no later than 12 Noon on June 20, 1988 and provide their name(s), organization represented, and telephone number. Interested speakers will be limited to 10 minutes of oral testimony. Interested parties may submit written testimony at the hearing, or by the deadline below.

Submit written comments by July 6, 1988 to:

Marion E. Reitz, Director
Division of Public Welfare
CN 716
Trenton, New Jersey 08625

The agency proposal follows:

Summary

The proposed amendment eliminates the "double payment" for housing for families who are in emergency shelter beginning with the first full month of entitlement. This amendment will correct a basic inequity in the present rule. Families in shelter do not pay any housing costs and, therefore, have more disposable income than families who pay rent from their regular assistance check. Essentially, families in shelter receive a double benefit because shelter costs are paid simultaneously through both their AFDC grant and through emergency assistance. This policy would result in a 30 percent reduction of the regular AFDC grant amount while families' housing costs are being paid in full through emergency assistance. Full AFDC grants would be restored immediately once a family left the Emergency Assistance (EA) program. Funds generated from this change will be used to continue funding of the County Homelessness Assistance Grant Initiative. This initiative, funded at $2 million in Fiscal Year 1988, provides funds for counties to use more flexibility than EA funds to develop longer term solutions to the problem of homelessness, such as rental subsidies.

On March 10, 1988 the Department of Human Services submitted a report to the Legislature documenting the effects experienced by families as a result of the November 16, 1987 revised rules governing EA to homeless persons. Those regulations followed a period of time during which the Department's previous regulations were suspended by *Maticka v. City of Atlantic City*, a New Jersey Appellate Court decision that required a reassessment of the Department's emergency assistance policy. The Department's new rules, adopted on November 16, 1987 (at 19 N.J.R. 2190(a)) dramatically broadened eligibility for EA, and also permitted County Welfare Agencies to extend emergency assistance for up to two additional months following the initial three month period in situations where all reasonable efforts to secure permanent shelter by both the county welfare agency and the client proved unsuccessful. Subsequent emergency rulemaking, effective April 1, 1988, granted a one-time, one month, extension of EA benefits for those families whose maximum extended benefits expired on March 31, 1988.

As a result of these changes, New Jersey's EA program has been substantially improved and liberalized. The number of families served by EA has been tripled from 5,000 to 16,000. Program expenditures have risen from $9 million to $30 million.

In examining the present EA system over the past year, a basic inequity was found to exist. Families on AFDC who are placed on emergency assistance and in temporary shelter arrangements (that is, hotels, motels) receive full AFDC grants; but do not pay any portion of their rent from that grant. Ninety-nine percent of AFDC recipients, who at any time are not in hotels or motels under emergency assistance, are required to cover their rental costs out of the same size grant. This disparity in policy penalizes the efforts put forth by those families who remain self-sufficient. Families in the temporary shelter arrangement have more disposable income available for their use and are financially better off than those AFDC families living in the community. The temporary lodging of such EA families creates a double expenditure of funds for housing purposes.

Full grants will be resumed immediately when a family leaves the hotel or motel and enters an apartment or other transitional or permanent living arrangement. Funds saved by this policy change will be utilized to continue the funding of the County Homelessness Assistance Grant program. This program provides rental assistance and other forms of aid to homeless families to help them leave welfare hotels and secure better transitional and permanent living arrangements. This amendment ensures the future funding of this initiative at the county level where individual family needs and circumstances are most effectively understood and accommodated.

Social Impact

The proposed amendment provides for a policy change to remove the inequity in the current AFDC program that allows double payment for housing for families in temporary shelters under emergency assistance. The AFDC grant for families in temporary placements at government expense will be reduced by 30 percent. Since shelter costs are paid in full through emergency assistance funds, and these families do not make rental payments, this change should not disadvantage families in emergency shelter. By reducing the AFDC grant, duplicate assistance is eliminated. In addition, as a result of this amendment, families on EA will be eligible for additional food stamp support, as described below.

Economic Impact

Funds saved by this policy change, approximately $3 million in Fiscal Year 1989, will be utilized to continue funding for the County Homelessness Assistance Grant program in Fiscal Year 1989. The rule will also maximize the flow of Federal dollars to the State because EA recipients will be eligible for increased Food Stamp benefits (at 100 percent Federal funding) resulting from the 30 percent adjustment to AFDC payments, that is, for every $3.00 reduction in the grant, the recipient will receive $1.00 in increased food stamp benefits.

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 business.

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

10:82-5.10 Emergency assistance

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

(d) Needs of the eligible family may be recognized in accordance with the regulations and limitations in the following paragraphs:

1. Emergency shelter: The county welfare agency shall authorize payment of the actual cost of adequate emergency shelter arrangements at the most reasonable rate available, for a specified temporary period (see N.J.A.C. 10:81-7.1(k)6vii concerning notice requirements) not to exceed two calendar months following the month in which the state of homelessness first becomes known to the county welfare agency. Such emergency shelter, wherever possible, shall be in the municipality in which the eligible family currently resides. If however, shelter as delineated above is not available within the municipality of customary residence, the recipient, as a condition of eligibility, shall be obliged to accept shelter as delineated above which is situated outside the municipality of customary residence. In situations where the county welfare agency determines that despite efforts of both the client and the agency (see 6 below), permanent living arrangements are unavailable, an extension of emergency assistance may be authorized in accordance with the provisions of [(d)1.vii] **(d)1.viii** below.

i. Beginning with the first full calendar month of authorized payment for emergency shelter arrangements, regular assistance grants for families in temporary shelters will be based on a 30 percent shelter cost adjustment to AFDC allowance standards. The adjusted allowance standards to be used are set forth in Schedule VII and Schedule VIII. The adjusted allowance standards are applicable only to those families in temporary shelter arrangements.

Schedule VII
Adjusted AFDC Allowance Standards for Families in Temporary Shelters

AFDC-C AFDC-F	**Number in Family**	**AFDC-N**
113	**1**	**76**
225	**2**	**151**
297	**3**	**198**
342	**4**	**228**
386	**5**	**258**
431	**6**	**288**
476	**7**	**317**
521	**8**	**347**
566	**9**	**377**
610	**10**	**407**
Add $45 Each Person	**more than 10**	**Add $30 Each Person**

Schedule VIII
Adjusted AFDC Allowance Standards for Families in Temporary Shelters
Per Capita Table: -C, -F Segment

Total Family Size	**Number in -C or -F Segment**								
	1	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**9**
2	**113**								
3	**99**	**198**							
4	**85**	**171**	**256**						
5	**77**	**155**	**232**	**309**					
6	**72**	**144**	**216**	**288**	**359**				
7	**68**	**136**	**204**	**272**	**340**	**408**			
8	**65**	**130**	**195**	**260**	**326**	**391**	**456**		
9	**63**	**126**	**188**	**251**	**314**	**377**	**440**	**503**	
10	**61**	**122**	**183**	**244**	**305**	**366**	**427**	**489**	**550**

Per Capita Table: -N Segment

Total Family Size	**Number in -N Segment**								
	1	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**9**
2	**76**								
3	**66**	**132**							
4	**57**	**114**	**171**						
5	**52**	**103**	**155**	**206**					
6	**48**	**96**	**144**	**192**	**240**				
7	**46**	**90**	**136**	**181**	**227**	**272**			
8	**43**	**87**	**130**	**174**	**217**	**260**	**304**		
9	**42**	**84**	**126**	**168**	**209**	**251**	**293**	**335**	
10	**41**	**81**	**122**	**162**	**204**	**244**	**285**	**326**	**366**

Renumber existing i. through vii. as **ii.** through **viii.** (No change in text.)

2.-6. (No change.)

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

(a)

DIVISION OF YOUTH AND FAMILY SERVICES

Manual of Standards for Residential Child Care Facilities

Proposed Readoption: N.J.A.C. 10:127.

Proposed Amendments to Readoption: N.J.A.C. 10:127-1.1, 1.2, 1.3, 1.4, 2.2, 2.4, 3.1, 3.3, 3.6, 4.5, 4.7, 4.10, 4.11, 4.12, 4.16, 4.19, 4.23, 5.1, 5.3, 6.1 and 6.3.

Authorized By: Drew Altman, Commissioner, Department of Human Services.

Authority: N.J.S.A. 30:1-14 and 15 and N.J.S.A. 30:4C-4.

Proposal Number: PRN 1988-281.

Submit comments by July 6, 1988 to:
J. Patrick Byrne, Chief
Bureau of Licensing
Division of Youth and Family Services
One South Montgomery Street
CN 717
Trenton, New Jersey 08625

The agency proposal follows:

Summary

N.J.A.C. 10:127 governs the approval of residential child care facilities serving 13 or more children who are placed or financed by the Division of Youth and Family Services (DYFS) and that are not licensed or regulated by another New Jersey State agency. The rules set minimum requirements in the areas of administration, life-safety/physical facilities, staffing, transportation, health care and program, including treatment services, recreation and education. Currently, the DYFS Bureau of Licensing approves and regulates 68 residential facilities both within and outside New Jersey.

In accordance with the "sunset" provisions of Executive Order 66 (1978), N.J.A.C. 10:127 expires September 19, 1988. The Division of Youth and Family Services (DYFS) proposed to readopt the chapter with substantive and technical amendments. The proposed readoption is necessary to continue in full force and effect these rules governing residential child care facilities, under the jurisdiction of the Division's Bureau of Licensing. The Division has carefully reviewed the chapter and has determined that N.J.A.C. 10:127 continues to be reasonable, necessary and proper for the reason it was originally adopted.

As part of the readoption, the Division is proposing to change the chapter name to "Manual of Requirements for Residential Child Care Facilities" in lieu of "Manual of Standards for Residential Child Care Facilities," as it currently appears in the New Jersey Administrative Code. The DYFS believes that the term "requirements" more precisely denotes minimum baseline expectations to be met in order to qualify for State regulatory approval; whereas the term "standards" refers more accurately to state-of-the-art practices, such as those that are contained in higher-level model or accreditation guidelines. Other technical changes are being proposed to correct grammatical errors or misspellings.

The Division also proposed to amend N.J.A.C. 10:127-1.3, so that it requires biennial (rather than annual), program inspections of these facilities and extends the regulatory approval period from one to two years. This will enable the DYFS Bureau of Licensing to utilize its limited staff resources more effectively by granting approvals for two years, rather than one year, making more staff time available for periodic monitoring and for focusing on those programs in need of more technical assistance. Specifically, this system allows the Bureau of Licensing to schedule four program inspections/visits to the facility during every two-year period—one formal inspection and three monitoring visits—rather than two formal program inspections and no monitoring visits (except in response to a complaint against a facility) under the current scheme. By eliminating one of the two formal program inspections, DYFS realizes a trade-off in terms of time commitment, staff resources and workload volume in favor of a more frequent presence at every residential facility that aids the facility in maintaining a higher level of compliance. Life-safety/physical facility site inspections would continue to be conducted annually.

This two-year approval/program inspection practice has already been formally adopted in the DYFS rules governing child adoption agencies and children's shelter facilities and homes, and will be incorporated in revisions to the rules for children's group homes, now being developed in cooperation with the State's residential child care community.

The Division proposes to amend N.J.A.C. 10:127-5.3(f)5 to require that automatic electrical fire alarm and detection systems contain smoke detectors as the required detection devices.

Social Impact

The Division anticipates that a positive social impact will result from the readoption of this chapter. Readoption will assure the continued oversight and inspection by the Division of residential facilities providing care to children, in conformance with the requirements of the chapter. The children will benefit from the continued adherence by these facilities to requirements governing the children's care and environment while they are receiving residential treatment. No negative impact on the ongoing operations of the facilities is anticipated.

Economic Impact

No change in economic impact on these facilities or on the Division is anticipated, since residential facilities have been meeting the requirements of this chapter since it was adopted in 1983.

The proposed change from annual to biennial program inspections and from an annual to biennial regulatory approval period should have a positive impact, both on regulated facilities and the DYFS. Under the two-year approval/program inspection scheme, applications for re-approval will be required to be prepared and submitted by the facilities and reviewed and assessed by the DYFS once every two years instead of annually. As a result, paperwork, time commitments and administrative workload demands for both facilities and DYFS staff will be reduced, enabling the facilities to devote more staff time to direct services and the DYFS more opportunity to provide support and assistance to the facilities.

Regulatory Flexibility Analysis

This proposal affects residential child care facilities, all of which fall within the definition of a small business, as defined in the Regulatory Flexibility Act (P.L. 1986, c.169). As such, it is not appropriate or necessary to establish differential rules that would apply to larger and smaller entities, as called for under the law. However, it should be emphasized that these rules have been designed to constitute minimum baseline requirements of safety, health, supervision and program in order to minimize the administrative and economic burden on these facilities while still assuring the well-being of the children they serve.

Full text of the proposed readoption appears in the New Jersey Administrative Code at N.J.A.C. 10:127.

Full text of the amendments to the readoption follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]).

OFFICE OF ADMINISTRATIVE LAW NOTE: The provisions of N.J.A.C. 10:127-6.4, 6.5, 6.6, and 6.7 were properly proposed and adopted and have been in effect since September 19, 1983, although they were inadvertently omitted from the printing of N.J.A.C. 10:127 in the Administrative Code. These rules are published herein as part of this readoption.

CHAPTER 127
MANUAL OF [STANDARDS] ***REQUIREMENTS*** FOR RESIDENTIAL CHILD CARE FACILITIES

10:127-1.1 Legal authority

(a)-(e) (No change.)

(f) Under N.J.S.A. 30:1-15, the Department of Human Services is authorized to "visit and inspect" publicly or privately maintained institutions or other institutions and non-institutional agencies [to include] **, which may include,** but are not limited to, residential child care facilities that:

1. Provide board, lodging or care for children who are not placed or financed by the Division of Youth and Family Services or any other New Jersey **State** agency; and
2. (No change.)

(g) (No change.)

10:127-1.2 Definitions

. . .

"Manual of [Standards] **Requirements** for Residential Child Care Facilities" or "Manual of [Standards] **Requirements"** means the rules [and regulations] promulgated in [this chapter,] **N.J.A.C. 10:127,** which shall constitute minimum requirements for residential child care facilities.

. . .

10:127-1.3 Approval requirements

(a) (No change.)

(b) The Bureau shall conduct on an annual basis an on-site physical facility **inspection** and **a biennial** programmatic inspection of the facility to determine compliance with this chapter.

(c) If the facility meets all applicable provisions of this chapter, the Bureau shall issue a [letter] **regular certificate** of approval.

(d) The Bureau shall provide notice if a [letter] **certificate** of approval shall not be issued.

(e) If the Bureau determines that a facility is in substantial compliance with the provisions of this chapter, providing that no serious or imminent hazard affecting the children exists, the Bureau may issue a [letter of] temporary **certificate of** approval.

(f) When a [letter of] temporary **certificate of** approval is issued, the Bureau shall provide a written statement explaining what the facility must do to achieve full compliance.

(g) Each certification period, which may include the issuance of one or more temporary certificates and/or one regular certificate, shall be two years.

1. In determining the expiration date of the first regular certificate of approval, the Bureau shall compute the two-year approval period from the date of issuance of the first temporary or regular certificate.

2. In determining the expiration date of a renewed regular certificate, the Bureau shall compute the two-year approval period from the date on which the previous regular certificate expired.

[(g)] **(h)** The [letter of approval] **regular** or temporary **certificate of** approval shall be kept on file at the facility.

[(h)] **(i)** An authorized representative of the Bureau may[,] at any time make an announced or unannounced visit and inspect the facility and/or review files, reports or records to determine its compliance with this chapter and/or to investigate a complaint.

[(i)] **(j)** A facility's approval may be denied or revoked for any activity, policy or conduct that presents a serious or imminent hazard to the health, safety and well-being of a child or that otherwise demonstrates unfitness or inability to operate a residential child care facility.

10:127-1.4 Administrative hearings

(a) To effectuate the purposes of this chapter, the Bureau or the facility[,] may initiate an administrative hearing in the interest of justice.

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

10:127-2.2 Intake and admissions procedures

(a) Pre-admission requirements:

1. For non-emergency placements, the facility shall admit only those children for whom a comprehensive intake evaluation, including the psychological, family, [development] **developmental**, social, and chronological age factors affecting the child, is completed.

2.-4. (No change.)

(b) Admission requirements:

1. Upon the child's admission, the facility shall obtain pertinent factual and identifying information, including, as a minimum, the following:

i.-viii. (No change.)

ix. Date(s) and length of stay of admission to and discharge from previous facilities[;] , if any;

x. Child's medical history, chronic conditions, past serious illnesses, allergies, special diet[s];

xi. A statement signed by the parent(s) granting consent for emergency medical or surgical care for the child; **and**

xii. (No change.)

2. (No change.)

3. Following admission to a facility each child shall be:

i.-ii. (No change.)

iii. Informed of fire [exists] **exits** and [evaluation] **evacuation** procedures.

10:127-2.4 Records

(a) General [requirement] **requirements**:

1.-3. (No change.)

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

(d) Administrative records [-] : Every facility shall keep on file the following written records:

1. (No change.)

2. A copy of the facility's insurance coverage including:

i. (No change.)

ii. Fire insurance[.] ;

3.-5. (No change.)

6. A current copy of [this chapter (Manual of Standards)] **the Manual of Requirements**;

7.-21. (No change.)

10:127-3.1 Basic information

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

(c) Every facility shall have:

1.-2. (No change.)

3. Social service staff, who shall be responsible for developing and implementing the facility's social service program including the performance of duties relating to casework services, intake procedures, treatment planning, provision of direct therapeutic services, family contacts and maintanance of treatment records[.] ;

4.-9. (No change.)

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

10:127-3.3 Staff qualifications

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

(c) Social services/clinical director—The social services/clinical director of the facility shall:

1. (No change.)

2. Have a master's degree from an accredited graduate school in sociology, psychology, [science] **social** work, mental health or a related field and two years of professional clinical experience in human services or mental health field; or

3. (No change.)

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

(f) Child care director—The child care director of the facility shall:

1. (No change.)

2. Have a high school or high school equivalency diploma and five years of professional experience in **the** human services or mental health field, two years of which shall have been in **a** residential child care facility, group home or shelter; or

3. (No change.)

(g) (No change.)

10:127-3.6 Governing body/citizens board

(a) Every facility shall have **a** governing body/citizens board which shall either:

1.-2. (No change.)

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

10:127-4.5 Discharge/aftercare

(a) (No change.)

(b) The facility shall notify the placing agency in writing at least 10 calendar days prior to the discharge of a child when a child [had] **has** demonstrated an inability to continue functioning in the program.

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

10:127-4.7 Behavior management room

(a) (No change.)

(b) General requirements:

1. The facility shall prepare and maintain a written policy governing the criteria for use of the room, staff members [authority] **authorized** to place a child in the room, procedures for insuring a child's safety while confined, and time limitations for placement of a child in such a room.

2. (No change.)

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

10:127-4.10 Food and nutrition
(a) General requirements:
1. (No change.)
2. Menus shall be dated and kept [or] **on** file for a minimum of 90 calendar days.
3.-4. (No change.)
(b) (No change.)

10:127-4.11 Rest, bedroom and sleep
(a) (No change.)
(b) General requirements:
1.-3. (No change.)
4. Every child shall be provided with sanitary bed linens that are changed[,] weekly, a blanket or other suitable covering that is cleaned or replaced, as necessary, and a pillow.
5.-17. (No change.)

10:127-4.12 Education
(a) General requirements:
1.-4. (No change.)
5. The facility shall provide or utilize on-grounds or community vocational education services appropriate to the age, skill level, [interest] **interests** and abilities of those children who require such services.
(b)-(e) (No change.)

10:127-4.16 Discipline and control
(a)-(d) (No change.)
(e) The facility shall prohibit the following types of punishment:
1.-9. (No change.)
10. Temporary suspension of a child from the facility to a parent(s), relative(s), foster home or drop-in shelter without the consent of the placing agency[,] . [such] **Such** consent shall be documented in the child's record.

10:127-4.19 Search and seizure requirements
(a) Search procedure for a weapon(s)
1. A facility staff member shall be permitted to frisk search (surface search of outer clothing) a child only when there is reasonable suspicion that the child is in possession of **a** weapon(s).
2. A facility staff member shall be prohibited from reaching into a child's pockets unless the frisk[s] search indicates that [their] **there** is reasonable belief that the child is in possession of a weapon(s).
3. (No change.)
(b)-(c) (No change.)

10:127-4.23 Mail and telephone communications
(a)-(b) (No change.)
(c) A staff member may open parcels and letters only if [he or she] **s/he** suspects that the contents contain contraband and then only in the presence of the child sending or receiving the parcel or letter and another staff member. A record signed by the staff member[,] shall be maintained in the child's file documenting the specific reason why such mail was opened and the results.
(d)-(h) (No change.)

10:127-5.1 New Jersey local government physical facility requirements
(a) Any residential child care facility located in New Jersey shall comply with the requirements in (b) through [(d)] **(e)** below.
(b) An applicant seeking approval to open and operate a facility for the first time as such shall:
1. For newly constructed buildings, existing buildings whose construction code use group classification would change from that which it had been or existing buildings that require major alteration or renovation, submit to the Bureau a copy of the building's certificate of occupancy issued by the municipality in which it is located, reflecting the building's compliance with the provisions of the State Uniform Construction Code (N.J.A.C. 5:23), hereinafter referred to as UCC, for the I-3 use group classification[.] ;
2. For existing buildings whose construction code use group classification is already I-3 and which [has] **have** not had major alterations or renovations to make [it] **them** suitable for use as a residential child care facility, submit to the Bureau a copy of the building's certificate of occupancy issued by the municipality in which it is located at the time the building was originally constructed or approved for use in the I-3 use group, or a certificate of continued occupancy issued by the municipality in which it is located, reflecting the facility's compliance with the municipality's construction code requirements that were in effect at the time it was originally constructed or converted to use group classification I-3; and
3. (No change.)
(c)-(e) (No change.)

10:127-5.3 New Jersey State government physical facility requirements
(a)-(c) (No change.)
(d) Exit requirements:
1. (No change.)
2. Doors:
i.-ii. (No change.)
iii. Doors used for exits shall:
(1) (No change.)
(2) Be unlocked from the inside of the building while children are at the facility; [and]
(3) Swing in the direction of egress when serving an occupant load of more than 50[.] **; and**
(4) In enclosed exit stairs, swing in the direction of egress, be self-closing and not block the egress of people utilizing the floors above.
iv. (No change.)
3.-4. (No change.)
(e) (No change.)
(f) Fire protection:
1.-4. (No change.)
5. Buildings with a capacity of more than 12 children that have been in existence and approved as a residential facility prior to February 22, 1983 shall have and maintain at least one of the following:
i. A comprehensive automatic electrical fire alarm and detection system. **The detection devices shall be smoke detectors**; or
ii. (No change.)
6.-16. (No change.)
(g)-(h) (No change.)
(i) Lighting:
1. General requirements:
i. (No change.)
ii. At least 20 foot candles of light, natural or artificial, shall be provided in classroom and study areas. This illumination shall be measured three feet above the floor at the furthest point from the light source.
iii. (No change.)
2. (No change.)
(j)-(p) (No change.)
(q) Maintenance and sanitation:
1. (No change.)
2. Indoor maintenance and sanitation requirements:
i.-iv. (No change.)
v. The facility shall utilize receptacles for food waste disposal that are made of durable materials that are nonabsorbent, leak proof, **easily cleaned** and provided with tight fitting covers.
vi.-vii. (No change.)
3. (No change.)
(r) Lead paint[-]: Facilities caring for children six years of age [and/or] **or** younger [or] **and/or** older children [that] **who** have been diagnosed as having pica shall comply with the following:
1. Lead paint shall not be used on and shall be removed by the facility from any interior **or** exterior surfaces, furniture, toys or other equipment used therein, in accordance with the provisions of Chapter [51]**13** of the New Jersey State Sanitary Code (N.J.A.C. 8:51-7.1 through 7.5).
2. (No change.)

10:127-6.1 Vehicle requirements
(a) (No change.)
(b) Vehicles used for transportation of children shall be maintained in safe operating condition and shall be properly registered

and have a currently valid inspection sticker for the state in which [it is] **they are** registered.

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

10:127-6.3 Safety practices

(a)-(h) (No change.)

(i) The driver or second adult(s) shall ensure that each child is received by [their] **his or her** parent or person designated by the parent.

(j) (No change.)

10:127-6.4 Transportation records

(a) The facility shall keep on file the name of each driver and a photostatic copy of his or her valid driver's license.

(b) These records shall be available upon request to any authorized representative of the Bureau.

10:127-6.5 Insurance

(a) The facility shall maintain liability insurance for bodily injury or death in minimum amounts of $300,000 per person and $500,000 per accident.

(b) If the facility's transportation services are provided by a private individual or firm under contract or other arrangement, the facility shall maintain on file a copy of the individual's or firm's insurance coverage in the amount specified in (a) above and make a copy of such coverage available to the Bureau upon request.

10:127-6.6 Other requirements

(a) The facility shall provide each child with the transportation necessary for implementing the child's treatment plan.

(b) The facility shall have means of transporting children in cases of emergency.

10:127-6.7 [Special regulations] **Transportation of physically handicapped non-ambulatory children**

(a) The following additional [regulations] **rules** shall be required for facilities serving [specially handicapped, non-ambulatory children] **physically handicapped children who are non-ambulatory:**

1. A ramp device shall be provided to permit entry and exit of a child from the vehicle. A hydraulic lift may be utilized provided that a ramp is also available in case of emergency.
2. Wheelchairs shall be securely fastened to the floor of the vehicle.
3. The arrangement of the wheelchairs shall provide an adequate aisle space and shall not impede access to the exit door of the vehicle.

INSURANCE

(a)

DIVISION OF LICENSING AND ENFORCEMENT

Insurance Producer Licensing Professional Qualifications

Reproposed Repeals: N.J.A.C. 11:2-1 and 19 Reproposed New Rules: N.J.A.C. 11:17-3 and 11:17-5.7

Authorized By: Kenneth D. Merin, Commissioner, Department of Insurance.

Authority: N.J.S.A. 17:1C-6, 17:1-8.1, P.L. 1987, c.293. (N.J.S.A. 17:22A-1 et seq., 17:22A-4(c) and 24.)

Proposal Number: PRN 1988-300.

Submit written comments by July 6, 1988 to:

Verice M. Mason
Assistant Commissioner
Division of Legislative and Regulatory Affairs
Department of Insurance
201 East State Street
CN 325
Trenton, New Jersey 08625

The agency proposal follows:

Summary

The proposed new rules contain insurance producer professional qualification requirements designed to implement the "New Jersey Insurance Producers Licensing Act", (the Act) P.L. 1987, c.293 (N.J.S.A. 17:22A-1 et seq.), which was signed October 29, 1987 by Governor Kean and by its terms takes effect 180 days thereafter.

The Act amends certain provisions of the Insurance Licensing statute and repeals others under statutory Titles 17 and 17B. Rules concerning insurance producer licensing and licensing transition have been separately proposed and adopted, operative as of April 26, 1988 (see 20 N.J.R. 904(a)). These proposed new rules provide for the professional qualifications of insurance producers, specifically regarding required professional education and examination provisions. Certain rules are proposed for repeal and replacement; other proposed new rules deal with continuing education and recognized professional designations.

Proposed repeals and new rules concerning this subject matter were previously published in the February 1, 1988, New Jersey Register at 20 N.J.R. 237(a). In response to that proposal, comments were received from various persons and entities, which remain on file with the Department.

As a result of the comments received, as well as the Department's own internal review, the Department has determined to publish the following proposed repeals and new rules. It should be noted that this reproposal supersedes the original proposal and that any comments received in response thereto have either been accepted or rejected. Accordingly, any interested person who wishes to respond to the reproposal should submit written comments which are responsive to the current text of the reproposal.

The proposed new rules include several changes; the major ones are summarized below:

With regard to approval of insurance education programs, the proposed new rules modify the original language to clarify that some provisions apply only to prelicensing education courses or continuing education courses. The reproposed new rules specifically authorize the use of special lecturers or guest speakers for both prelicensing and continuing education, so long as the program carries out necessary administrative duties and maintains proper records.

With regard to the courses of prelicensing education, the proposed new rules contain a downward adjustment in the minimum number of classroom hours. This adjustment has been made as the result of further refinement of the curricula and advice and comments from other insurance educators. The Department notes that the number of classroom hours stated is a minimum and expects that approved programs may choose to expand that number. Additionally, the proposed new rules include a combined life and health course, with minimum hours less than a combination of the two because of the cross-application of some curriculum material. The property/casualty curriculum has been refined to include health authority topics because of the required knowledge of that material for casualty insurance, workers' compensation and others.

With regard to the section on examination, the proposed new rules require individual resident limited insurance representatives who deal with bail bonds and mortgage guarantee insurance to pass an examination. The proposed new rules also include a procedure by which retaking the examination may be mandated when the Department receives information about a breach of examination security provisions either before or after a license has been issued.

With regard to continuing education, the proposed new rules eliminate the exemption for those holding the CLU and CPCU designations. The proposed new rules permit the approval of a group or series of courses for up to 12 continuing education units. This allows organizations which offer and administer existing programs of continuing insurance education to obtain a blanket approval, which is expected to improve flexibility and ease administrative burdens while maintaining the objectives of the new rules.

With respect to transition, the proposed new rules contain an implementation date for the new prelicensing courses of July 1, 1989. After that date, the State licensing examination will test the material in the new courses. Additionally, credit may be allowed for continuing education courses taken after August 1, 1988 and approved for credit retroactively in accordance with the proposed standards. This will allow those licensees renewing in the August 1, 1992 licensing quarter a full four years to complete the continuing education requirements, and ease the expected burden of initial credit certification when the rules are adopted.

N.J.A.C. 11:17-3.1 describes the standards and procedures for approval of insurance education programs, replacing the repealed rules at N.J.A.C. 11:2-19. The proposed new rule provides for Department approval of

programs that teach insurance courses to satisfy professional qualification requirements for prelicensing and continuing education.

N.J.A.C. 11:17-3.1(b) describes the information filing requirements for all insurance education programs that seek approval. N.J.A.C. 11:17-3.1(c) describes the additional filing requirements of programs that will teach prelicensing courses. N.J.A.C. 11:17-3.1(d) requires that the program director sign all applications and sets a processing fee of $100.00. N.J.A.C. 11:17-3.1(e) describes the approval process.

N.J.A.C. 11:17-3.1(f) describes the standards for approval of insurance education programs. Programs shall maintain a permanent office in New Jersey where student records are kept, copies of educational materials used and the program's certificate of approval. The office shall be open to the Department for inspection and accessible to prospective, present and past students. This requirement of a permanent office in New Jersey is waived for courses sponsored by accredited colleges and universities, or producer trade associations, if proper records are maintained and available. Approved programs shall maintain a director in charge, who is accessible at or through the program's New Jersey office for communication to and from the Department and the public. The director is the personal point of contact with the program, and is responsible to receive and distribute information to other program locations and instructors.

An approved program shall use qualified instructors. Instructors employed to teach prelicensing education courses shall have five years of experience in insurance practice, education or its equivalent; additionally, they shall demonstrate professional competence by holding a recognized professional designation, being a member of the faculty of an accredited college or university, or passing an examination designed to test the knowledge and competence of instructors. Neither the director nor any instructors may have had an insurance license revoked. Approved programs may use special lecturers or guest speakers so long as it develops proper records and reports.

The proposed new rules retain the present standard requiring that programs use adequate classroom facilities for teaching the courses. The programs shall teach prelicensing courses in accordance with curricula established by the Department and/or continuing education programs approved by the Department in accordance with N.J.A.C. 11:17-3.4. All courses shall be conducted and administered so that the Department may rely on certificates of completion of prelicensing courses, and reports of completion of continuing education courses. Programs teaching prelicensing courses shall provide remedies for students who failed the State licensing examination. Approved programs shall retain necessary student records for a period of five years.

N.J.A.C. 11:17-3.1(g) and (h) provide that approved programs may teach courses at multiple, permanent locations or may conduct classes at temporary locations. This provision is designed to promote flexibility and to ensure that proper prelicensing and continuing education courses are widely available throughout the State. N.J.A.C. 11:17-3.1(i) requires that a program director shall provide scheduling information to the Department upon request so that classes may be monitored.

An approved program is required by proposed N.J.A.C. 11:17-3.1(j) to issue a certificate containing specific information to students completing prelicensing education courses. This provision is presently contained in N.J.A.C. 11:17-19.4; the certificate is used to permit entrance to the State licensing examination. Issuance of the certificate by an approved program is confirmation that the student has received a minimum 70 percent passing course grade, as under the current rule, indicating that program personnel are reasonably confident that the individual has learned the material.

Proposed N.J.A.C. 11:17-3.1(l) states that any program denied approval for failure to meet the rule standards shall be advised in writing of the reason for the denial, and further advised of its right to request a hearing in accordance with the Administrative Procedure Act. This procedure recognizes that approval of insurance education programs is a quasi-licensing process.

As under current rule N.J.A.C. 11:2-19.5, proposed N.J.A.C. 11:17-3.1(m) provides that the Commissioner may suspend or revoke the approval of insurance education programs. Approval may be revoked for failure to maintain standards; failure to advise of changes in required information submitted in the application; obtaining approval by fraud or misrepresentation; if teaching prelicensing courses, failure to maintain a passing rate on the licensing examination of 70 percent or more; or, if teaching continuing education courses, failure to report students' continuing education units promptly and accurately. This latter requirement reflects the program's obligation to report continuing education units completed directly to the Department or its designee.

N.J.A.C. 11:17-3.1(n) allows the Commissioner to place a program on probation and is designed to improve regulatory flexibility in less serious cases.

N.J.A.C. 11:17-3.2 describes the prelicensing education requirements. Applicants for resident individual insurance producer licenses are required to satisfy these requirements.

N.J.A.C. 11:17-3.2(b) describes a new general course requirement for those applying for their first license as a producer. The course requires a minimum of 15 classroom hours, and covers general regulatory authority and methods; producer licensing; trade practices, standards of conduct and ethics; and general information on doing business as a licensed insurance producer in New Jersey. This course will include much of the "New Jersey law and practice" previously contained in authority-specific courses. This course will not, however, have to be re-taken by a producer who is applying for an additional license authority.

N.J.A.C. 11:17-3.2(c) describes the classroom hours for the authority-specific courses. Hours have been increased to 25 for life and health authorities, set at 45 hours for title insurance, and are increased to 125 hours for property/casualty insurance. The life and health courses may be combined in a single course with a minimum of 40 classroom hours. The property/casualty courses will include health topics. The life authority has been expanded to include material on contracts on a variable basis. New Jersey law and practice will be specific for each authority requested. Detailed curricula will be distributed to the approved education programs and updated by the Department from time to time as necessary.

N.J.A.C. 11:17-3.2(d) exempts those holding approved professional designations from the prelicensing education requirements in accordance with the Act. Those persons holding such designations are also exempt from taking the licensing examination. Anyone who has successfully completed the courses and tests necessary to attain one of the recognized professional designations is expected to be professionally qualified to be a licensed insurance producer.

The provision also provides an exemption to certain public employees under certain circumstances. Many State agencies, including the Department of Insurance, require their employees to surrender professional licenses when they obtain employment in order to avoid conflicts of interest. An individual who previously held a New Jersey insurance license, but was required to surrender it as a condition of public employment related to insurance, need not retake a prelicensing education course. Such people will be able to requalify for their license within one year of the termination of insurance-related public employment without again having to complete the basic prelicensing education requirements. N.J.A.C. 11:17-3.3(c) excuses such persons from retaking the prelicensing examination.

N.J.A.C. 11:17-3.2(e) implements the Act's provision for waiver of prelicensing education requirements. Waivers will be granted for those who currently hold or have held an insurance license in another state within one year of application for the waiver, or those who, as veterans, have completed veterans' insurance education programs. Prelicensing education is also waived for lawyers seeking title insurance authority. The waiver process will also be used to accept comparable insurance courses taught at any accredited college or university.

Waivers expire in 60 days and may not be reissued or renewed. Those who have not passed the test within 60 days of the waiver must complete the required prelicensing education course.

N.J.A.C. 11:17-3.3 describes the State licensing examination requirements and the terms and conditions for testing by an independent vendor. Applicants for resident individual insurance producer licenses must pass the State licensing examination unless they are specifically exempted or have passed comparable examinations required to attain a recognized professional designation.

N.J.A.C. 11:17-3.3(b) sets forth required provisions for a contract between any vendor of insurance producer testing services and the Department. This subsection replaces N.J.A.C. 11:2-1.6, and most of the terms are substantially similar to the current rule. It also provides that the testing vendor will supply forms and information directly to the approved education programs and send them statistics concerning their graduates' performance on the State licensing examination.

In addition, the rule describes the contract vendor's obligation to collect and transmit electronically to the Department certain data captured during the test registration process that is also necessary in the licensing process. This will improve efficiency, as data need not be collected twice. The proposed rule also permits provisions in a testing contract concerning the testing vendor's issuance of temporary work authority to passing test candidates, to implement the proposed temporary work authority described in N.J.A.C. 11:17-2.4.

N.J.A.C. 11:17-3.3(c) exempts from the licensing examination requirement those persons holding recognized professional designations. Examinations successfully completed in achieving a recognized professional designation are considered to be sufficient evidence of the requisite professional qualifications and comparable to the State licensing examination. Under N.J.A.C. 11:17-3.3(d), applicants who previously held a New Jersey insurance license which was terminated as a condition of insurance-related public employment need not retake the examination if they apply for the license within one year of termination of employment.

N.J.A.C. 11:17-3.3(e) provides a procedure that may be used when information received by the Department indicates there may have been a breach of security in the established procedure for taking the examination. The Commissioner may, by order, advise the licensee or license applicant of the information received and order the test retaken. If not retaken, the Department may proceed to revoke an issued license or refuse to issue the license in accordance with standard procedures protecting rights of due process of law.

N.J.A.C. 11:17-3.3(f) requires that those resident individuals who are registered as limited insurance representatives to deal with bail bonds and mortgage guarantee insurance shall have passed an examination.

N.J.A.C. 11:17-3.4 describes the requirements for continuing education, which are new requirements designed to implement the continuing education authority contained in the Act.

Beginning August 1, 1992, no individual insurance producer license will be renewed unless the renewal applicant has successfully completed the continuing education requirements. This date was chosen based on the four-year renewal cycle and the initial relicensing of current licensees as producers on August 1, 1988. A licensee will have completed the continuing education requirements if he or she completes at least 48 continuing education credit units during the four-year license term. (New Jersey attorneys holding producer licenses with title insurance authority only are exempt.) At least 48 continuing education units must be completed during each four year renewal cycle.

N.J.A.C. 11:17-3.4(b) provides that approved insurance programs may submit for certification such continuing education courses as they may develop. This subsection further describes the certification process.

Allowing approved education programs to develop such courses permits the greatest amount of flexibility and creativity concerning course content. Credit will not be certified for courses primarily concerning salesmanship or personal motivation, nor will primarily social activities be used to compute course length.

Submissions for certification of continuing education units shall include sufficiently detailed information to allow proper evaluation of the course. Continuing education units will be certified based on course length and content.

N.J.A.C. 11:17-3.4(c) provides standards for accepting or certifying continuing education units. Each part of the Chartered Life Underwriter (CLU) or Chartered Property/Casualty Underwriter designations (CPCU) will be worth 12 units. College level insurance courses will be worth four credits for each semester hour completed. Continuing education courses taught by approved insurance education programs will be certified for a specific number of units based on the length of the course and its content.

Approved education programs may also submit a comprehensive package of courses that can be certified for up to 12 continuing education units. This provision will permit trade associations or insurance education institutes who issue certain designations that require continuing education to obtain a blanket approval for an annual array of courses. For example, the Certified Insurance Counselor (CIC) designation requires a number of courses be taken each year to obtain and maintain the designation. This provision allows it, and similar programs, to have their courses certified and reported as a package so that those who obtain and maintain the designation will have satisfied the continuing education requirement over four years. Such a process is simpler to oversee and administer for both the Department and the programs conferring these designations.

To ensure that proper credit is received by those completing courses at approved insurance education programs, N.J.A.C. 11:17-3.4(d) provides that the director of such programs will report the credits directly to the Department or its designee. This process is expected to be easier to administer than any alternative. Under N.J.A.C. 11:17-3.4(e), those seeking credit for CLU, CPCU or college courses will report them directly to the Department with a transcript.

N.J.A.C. 11:17-3.4(f) provides that the Department or its designee will send to resident licensees an annual report describing the continuing education units completed, the number remaining to be completed, and the licensee's renewal date. Pursuant to N.J.A.C. 11:17-3.4(h), at least five months prior to renewal, the licensee will receive a statement as to whether the continuing education requirements for renewal have been met, based upon current records. In the event that a licensee asserts that either the annual statement or the final statement does not contain all the credits to which he or she is entitled, N.J.A.C. 11:17-3.4(g) provides that it will be the licensee's obligation to contact the program director where the course was taken and have them submit a supplemental statement to the Department or its designee.

N.J.A.C. 11:17-3.5 describes the recognized professional designations which will be acceptable substitutes for other education and examination requirements as provided elsewhere in proposed N.J.A.C. 11:17-3.

The recognized professional designations are as follows:

1. A Chartered Life Underwriter (CLU) designation conferred by the American College of Life Underwriters, will be accepted for life and health authorities.

2. A Chartered Property/Casualty Underwriter (CPCU) designation conferred by the American Institute of Property and Liability Underwriters will be accepted for property/casualty, health and surplus lines authorities.

Applicants seeking acceptance of a professional designation as satisfaction of any education or examination license requirement will be required to submit adequate proof of achievement of that designation.

The transition provisions at N.J.A.C. 11:17-5.7 continue the approval of current insurance education programs until the approval expires or is revoked. This rule also allows those who have completed the education and examination requirements under prior law to be licensed as producers, subject to the two-year limit on education and one-year limit on examination.

N.J.A.C. 11:17-5.7(c) provides that the expanded prelicensing education courses, described at N.J.A.C. 11:17-3.2(b) and (c), shall take effect by July 1, 1989. No prelicensing education certificate dated thereafter may be issued unless the new course has been completed. N.J.A.C. 11:17-5.7(d) provides that after July 1, 1989, the State licensing examination will test the material based on the new courses. N.J.A.C. 11:17-5.7(e) confirms that courses contained in present rules N.J.A.C. 11:2-1.1, 1.2, 1.3 and 1.5 will remain as the approved courses despite the repeal of those sections.

N.J.A.C. 11:17-5.7(f) establishes August 1, 1988 as the start date for continuing education courses, four years prior to the August 1, 1992, when those who renew must have completed the continuing education requirements. The Department anticipates that some courses will be certified retroactively during the start-up, so that those completing them may receive credit.

Social Impact

The proposed new rules affect all current and future licensed and authorized insurance producers. The proposed new rules will have a positive social impact in that the rules will greatly improve professionalism of insurance producers and thereby improve the quality of insurance services rendered to the public. The rules' professional qualification requirements (prelicensing education, examination and continuing education) for licensed insurance producers are comparable to those in other regulated occupations in New Jersey.

Insurance is a complicated subject and requires comprehensive and continuously changing knowledge and expertise. The prelicensing education and continuing education requirements of the proposed new rules ensure that licensed insurance producers in New Jersey will obtain and maintain the necessary knowledge and expertise to properly advise insurance customers. The public will not be affected economically by the proposed new rules.

The proposed new rules place an affirmative responsibility on insurance producers to update their skills in order to obtain a renewal license. The proposed new rules also address a public need by protecting the interests of insurance consumers in helping them make informed insurance decisions with the assistance of knowledgeable insurance producers. The insurance producer should have a higher sense of self-esteem, and ultimately enjoy a better reputation in the community.

Economic Impact

The increase in producer prelicensing course hours will increase the cost of entry to producer license candidates. The continuing education requirement will impose a continuing economic cost on producer licensees for the cost of completing the courses. Instructors at approved programs will incur the cost of any necessary fee for administration of the instructor's examination. These costs are substantially outweighed by the expected improvements in insurance industry professionalism and the resultant benefits to consumers of insurance products.

Insurance consumers will experience a more efficient allocation of premium dollars, as their insurance needs will be handled by professional, qualified advisors. The Department of Insurance will incur administrative costs in monitoring compliance with the requirements of the proposed new subchapter and in approving courses and producers. The Department expects these costs to be absorbed in its existing budget through offsetting savings resulting from the new producer licensing system.

Any economic impact on approved programs created by these rules will be passed through to the license candidates or licensees.

Regulatory Flexibility Statement

The proposed new rules will apply to small businesses in New Jersey; 21 proprietary professional schools and about 5,000 insurance producer businesses will be affected.

Individual insurance producers will be required to complete courses of continuing education in order to maintain their licenses and will incur the costs of these courses in order to comply. Proprietary insurance schools will be required to maintain certain records of the students they teach and report those taking continuing education courses to the Department. These tasks may be accomplished by existing staff; no professional services are required.

Individual insurance producers will bear the cost of approximately two full-day or four half-day continuing education courses per year. These costs will be borne per individual licensed producer.

The proposed new rules attempt to minimize costs of compliance as follows:

1. Records required to be kept by proprietary insurance schools are limited to the kind most schools presently keep.
2. Insurance schools are not required to offer continuing education courses; they will do so only if economically feasible.
3. The proposed new rules permit a great deal of flexibility by permitting the schools to offer courses in several permanent locations, or in temporary locations.
4. The proposed new rules give individual producers continuing education credits for the kinds of courses they take without any mandate.
5. The proposed new rules provide producers with a wide range of courses taught by approved programs and others to ameliorate costs through competitive pressures.
6. The proposed new rules minimize individual producer recordkeeping and reporting by having the approved education programs report continuing education credits to the Department.

Full text of the proposed repeals appear in the New Jersey Administrative Code at N.J.A.C. 11:2-1 and 11:2-19.

Full text of the proposed new rules follows.

SUBCHAPTER 3. PROFESSIONAL QUALIFICATIONS

11:17-3.1 Approval of insurance education programs

(a) Professional schools, insurance companies and others who establish programs which include teaching of insurance courses to satisfy professional qualification requirements for prelicensing or continuing education shall obtain approval in accordance with this section.

(b) An application for approval of an insurance education program shall be made on a form prescribed by the Commissioner and shall provide the following information:

1. The name of the program and the address of the permanent program office;
2. The name and address of the sponsoring organization, if any;
3. The name of the program director or directors, and New Jersey producer license reference number(s), if any;
4. Whether the program will teach prelicensing education courses, continuing education courses, or both;
5. The address of any permanent classroom or classrooms to be used by the program; and
6. Any other information that may be required by the Department to determine whether the program meets the requirements for approval.

(c) Programs seeking approval to teach courses of prelicensing education shall also provide:

1. The names of all instructors employed by the program to teach prelicensing education courses and sign certificates of completion, together with documentation confirming that each is qualified in accordance with (f)3 below;
2. The names of the courses, by license authority, which will be taught by the program, if approved;
3. The amount of tuition, fees and other charges to be paid by students; and
4. A copy of the enrollment application for the program, a form of student contract, and any other agreement between the program and student.

(d) Each application for program approval shall be certified as correct by the program director or directors named in the application, and shall be accompanied by a fee of $100.00. The application for approval shall be submitted to the Supervisor of Insurance Education.

(e) Applications for program approval shall be reviewed to determine compliance with the requirements prescribed in this subchapter. An applicant shall supply such additional information or documentation as may be required by the Department to determine whether such requirements are met.

1. An inspection of the program office and any permanent classroom facility may be conducted prior to approval or the approval may be granted conditioned upon the results of an inspection.
2. If the application is in proper form and the requirements described in this subchapter are met, the Department shall issue a certificate of approval which shall contain:
   i. The name and approval code number of the program;
   ii. An indication as to whether the program is approved for prelicensing education, continuing education or both; and
   iii. The effective date and expiration date of the approval.
3. A program approval shall expire in the third year on the last day of the licensing quarter in which it was effective.
4. A program approval may be renewed by the same procedure set forth in this section.

(f) Each approved insurance education program (except as modified hereafter) shall:

1. Maintain a permanent office in New Jersey where shall be maintained student records, samples of all instructional material used, up-to-date copies of the New Jersey insurance statutes and administrative rules, and the certificate of approval for the program. The office shall be open and accessible to the Department and to prospective, present and past students during normal business hours. The requirement for a permanent office in New Jersey may be waived for courses sponsored by accredited colleges and universities or for producer trade associations that agree to maintain student records and provide records to the Department and former students upon request.
2. Retain a director in charge of the program, who shall be accessible to the Department and the public at or through the program's office during normal business hours. The program director shall:
   i. Oversee the program and activities of all instructors;
   ii. Be responsible to carry out the program's administrative duties imposed by this subchapter; and
   iii. Receive and distribute to all instructors and students communications from the Department and others. The director shall not have had his or her insurance license revoked.
3. Use knowledgeable and competent instructors to teach all courses. An instructor shall not have had his or her New Jersey insurance license revoked. Instructors employed to teach courses of prelicensing education shall have at least five years' experience in insurance practice, insurance education or the equivalent, and shall, in addition:
   i. Hold a recognized professional designation;
   ii. Have passed the New Jersey instructor examination; or
   iii. Be a faculty member of an accredited college or university.
4. Be permitted to use special lecturers or guest speakers to instruct on particular topics, so long as the program carries out the recordkeeping and reporting requirements imposed by this subchapter.

5. Use classroom facilities with sufficient lighting, desks or tables and which are otherwise conducive to learning. Classroom facilities shall be open to the Department for class monitoring at any time.

6. If approved to teach prelicensing courses, instruct students in accordance with a curricula established or approved by the Department.

7. Conduct and administer courses in a manner reasonably calculated to assure that certificates or reports of courses attended and completed accurately reflect the student's attendance and performance.

8. Maintain for five years the records of each student including, at a minimum, the name(s) of the course or courses taken and whether the course was passed or failed, if applicable.

9. If approved to teach prelicensing courses, provide remedies for students who have failed the State licensing examination, which may include review courses or second full courses at reduced rates.

10. If approved to teach prelicensing courses and if it charges tuition therefor, provide to all persons requesting an enrollment application or information, at the time of such request and in a manner approved by the Department, all passing rates on the State licensing examination for all programs for each examination given during the preceding six month period; or, if the program has not been in operation for this period of time, the passing rate for all examinations given during the period which the program has been in operation. This information shall be test specific and shall be furnished in writing and without request.

(g) An approved insurance education program may maintain classroom facilities at more than one permanent location in New Jersey under the supervision of a single director, provided that:

1. The address of each permanent classroom is revealed on the application for approval or subsequent amendments;

2. That each classroom meets the standard of (f)5 above; and

3. Permanent student records are maintained at the program's office.

(h) An approved insurance education program may conduct classes at temporary locations in New Jersey provided that each classroom facility meets the requirements of (f)5 above, and that permanent student records are maintained at the program's office.

(i) Upon request from the Department, the director of an approved education program shall provide information about the time, date and place of any prelicensing or continuing education courses scheduled so that the classes may be monitored.

(j) An approved insurance education program shall issue to each student who has successfully completed a prelicensing education course a certificate which shall contain the following:

1. The program name and program code number;

2. The student's name;

3. The name of the course and the hours of study;

4. Signatures of the student and the instructor;

5. The course completion date; and

6. A statement that the student was instructed for the number of hours indicated on the certificate, that the instructor is satisifed that the student knows the material, and that the student has received at least a 70 percent minimum passing course grade in the program.

(k) Any insurance education program may be denied approval for failure to meet the requirements in this section.

(l) Any denial of program approval, or any proposal to revoke or suspend approval, shall be in writing, and shall advise the applicant of his or her right to a hearing in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1 et seq. Nothing in this section shall prohibit the rejection and return of applications for correction of ministerial errors.

(m) The Commissioner may suspend or revoke the approval of an insurance education program for any of the following reasons:

1. The failure to maintain any requirement set forth in this section;

2. The failure to advise the Department promptly of any change in information initially submitted in the application during the period of approval;

3. Obtaining an approval by fraud or misrepresentation;

4. The failure to conduct any classes for a period of 12 months;

5. For prelicensing education programs only, the failure to maintain an overall passing rate on the State insurance licensing examination of 70 percent or more during any period of 12 consecutive months. For the purpose of calculating the passing rate, each examination taken by each program graduate will be counted;

6. For continuing education programs only, the failure to report to the Department students' continuing education units.

(n) As an alternative to suspension or revocation of approval, the Commissioner may place any program on probation with appropriate conditions.

11:17-3.2 Prelicensing education

(a) Each applicant for a resident insurance producer's license shall pass a course of prelicensing education with the appropriate number of hours of classroom instruction described in (b) through (e) below.

(b) Prior to being licensed in New Jersey for the first time as a producer, an applicant shall complete a course on regulation of the insurance industry in New Jersey for a total of 15 classroom hours. The course shall include the following topics:

1. State regulatory jurisdiction;

2. The powers of the Commissioner and the methods of regulation;

3. Producer licensing;

4. Producer trade practices, standards of conduct and ethics; and

5. Doing business as a licensed insurance producer.

(c) Prior to being admitted to the State licensing examination to obtain a particular producer license authority, an applicant shall complete a course of prelicensing education for the specific authority or authorities as follows:

1. Life authority, for a total of 25 classroom hours:

i. General life insurance concepts;

ii. Annuities;

iii. Contracts on a variable basis; and

iv. New Jersey law and practice regarding life insurance.

2. Health authority, for a total of 25 classroom hours:

i. General health insurance concepts; and

ii. New Jersey law and practice regarding health insurance.

3. Life and health authorities, for a total of 40 classroom hours:

i. General life insurance concepts;

ii. Annuities;

iii. Contracts on a variable basis;

iv. General health insurance concepts; and

v. New Jersey law and practice regarding life and health insurance.

4. Property/casualty authority, for a total of 125 classroom hours:

i. General property insurance concepts;

ii. General casualty insurance concepts;

iii. Health insurance concepts; and

iv. New Jersey law and practice regarding property/casualty and health insurance.

5. Title insurance authority, for a total of 45 classroom hours:

i. General principles of real estate and title insurance; and

ii. New Jersey law and practice regarding title insurance.

(d) A person holding an approved professional designation described in N.J.A.C. 11:17-3.5 shall not be required to complete the courses of prelicensing education.

(e) A person who previously held a New Jersey insurance license, which was surrendered as a condition of public employment, shall not be required to complete the courses of prelicensing education to reinstate the license provided that the employment was insurance-related and application for license is made within one year of termination of the public employment.

(f) Upon application to the Supervisor of Insurance Education, any of the courses in (c) above may be waived for any license applicant who can demonstrate that he or she satisfies at least one of the following conditions:

1. For all authorities, that he or she holds, or has held, an insurance producer, agent, broker or solicitor license in a state other than this State, which is current or expired less than one year preceding the date of application for waiver;

2. For all authorities, that he or she is a veteran of the United States armed services, and has completed a course of veteran's education approved by the Department of Education and the Commissioner of Insurance;

3. For all authorities, that he or she has successfully completed courses in insurance subjects at an accredited college or university, which are equivalent or comparable to the prelicensing courses required for the authority requested;

4. For title insurance authority only, that he or she is an attorney at law admitted to practice in New Jersey.

(g) An application for waiver shall be made on a form prescribed by the Department and shall be submitted directly to the Supervisor of Insurance Education prior to registering for the State licensing examination or making application for an insurance producer license. In addition to providing the information requested by the form:

1. Applicants seeking a waiver authorized by (f)1 above shall submit a recent certification of license status or letter of severance issued by the insurance licensing authority in the state where they hold or held an insurance license.

2. Applicants seeking a waiver authorized by (f)2 above shall submit proof of completion of a course of veteran's education issued by the New Jersey Department of Education.

3. Applicants seeking a waiver authorized by (f)3 above shall submit a transcript issued by the college or university where the course was taken and a description of the subject matter covered.

4. Applicants seeking a waiver authorized by (f)4 above shall submit a certificate of good standing issued by the Clerk of the New Jersey Supreme Court.

(h) If a waiver is approved pursuant to (f) and (g) above, the Supervisor of Insurance Education shall issue a letter of approval waiving the prelicensing education requirement, which shall be attached to the producer license application when submitted to the Department.

(i) Producer license applicants who obtain a waiver of the education requirement shall be solely responsible for preparing themselves to take the state examination.

(j) Waivers shall expire in 60 days from the date of issuance and shall not be reissued or renewed.

11:17-3.3 State licensing examination; use of independent examination vendor; exemptions; retaking of examination

(a) All applicants for a resident insurance producer license shall pass the State licensing examination, which may be given by the Department or by an independent vendor under contract to the Department that meets the criteria set forth in (b) below.

(b) Any contract for development and administration of the New Jersey State insurance producer licensing examination shall include, without limitation, the following terms and conditions:

1. The contract vendor shall develop and administer the examination in accordance with specifications approved by the Commissioner.

2. Examinations shall be administered not less than two times per month at such times and places as many be agreed upon by the Commissioner and the contract vendor. The contract vendor shall provide the Commissioner with at least four months' prior notice of scheduled test administration dates.

3. The contract vendor shall:

i. Establish at least four test administration centers within the State;

ii. Provide all physical facilities; and

iii. Provide all test center personnel sufficient for the administration of the test.

4. At least one test administration center shall be in each of the following areas:

i. Newark;

ii. Trenton;

iii. Camden; and

iv. Atlantic City.

5. The contract vendor shall collect from applicants taking the insurance license examination a previously agreed upon fee covering the cost of developing and administering the examination.

6. The contract vendor shall administer the examination in accordance with the contract, which shall contain adequate provisions for preregistration of test candidates, walk-in testing, score reporting, security measures and such other provisions that, in the opinion of the Department, assure fair and consistent administration of the examination.

7. The contract vendor shall print and distribute to all approved education programs and to any prospective test candidate such candidate bulletins, registration forms and other information that may be useful or required.

8. The contract vendor shall score examinations promptly, and shall mail score reports to all passing and failing candidates within 15 calendar days after each test date.

9. The contract vendor shall provide to failing candidates, for each test taken, diagnostic information by major content areas.

10. The contract vendor shall provide to the Department:

i. Alphabetical lists containing candidate names, addresses, identification numbers, school code numbers and scores on State producer licensing examinations of passing and failing candidates; and

ii. Summary statistics, for each test, indicating the number of candidates registered, tested and absent, and passing or failing.

11. The contract vendor shall provide to the Department, on at least a quarterly basis, accumulative, non-personally identifiable pass/fail data and diagnostic data by major content areas for each test for approved programs of prelicensing insurance education.

12. The contract vendor shall provide to approved programs teaching courses of prelicensing education quarterly reports about their students' performance on the licensing examination, which shall contain students' names, the tests taken, scores (passing or failing) and summary statistics.

13. The Department shall have the sole responsibility for establishing minimum qualifications and passing requirements of candidates taking the licensing examination. These qualifications and passing requirements shall be on file at the offices of the Department and shall be made available for public inspection.

14. The contract vendor shall defend and indemnify the Department of Insurance, the State of New Jersey and its agents, officers and employees from all claims, actions, damages, liability and expenses in connection with loss of life, personal injury and/or damage to property arising out of the ownership, occupancy or use by the contract vendor of any facilities used as test administration centers, occasioned wholly or in part by any act or omission of the contract vendor, its agents, contractors or employees.

15. The contract vendor shall provide technical and legal assistance to the Department in the event of any legal challenge to the validity of any examination administered, prepared and/or copywrited by the contract vendor or the Department in which the State of New Jersey or any of its agencies, officers or employees is named as a party.

16. The contract vendor shall provide public liability insurance with respect to the test facilities in a form satisfactory to the Department with minimum policy limits of $1,000,000 bodily injury coverage for each occurrence; $1,000,000 aggregate bodily injury coverage; $500,000 property damage coverage for each occurrence; and $1,500,000 aggregate property damage coverage.

17. The contract vendor shall transmit to the Department, in a form satisfactory to the Department, information collected during the test registration process to aid in prompt licensing of passing candidates, and may issue to passing candidates, on a form prescribed by the Department, a temporary work authority. The contract vendor shall deliver the test registration forms of passing candidates to whom a temporary work authority has been issued within 30 days of the date of the test.

(c) Applicants holding a recognized professional designation described in N.J.A.C. 11:17-3.5 are exempt from the licensing examination.

(d) Applicants who previously held a New Jersey insurance license which was terminated as a condition of public employment, are exempt from re-examination provided that the public employment was in an insurance-related field and the license application is made within one year of the termination of that employment.

(e) For good cause shown, the Commissioner may, by order, require an applicant for licensure or a licensee to retake the State licensing examination within a specified period of time. The order shall clearly and fully state the alleged factual circumstances upon which it is based. In the case of a licensee, a license shall remain effective pending the results of the new examination unless otherwise subject to revocation or suspension.

1. A licensee or applicant for licensure may appeal the decision of the Commissioner within 10 days of receipt of the order to retake the examination by filing with the Commissioner a written statement and supporting documentation, if any, disputing with specificity the allegations in the order. In appropriate circumstances, the Commissioner, or his or her designee, may provide the licensee or applicant for licensure with the opportunity to present evidence orally.

2. After review of the record, the Commissioner shall either rescind the order or require the licensee or applicant for licensure to retake the examination within a prescribed period of time.

i. If a licensee fails to retake the examination within the prescribed period of time, the Commissioner shall issue an Order to Show Cause why the license should not be revoked and shall advise the licensee of his or her right to a hearing pursuant to the provisions of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., as implemented by the Uniform Rules of Administrative Procedure, N.J.A.C. 1:1-1.

ii. If an applicant for licensure fails to retake the examination within the prescribed period of time, the Commissioner may refuse to issue the license for which application is made and shall advise the applicant for licensure of his or her right to a hearing pursuant to the provisions of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., as implemented by the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.

(f) Resident individuals registered by any insurance company to do business as a limited insurance representative dealing with bail bonds or mortgage guarantee insurance shall have taken and passed a special examination. The insurance company registering such persons shall confirm that this requirement has been met, and the limited insurance representative shall maintain evidence of meeting this requirement at his or her place of business.

11:17-3.4 Continuing education

(a) No resident individual insurance producer license shall be renewed after July 31, 1992 unless the renewal applicant demonstrates that he or she has completed 48 continuing education credits during the previous four years. This requirement shall not apply to attorneys-at-law admitted to practice in New Jersey with authority for title insurance only.

(b) Approved insurance education programs may submit to the Department for certification of continuing education credits such courses as they may develop.

1. A request for continuing education credit certification shall be made on a form prescribed by the Department which shall request the following information:

i. The name and code number of the approved education program submitting the course;

ii. A brief description of the topics or subject matter to be covered;

iii. Copies of any and all materials to be used;

iv. The number of actual classroom hours required to complete the course; and

v. Such other information as may, in the opinion of the Department, be necessary to evaluate the course for certification of continuing education credits.

2. Submissions for certification of a series of courses in accordance with (c)4 below may substitute the education requirements to obtain and maintain the designation together with samples of courses, for the requirements of (b)1 i, ii, iii and iv above.

3. The Supervisor of Insurance Education shall certify courses submitted for continuing education credits as provided above, or disapprove the course for continuing education credits, and notify the program director of the decision. In the event of disagreement with the decision, the program director may, within 30 days of receipt of notice from the Department, supply the Supervisor of Insurance Education with a written request for reevaluation supported by reasons for disagreement with the decision and such additional information as may be appropriate. The Supervisor of Insurance Education shall promptly reevaluate the course and advise the program director of the Department's final decision on the continuing education credits allowed.

4. No credit shall be allowed for courses dealing with salesmanship or personal motivation, nor shall primarily social activities be considered to compute course length.

(c) Continuing education credits shall be certified in accordance with the following:

1. Each completed part of the Chartered Life Underwriter (CLU) and Chartered Property/Casualty Underwriter (CPCU) designations shall be worth 12 continuing education credits.

2. Each college level insurance course completed and passed at an accredited college or university shall be worth four continuing education credits for each semester hour of college credit.

3. Each continuing education course submitted by an approved insurance education program shall be worth the number of credits computed in accordance with the following schedule:

i. One credit for a half day course;

ii. Two credits for a full day course;

iii. Three credits for a two day course;

iv. Four credits for a course more than two days;

v. Two credits for a basic level or introductory course; and

vi. Four credits for an advanced course.

4. Each series of courses submitted as a single unit by an approved education program, and which are administered in connection with the issuance or annual maintenance of a professional designation approved in at least one-third of the states requiring continuing education as a condition of licensure, shall be worth up to 12 continuing education units based upon the length of the courses and the level of difficulty of the subject matter.

5. The number of continuing education credits certified shall be based upon the length of the course and the level of difficulty as provided in (c)3 above.

(d) The director of an approved insurance education program shall report the names and producer license reference number of those persons completing each continuing education course within 30 days of course completion or certification of continuing education credits, whichever is later. The instructor teaching the course may be deemed to have completed it for the purpose of securing continuing education credit. The report shall be made to the Department, or its designee, on a form prescribed by the Department, and shall include the following information:

1. The program name and school code;

2. The name of the continuing education course completed; and

3. The number of continuing education credits as certified.

(e) Producers who request continuing education credit for one or more parts of the CLU or CPCU designations, or insurance courses completed at an accredited college or university, shall submit to the Department, on a form prescribed by the Department, the request together with a transcript or other documentation to demonstrate completion of the course.

(f) At least once each year, the Department, or its designee, shall issue to individual resident producers an accounting which shall identify and include:

1. The number of continuing education units completed, the course or courses taken, and the school code where the credits were completed;

2. The total number of continuing education units completed;

3. The total number of continuing education credits remaining to be completed; and

4. The license renewal date of the producer.

(g) If the accounting required by (f) above is considered by the resident producer to be inaccurate, he or she shall promptly request the director of the approved education program to file with the Department, or its designee, an appropriate supplemental report.

(h) At least five months prior to the renewal of license, the Department, or its designee, shall issue to individual resident producers a statement indicating, based on current records, whether the continuing education requirement for renewal has been met. In the event the producer asserts that credit has not been recorded for a certified continuing education course, it shall be the sole responsibility of the producer to request the director of the approved program where the course was taken to file with the Department, or its designee, a supplemental report of continuing education units.

11:17-3.5 Recognized professional designations

(a) The Department recognizes the following professional designations as acceptable substitutes for the producer education and examination requirements except continuing education:

1. For life and health authorities, a Chartered Life Underwriter (CLU) designation conferred by The American College of Life Underwriters;

2. For property/casualty, health and surplus lines authorities, a Chartered Property/Casualty Underwriter (CPCU) designation conferred by The American Institute of Property and Liability Underwriters.

(b) An applicant seeking to rely on a recognized professional designation to satisfy any education or examination requirements in accordance with (a) above, shall submit adequate proof of such achievement which shall include an official document or transcript issued by the organization conferring the designation.

11:17-5.7 Professional qualifications

(a) Insurance education programs approved in accordance with the prior rule, N.J.A.C. 11:2-19, are deemed to continue as approved until their current approval expires, unless approval is revoked.

(b) Subject to the time limitations of the New Jersey Insurance Producers Licensing Act, P.L. 1987, c.293, and N.J.A.C. 11:17-5.4, individuals applying for producer licenses are deemed to satisfy the education and examination requirements of N.J.A.C. 11:17-3.2 and 3.3 by completing courses of prelicensing education at an approved program and passing the State licensing examination in accordance with prior law.

(c) The provisions of N.J.A.C. 11:17-3.2(b) and (c) shall take effect on July 1, 1989. No approved education program shall issue after that date a certificate confirming that a person has satisfied the requirements of prelicensing education unless the individual has completed the course or courses described in N.J.A.C. 11:17-3.3.

(d) The State licensing examination administered on or after July 1, 1989 shall be in accordance with examination specifications designed to test the curricula as provided in N.J.A.C. 11:17-3.3.

(e) Until June 30, 1989, approved education programs may teach courses and issue certificates of completion of prelicensing education that include the minimum course hours specified in prior rules N.J.A.C. 11:2-1.1, 1.2, 1.3 and 1.5.

(f) No continuing education credits shall be accepted for courses completed prior to August 1, 1988.

(a)

DIVISION OF ADMINISTRATION

Unfair Claims Settlement Practices
Use of After Market Parts

Proposed Amendments: N.J.A.C. 11:2-17.3 and 17.10

Authorized By: Kenneth D. Merin, Commissioner, Department of Insurance.

Authority: N.J.S.A. 17:1-8.1, 17:1C-6(e) and 17:29B-1 et seq.

Proposal Number: PRN 1988-299.

Submit comments by July 6, 1988 to:

Verice M. Mason
Assistant Commissioner
Legislative and Regulatory Affairs
Department of Insurance
CN 325
Trenton, New Jersey 08625

The agency proposal follows:

Summary

The proposed amendments set forth standards with regard to the use of after market parts in automobile damage repairs. After market parts are exterior automobile replacement parts, including inner and outer panels, which are manufactured by any manufacturer other than the original vehicle manufacturer.

In the past, automobile manufacturers were the primary manufacturers of replacement body parts. However, now that replacement parts by other manufacturers have come on the market as competitive parts at lower prices than the original manufacturer's body parts, many insurers are requiring their use in automobile damage repairs for which they pay following an insured's accident. The proposed amendments seek to regulate the identification, quality and disclosure aspects involved with the use of after market parts used in the repair of automobiles where insurance proceeds provide the basis of payment therefor.

The Department of Insurance recognizes an appropriate role in assuring that policyholders are treated fairly in the process of having damaged vehicles repaired with insurance proceeds. Existing unfair trade practice law prohibits insurers from failing to respond to their contractual obligations to indemnify policyholders for loss. These requirements apply to all areas of potential abuse in the claims handling process and would therefore extend to improper insurer practices involving the use of after market crash parts.

This proposal amends N.J.A.C. 11:2-17.3 to include the definition of "after market part", and amends N.J.A.C. 11:2-17.10, concerning rules for fair and equitable settlements applicable to property and liability insurance. As herein proposed, N.J.A.C. 11:2-17.10 will require that all after market parts used by insurers be identified as to their manufacturer and that the identification be accessible even after installation; that after market parts used by insurers be of like kind and quality to the replacement parts available from the original manufacturer; and disclosure by insurers of the fact that an after market part is proposed for use in the repair of a vehicle rather than a part made by the original manufacturer.

The proposed amendments also make several minor and non-substantive grammatical and technical changes.

Social Impact

The proposed amendments will benefit both insurers and insureds by providing them with the widest availability of replacement parts for damaged automobiles without sacrificing quality, performance and warranty protection. Insureds will now be made fully and timely aware of the fact that after market parts will be used in the repair of their automobile.

Seeing that policyholders receive fair and proper treatment in the automobile repair process is the everyday responsibility of automobile insurers. This responsibility stems from the insurance contract, regulatory requirements, and most importantly, sound business practices. An insurer who fails to meet this responsibility will have an unhappy policyholder who may initiate formal legal action or file a complaint with the Department of Insurance. Over time, insurer practices leading to dissatisfied customers will tend to have an adverse effect on an insurer's reputation and, therefore, be contrary to the insurer's business interests. The proposed amendments address these concerns.

Economic Impact

Since the introduction of after market parts to the marketplace has already resulted in the reduction of prices of some replacement parts due to increased competition, it is expected that these proposed amendments, sanctioning the use of after market parts subject to qualifications, may result in even lower prices for some replacement parts. The proposed amendments will also protect insurers and insureds from being overcharged for replacement parts by ensuring that they are fully apprised of the fact that after market parts are being used in repairs instead of original manufacturer replacement parts. The advent of nonoriginal equipment after market exterior parts is having a favorable effect on the cost of repairing automobiles. The use of such after market parts has also reduced the cost of original equipment parts where there has been competition. To the extent lower priced parts (nonoriginal equipment and original equipment) have been used in the repair process, a favorable impact is anticipated on automobile insurance premiums. If after market parts competition becomes more widespread, the impact on auto insurance consumers will be increasingly favorable.

Regulatory Flexibility Statement

The proposed amendments primarily impose compliance obligations on insurance companies writing automobile insurance in New Jersey. Few such insurers, if any, are "small businesses" as that term is defined in N.J.S.A. 52:14B-17. To the extent that an insurance company is a "small business", the proposed amendments impose a disclosure requirement (see N.J.A.C. 11:2-17.10(a)13). The proposed amendments also require insurance companies to be more selective in their use of after market parts by sanctioning the use of only high quality parts. Insurance companies will also be required to cover the cost of modifications to the automobile made necessary by their use of after market parts. This cost, if any, will be voluntarily assumed since the insurance company is not required to use after market parts. The proposed amendments apply to all insurance carriers licensed to write automobile insurance in New Jersey since both the large and small companies have the same responsibilities in protecting and dealing with their insureds.

Manufacturers of after market parts, some of whom may be "small businesses," will be required to affix their identification to the after market part they manufacture if they wish to have their parts used in the repair of automobiles where insurance proceeds provide the basis of payment therefor. The identification is also required to be accessible after installation. To the extent that such manufacturers are not presently complying with this requirement, they will henceforth be required to do so. The cost of compliance is clearly minimal since most manufacturers either presently abide by this requirement or can do so with little expense. To avoid any compliance burdens, the amended rules afford the manufacturer a degree of flexibility in the manufacture and precise placement of the identification. The proposed amendments will apply equally to all after market part manufacturers since the abuses sought to be corrected by the proposed amendments do not relate to operations of any particular size. Presently, there are scores of after market part manufacturers, most of whom are located in foreign countries. They comprise a market share of about five percent.

The proposed amendments do not directly impose any requirements upon automobile repair facilities, many of which are "small businesses," since the insurer and not the repair facility will control the repair and the option to use after market parts. Concomitantly, it is the insurer and not the repair facility that is required by the proposed amendments to disclose the use of an after market part.

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

11:2-17.3 Definitions

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

"After market part" means sheet metal or plastic parts which constitute the exterior of an automobile, including inner and outer panels, manufactured by any manufacturer other than the original manufacturer of the part. Examples of after market parts include, but are not necessarily limited to, the following: doors, hoods, fenders, trunk lids, grills and bumper components.

. . .

11:2-17.10 Rules for fair and equitable settlements applicable to property and liability insurance

(a) This section, unless otherwise noted in this subchapter, is applicable to claims arising under all property/liability coverages. This section is organized so that the requirements for all lines of property/liability insurnace are found in (a)1 through 6 below; for automobile insurance only, [the requirements are found] in (a)7 through [9] **13** below; **and** for other than automobile insurance only, [the requirements are found] in (a)[10 and 11] **14 and 15** below. The requirements of this section with respect to motor vehicle claims are in addition to the requirements of N.J.A.C. 11:3-10. In addition to the [rules found in] **provisions of** this section, the requirements for auto physical damage first party claims found in N.J.A.C. 11:3-10.1 [-]**through** 10.4 shall **also** be construed to [also] apply to auto**mobile** property damage third party claims from the time [when] **that** liability becomes reasonably clear. The requirements are as follows:

1.-9. (No change.)

10. All after market parts used in the repair of an automobile where insurance proceeds provide the basis of payment therefor shall carry sufficient permanent identification so as to identify the manufacturer thereof. Such identification shall be accessible after installation to the extent possible.

11. No insurer shall require the use of after market parts in the repair of an automobile unless the after market part is at least equal in like kind and quality to replacement parts available from the original manufacturer of the part in terms of fit, performance and warranty. Use of after market parts which have been certified by an independent testing laboratory as being of like kind and quality to the original manufactured part will be deemed to be in compliance with the requirements of this paragraph.

12. Insurers specifying the use of after market parts shall provide coverage for any modifications which may become necessary in making the repair.

13. The insurer must disclose to the claimant, in writing, either on the estimate or on a separate document attached to the estimate, the following information, which shall appear in print no smaller than 10 point type:

THIS ESTIMATE HAS BEEN PREPARED BASED ON THE USE OF AUTOMOBILE PARTS NOT MADE BY THE ORIGINAL MANUFACTURER. PARTS USED IN THE REPAIR OF YOUR VEHICLE BY OTHER THAN THE ORIGINAL MANUFACTURER ARE REQUIRED TO BE AT LEAST EQUAL IN LIKE KIND AND QUALITY IN TERMS OF FIT, PERFORMANCE AND WARRANTIES TO REPLACEMENT PARTS AVAILABLE FROM THE ORIGINAL MANUFACTURER.

The insurer shall clearly identify on the estimate of such repair all after market parts installed on the vehicle.

[10.] **14.** If the insurer intends to exercise its right to inspect, or cause to be inspected by an independent appraiser, damages prior to repair, it shall have 10 working days following receipt of notification of claim to inspect the claimant's damaged property at a place and time reasonably convenient to the claimant, provided that the claimant has not refused to make the property available for inspection. For third-party property damage claims, [(a)10 of] this **paragraph** [section] shall apply once the insured's liability is reasonably clear. This [provision, (a)10,] **paragraph** does not apply to losses caused by a catastrophe.

Recodify existing 11. as **15.** (No change in text.)

DIVISION OF THE REAL ESTATE COMMISSION

The following proposals are authorized by the New Jersey Real Estate Commission, Daryl G. Bell, Executive Director.

Submit comments by July 6, 1988 to:
Robert J. Melillo
Special Assistant to the Director
New Jersey Real Estate Commission
20 West State Street, CN 328
Trenton, New Jersey 08625

(a)

Maintained Offices
Proposal Amendment: N.J.A.C. 11:5-1.18

Authority: N.J.S.A. 45:15-6.
Proposed Number: PRN 1988-288.

The agency proposal follows:

Summary

The New Jersey Real Estate Commission (Commission) proposes an amendment to N.J.A.C. 11:5-1.18 which concerns office supervision (maintained offices). The purpose of the amendment is to ensure that employing brokers and brokers of record are aware of their obligation to directly supervise their primary office location or to appoint a person who would qualify to supervise a branch office pursuant to N.J.A.C. 11:5-1.19 to do so.

Upon reviewing various circumstances which have required constant interpretation of the existing rule, the Commission has recognized that the language contained in the rule fails to specifically state the manner in which brokers must supervise their offices. Therefore, it has become necessary to clarify the rule. This change should help to eliminate any misunderstanding by employing brokers and brokers of record as to their responsibility concerning office management during normal business hours.

The proposed amendment states, in part, that all such offices shall be under the direct supervision of either the broker or of a person who would qualify to supervise a branch office as provided in N.J.A.C. 11:5-1.19(c). Furthermore, such supervision shall be maintained on a full-time basis.

The most important aspect of the rule indicates that a broker who maintains a main office and one or more branch offices is ultimately responsible for all such activities at such locations.

Social Impact

The proposed amendment will have a favorable impact on the real estate industry and the general public by assuring efficient and professional management at all real estate establishments.

In addition, those individuals who utilize the services of a broker will be assured that the broker's office is properly supervised at all times. The presence of a qualified licensee exerting supervisory authority over all activities at an office on a full-time basis should help to assure that quality service is provided to all members of the public including those who may be dealing directly with a relatively inexperienced licensee.

Economic Impact

The proposed amendment will also have a beneficial economic effect on the entire real estate industry. Brokers shall reap the financial rewards from satisfied clients who have received real estate services overseen by a senior licensee. Also, upon implementation of the management procedures as required by the amendment, many real estate enterprises should experience a financial savings because of the reduction of administrative errors and subsequent delays in transactions which frequently result from poorly managed offices. Furthermore, the amendment should reduce the number of complaints from clients to brokers and to the Real Estate Commission. Thus, the Commission will save the time and expense of investigating such complaints and conducting hearings to resolve disputes which frequently arise from a lack of adequate supervision of some licensees.

Regulatory Flexibility Statement

The proposed amendment will not impose any additional recordkeeping or reporting requirements on small real estate enterprises. However, upon adoption, the Commission expects small and large businesses alike to conform to the provisions of this rule as amended and N.J.A.C. 11:5-1.19(c). Based on the language contained in the amendment, brokers will be fully apprised of their obligation to maintain adequate supervision of all of their real estate offices during normal business hours.

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

11:5-1.18 Maintained offices

(a) Every resident real estate broker **not licensed as a broker-salesperson** shall maintain a bona fide regularly established office for the transaction of business [into] **in** the State of New Jersey, which shall be open to the public during usual business hours. [This regulation shall not apply to brokers licensed as broker-salespersons.] **All such offices shall be under the direct supervision of either the broker him or herself, or of a person who would qualify to supervise a branch office as provided in N.J.A.C. 11:5-1.19(c). Such supervision shall be maintained on a full-time basis. In the event the sole office of a broker, or the main office of a broker who also maintains one or more branch offices, is under the direct supervision of a qualified licensee other than the broker him or herself, the broker who maintains such an office shall be ultimately responsible for all activities conducted at such locations. Such a broker shall also provide sufficient information to the personnel at such offices so as to allow them to make communication with such broker at all times.**

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

(a)

Approved Schools; Requirements
Re-Proposed Amendment: N.J.A.C. 11:5-1.28

Authority: N.J.S.A. 45:15-10.1 and 45:15-6
Proposal Number: PRN 1988-286.

The agency proposal follows:

Summary

This proposed amendment supersedes the notice of proposed amendments to N.J.A.C. 11:5-1.28(j), (k) and (l) published in the New Jersey Register on March 7, 1988 at 20 N.J.R. 498(a). The New Jersey Real Estate Commission has incorporated several substantive changes following the receipt and review of public comments on the initial proposed amendment.

Specifically, N.J.A.C. 11:5-1.28(j) has been revised to clarify the requirement concerning the number of instructors who must be present in the classroom. While this proposed amendment does not change the requirement that at least one approved instructor must be present at all sessions of a course, it does indicate that the team teaching method may be utilized as a means of instruction in broker courses. Thus, it is permissable for an approved school to employ several instructors, trained as specialists in a particular area of real estate, to teach a broker's course in a team fashion. However, approved schools must obtain prior consent from the Commission in order to use this teaching method.

In addition, under N.J.A.C. 11:5-1.28(k), the reference to "18 years of age" contained in the prior proposed amendment has been deleted as an eligibility requirement. However, the Commission has added a provision in N.J.A.C. 11:5-1.28(k) which provides that the Commission may conduct criminal history record checks on applicants seeking approval as real estate instructors. Further, a change has been made in this subsection to permit adjunct faculty members of an accredited institution of higher learning to qualify as instructors to teach in an approved school.

N.J.A.C. 11:5-1.28(l) of this proposed amendment also revises the requirement that an instructor must actually teach a certain portion of one course every two years in order to continue to qualify as an approved instructor. Under this amendment, an instructor must teach a minimum of 60 hours in salesperson or broker courses within the two year period to maintain his or her certification, rather than 75 percent of one course as initially proposed.

This proposed amendment also reflects other changes that were made to correct typographical errors contained in the prior notice of proposal.

At this time, the Commission anticipates that no fees will be charged to currently approved instructors or candidates for approval to attend the seminars referred to in N.J.A.C. 11:5-1.28(k)2, 3 and 4.

This proposed amendment would effectuate changes in the criteria which apply to applicants seeking certification as approved real estate education instructors. The amendment also addresses the requirement to have an approved instructor in the classroom at all times, even when a particular session is being conducted by a guest lecturer. This amendment is a companion to revised N.J.A.C. 11:5-1.27(g), the adoption of which appears elsewhere in this issue of the New Jersey Register, which would substantially revise the syllabus for the 90 hour brokers pre-licensure course which by law must be completed by almost all broker candidates. The Commission is desirous, through this proposed amendment, of assuring that persons who will be teaching the new material in the revised brokers course are themselves familiar with that information and competent to teach it.

As currently worded, N.J.A.C. 11:5-1.28(k) establishes standards upon which an applicant may qualify as an approved real estate education instructor. This provision fails, however, to explicitly state that the Commission has the authority to consider an applicant's general character and criminal history, if any, when assessing the applicant's qualifications for designation as an approved instructor. The proposed amendment clearly provides that in order to qualify as an approved instructor, each applicant shall have a background of good moral character, including the absence of any conviction for certain crimes, as specified in N.J.S.A. 45:15-12.1.

The proposed amendment imposes the requirement that a person seeking to be an approved instructor on the basis of their membership on the faculty of a college or university must be a member of the faculty or adjunct faculty of an accredited institution of higher learning and have taught at least one 30 hour course offered by such a college or university.

The proposed amendment reduces from five to three years the period of time during which an actively practicing attorney must have been engaged in the practice of law in order to qualify as an approved instructor. The amendment indicates that only actively practicing attorneys of the State of New Jersey fall within this criteria. Also, the period of time during which the attorney has practiced must be the three years immediately preceding his or her application for approval as an instructor, and the attorney's law practice must have included substantial experience in real estate. Currently, there is no reference in this subsection to the quantity or nature of the experience an attorney is required to have in order to qualify.

The proposed amendment provides that a person may qualify for approval as a real estate instructor if they hold a bachelor's degree with a major in real estate from an accredited college or university. The degree must have been issued within three years of the submission of the application for approval as an instructor. The word "degree" appears without qualification in the present rule. Therefore, some applicants have mistakenly concluded that an associate's or two year degree in any subject would fulfill this criteria.

The proposed amendment further provides that an applicant for approval as a real estate instructor who holds a bachelor's degree with a major unrelated to real estate, and who possesses a minimum of 225 classroom hours or 15 credit hours in real estate or related subjects from an accredited college or university, will qualify as an approved instructor. Such an applicant must also possess a teaching certificate. This part of the proposed amendment also reflects an increase in the number of classroom hours completed in real estate related courses from 200 to 225 to assure that the applicant has a thorough knowledge of such topics. In addition, this change maintains consistency with the requirements regarding credit hours, since one credit hour is generally the equivalent of 15 classroom hours.

The proposed amendment also removes the requirement that a licensed New Jersey real estate broker have a minimum of five years experience "in the areas of study he or she proposes to teach" in order to qualify as a real estate instructor, and instead imposes a requirement that such a licensee shall have had five years of experience as a New Jersey licensee in order to qualify as an approved instructor. This revision is proposed on the basis of the Commission's conclusion that a combination of two years of experience as a New Jersey broker, an applicant's successful completion of a real estate broker's education course and passage of the New Jersey broker's examination, plus at least three years of other experience as a licensee, are indicative of the fact that the applicant has obtained sufficient knowledge in the real estate field to qualify as an approved real estate instructor.

In addition, the proposed amendment establishes N.J.A.C. 11:5-1.28(k)1vi, which would apply to persons who are qualified to effectively teach real estate subjects but who don't fit neatly into the categories in N.J.A.C. 11:5-1.28(k)1i through v.

Several new paragraphs are also proposed to ensure that, upon certification by the Commission, all real estate instructors in the State of New Jersey are competent to teach the real estate pre-licensure courses. N.J.A.C. 11:5-1.28(k)2 requires a real estate instructor applicant to attend an instructional seminar conducted by the Commission prior to being certified. These courses will be offered by the Commission at least twice each year. N.J.A.C. 11:5-1.28(k)3 requires all currently certified instructors to attend an instructional seminar within 12 months of the effective date of this amendment. Any currently approved instructor who does not attend the seminar shall lose their approved status. N.J.A.C. 11:5-1.28(k)4 provides that the Commission may in the future require all approved real estate instructors to periodically attend informational seminars in order to familiarize themselves with future developments in the real estate field.

Finally, the proposed amendment includes new N.J.A.C. 11:5-1.28(l), which establishes the consequences of failing to teach a minimum number of course hours during any two year period.

Social Impact

The proposed amendment will have a favorable social impact on approved real estate schools in this State. The criteria by which individuals may receive Commission approval as real estate instructors have been strengthened to ensure that the overall quality of real estate education at real estate schools is upgraded. Further, the requirement that approved instructors who have remained inactive for two or more consecutive years must re-qualify for approval will lessen the risk of a course being conducted by individuals who have failed to keep abreast of the latest trends and developments in the real estate field. By improving the quality of real estate education in New Jersey, the students will benefit by being better prepared to engage as professionals in the real estate field.

Economic Impact

The proposed amendment will have a substantial economic impact on the real estate business because it will assure that the instructors of real estate licensure courses are fully competent to teach such courses, thus producing better educated licensees. However, the Commission does not anticipate that adoption of this proposed amendment will substantially increase the costs of offering pre-licensure courses. With regard to the proposed amendment to N.J.A.C. 11:5-1.28(j), the economic impact will be substantial because the operators of approved real estate schools will no longer have to pay two instructors to cover one classroom session when a guest lecturer who is an approved instructor conducts a particular class. Consequently, the frequency of having specialists in particular fields conduct real estate education classes on such topics should increase, which, again, will result in an improvement in the overall quality of real estate education. However, to insure that required material is covered, the Commission has retained the requirement that one approved instructor be present at all times, including during sessions conducted by guest lecturers who are not approved instructors.

It is expected that this potential saving to approved schools will at least partially offset any increase in their operating costs which may result from their having to, in some cases, retain better qualified persons to teach courses who may, in turn demand higher salaries than do current instructors. The provision allowing team teaching in broker courses should also help to offset costs.

Regulatory Flexibility Statement

The proposed amendment will affect all applicants seeking the approval of the Real Estate Commission to teach real estate courses, and currently approved New Jersey real estate instructors. The real estate educational system in New Jersey consists of 540 currently approved real estate instructors, 91 approved real estate schools and 375 alternative classroom locations. A large majority of these schools are small businesses, as the Regulatory Flexibility Act, P.L. 1986, c.169, defines that term.

As previously stated, the amendment will upgrade the qualifications of instructors authorized to teach real estate courses within this State. This upgrade is essential to assure competency in complex areas such as BOCA, ECRA, and other environmental and social concerns of the real estate business. Lesser qualifications for instructors at schools which are small businesses would defeat the purpose of this upgrade and are, therefore, not provided in these amendments.

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

11:5-1.28 Approved schools; requirements

(a)-(i) (No change.)

(j) The maximum teaching load per teacher or instructor shall not exceed the ratio of one teacher or instructor to 60 students per class. Each course of instruction herein provided shall be under the supervision of an instructor qualified as provided for herein. **At least one approved instructor** [who] shall be present in the classroom at all sessions. Additional instructors or guest speakers may be utilized for instruction with respect to given subjects provided that not more than [twenty-five] **25** percent of the prescribed respective instruction is done by persons other than [the instructor in whom overall responsibility is vested] **approved instructors. At least 75 percent of the prescribed course of instruction in all salesperson pre-licensure courses conducted by a Commission-approved real estate school shall be taught by one approved instructor. In the broker pre-licensure course, team-teaching by up to three approved instructors is permitted, provided that the director of any school offering such a broker's course shall designate to the Commission prior to the commencement of the course one approved instructor on the team who shall have overall responsibility for the quality of instruction in that course.**

(k) Each [staff member] **applicant for approval as a real estate instructor** shall[:] **have a background of good moral character, including the absence of any conviction for the certain crimes or other like offenses referred to in N.J.S.A. 45:15-12.1, subject to the applicant's ability to affirmatively demonstrate his or her rehabilitation from such conviction. In order to confirm the absence of any such conviction, the Commission shall require all non-attorney and non-broker applicants to submit with his or her application for instructor approval a New Jersey State Police Request for Criminal History Record Information Form and a certified check or money order in the amount established by the New Jersey State Police as the processing fee for such forms.**

1. To qualify for approval by the Commission as a real estate instructor, an applicant must fulfill one or more of the following criteria:

[1.]**i.** [In the case of a] **Be a member of the faculty or adjunct faculty of an accredited** college or university, [have qualified as an instructor or professor in subjects dealing with, or related to real estate and such other required subjects as are to be taught] **and have previously taught at least one course of at least 30 hours in duration in real estate or related subjects offered by such an accredited college or university**; [or]

[2.]**ii.** Have actively practiced as [an] **a licensed** attorney at law **of the State of New Jersey** for a minimum of [five] **three** years [in the areas of study he proposed to teach] **immediately preceding his or her application for approval as a real estate instructor, with substantial experience in real estate**; [or]

[3.]iii. Hold a **bachelor's** degree **issued within three years of application** as evidence of having majored in real estate from an accredited college or university; [or]

[4.]iv. Hold a **bachelor's** degree from an accredited college **or university** [with at least two years of teaching experience] and possess a minimum of [200] **225** classroom hours **or 15 credit hours from an accredited college or university in real estate or related subjects, and hold a teaching certificate issued by this or any other state**; [or]

[5.]v. [Be a] **Have been** licensed **as a** real estate broker in the State of New Jersey [with] **for at least two years immediately preceding application and possess** a minimum of five years **total** experience [in the areas of study he proposes to teach] **as a New Jersey real estate licensee immediately preceding application;** [.] **or**

vi. Otherwise demonstrate the knowledge and ability, based upon any combination of the factors noted in (k)1i through v above, to effectively teach real estate subjects.

NOTE: The above requirements shall not apply to any guest speaker as heretofore provided. Individuals qualifying [within requirements (k)1 to (5)] **as set forth in (k)1 above** shall file a Form "E", together with evidence of past experience in the area of study proposed to be taught.

2. Prior to any individual being certified by the New Jersey Real Estate Commission as an approved real estate instructor, the applicant must attend an instructional seminar conducted under the auspices of the Commission. Such seminars shall be offered as frequently as the Commission shall deem necessary, but in no event less than twice each year.

3. All individuals certified as approved real estate instructors on (the effective date of this rule amendment) must, within 12 months thereof attend an instructional seminar conducted under the auspices of the Commission. In the event that such persons do not attend such a seminar, their status as approved real estate instructors shall be revoked by the Commission and they shall be ineligible for reinstatement as such until they have attended such a seminar.

4. The Commission may require all approved real estate instructors to periodically attend informational seminars which the Commission in its discretion determines are necessary in order to familiarize such instructors with recent developments in the real estate field including but not limited to changes in licensing or examination procedures and statutory or rule amendments. The failure of an approved instructor to attend such informational seminars may subject that person to sanctions, including, but not limited to the suspension or revocation of their certification as an approved real estate instructor.

(1) In the event that an approved instructor fails to teach a minimum of 60 hours of instruction in pre-licensure courses offered by Commission-approved real estate schools during any two year period, his or her approval shall automatically terminate and he or she shall be required to re-apply for approval.

Recodify existing (l) through (v) as **(m) through (w)** (No change in text.)

(a)

Proscription of Certain Discriminatory Commission Splits

Proposed Amendment: N.J.A.C. 11:5-1.34

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

Proposal Number: PRN 1988-285.

The agency proposal follows:

Summary

The New Jersey Real Estate Commission (Commission) proposes to amend N.J.A.C. 11:5-1.34 which concerns the proscription of certain discriminatory commission splits.

The purpose of the proposed amendment is to clarify the kinds of fee arrangements or commission split policies between listing and selling brokers which the rule proscribes. In addition, the amendment includes a hypothetical situation to illustrate the type of commission rate variations which are permissible and those which are prohibited under the rule.

The proposed amendment clearly indicates that it is illegal for a licensee to adopt a discriminatory fee or commission split policy against another broker because of the other broker's failure or refusal to adhere to or to adopt any particular gross fee or commission rate. However, listing brokers may vary the portion or percentage of their gross fee or commission offered to selling brokers as a commission split so as to achieve equity with the portion or percentage of the gross fee or commission offered as a split by such selling brokers on their listings.

Social Impact

The proposed amendment will have a favorable impact on the entire real estate market.

The rule helps to enhance the availability and quality of real estate services for consumers by restraining licensees from adopting certain discriminatory fee or commission rate policies which inhibit price competition. Such restraint makes the rule consistent with New Jersey's antitrust laws which were enacted to ensure that there is fair competition among business enterprises in New Jersey.

Economic Impact

The proposed amendment will have a favorable economic effect on real estate licensees and the public.

The prohibition on certain discriminatory practices will create a more positive business environment and opportunities for selling and listing brokers. As a result, the proposed amendment will serve to stimulate competition in the real estate industry, and thus benefit the public as was originally intended at the time of the promulgation of the current rule. Also, the amendment will help to assure that all listings submitted to a multiple listing system, regardless of who the listing broker is, will be considered by all potential co-operating brokers as offering an equitable commission split, thereby maximizing the property's sale potential.

Regulatory Flexibility Statement

The proposed amendment will impose no additional recordkeeping or reporting procedures on small businesses. The amendment merely clarifies the language of the existing rule to ensure understanding and compliance by real estate licensees. Thus, management and accounting procedures of small real estate operations will not have to change.

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

11:5-1.34 Proscription of certain discriminatory commission splits

(a) No licensee shall directly or indirectly take any punitive or retaliatory action against any other licensee(s) where such action is based upon the failure or refusal [or] **by such other licensee(s) to** adhere to or **to** adopt any **gross fee or** commission **rate**

(b) No licensee shall adopt a discriminatory **fee or** commission split against another broker because of such other broker's failure or refusal to adhere to or **to** adopt any **gross fee or** commission **rate**; if a listing broker varies his **or her fee or** commission split policy with any selling broker on a cooperative sale, the listing broker shall maintain a file at his **or her** place of business which shall contain in writing an explanation for the variation and which **shall reflect** [reflects] who made the decision and why it was made.

(c) Nothing in this section shall prohibit a listing broker from varying [his commission split policy] **the portion or percentage of his or her gross fee or commission offered to all other selling brokers as a commission split** with respect to any or one or more selling brokers in order to achieve equity [of commission splits] with **the portion or percentage of the gross fee or commission offered by** such other selling brokers [or brokers in connection with] **as** their commission split policy [with such listing broker.] **offered on their listings to all other selling brokers.**

(d) The following is an example of the application of the requirements of this section:

Assume broker A offers a 50 percent commission split on all listings taken by his office at a gross commission of six percent, broker B offers a 60 percent/40 percent commission split on all listings taken by his office at a gross commission of six percent and broker C offers a 50 percent commission split on all listings taken by his office at a gross commission of four percent.

Broker A may vary his standard offer of a 50 percent split with regard to broker B, that is, he may offer broker B only a 40 percent split.

However, broker A may not offer broker C less than the 50 percent split on his six percent listings. This is so because broker C offers to

all brokers the same portion or percentage of his four percent listings as does broker A on his six percent listings, that is, 50 percent. The fact that broker A only earns a net of two percent on sales of broker C's listings does not serve as a basis for broker A to offer broker C only two percent on his six percent listings, while offering three percent on those listings to other cooperating brokers.

LABOR

(a)

DIVISION OF WORKPLACE STANDARDS
Prevailing Wages for Public Works Inspection of Records
Proposed New Rule: N.J.A.C. 12:60-6.1

Authorized By: Charles Serraino, Commissioner, Department of Labor.

Authority: N.J.S.A. 34:1-20, 34:1A-3(e), 34:11-56.25 et seq., specifically 34:11-56.31 and 34:11-56.43 and P.L. 1987, c. 451.

Proposal Number: PRN 1988-302.

Submit comments by July 6, 1988 to:
Alfred B. Vuocolo, Jr.
Chief Legal Officer
Office of the Commissioner
New Jersey Department of Labor
CN 381
Trenton, New Jersey 08625-0381

The agency proposal follows:

Summary

Pursuant to P.L. 1987, c. 451, the Commissioner of the Department of Labor (Commissioner) was granted the power to direct that funds be withheld from public works employers who fail to produce records requested by the Commissioner. The proposed new rule sets forth recordkeeping requirements for public works employers, and lists the penalty applicable for noncompliance.

N.J.A.C. 12:60-6.1(a) confers upon the Commissioner the authority to inspect the public works records, question employees and request written statements from employers to verify compliance with State labor laws.

N.J.A.C. 12:60-6.1(b) outlines the method for withholding funds from a public works employer from noncompliance with a request for records.

Social Impact

The proposed new rule will enable the Department to inspect records to determine violations of the prevailing wage act and to withhold the funds of those noncomplying employers. This will increase the number of employers who are in compliance with the prevailing wage law, which will result in better working conditions for public works employees.

Economic Impact

The proposed new rule will enable the Department to withhold funds from public works employers who fail to produce records, which will have a negative effect on such employers until they comply with the order. The Department does not expect to experience any economic impact.

Regulatory Flexibility Statement

The proposed new rule will not impose any additional reporting, recordkeeping or compliance requirements upon small businesses, other than those currently required pursuant to the New Jersey Prevailing Wage Act at N.J.S.A. 34:11-56.31. Therefore, a regulatory flexibility analysis is not required.

Full text of the proposal follows.

SUBCHAPTER 6. INSPECTION OF RECORDS

12:60-6.1 Inspections

(a) The Commissioner, or an authorized designee, shall have the authority to:

1. Inspect and copy books, registers, payrolls or other records that relate to or affect wages, hours and other conditions of employment for public works employees;

2. Question public works workmen to determine whether they are aware of violations of the prevailing wage act; and

3. Require public works employers to submit written statements, including sworn statements, concerning wages, hours, names, addresses and any other employee information as may be determined necessary by the Commissioner.

(b) If, within 10 days of a request by the Commissioner, a public works employer fails to file the material listed in (a)1 or 3 above, sworn as to its accuracy, the Commissioner may, within 15 days:

1. Direct the officer responsible for disbursement of funds for the public body which contracted for the public works project to withhold from the employer 25 percent of the amount, not to exceed $100,000, due the employer under the contract for the project.

2. When the employer complies with the request for records, the Commissioner shall notify the public body, who shall immediately release the withheld funds.

(b)

Establishment of Ratio of Apprentices to Journeymen for Public Work Projects
Proposed New Rule: N.J.A.C. 12:60-7

Authorized By: Charles Serraino, Commissioner, Department of Labor.

Authority: N.J.S.A. 34:1-20, 34:1A-3(e) and 34:11-56.25 et seq.

Proposal Number: PRN 1988-304.

Submit comments by July 6, 1988 to:
Alfred B. Vuocolo, Jr.
Chief Legal Officer
New Jersey Department of Labor
CN 381
Trenton, New Jersey 08625-0054

The agency proposal follows:

Summary

The Prevailing Wage Act, N.J.S.A. 34:11-56.25 et seq., requires the Commissioner of the Department of Labor to determine prevailing wage rates "for each craft or trade or classification of all workmen needed to perform public work contracts", N.J.S.A. 34:11-56.30. "Workmen" is defined in the Act to include the classification of "apprentices . . . employed by any contractor or subcontractor . . .". N.J.S.A. 34:11-56.26(7). Prevailing wage rates for each craft or classification are derived from collective bargaining agreements in the locality. N.J.S.A. 34:11-56.26(9).

For many years, the Department of Labor has employed an allowable ratio of one apprentice to every five journeymen on public work projects. A review of recent collective bargaining agreements has revealed that this ratio may no longer be representative. In order to more accurately reflect common industry practice, the Department has decided to rely on the collective bargaining agreements used to determine the prevailing wages to also determine the ratio of apprentices to journeymen a contractor or subcontractor is permitted to employ on public work projects.

The purpose of this new subchapter is to set forth by rule the Department's criteria for determining who is an apprentice and the ratio of apprentices to journeymen permitted on public works projects.

N.J.A.C. 12:60-7.1 sets forth the definition of apprentice and records.

N.J.A.C. 12:60-7.2 sets forth the responsibilities of contractors and subcontractors who employ apprentices on public work projects. The employer must maintain with its records written evidence that the apprentice or apprentices are registered in an approved apprentice program while performing work on the project. This section also prohibits a contractor or subcontractor from creating superfluous job titles and worker classifications in order to avoid paying the prevailing wage to journeymen who traditionally do a specific task.

N.J.A.C. 12:60-7.3(a) sets forth that upon determining the prevailing wage rate the Commissioner shall determine the ratio of apprentices to journeymen a contractor or subcontractor is permitted to employ on public works projects.

N.J.A.C. 12:60-7.3(b) sets forth the ratio of apprentices to journeymen (1:4) that the Commissioner will establish when there is no ratio set forth in the collective bargaining agreement used to make the prevailing wage determination.

N.J.A.C. 12:60-7.3(c) sets forth the minimum rate that must be paid to employees when the prevailing collective bargaining agreement for a craft or trade does not specify an apprentice rate.

N.J.A.C. 12:60-7.4 sets forth the manner in which a contractor or subcontractor must correct the wage rate if the Department determines there is a violation of the apprentices/journeymen ratio. Specifically, the Department will conduct an audit and order the contractor and subcontractor to pay the worker an additional amount equal to the difference between the rate of an apprentice and the rate of a journeyman plus any applicable benefits the worker is entitled to as a journeyman.

Social Impact

The proposed rules have a positive social impact by acknowledging the results of the collective bargaining process in establishing apprentice/journeyman ratios. By basing the Commissioner's apprentice/journeymen ratios on pertinent collective bargaining agreements, the proposed new rules provide for improved regulatory input into public work projects.

Economic Impact

The proposed new rules will tend to lower the cost of public work contracts by ensuring that apprentices employed in accordance with the prevailing apprentice/journeyman ratio are paid at the apprentice rate rather than at the journeyman rate.

The proposed new rules will not affect the Department economically. Although the promulgation of a rule requires additional agency work, this work will be accomplished by existing personnel without any added cost to the Department.

Regulatory Flexibility Statement

The proposed new rules place no record keeping or reporting requirements on small businesses as that term is defined in the Regulatory Flexibility Act, P.L. 1986 c. 169. The compliance requirements of the new rules relate to Department access to employer records and employees, the creation of job titles and worker classifications and wage rate corrections. As the record and employee access requirements relate directly to the Department's ability to enforce the Prevailing Wage Act, and the ban on inconsistent job titles and worker classifications, and the wage rate correction provisions, do not lend themselves, in the context of the purposes of the Prevailing Wage Act, to differentiation based exclusively on the size of the employing contractor or subcontractor, lesser compliance requirements for small businesses are inappropriate and not proposed.

Full text of the proposal follows.

SUBCHAPTER 7. CRITERIA FOR DETERMINING APPRENTICE TO JOURNEYMAN RATIO

12:60-7.1 Definitions

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

"Apprentice" means an individual who, while performing work on a public work project, is registered, in good standing, in an apprenticeship program approved or certified by the Division of Vocational Education in the New Jersey Department of Education or by the Bureau of Apprenticeship and Training in the United States Department of Labor.

"Records" means all books, registers, payrolls, and any other documentation maintained by the employer that have a bearing upon the question of wages, hours, and other conditions of employment of any workmen.

12:60-7.2 Responsibilities of contractors and subcontractors

(a) A contractor or subcontractor employing one or more apprentices on a public work project shall maintain with its records written evidence that the apprentice or apprentices are registered in an approved apprenticeship program while performing work on the project.

1. The contractor or subcontractor shall make all records available for inspection by the public body awarding the contract and by the Commissioner during normal business hours.

2. The awarding body and the Commissioner shall have unencumbered access to the employees who are employed on a public work project for the purpose of interviewing and determining compliance.

(b) A contractor or subcontractor shall not create job titles and worker classifications which are not consistent with prevailing practices and existing task ratios for a specific building trades craft for the purpose of circumventing the intent of this subchapter.

12:60-7.3 Ratio of apprentices to journeymen

(a) Upon determining the prevailing wage rate and establishing the prevailing wage in the locality for each craft, trade or class of workmen needed to perform public work contracts, the Commissioner shall also determine the ratio of apprentices to journeymen for the purpose of establishing the number of workmen who may be paid the apprentice rate.

(b) If no ratio of apprentices to journeymen is set forth in the collective bargaining agreement used by the Commissioner to make his or her prevailing wage determination, the maximum ratio of apprentices to journeymen shall be one apprentice to every four journeymen.

(c) If the prevailing collective bargaining agreement for a craft or trade does not provide for an apprentice rate, the employer shall pay the employees not less than the journeyman's rate even if an employee is registered in an apprentice program for that trade.

12:60-7.4 Correction of wage rate

(a) If the Department determines that a worker who has been paid an apprentice wage rate on a project is entitled to a journeyman's rate, the Department shall conduct an audit and require the contractor or subcontractor to pay the worker an additional amount equal to the difference between the rate of an apprentice and the rate of a journeyman plus any applicable benefits the worker is entitled to as a journeyman.

(a)

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Rules of Procedure

Proposed New Rules: N.J.A.C. 12:112

Authorized By: Charles Serraino, Commissioner, Department of Labor.

Authority: N.J.S.A. 34:1-20, 34:1A-3(e), 34:6A-32 and 34:6A-42(c).

Proposal Number: PRN 1988-303.

Submit comments by July 6, 1988 to:
Alfred B. Vuocolo, Jr.
Chief Legal Officer
New Jersey Department of Labor
CN 381
Trenton, New Jersey 08625-0381

The agency proposal follows.

Summary

The New Jersey Public Employees Occupational Safety and Health Act, N.J.S.A. 34:6A-25 et seq., enacted on January 17, 1984, ensures that all public employees are provided with a safe and healthful workplace free from recognized hazards. If the Commissioner of the Department of Labor (Commissioner) determines that an employer has violated a provision of this Act, or a safety or health standard or rule promulgated under this Act, the Commissioner must with reasonable promptness issue to the employer a written order to comply which must describe the nature of the violation, including a reference to the provision of the act, standard, rule or order alleged to have been violated, the sanction therefor, where appropriate, and must fix a reasonable time for compliance. N.J.S.A. 34:6A-41(a).

The Act also establishes an Occupational Safety and Health Review Commission (Review Commission) within the Department of Labor to hear appeals from written orders to comply issued under this Act. N.J.S.A. 34:6A-42(a). The Review Commission is required to adopt rules concerning the procedural aspects of its hearings. N.J.S.A. 34:6A-42(c).

The proposed new rules set forth the rules of procedure of the Review Commission. The rules are modeled after the current rules of procedure utilized by the Federal Review Commission as required by the Federal Occupational Safety and Health Act. See 29 U.S.C. 661(g) and 29 CFR §2200.1 et seq.

The new rules will provide detailed guidance for the efficient and fair performance of the three members of the Review Commission. They will also provide each public employer intending to appeal an order to comply issued under the Act with an explanation of the employer's rights and obligations when coming before the Review Commission. Finally, these rules will enable an employer to prepare documents for presentation before the Review Commission with a minimum amount of difficulty and will aid in the reduction in procedural errors.

N.J.A.C. 12:112-1.1 through 1.13 contain general provisions including purpose, scope and definition sections. Also included are sections concerning what constitutes a quorum, when Review Commission members may vote, how to compute time under the rules, how to request an extension for time for filing documents, when and how service and notice will occur, when and how to file documents with the Review Commission, and consolidation and severance of proceedings.

N.J.A.C. 12:112-2.1 through 2.4 set forth procedures for party and nonparty participation in proceedings before the Review Commission.

N.J.A.C. 12:112-3.1 through 3.10 set forth requirements and procedures for notices and motions.

N.J.A.C. 12:112-4.1 and 4.2 set forth requirements and procedures for pre-hearing conferences.

N.J.A.C. 12:112-5.1 through 5.10 set forth hearing requirements and procedures for hearings.

N.J.A.C. 12:112-6.1 and 6.2 set forth post-hearing procedures.

N.J.A.C. 12:112-7.1 through 7.6 set forth miscellaneous issues such as settlement, withdrawal, expedited proceedings, standards of conduct and ex parte communication.

Social Impact

The proposed new rules will benefit public employers by providing them with procedures by which they can appeal any written order to comply issued by the Commissioner. The new rules also define the right of affected public employees or their representatives to participate in pending proceedings before the Review Commission.

The new rules will require the Commissioner to follow hearing procedures if an employer appeals a written order to comply.

Economic Impact

Because the new rules apply only to public sector employers, they will not have any economic impact upon employers in the private sector in New Jersey.

Public employers who choose to appeal any written order to comply issued by the Commissioner will bear the costs associated with such an appeal. However, the new rules propose a streamlined administrative process designed for the expeditious resolution of appeals at the lowest possible cost.

The Department of Labor will bear the full cost occasioned by the compensation of the members of the Review Commission as well as the support staff needed to perform its duties.

Regulatory Flexibility Statement

This rule applies exclusively to public employers and will have no effect on small businesses, therefore, a regulatory flexibility analysis is not required.

Full text of the proposal follows:

CHAPTER 112
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION RULES OF PROCEDURES

SUBCHAPTER 1. GENERAL PROVISIONS

12:112-1.1 Purpose

The purpose of this chapter is to set forth the hearing procedures of the New Jersey Public Employees Occupational Safety and Health Review Commission.

12:112-1.2 Scope

This chapter shall govern all proceedings before the Review Commission.

12:112-1.3 Validity

Should any section, paragraph, sentence or word of this chapter be declared for any reason to be invalid, such decision shall not affect the remaining portions of this chapter.

12:112-1.4 Definitions

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

"Act" means the New Jersey Public Employees Occupational Safety and Health Act, N.J.S.A. 34:6A-25 et seq.

"Agency" means:

1. An executive department, or an employing unit or authority of the executive branch of the State, or any department, division bureau, board, council, employer or authority of the State; except any bi-state agency; or

2. Any county, municipality, or any department, division, bureau, board, council, employer or authority of any county or municipality, or any school district or special purpose district created pursuant to law.

"Commissioner" means the Commissioner of the New Jersey Department of Labor or his or her designee.

"Day" means a calendar day.

"Employee" means any public employee, any person holding a position by appointment or employment in the service of an "employer" as that term is used in the Act and shall include any individual whose work has ceased as a consequence of, or in connection with, any administrative or judicial action instituted under this Act; provided, however, that elected officials, members of boards and commissions and managerial executives as defined in the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., shall be excluded from the coverage of the Act.

"Employer" means public employer and shall include any person acting directly on behalf of, or with the knowledge and ratification of:

1. The State, or any department, division, bureau, board, council, agency or authority of the State except any bi-state agency; or

2. Any county, municipality, or any department, division, bureau, board, council, agency or authority of any county or municipality, or of any school district or special purposes district created pursuant to law.

"Non-party" means a person or entity who participates in the Review Commission proceeding as a witness or in amicus curiae capacity.

"Order to comply" means a written directive issued by the Commissioner to an employer as set forth in N.J.S.A. 34:6A-41.

"Party" means either the complainant who is the Commissioner or the respondent who is the employer in the Review Commission proceeding.

"Proceeding" means any proceeding before the Review Commission.

"Review Commission" means the Occupational Safety and Health Review Commission created by N.J.S.A. 34:6A-42.

"Secretary" means the Executive Secretary of the Review Commission.

"Working day" means any Monday through Friday but shall not include Saturday, Sunday, any Federal holiday or any State holiday. In computing 15 working days, the day of receipt of any notice shall not be included.

"Workplace" means a place where public employees are assigned to work or customarily suffered or permitted to work.

12:112-1.5 Quorum

(a) No official business of the Review Commission shall be conducted without a quorum.

(b) A quorum shall consist of at least two of the three members of the Review Commission.

12:112-1.6 Voting

(a) Members of the Review Commission shall be present in order to vote except as provided in (b) below.

(b) A member who has been absent with good cause may vote by letter ballot provided he or she certifies that he or she has read the transcript, in the case of a hearing, or is otherwise familiar with the issue over which the vote was cast.

12:112-1.7 Computation of time

(a) In computing any period of time prescribed or allowed in this chapter, the day from which the designated period begins to run shall not be included.

(b) The last day of the period so computed shall be included unless it is a Saturday, Sunday, Federal holiday, or State holiday in which event the period runs until the end of the next day which is not a Saturday, Sunday, Federal holiday, or State holiday.

(c) When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, Federal holidays and State holidays shall be excluded in the computation.

12:112-1.8 Extension of time

Requests for extensions of time for the filing of any document shall be in writing, addressed to the Secretary of the Review Commission and received in advance of the date on which the document is due to be filed. Extensions of time shall be honored for good cause.

12112-1.9 Address of record

(a) The initial document filed by any party or non-party shall contain his or her name, address, and telephone number. Any change in such information shall be communicated promptly in writing to the Review Commission, and to all other parties and non-parties.

(b) A party or non-party who fails to furnish such information shall be deemed to have waived his or her right to notice and service under this chapter.

12:112-1.10 Service and notice

(a) At the time of filing documents, a copy shall be served by the filing party on every other party or non-party.

(b) Service upon a party or non-party who has appeared through a representative shall be made only upon such representative.

(c) Unless otherwise ordered, service may be accomplished by postage pre-paid first class mail or by personal delivery. Service is deemed effected at the time of mailing (if by mail) or at the time of personal delivery (if by personal delivery).

(d) Proof of service shall be accomplished by a written statement of the same which sets forth the date and manner of service. Such statement shall be filed with the document.

(e) The employer shall, immediately upon receipt of notice of the docketing of the notice of contest, post, where the written order to comply is required to be posted, a copy of the notice of contest. A notice in the following form shall be deemed to comply with this paragraph:

(Name of employer)

This employer has been cited by the Commissioner of Labor for violation of the Public Employees Occupational Safety and Health Act, N.J.S.A. 34:6A-25 et seq. The written order to comply has been contested and will be the subject of a hearing before the Occupational Safety and Health Review Commission.

(f) A copy of the notice of the hearing to be held before the Review Commission shall be posted by the employer at or near the place where the written order to comply is required to be posted.

(g) Where posting is required by this section, such posting shall be maintained until the commencement of the hearing or until earlier disposition.

12:112-1.11 Filing

(a) Prior to the assignment of a case to the Review Commission, all papers shall be filed with the Secretary of the Review Commission at CN 110, Trenton, New Jersey 08625-0110. Subsequent to the assignment of the case to the Review Commission, and before the issuance of its decision, all papers shall be filed with the Review Commission at the address given in the notice informing of such assignment. Subsequent to the issuance of the decision of the Review Commission, all papers shall be filed with the Secretary.

(b) Unless otherwise ordered, all filing shall be accomplished by first class mail.

(c) Filing is deemed effected at the time of mailing.

12:112-1.12 Consolidation

Cases may be consolidated on the motion of any party or on the Review Commission's own motion, where there exist common parties, common questions of law or fact, or both, or in such other circumstances as justice and the administration of the Act require.

12:112-1.13 Severance

Upon its own motion, or upon motion of any party, the Review Commission may, for good cause, order any proceeding severed with respect to some or all issues or parties.

SUBCHAPTER 2. PARTICIPATION

12:112-2.1 Non-party participation

(a) A petition for a non-party to participate as a witness or in an amicus curiae capacity shall be filed at least 10 days before the commencement of the hearing before the Review Commission, except as provided in (c) below.

(b) The petition shall set forth the interest of the non-party in the proceeding and show that the participation of the non-party will assist in the determination of the issues in question, and that the participation of the non-party will not unnecessarily delay the proceeding.

(c) The Review Commission may grant a petition for participation of a non-party to such an extent and upon such terms as the Review Commission determines.

12:112-2.2 Party and non-party representatives

(a) Any party or non-party may appear in person or through a representative.

(b) A representative of a party or non-party shall be deemed to control all matters respecting the interest of such party or non-party in the proceeding.

(c) Nothing contained herein shall be construed to require any representative to be an attorney at law.

12:112-2.3 Appearances of parties and non-parties

(a) A representative of a party or non-party shall enter an appearance by signing the first document filed on behalf of the party or non-party in accordance with (b) below, or thereafter by filing an entry of appearance in accordance with (c) below.

(b) If the first document filed on behalf of a party or non-party is signed by a representative, the representative shall be recognized as representing that party or non-party. No separate entry of appearance is necessary.

(c) Where a representative has not previously appeared on behalf of a party or non-party, he or she shall file an entry of appearance with the Secretary. The entry of appearance shall be signed by the representative.

12:112-2.4 Withdrawals of parties and non-parties

(a) Any counsel or representative of record desiring to withdraw his or her appearance shall file a motion with the Review Commission requesting leave therefor, and showing that prior notice of the motion has been given by him or her to his or her client or counsel or representative, as the case may be.

(b) The motion of counsel to withdraw may, in the discretion of the Review Commission, be denied where it is necessary to avoid undue delay or prejudice to the rights of a party.

SUBCHAPTER 3. NOTICES AND MOTIONS

12:112-3.1 Title of cases

(a) Cases initiated by a notice of contest shall be titled:

Commissioner of Labor, Complainant versus

(Name of Contestant), Respondent.

(b) The titles listed in (a) above shall appear at the left upper portion of the initial page of any document filed.

(c) The initial page of any document shall show, at the upper right of the page, opposite the title, the docket number, if known, assigned by the Review Commission.

12:112-3.2 Signing of motions

(a) Motions shall be signed by the filing party or by the party's representative. The signature of a representative constitutes a representation by him or her that he or she is authorized to represent the party on whose behalf the action is filed.

(b) The signature of a representative or party also constitutes a certificate by him or her that he or she has read the motion, or other paper, that to the best of his or her knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is arranged by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

12:112-3.3 Notices of contest

Within 15 working days after receipt of notification that the employer intends to contest the written order to comply issued under the Act, the Commissioner shall notify the Review Commission of the receipt in writing and shall promptly furnish to the Secretary of the Review Commission the original of any documents or records filed by the employer and copies of all other documents or records relevant to the contest.

12:112-3.4 Employer contest

(a) The Commissioner shall file with the Review Commission a complaint conforming to N.J.A.C. 12:112-3.5 no later than 30 days after the filing of the Commissioner's notice to the Review Commission pursuant to N.J.A.C. 12:112-3.3.

(b) Upon a showing by the employer that it cannot frame a responsive answer to the allegations of the complaint, the employer may move for a more definite statement of the Commissioner's allegations before filing an answer. The motion shall be filed with the Review Commission within 20 days after service of the complaint and shall point out the defects complained of and the details desired. The prompt filing of an amended complaint meeting the objections of the moving party may obviate the necessity for the Review Commission to rule on the motion.

(c) In response to a motion for a more definite statement, the Commissioner may be ordered to file an amended complaint. The order will require the Commissioner to supply such additional information or further particularization of the complaint's allegations as the Review Commission deems necessary.

(d) Except as provided in (d)1 below, the employer shall file with the Review Commission an answer conforming to N.J.A.C. 12:112-3.6 within 30 days after service of the complaint.

1. If a motion to dismiss or a motion for a more definite statement has been filed, the answer shall be filed within 15 days after the motion is denied. If a motion to amend the complaint or a motion for a more definite statement has been granted, or if an amended complaint has been filed voluntarily under N.J.A.C. 12:112-3.5(f) before an answer is served, the answer shall be filed within 30 days after service of the amended complaint.

12:112-3.5 Complaints

(a) The purpose of this section is to insure the early ascertainment of the issues to be litigated. Attachment of the order to comply to the complaint and incorporation of its terms by reference does not comply with this section. The complaint shall contain the following allegations in separately designated paragraphs:

1. The employer is engaged in an activity within the scope of the Act;

2. The employer's name, address of record and type of service performed on the date of the alleged violation; and

3. The time and place of each alleged violation.

(b) Each alleged violation shall be set out in a separate numbered paragraph, which shall contain the paragraphs described below. All allegations that relate to the same alleged violation shall be placed in one paragraph. A paragraph alleging a violation shall in separate subparagraphs clearly and concisely state the following:

1. What provision of the Act, standard, rule or order was violated and the item and order number in which the alleged violation is set forth;

2. The factual basis for each allegation necessary to establish that the standard or rule applies, and what scope or application provision governs its applicability;

3. The factual basis for each allegation necessary to establish that the cited circumstances, conditions, practices or operations violated the cited provision of the Act, standard, rule or order;

4. Where pertinent, the factual basis for the allegation that employees had access to or were exposed to the cited circumstances, conditions, practices or operations;

5. That the employer knew or could have known with the exercise of reasonable diligence of the cited circumstances, conditions, practices or operations;

6. Any allegation that the alleged violation is serious, or that the employer willfully committed the alleged violation;

7. Any allegation that the employer repeatedly committed the alleged violation, each prior written order to comply and item number that serves as the basis for the classification, and the date that each became a final order of the commission; and

8. That the proposed penalty is appropriate, specifying the amount.

(c) With respect to each alleged violation of the general duty clause of the Act, the complaint shall also identify the alleged hazard and specify the feasible means by which the employer could have eliminated or materially reduced the alleged hazard.

(d) With respect to each alleged violation of any standard or rule under which the obligation of the employer is contingent upon the existence of a hazard, the complaint shall also identify the particular hazard created by the circumstances, conditions, practices or operations that are the basis for the alleged violation. With respect to each alleged violation of any standard or rule that does not specify a means of abatement and does not provide a specific performance criterion, the complaint shall also identify the feasible means by which the employer could have abated the allegedly violative condition.

(e) The complaint shall state the penalty proposed, and allege that the penalty is "appropriate" under the Act. The complaint shall also identify the written order to comply and item number in which the violation was previously cited and the date on which this prior order became a final order of the Review Commission.

(f) A contested written order to comply may be amended once as a matter of course in the complaint before an answer is served if:

1. The amended allegation arises out of the same conduct, occurrence or hazard described in the order;

2. The amendment does not result in incurable harm to the employer in the preparation or presentation of its case; and

3. The complaint clearly identifies the change that is being made in the allegation.

12:112-3.6 Content of the answer

(a) General denials of the Commissioner's allegations shall not be accepted. The answer shall contain in short and plain terms a response to each allegation of the complaint. It shall specifically admit or deny each allegation or, if the employer is without knowledge of the facts, the answer shall so state. A statement of lack of knowledge has the effect of a denial. A failure to respond to an allegation shall be treated as an admission that the allegation is true. Amendment of the answer to correct a failure to respond may be permitted when the presentation of the merits of the case will be subserved thereby and the party who obtained the admission fails to satisfy the Review Commission that the amendment will prejudice him or her in presenting his or her case or defense on the merits.

(b) The employer shall state in its answer in separate numbered paragraphs any matter that may constitute avoidance or an affirmative defense to the extent they are known or with reasonable diligence could have been known, including but not limited to the following:

1. Creation of a greater hazard by complying with a cited standard;

2. Exemption of the Act;

3. Failure to issue a written order to comply with reasonable promptness;

4. Infeasibility of compliance;

5. Invalidity of the cited standard;

6. Preemption of the Act, by a specific standard;

7. Preemption of a standard by a more specifically applicable standard; or

8. Unpreventable employee conduct.

(c) By pleading avoidance or an affirmative defense, the employer does not waive its right to argue that the Commissioner has the burden of persuasion concerning the matter.

12:112-3.7 Statement of position

(a) Any any time prior to the commencement of the hearing before the Review Commission, any party or non-party entitled to appear may file a statement of position with respect to any or all issues to be heard.

(b) The Review Commission may order the filing of a statement of position.

12:112-3.8 Motions without conference consideration

A motion shall not be viewed favorably if the subject of the motion has not been first discussed among the parties prior to the conference.

12:112-3.9 Motions and request

(a) A request for an order by the Review Commission shall be made by motion. Motions shall be in writing or, unless the Review Commission directs otherwise, may be made orally during a hearing on the record and shall be included in the transcript. In exigent circumstances in cases pending before the Review Commission, a motion may be made telephonically if it is reduced to writing and filed within three days of the telephone call. A motion shall state with particularity the grounds on which it is based and shall set forth the relief or order sought. A motion shall not be included in another document, such as a brief or a petition for discretionary review, but shall be made in a separate document. Unless a motion is made by all participants, the moving participant shall state in the motion any opposition or lack of opposition of which he or she is aware.

(b) A motion filed in lieu of an answer pursuant to N.J.A.C. 12:112-3.4 shall be filed no later than 20 days after the service of the complaint. Any other motion shall be made as soon as the grounds therefor are known.

(c) Any party upon whom a motion is served shall have 10 days from service of the motion to file a response. A procedural motion may be ruled upon prior to the expiration of the time for response. A party adversely affected by the ruling may within five days of service of the ruling seek reconsideration.

(d) The filing of a motion, including a motion for a postponement, does not automatically postpone a hearing.

12:112-3.10 Failure to obey rules

(a) When any party or non-party has failed to proceed as provided by these rules or as required by the Review Commission, he or she may be declared to be in default either:

1. On the initiative of the Review Commission, after having been afforded an opportunity to show cause whey he or she should not be declared to be in default; or

2. On the motion of a party.

(b) After a finding of default, the Review Commission, in its discretion, may enter a decision against the defaulting party or non-party or strike any document not filed in accordance with these rules.

(c) For reasons deemed sufficient by the Review Commission and upon motion expeditiously made, the Review Commission may set aside a sanction imposed under (b) above.

SUBCHAPTER 4. PRE-HEARING CONFERENCE

12:112-4.1 Discussion among the parties

(a) At least two weeks before the hearing, the parties shall meet, or confer by telephone, and discuss the following:

1. Settlement of the case;
2. The narrowing of issues;
3. An agreed statement of issues and facts;
4. Defenses;
5. Witnesses and exhibits; and
6. Any other pertinent matter.

12:112-4.2 Pre-hearing conference

(a) The Review Commission shall schedule and preside over a pre-hearing conference.

(b) At the beginning of the pre-hearing conference, the Review Commission shall enter into the record all agreements reached by the parties as well as defenses raised during discussions.

(c) The parties and the Review Commission then shall attempt to resolve or narrow the remaining issues.

(d) At the conclusion of the pre-hearing conference, the Review Commission shall enter into the record any further agreements reached by the parties.

SUBCHAPTER 5. HEARINGS

12:112-5.1 Notice of hearing

The Review Commission may schedule a hearing to occur one or more days after the conference if, in its discretion, it determines that such a schedule would result in a more practical or efficient case disposition.

12:112-5.2 Issues in dispute

The Review Commission shall hold a hearing on any issue that remains in dispute at the conclusion of the conference.

12:112-5.3 Postponement of hearing

(a) Postponement of a hearing at the request of a party may be granted by the Review Commission for good cause.

(b) Except in the case of an extreme emergency or in unusual circumstances, no such request shall be considered unless received in writing at least three days in advance of the time set for the hearing.

12:112-5.4 Failure to appear

(a) Subject to the provisions of (b) below, the failure of a party to appear at a hearing shall be deemed to be a waiver of all rights except the right to be served with a copy of the decision of the Review Commission.

(b) The Review Commission, upon a showing of good cause, may excuse such failure to appear. In such event, the hearing shall be rescheduled.

12:112-5.5 Transcript of testimony

A hearing shall be transcribed verbatim. A copy of the transcript of testimony taken at the hearing, duly certified by the reporter, shall be filed with the Review Commission.

12:112-5.6 Duties and powers of Review Commission

(a) It shall be the duty of the Review Commission to conduct a fair and impartial hearing, to assure that the facts are fully elicited, to adjudicate all issues and avoid delay.

(b) The Review Commission shall have authority to:

1. Administer oaths and affirmations;
2. Issue authorized subpoenas;
3. Rule upon petitions to revoke subpoenas;
4. Rule upon offers of proof and receive relevant evidence;
5. Take or cause depositions to be taken whenever the needs of justice would be served;
6. Regulate the course of the hearing and, if appropriate or necessary, exclude persons or counsel from the hearing for contemptuous conduct and strike all related testimony of witnesses refusing to answer any proper questions;
7. Hold conferences for the settlement or simplification of the issue;
8. Dispose of procedural requests or similar matters, including motions referred to the Review Commission and motions to amend; also to dismiss complaints or portions thereof, and to order hearings reopened or, upon motion, consolidated prior to issuance of their decision;
9. Make decisions;
10. Call and examine witnesses and to introduce into the record documentary or other evidence;
11. Request the parties at any time during the hearing to state their respective positions concerning any issue in the case or theory in support thereof;
12. Adjourn the hearing as the needs of justice and good administration require; and
13. Take any other action necessary under the foregoing and authorized by this chapter.

12:112-5.7 Disqualification of member of Review Commission

(a) A member of the Review Commission shall withdraw from a proceeding whenever he or she deems him or herself disqualified.

(b) Any party may request a member of the Review Commission, at a time following his or her designation and before the filing of his or her decision, to withdraw on grounds of personal bias, or conflict of interest, or disqualification, by filing with the Review Commission promptly upon the discovery of the alleged facts an affidavit setting forth in detail the matters alleged to constitute grounds for disqualification.

(c) If, in the opinion of the Review Commission, the affidavit referred to in (b) above is filed with due diligence and is sufficient on its face, the other members of the Review Commission shall rule upon the adequacy of the member in question to serve.

(d) If the remaining members of the Review Commission determine that a member is disqualified, they shall remove the member from the proceeding. The other members of the Review Commission shall so rule upon the record stating the grounds for their ruling and shall proceed with the hearing, or if the hearing has closed, the remaining members of the Review Commission shall proceed with the issuance of their decision.

12:112-5.8 Examination of witnesses

Witnesses shall be examined orally under oath. Opposing parties shall have the right to cross-examine any witness whose testimony is introduced by an adverse party.

12:112-5.9 Objections

(a) Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence or a ruling by the Review Commission, may be stated orally or in writing, accompanied by a short statement of the grounds for the objection, and shall be included in the record. No such objection shall be deemed waived by further participation in the hearing.

(b) Whenever evidence is excluded from the record, the participant offering such evidence may make an offer of proof, which shall be included in the record of the proceeding.

12:112-5.10 Filing of briefs

(a) A party is entitled to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. Any party or non-party shall be entitled, upon request made before the close of hearing, to file a brief, proposed findings of fact and conclusions of law, or both, with the Review Commission. In lieu of briefs, the Review Commission may permit or direct the parties or non-parties to file memoranda or statements of authority.

(b) Briefs shall be filed simultaneously on a date established by the Review Commission. A motion for extension of time for filing any brief shall be made at least three days prior to the due date and shall recite that the moving party or non-party has advised the other parties and non-parties of the motion. Reply briefs shall not be allowed except by order of the Review Commission.

(c) Untimely briefs shall not be accepted unless accompanied by a motion setting forth good cause for the delay.

SUBCHAPTER 6. POST HEARING PROCEDURES

12:112-6.1 Decision of the Review Commission

(a) The Review Commission shall hear and make a decision upon any proceeding instituted before it.

(b) The proceeding shall be deemed completed when all post hearing submissions that have been authorized are submitted within the time limit established by the Review Commission.

(c) If post hearing submissions are not received within the time limit established by the Review Commission, the proceeding shall be deemed closed on the date established by the Review Commission as the closing date for submissions.

(d) The Review Commission shall render a decision in writing within 45 calendar days of the closing date of the proceeding and the decision shall be distributed to all parties and non-parties to the hearing.

(e) A party shall have 14 calendar days after the decision in (d) above to file an exception.

(f) The decision shall become the final order of the Review Commission within 30 calendar days of the issuance of the decision.

(g) Copies of the final order shall be mailed to all parties and nonparties of the hearing.

12:112-6.2 Stay of final order

(a) Any party aggrieved by a final order of the Review Commission may, while the matter is within the jurisdiction of the Review Commission, file a motion for a stay.

(b) Such motion shall set forth the reasons a stay is sought and the length of the stay requested.

(c) The Review Commission may order such stay for the period requested or for such longer or shorter period as it deems appropriate.

SUBCHAPTER 7. MISCELLANEOUS ISSUES

12:112-7.1 Settlement policy

(a) Settlement is permitted and encouraged by the Review Commission at any stage of the proceedings.

(b) The Review Commission does not require that the parties in the hearing include any particular language in a settlement agreement, but does require that the agreement specify the terms of settlement for each contested item and specify any contested item or issue that remains to be decided. Unless the settlement agreement states otherwise, the withdrawal of a notice of contest or an order to comply shall be with prejudice.

12:112-7.2 Filing of settlement

(a) A settlement submitted for approval shall be filed with the Secretary. When a settlement agreement is filed with the Secretary, proof of service shall be filed with the settlement agreement, showing service upon all parties in the manner prescribed by N.J.A.C. 12:112-1.10. The parties in the hearing shall file a final consent order for adoption by the Review Commission.

(b) A settlement document shall be typewritten.

12:112-7.3 Withdrawal

(a) A party may withdraw its notice of contest or written order to comply at any stage of a proceeding.

(b) The notice of withdrawal shall be served in accordance with N.J.A.C. 12:112-1.10(c) upon all parties. It shall also be posted in the manner prescribed in N.J.A.C. 12:112-1.10(g).

(c) Proof of service shall accompany the notice of withdrawal.

12:112-7.4 Expedited proceeding

(a) Upon application of any party in the hearing or upon its own motion, the Review Commission may order an expedited proceeding. When an expedited proceeding is ordered by the Review Commission, the Secretary shall notify all parties and nonparties.

(b) When an expedited proceeding is ordered by the Review Commission, it shall take precedence on the docket of the Review Commission over all other classes of cases, and shall be set for hearing or for the submission of briefs at the earliest practicable date.

(c) The Review Commission shall make rulings with respect to time for filing of pleadings and with respect to all other matters, without reference to times set forth in these rules, and shall do all other things appropriate to complete the proceeding in the minimum time consistent with fairness.

12:112-7.5 Standards of conduct

(a) All representatives appearing before the Review Commission shall comply with the letter and spirit of ethical conduct.

(b) If an attorney or other representative practicing before the Review Commission engages in unethical or unprofessional conduct or fails to comply with any rule or order of the Review Commission, the Review Commission may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action, including suspension or disbarment from practice before the Review Commission.

12:112-7.6 Ex parte communication

(a) There shall be no ex parte communication with respect to the merits of any case not concluded, between any member, employee, or agent of the Review Commission who is employed in the decisional process and any of the parties, non-parties, representatives or other interested persons in the hearing.

(b) In the event an ex parte communication occurs, the Review Commission may make such orders or take such actions as fairness requires. Any disciplinary action by the Review Commission, including suspension or disbarment, shall be governed by N.J.A.C. 12:112-7.5(b).

(c) All ex parte communications in violation of this section shall be placed on the public record of the proceeding.

COMMERCE, ENERGY AND ECONOMIC DEVELOPMENT

(a)

THE COMMISSIONER

Grants and Financial Assistance
Local Development Financing Fund
Proposed Amendments: N.J.A.C. 12A:12-2.3 and 2.7

Authorized By: Borden R. Putnam, Commissioner, Department of Commerce, Energy and Economic Development.

Authority: N.J.S.A. 52:27H-6f, 34:1B-36 (P.L. 1983, c.190).

Proposal Number: PRN 1988-272.

Submit comments by July 6, 1988 to:
Bernard J. McBride
Administrative Practice Officer
New Jersey Department of Commerce, Energy and Economic Development
CN 825
Trenton, New Jersey 08625

The agency proposal follows:

Summary

These proposed amendments to N.J.A.C. 12A:12-2.3 and 12A:12-2.7 would amend the current requirements of a 10 percent minority set-aside provision to a more inclusive seven percent minority set-aside and three percent women businesses set-aside. The rationale for this change is to make the effected provisions consistent with the existing State set-aside statute and policy. These amended provisions will require each project which receives financial assistance from the Local Development Fund Financing Act to set aside no less than seven percent of the aggregate project construction cost for construction opportunities for minority businesses and three percent for women businesses.

Social Impact

The anticipated social impact from these amendments is positive. The proposed amendments' aim, in a social context, is to make the Local Development Financing Fund more inclusive as to those businesses deemed to receive additional contracting opportunities.

Economic Impact

These proposed amendments should not have any negative economic impact on the various parties who participate in the Local Development Financing Fund Program. The State in general will not experience any additional cost in administering this program and the State will benefit economically by the increased contracting opportunities afforded to women businesses.

Regulatory Flexibility Statement

These proposed amendments would not impose any additional reporting, recordkeeping or other compliance requirements on small businesses. Rather, many of the businesses who will participate in the set-aside will be small businesses by definition and should benefit from these amendments.

Full text of the recently adopted new rules can be found in the April 18, 1988 New Jersey Register at 20 N.J.R. 930(d).

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

12A:12-2.3 Application for financial assistance

(a)-(e) (No change.)

(f) Each application for financial assistance from the Fund shall be accompanied by a minority **and women** business set-aside plan. (See N.J.A.C. 12A:12-2.7)

12A:12-2.7 Minority **and women** business set-aside plans and requirements

(a) Each project approved to receive financial assistance from the Fund shall set aside not less than [10] **seven** percent of the aggregate project construction costs for the purpose of providing contracting opportunities for minority businesses[.]**, and not less than three percent of the aggregate project construction costs for the purpose of providing contracting opportunities for women businesses.**

(b) The developer and/or general contractor of the project shall identify the minority **and/or women** businesses that will participate in the project by construction trade, together with the contract sum to be paid to each minority business

(c) (No change.)

LAW AND PUBLIC SAFETY

(b)

BOARD OF VETERINARY MEDICAL EXAMINERS

Examination Requirements
Prescriptions
Proposed Amendment: N.J.A.C. 13:44-1.2 and 2.1

Authorized By: Board of Veterinary Medical Examiners, David A. Meirs, D.V.M., President.

Authority: N.J.S.A. 45:16-9.9.

Proposal Number: PRN 1988-292.

Submit comments by July 6, 1988 to:
Maurice W. McQuade, Executive Director
State Board of Veterinary Medical Examiners
1100 Raymond Boulevard, Room 513
Newark, New Jersey 07102

The agency proposal follows:

Summary

The Board of Veterinary Medical Examiners is proposing to amend its rule on licensure by examination to include the requirement that applicants obtain a grade of 70.0 on the Clinical Competency Test as a prerequisite to taking the New Jersey Practical Examination. The Board also proposes to amend its rule on prescriptions to include a client/patient relationship in the prescription of drugs, and to propose a new subsection concerning the definition of client/patient relationship.

N.J.A.C. 13:44-1.2(b) is proposed to be amended to add the Clinical Competency Test (CCT) as a prerequisite to taking the New Jersey Practical Examination. The CCT, which since 1982 has been administered twice yearly by the Professional Examination Services (P.E.S.) is now used by the State and has been found by the Board to validly test the clinical skills which a qualified applicant should have. It is prepared by P.E.S. in cooperation with the National Board Examination Committee of the American Veterinary Medical Association. The passing grade requirement for the National Board Examination (NBE) and CCT has been changed from 70 to 70.0 to reflect the fact that scores of 69.5 to 69.9 are not rounded off to 70.0 in determining whether an applicant has achieved a passing grade. In requiring that applicants take the CCT as well as the NBE and achieve the minimum score of 70.0 prior to taking the New Jersey Practical Exam, the Board is seeking to ensure that qualified applicants be admitted to practice veterinary medicine.

The language of N.J.A.C. 13:44-2.1 is proposed for amendment to clarify its meaning and to include the requirement that a veterinarian establish a client/patient relationship as another condition to prescribing medicine and medical supplies. The Board is concerned that the practice of some veterinarians of dispensing drugs and medical supplies to client/patients without a valid client/patient relationship may endanger the health and safety of animals and humans. The proposed amendment defines the appropriate veterinarian-client/patient relationship and is intended to prevent careless or negligent prescription practices by prohibiting indiscriminate prescription or distribution of prescription items. The Board anticipates that this definition will aid practicing veterinarians in understanding the parameters of the client/patient relationship.

Social Impact

The proposed amendment to N.J.A.C. 13:44-1.2(b) will make the Clinical Competency Test (CCT) consistent with the National Board Examination (NBE) in that it will require an applicant to obtain a grade of 70.0 prior to taking the New Jersey Practical Examination. This requirement will be beneficial to the Board of Veterinary Medical Examiners as well as the public since the CCT validly tests the clinical skills which a qualified applicant should possess. The applicant will benefit as well since he will be tested for skills which will ensure that he is a competent practitioner.

The proposed amendment to N.J.A.C. 13:44-2.1 is expected to improve the quality of veterinary care by setting standards to define the proper veterinarian-client/patient relationship that should exist prior to the dispensing of drug prescriptions or supplies. As such, the rule is intended to ensure that animals receive proper medication to remedy the presenting symptoms and thus decrease the possibility for misdiagnosis. Animal safety is, therefore, enhanced since the risk of drug abuse to animals is decreased. The proposal further acts as a check on improper distribution of prescription items to humans by veterinarians willing to make prescription items available for humans, a practice long held to be improper by the Board.

Economic Impact

The amendment to N.J.A.C. 13:44-1.2 requiring a minimum score of 70.0 on the CCT as a prerequisite to taking the New Jersey Practical Examination does not impose an economic impact on a practitioner as he is already required to take this examination. The proposal clarifies what constitutes a client/patient relationship. Such a relationship must exist prior to dispensing drug prescriptions or medical supplies and should have little or no economic impact on the practitioner and consumer.

The client/patient relationship requirement may reduce the consumer's medical expenses as the practitioner will be more adequately informed of the symptoms, medical history, and living environment of the animal, and consequently will dispense the proper medication. In effect, the chances for misdiagnosis are reduced and the overall medical cost will thus be less.

Regulatory Flexibility Statement

The Board of Veterinary Medical Examiners has approximately 2064 licensees of whom many may qualify as "small businesses" for the purposes of a regulatory flexibility analysis.

The first section of this proposal deals with N.J.A.C. 13:44-1.2 concerning licensing examinations. This rule requires no regulatory flexibility analysis because it imposes no new reporting, recordkeeping or other compliance requirements on small businesses.

The second section of the proposal deals with N.J.A.C. 13:44-2.1 concerning the issuing of prescriptions and the necessity of a client/patient relationship as a prerequisite. This rule codifies the general understanding that before a veterinarian may issue a prescription he or she must first have developed a bona fide client/patient relationship with the client. Thus the compliance requirement established in this rule is fundamental to the practice of proper veterinary medicine and one with which most veterinarians already comply. For those veterinarians who do not presently comply with the proposed rule, compliance will be easily effectuated and will not require any additional professional services.

Not only is the development of a bona fide client/patient relationship a fundamental part of proper veterinary medicine but it is also a necessary safeguard against indiscriminate and improper prescribing of prescription drugs which would pose a serious threat to the public health, safety, and welfare of New Jersey's citizens. For this reason there can be no exemption for the "small businesses" which are affected by the proposed rule.

The rule imposes no new recording or recordkeeping requirements and should have no adverse economic impact on the Board's licensees. There are no anticipated initial capital costs for compliance nor is the annual compliance cost, for those licensees not already in compliance, likey to be significant.

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

13:44-1.2 Examinations

(a) (No change.)

(b) As a prerequisite to taking the New Jersey Practical Examination, an applicant shall have attained a grade of 70.0 on the National Board Examination and **the Clinical Competency Test**, calculated according to New Jersey criteria, within five years preceding application for the New Jersey Practical Examination and shall not have scored less than 70.0 on more than one section of each test. **A score of 69.5 to 69.9 shall not be rounded off to 70.0 in computing a passing score.**

(c)-(h) (No change.)

13:44-2.1 Prescriptions

(a) [No] A licensee shall **not** prescribe, sell, dispense or distribute any prescription item, including medications[,] **and** supplies [and apparti] in an indiscriminate manner or without good cause or where the licensee reasonably knows or should know that the item or items prescribed are to be used for unauthorized or illicit consumption or distribution. **A licensee shall not issue a prescription for, or dispense an item where he knows or has reason to know** [or] that an item or items previously prescribed or dispensed were used by the recipient for unauthorized or illicit consumption or distribution.

(b) A licensee shall not prescribe, sell, dispense or distribute any prescription item unless a bona fide client/patient relationship exists. For the purpose of this subsection, a bona fide client/patient relationship shall exist when:

1. The licensee has assumed or agreed to assume the responsibility for making veterinary medical judgments regarding the client's (owner or caretaker) animal; and

2. The licensee possesses sufficient knowledge of the animal to formulate at least a general, preliminary diagnosis of its medical condition. Said knowledge shall be based upon the licensee's personal knowledge of the keeping and care of the animal, or by virtue of a recent examination, or by medically appropriate and timely visits to the premises where the animal is kept; and

3. The licensee or a covering designee is readily available for follow-up in case of adverse reactions or failure of the regimen or therapy.

Recodify existing (b)-(c) as **(c)-(d)** (No change in text.)

NEW JERSEY RACING COMMISSION

The following proposals are authorized by Charles K. Bradley, Deputy Director, New Jersey Racing Commission.

Submit comments by July 6, 1988 to:
Charles K. Bradley, Deputy Director
New Jersey Racing Commission
CN 088
Justice Complex
Trenton, New Jersey 08625

(a)

Thoroughbred Rules
Horsemen Associations
Proposed Amendment: N.J.A.C. 13:70-1.30.

Authority: N.J.S.A. 5:5-30.

Proposal Number: PRN 1988-297.

Summary

The proposed amendments state that prior approval must be obtained from the Racing Commission for all expenditures that exceed the approved budget levels for the horsemen's organization's budget as submitted for approval. The proposed amendment to N.J.A.C. 13:70-1.30(h) regulates reasonable travel, entertainment, meals, and lodging expenses according to the horsemen's organizations' travel and expense reimbursement guidelines, on file with the Commission, rather than the New Jersey State Travel Regulations, since the horsemen's organizations' members are not State employees and do not receive State funds. The proposed amendment also states that for travel and expense reimbursement in excess of amounts allowed under such guidelines the Commission may require special justification and/or prior approal. These proposed amendments were suggested by comments received when the Racing Commission adopted rules governing funds allocated to the horsemen's organization at 20 N.J.R. 404 published on February 16, 1988. The proposed amendment to N.J.A.C. 13:71-25 (g) and (h) increase the percentage for allocation of funds from 65 to 70 percent for programs designed to benefit the horsemen, and from 15 to 30 percent for administrative expenses.

Economic Impact

The economic impact of the proposed amendments would be a positive one in that the Racing Commission must grant prior approval for any expenditures exceeding approved Line items for budgets submitted by the horsemen's organization. In addition, the proposed guidelines provide for 70 percent of the statutorily allocated money to be used for programs designed to aid the horsemen and places a restriction on administrative expenditures not to exceed 30 percent of the funds available without Racing Commission approval.

Social Impact

The social impact of the proposed amendments would be positive in that the Racing Commission would have greater control over statutorily allocated monies to the horsemen's organization for funds devoted to funding benevolent programs designed to aid the horsemen.

Regulatory Flexibility Statement

There are no compliance requirements imposed by this proposal upon small businesses, as it deals with the statutorily allocated funds to the horsemen's organizations, which are not "businesses" as defined in the Regulatory Flexibility Act.

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

13:70-1.30 Horsemen associations

(a) It shall be the intent of this rule to establish guidelines that ensure that funds allocated to the [Horsemen's Benevolent and Protective Association and the Standardbred Breeders' and Owners' Association] **horsemen's organizations** by statute (N.J.S.A. 5:5-66) are used to finance programs to benefit all New Jersey horsemen and that administrative and overhead costs are reasonably related to such programs.

(b) Funds allocated to the [Horsemen's Benevolent and Protective Association and the Standardbred Breeders' and Owners' Association] **horsemen's organizations** by statute must be used to benefit all New Jersey horsemen. Membership in the [Horsemen's Benevolent and Protective Association and the Standardbred Breeders' and Owners' Association] **horsemen's organizations** shall not be a condition for receiving benefits.

(c) Amounts collected as voluntary dues from members [of the Horsemen's Benevolent and Protective Association and the Standardbred Breeders' and Owners' Association] are excluded from this rule. However, funds acquired from sources other than the statutory allocation must be kept separate and apart from funds obtained from the statutory allocation.

(d) The [Horsemen's Benevolent and Protective Association and the Standardbred Breeders' and Owners' Association] **horsemen's organizations** shall maintain adequate records concerning receipt of and distribution of funds allocated to them by statute. The New Jersey Racing Commission shall have access to all records maintained by the [Horsemen's Benevolent and Protective Association and the Standardbred Breeders' and Owners' Association] **horsemen's organizations** which relate directly or indirectly to funds allocated by statute.

(e) The [Horsemen's Benevolent and Protective Association and the Standardbred Breeders' and Owners' Association] **horsemen's organizations** shall submit detailed budgets to the Racing Commission by December 15 of each year, identifying the source and use of funds, as well as any surplus or deficit that may result. The budget must also include the actual prior year's expenses in each category for comparison purposes. In addition, quarterly budget reports must be filed with the Commission 45 days after the close of each quarter. These reports must reflect actual income and expenses to date, as well as projected income and expenses for the remainder of the year. **Prior approval must be obtained from the Commission for all expenditures that exceed the approved budget levels.**

(f) [The Horsemen's Benevolent and Protective Association and the Standardbred Breeders' and Owners' Association shall file audited] **Audited** financial statements, including balance sheet, income statement and source and use of funds, prepared by a certified public accountant of New Jersey, **must be filed** with the Commission by February 28 for the preceding calendar year.

(g) Funding for benevolent programs, including but not limited to pension plans, [and] health and life insurance plans, **etc.** [is] **will be** considered reasonable if **such program** [the] funding **on an annual basis** is at least [65] **70** percent of the total statutory allocation. Whether or not a program will be considered a "benevolent program" will be decided upon application to the Racing Commission. [Funding] **Annual benevolence program funding** below [65] **70** percent of the total statutory allocation requires justification satisfactory to the Commission. The administrative costs and overhead **expenses** of administering **the horsemen's organizations including benevolent programs** [these specific benevolent programs] may not exceed [15] **30** percent of the total **allocated by statute** [dedicated to such programs] **unless and to the extent specifically authorized in advance by the Racing Commission.**

(h) General administration and overhead expenses are considered reasonable if they are less than [15] **30** percent of the statutory allocation. Funding above [15] **30** percent of the total statutory allocation requires justification satisfactory to the Commission. Within this category, expenses for travel, entertainment, meals and lodging are considered reasonable if they conform to [the New Jersey State Travel Regulations. For expenses in excess of amounts allowed under New Jersey State Travel Regulations, the Racing Commission may require special justification and/or prior approval.] **the horsemen's organizations' travel and expense reimbursement guidelines on file and approved by the Commission. For expenses in excess of amounts allowed under these guidelines, the Racing Commission may require special justification and/or prior approval.**

(i) Payments to national programs are allowed only to the extent that the [Horsemen's Benevolent and Protective Association and the Standardbred Breeders' and Owners' Association] **horsemen's organizations** can clearly show that the payments benefit all New Jersey horsemen, not just members of these organizations.

(j) If a surplus results at the end of a calendar year, the entire surplus must be applied to funds dedicated to benevolent programs in following years, **or** as may be approved by the Commission.

(k) Violation of [these rules] **this rule** may subject the organization to a fine not to exceed $1,000 per violation.

(a)

Thoroughbred Rules
Daily Triple
Proposed New Rule: N.J.A.C. 13:70-29.50

Authority: N.J.S.A. 5:5-30.

Proposal Number: PRN 1988-293.

The agency proposal follows:

Summary

The Racing Commission is proposing a new form of wagering to be known as the Daily Triple. This would be a new pari-mutuel pool which is not a parlay and which would not have any connection, or relation to, any other pari-mutuel pool conducted by the track associations, nor to the rules governing the distribution of such other forms of pari-mutuel wagering.

The Daily Triple would consist of patrons selecting the winner of three consecutive races and would be a separate and distinct wagering pool. The proposed new rule would set forth the method of distribution for individuals correctly selecting the winners of the three consecutive races comprising the Daily Triple pool.

Economic Impact

The economic impact of the proposed rule would be positive. The racing associations feel that this form of wagering would be a better alternative for the patrons than the present Super-Six pool. It is anticipated that offering this form of wagering to the racing public will generate a larger mutuel handle than the Super-Six.

Social Impact

The social impact of the proposed new rule is positive. The rule offers a form of wagering that is more easily understood by the public in that they must select the winner of three consecutive races, as opposed to the Super-Six form of wagering wherein if no one successfully picks the winners of the six races, carry-over provisions allow for a sum of money to be carried over to the next day's racing. Also, the monies wagered in the Daily Triple will be disbursed on that racing day and will not be carried over.

Regulatory Flexibility Statement

There are no compliance requirements imposed by this proposal upon small businesses, as the rule deals with a new form of wagering at the racetracks, which are not small businesses as defined in the Regulatory Flexibility Act.

Full text of the proposed new rule follows.

13:70-29.50 Daily Triple

(a) The Daily Triple pari-mutuel pool is not a parlay and has no connection with or relation to any other pari-mutuel pool conducted by the association, nor to any win, place and show pool shown on the totalisator board, nor to the rules governing the distribution of such other pools.

(b) A valid Daily Triple ticket shall be evidence of a binding contract between the holder of the ticket and the racing association, and said ticket shall constitute an acceptance of Daily Triple provisions and N.J.A.C. 13:70-29.

(c) A Daily Triple may be given a distinctive name to be selected by the association conducting such races, such as Win 3, subject to the prior approval of the Commission.

(d) The Daily Triple pari-mutuel pool shall consist of amounts contributed for a selection for win only in each of the three consecutive races designated by the association with the prior approval of the Commission. Each person purchasing a Daily Triple ticket shall designate the winning horse in each of the three races comprising the Daily Triple.

(e) Those horses constituting an entry of coupled horses or those horses coupled to constitute the field in a race comprising the Daily Triple shall race as a single wagering interest for the purpose of the Daily Triple pari-mutuel pool calculations and payouts to the public. However, if any part of either an entry or the field racing as a single interest is a starter in a race, the entry or the field selection shall remain as the designated selection to win in that race for the Daily Triple calculation, and the selection shall not be deemed a scratch.

(f) The net amount in the pari-mutuel pool subject to distribution among winning ticket holders shall be distributed among the holders of tickets which correctly designate the winners in all three races comprising the Daily Triple.

(g) If no ticket is sold combining the three winners of the Daily Triple, the net amount in the pari-mutuel pool shall be distributed among the holders of tickets which include the winners of at least two of the three races comprising the Daily Triple.

(h) If no ticket is sold combining at least two winners of the Daily Triple, the net amount in the pari-mutuel pool shall be distributed among holders of tickets which include the winner of any one race comprising the Daily Triple.

(i) If no ticket is sold that would require distribution of the Daily Triple pool to a winner pursuant to (f) through (h) above, the association shall make a complete and full refund of the Daily Triple pool.

(j) If for any reason one of the races comprising the Daily Triple is cancelled, the net amount of the pari-mutuel pool shall be distributed as provided in (g), (h), and (i) above.

(k) If for any reason two or more of the races comprising the Daily Triple are cancelled, a full and complete refund will be made of the Daily Triple pool.

(l) In the event a Daily Triple ticket designates a selection in any one or more of the races comprising the Daily Triple and that selection is scratched, excused or determined by the stewards to be a non-starter in the race, the actual favorite, as evidenced by the amounts wagered in the win pool at the time of the start of the race, will be substituted for the non-starting selection for all purposes, including pool calculations and payoffs.

(m) In the event of a dead heat for win between two or more horses in any Daily Triple race, all such horses in the dead heat for win shall be considered as winning horses in the race for the purpose of calculating the pool.

(n) No pari-mutuel ticket for the Daily Triple pool shall be sold, exchanged or cancelled after the time of the closing of wagering in the first of the three races comprising the Daily Triple, except for such refunds on Daily Triple tickets as required by this rule, and no persons shall disclose the number of tickets sold in the Daily Triple pool or the number or amount of tickets selecting winners of Daily Triple races until such time as the Stewards have determined the last race comprising the Daily Triple to be official. At the conclusion of the second of the three races comprising the Daily Triple, an association may, with the prior approval of the Commission, display potential distributions to ticket holders depending upon the outcome of the third race of the Daily Triple.

(a)

Harness Rules

Horsemen Associations

Proposal Amendments: N.J.A.C. 13:71-1.25.

Authority: N.J.S.A. 5:5-30.

Proposed Number: PRN 1988-296.

The agency proposal follows:

Summary

The proposed amendments state that prior approval must be obtained from the Racing Commission for all expenditures that exceed the approved budget levels for the horsemen's organization's budget as submitted for approval. The proposed amendment to N.J.AC. 13:71-1.25(h) regulates reasonable travel, entertainment, needs and lodging expenses according to the horsemen's organizations' travel and expense reimbursement guidelines, on file with the Commission, rather than the New Jersey State Travel Regulations, since the horsemen's organizations' members are not State employees and do not receive State funds. The proposed amendment also states that for travel and expense reimbursement in excess of amounts allowed under such guidelines the Commission may require special justification and/or prior approval. These proposed amendments were suggested by comments received when the Racing Commission adopted rules governing funds allocated to the horsemen's organization at 20 N.J.R. 405 published on February 16, 1988. The proposed amendments to N.J.A.C. 13:71-1.25(g) and (h) increase the percentages for allocation of funds, from 65 to 70 percent for programs designed to benefit the horsemen, and from 15 to 30 percent for administrative expenses.

Social Impact

The social impact of the proposed amendments would be positive in that the Racing Commission would have greater control over statutorily allocated monies to the horsemen's organization for funds devoted to funding benevolent programs designed to aid the horsemen.

Economic Impact

The economic impact of the proposed amendments would be a positive one in that the Racing Commission must grant prior approval for any expenditures exceeding approved line items for budgets submitted by the horsemen's organization. In addition, the proposed amendment provides for 70 percent of the statutorily allocated money to be used for programs designed to aid the horsemen and places a restriction on administrative expenditures not to exceed 30 percent of the funds available without Racing Commission approval.

Regulatory Flexibility Statement

There are no compliance requirements imposed by this proposal upon small businesses, as it deals with the statutorily allocated funds to the horsemen's organizations, which are not "businesses" as defined in the Regulatory Flexibility Act.

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

13:71-1.25 Horsemen associations

(a) It shall be the intent of this section to establish guidelines that ensure that funds allocated to the [Horsemen's Benevolent and

Protective Association and Standardbred Breeders' and Owners' Association] **horsemen's organizations** by statute (N.J.S.A. 5:5-66) are used to finance programs to benefit all New Jersey horsemen and that administrative and overhead costs are reasonably related to such programs.

(b) Funds allocated to the [Horsemen's Benevolent and Protective Association and the Standardbred Breeders' and Owners' Association] **horsemen's organizations** by statute must be used to benefit all New Jersey horsemen. Membership in the [Horsemen's Benevolent and Protective Association and the Standardbred Breeders' and Owners' Association] **horsemen's organizations** shall not be a condition for receiving benefits.

(c) Amounts collected as voluntary dues from members [of the Horsemen's Benevolent and Protective Association and the Standardbred Breeders' and Owners' Association] are excluded from this rule. However, funds acquired from sources other than the statutory allocation to these associations must be kept separate and apart from funds obtained from the statutory allocation.

(d) The [Horsemen's Benevolent and Protective Association and the Standardbred Breeders' and Owners' Association] **horsemen's organizations** shall maintain adequate records concerning receipt of and distribution of funds allocated to them by statute. The New Jersey Racing Commission shall have access to all records maintained by the [Horsemen's Benevolent and Protective Association and the Standardbred Breeders' and Owners' Association] **horsemen's organizations** which relate directly or indirectly to funds allocated by statute.

(e) The [Horsemen's Benevolent and Protective Association and the Standardbred Breeders' and Owners' Association] **horsemen's organizations** shall submit detailed budgets to the Racing Commission by December 15 of each year, for the following calendar year, identifying the source and use of funds and any surplus or deficit that may result. The budget must include the actual **prior year's** expenses [to date for the current calendar year] in each category for comparison purposes. In addition, [the Horsemen's Benevolent Protective Association and the Standardbred Breeders' and Owners Association shall file] quarterly budget reports **must be filed** with the Commission 45 days after the close of each quarter. These reports must reflect actual income and expenses to date, [and] **as well as** projected income and expenses for the remainder of that year. **Prior approval must be obtained from the Commission for all expenditures that exceed the approved budget levels.**

(f) [The Horsemen's Benevolent and Protective Association and the Standardbred Breeders' and Owners' Association shall file audited] **Audited** financial statements, including balance sheet, income statement and source and use of funds, prepared by a certified public accountant of New Jersey, **must be filed** with the Commission by February 28 of each year for the preceding calendar year.

(g) Funding for benevolent programs, including but not limited to pension plans, [and] health and life insurance plans, **etc.** [is] **will be** considered reasonable if **such program** [the] funding **on an annual basis** is at least [65] **70** percent of the total statutory allocation. Whether or not a program will be considered a "benevolent program" will be decided upon application to the Racing Commission. **Annual benevolence program** [Funding] **funding** below [65] **70** percent of the total statutory allocation requires justification satisfactory to the Commission. The administrative costs and overhead **expenses** of administering [these specific benevolent programs] **the horsemen's organizations' including benevolent programs** may not exceed [15] **30** percent of the total **allocated by statute** [dedicated to such programs] **unless and to the extent specifically authorized in advance by the Racing Commission.**

(h) General administration and overhead expenses are considered reasonable if they are less than [15] **30** percent of the statutory allocation. Funding above [15] **30** percent of the total statutory allocation requires justification satisfactory to the Commission. Within this category, expenses for travel, entertainment, meals and lodging are considered reasonable if they conform to [the New Jersey State Travel Regulations. For expenses in excess of amounts allowed under New Jersey State Travel Regulations, the Racing Commission may require special justification and/or prior approval.] **the horsemen's organizations' travel and expense reimbursement guidelines on file and approved by the Commission. For expenses in excess of amounts allowed under these guidelines, the Racing Commission may require special justification and/or prior approval.**

(i) Payments to national programs are allowed only to the extent that the [Horsemen's Benevolent and Protective Association and the Standardbred Breeders' and Owners' Association] **horsemen's organizations** can clearly show that the payments benefit all New Jersey horsemen, not just members of these organizations.

(j) If a surplus results at the end of a calendar year, the entire surplus must be applied to funds dedicated to benevolent programs in following years, **or** as may be approved by the Commission.

(k) Violation of this section may subject the organization to a fine not to exceed $1,000 per violation.

(a)

Harness Rules
Leaving of Paddock
Proposed Amendment: N.J.A.C. 13:71-6.14

Authority: N.J.S.A. 5:5-30.
Proposal Number: PRN 1988-295.

The agency proposal follows:

Summary

The proposed amendment allows trainers to leave the paddock area prior to a horse in his care completing its engagement.

Economic Impact

This proposed amendment will have no economic impact on the harness industry or the Racing Commission.

Social Impact

This proposed amendment would afford the trainers in the harness industry the same privilege provided to trainers in the thoroughbred industry.

Regulatory Flexibility Statement

There are no compliance requirements imposed by this proposal on small businesses, as the amendment deals with harness trainers being permitted to leave the paddock area, and does not affect small businesses as defined in the Regulatory Flexibility Act.

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

13:71-6.14 Leaving of paddock

No driver, [trainer] groom or caretaker, once admitted to the paddock or receiving barn, shall leave the same other than to warm up said horse until such race, or races, for which he was admitted is contested; provided however, that in the event of an emergency, trainers or grooms may leave the paddock but only with the permission of the paddock judge in which case the paddock judge shall maintain a written record thereof. Such record shall be delivered to the presiding judge. **A trainer may leave the paddock before his horse completes its engagement, but may not return to the paddock unless approval by the presiding judge has been given.**

(b)

Harness Rules
Daily Triple
Proposed New Rule: N.J.A.C. 13:71-27.54

Authority: N.J.S.A. 5:5-30.
Proposal Number: PRN 1988-294.

The agency proposal follows:

Summary

The Racing Commission is proposing a new form of wagering to be known as the Daily Triple. This would be a new pari-mutuel pool which is not a parlay and which would not have any connection with, or relation to, any other pari-mutuel pool conducted by the track associations, nor to the rules governing the distribution of such other forms of pari-mutuel wagering.

The Daily Triple would consist of patrons selecting the winner of three consecutive races and would be a separate and distinct wagering pool. The proposed new rule would set forth the method of distribution for individuals correctly selecting the winners of the three consecutive races comprising the Daily Triple pool.

Economic Impact

The economic impact of the proposed rule would be positive. The racing associations feel that this form of wagering would be a better alternative for the patrons than the present Super-Six pool. It is anticipated that offering this form of wagering to the racing public will generate a large mutuel handle than the Super-Six.

Social Impact

The social impact of the proposed new rule is positive. The rule offers a form of wagering that is more easily understood by the public in that they must select the winner of three consecutive races, as opposed to the Super-Six form of wagering wherein if no one successfully picks the winners of the six races, carry over provisions allow for a sum of money to be carried over to the next day's racing. Also, the monies wagered in the Daily Triple will be disbursed on that racing day and will not be carried over.

Regulatory Flexibility Statement

There are no compliance requirements imposed by this proposal upon small businesses, as it deals with a new form of wagering at the racetracks, which are not small businesses as defined in the Regulatory Flexibility Act.

Full text of the proposed new rule follows.

13:71-27.54 Daily Triple

(a) The Daily Triple pari-mutuel pool is not a parlay and has no connection with or relation to any other pari-mutuel pool conducted by the association, nor to any win, place and show pool shown on the totalisator board, nor to the rules governing the distribution of such other pools.

(b) A valid Daily Triple ticket shall be evidence of a binding contract between the holder of the ticket and the racing association, and said ticket shall constitute an acceptance of Daily Triple provisions and N.J.A.C. 13:71-27.

(c) A Daily Triple may be given a distinctive name to be selected by the association conducting such races, such as Win 3, subject to the prior approval of the Commission.

(d) The Daily Triple pari-mutuel pool shall consist of amounts contributed for a selection for win only in each of the three consecutive races designated by the association with the prior approval of the Commission. Each person purchasing a Daily Triple ticket shall designate the winning horse in each of the three races comprising the Daily Triple.

(e) Those horses constituting an entry of coupled horses or those horses coupled to constitute the field in a race comprising the Daily Triple shall race as a single wagering interest for the purpose of the Daily Triple pari-mutuel pool calculations and payouts to the public. However, if any part of either an entry or the field racing as a single interest is a starter in a race, the entry or the field selection shall remain as the designated selected to win in that race for the Daily Triple calculation, and the selection shall not be deemed a scratch.

(f) The net amount in the pari-mutuel pool subject to distribution among winning ticket holders shall be distributed among the holders of tickets which correctly designate the winners in all three races comprising the Daily Triple.

(g) If no ticket is sold combining the three winners of the Daily Triple, the net amount in the parti-mutuel pool shall be distributed among the holders of tickets which include the winners of at least two of the three races comprising the Daily Triple.

(h) If no ticket is sold combining at least two winners of the Daily Triple, the net amount in the pari-mutuel pool shall be distributed among holders of tickets which include the winner of any one race comprising the Daily Triple.

(i) If no ticket is sold that would require distribution of the Daily Triple pool to a winner pursuant to (f) through (h) above the association shall make a complete and full refund of the Daily Triple pool.

(j) If for any reason one of the races comprising the Daily Triple is cancelled, the net amount of the pari-mutuel pool shall be distributed as provided in (g), (h), and (i) above.

(k) If for any reason two or more of the races comprising the Daily Triple are cancelled, a full and complete refund will be made of the Daily Triple pool.

(l) In the event a Daily Triple ticket designates a selection in any one or more of the races comprising the Daily Triple and that selection is scratched, excused or determined by the stewards to be a non-starter in the race, the actual favorite, as evidenced by the amounts wagered in the win pool at the time of the start of the race, will be substituted for the non-starting selection for all purposes, including pool calculations and payoffs.

(m) In the event of a dead heat for win between two or more horses in any Daily Triple race, all such horses in the dead heat for win shall be considered as winning horses in the race for the purpose of calculating the pool.

(n) No pari-mutuel ticket for the Daily Triple pool shall be sold, exchanged or cancelled after the time of the closing of wagering in the first of the three races comprising the Daily Triple, except for such refunds on Daily Triple tickets as required by this rule, and no persons shall disclose the number of tickets sold in the Daily Triple pool or the number or amount of tickets selecting winners of Daily Triple races until such time as the Stewards have determined the last race comprising the Daily Triple to be official. At the conclusion of the second of the three races comprising the Daily Triple, an association may, with the prior approval of the Commission, display potential distributions to ticket holders depending upon the outcome of the third race of the Daily Triple.

TRANSPORTATION

The following proposals are authorized by Hazel Frank Gluck, Commissioner, Department of Transportation.

Submit comments by July 6, 1988 to:
Charles L. Meyers
Administrative Practice Officer
Department of Transportation
1035 Parkway Avenue
CN 600
Trenton, New Jersey 08625

TRANSPORTATION OPERATIONS

(a)

Speed Limits
Route N.J. 179 in Hunterdon County
Proposed Amendment: N.J.A.C. 16:28-1.158

Authority: N.J.S.A. 27:1A-5, 27:1A-6, 39:4-98.
Proposal Number: PRN 1988-270.

The agency proposal follows:

Summary

The proposed amendment will establish speed limit zones along Route 179 in the City of Lambertville, the Townships of East Amwell and West Amwell, Hunterdon County for the safe and efficient flow of traffic, the enhancement of safety, and the well-being of the populace.

Based upon a request from the local government, the Department's Bureau of Traffic Engineering and Safety Programs conducted traffic investigations. The investigations proved that the establishment of speed limit zones along Route 179 in the City of Lambertville, the Townships of East Amwell and West Amwell, Hunterdon County were warranted.

The Department therefore proposes to amend N.J.A.C. 16:28-1.158 based upon the request from the local government and the traffic investigations.

Social Impact

The proposed amendment will establish speed limit zones along Route 179 in the City of Lambertville, the Townships of East Amwell, and West Amwell, Hunterdon County for the safe and efficient flow of traffic, the enhancement of safety, and the well-being of the populace. Appropriate signs will be erected to advise the motoring public.

Economic Impact

The Department and local governments will incur direct and indirect costs for mileage, personnel and equipment requirements. The Department will bear the costs for the installation of "speed limit" zones signs. Motorists who violate the rules will be assessed the appropriate fine.

Regulatory Flexibility Statement

Since the proposed amendment does not place any bookkeeping, recordkeeping or compliance requirements on small businesses as the term is defined by the Regulatory Flexibility Act, N.J.S.A. 52:14B-19, a regulatory flexibility analysis is not required. The rule affects the motoring public.

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

16:28-1.158 Route 179

(a) The rate of speed designated for the certain parts of State highway Route 179 described in this **sub**section shall be established and adopted as the maximum legal rate of speed: [thereat:]

1. For both directions of traffic:

i. (No change.)

ii. In the Township[s] of West Amwell, [and East Amwell,] Hunterdon County:

(1) Zone four: 50 mph between the West Amwell Township-City of Lambertville corporate line and 375 feet north of [Melbourn] **Melborne** Lane (milepost 0.90 to 6.24).

iii. In the Township of East Amwell, Hunterdon County:

[(2)]**(1)** Zone five: 35 mph between 375 feet north of [Melbourn] **Melborne** Lane and [325 feet south of Larison Lane (milepost 6.24 to 6.77);] **Route N.J. 31—County Road 579 connection (milepost 6.24 to 6.34);**

(2) Zone six: 30 mph between Route N.J. 31—County Road 579 connection and 400 feet north of Wertsville Road (County Road 602) (milepost 6.34 to 6.53);

(3) Zone seven: 35 mph between 400 feet north of Wertsville Road (County Road 602) and 325 feet south of Larison Lane (milepost 6.53 to 6.77);

[(3)]**(4)** Zone [six:] **eight:** 45 mph between 325 feet south of Larison Lane and Route U.S. 202 and N.J. 31 (milepost 6.77 to 7.46).

(a)

Restricted Parking and Stopping
Routes N.J. 17 and U.S. 46 in Bergen County
Proposed Amendments: N.J.A.C. 16:28A-1.9 and 1.32

Authority: N.J.S.A. 27:1A-5, 27:1A-6, 39:4-138.1 and 39:4-199.
Proposal Number: PRN 1988-283.

The agency proposal follows:

Summary

The proposed amendments will establish "no parking bus stop" zones along Route N.J. 17 in Lyndhurst Township, and reduce the length of a bus stop on U.S. 46 in Elmwood Park Borough, Bergen County for the safe and efficient flow of traffic, the enhancement of safety, the well-being of the populace and the safe on/off loading of passengers at these bus stops.

Based upon requests from the local government officials, in the interest of safety, the Department's Bureau of Traffic Engineering and Safety Programs conducted traffic investigations. The investigations proved that the establishment of "no parking bus stop" zones along Route N.J. 17 in Lyndhurst Township was warranted. On U.S. 46 in Elmwood Park Borough, Bergen County, the reduction in length of a bus stop was warranted, to conform to standard practice.

The Department therefore proposes to amend N.J.A.C. 16:28A-1.9 and 1.32, based upon the requests from the local government officials and the traffic investigations.

Social Impact

The proposed amendments will establish "no parking bus stop" zones along Routes N.J. 17 in Lyndhurst Township and U.S. 46 in Elmwood Park Borough, Bergen County for the safe and efficient flow of traffic, the enhancement of safety, the well-being of the populace and the safe on/off loading of passengers at established bus stops. Appropriate signs will be erected to advise the motoring public.

Economic Impact

The Department and local governments will incur direct and indirect costs for mileage, personnel and equipment requirements. The local government will bear the costs for "no parking bus stop" zones signs. Motorists who violate the rules will be assessed the appropriate fine.

Regulatory Flexibility Statement

Since the proposed amendments do not place any bookkeeping, recordkeeping or compliance requirements on small businesses as the term is defined by the Regulatory Flexibility Act, N.J.S.A. 52:14B-19, a regulatory flexibility analysis is not required. The rule primarily affects the motoring public.

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

16:28A-1.9 Route 17

(a) (No change.)

(b) The certain parts of State highway Route 17 described in this subsection shall be designated and established as "no parking" zones where parking is prohibited at all times. In accordance with the provisions of N.J.S.A. 39:4-199 permission is granted to erect appropriate signs at the following established bus stops:

1.-5. (No change.)

6. Along (Rutherford Avenue) eastbound on the southerly side [thereof] in Lyndhurst Township, Bergen County:

i. (No change.)

7. Along (Rutherford Avenue) southbound on the westerly side in Lyndhurst Township, Bergen County:

i. Near side bus stop:

(1) Polito Avenue—Beginning at the prolongation of the easterly curb line of Polito Avenue and extending 105 feet easterly therefrom.

Renumber existing 7.-10. as **8.-11.** (No change in text.)

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

16:28A-1.32 Route U.S. 46

(a) (No change.)

(b) The certain parts of State highway Route U.S. 46 described in this subsection shall be designated and established as "no parking" zones where parking is prohibited at all times. In accordance with the provisions of N.J.S.A. 39:4-199, permission is granted to erect appropriate signs at the following established bus stops:

1.-7. (No change.)

8. In Elmwood Park Borough, Bergen County:

i. Along the eastbound (southerly) side:

(1) Far side bus stop:

(A) Boulevard—Beginning at the easterly curb line of Boulevard and extending [157] **105** feet easterly therefrom.

9.-14. (No change.)

(b)

Mid-Block Crosswalk
Route N.J. 88 in Ocean County
Proposed New Rule: N.J.A.C. 16:30-10.8

Authority: N.J.S.A. 27:1A-5, 27:1A-6, 39:4-34.
Proposal Number: PRN 1988-282.

The agency proposal follows:

Summary

The proposed new rule will establish a mid-block crosswalk along Route N.J. 88 in Point Pleasant Borough, Ocean County for the safe and efficient flow of traffic, the enhancement of safety, the well-being of the populace. The rule establishes a designated area for pedestrians to safely cross the roadway at other than an area which is controlled and directed by a police officer or a traffic control device.

Based upon a request from the local government officials, in the interest of safety, the Department's Bureau of Traffic Engineering and Safety Programs conducted a traffic investigation. The investigation proved that

the establishment of a mid-block crosswalk along Route 88 in Point Pleasant Borough, Ocean County was warranted.

The Department therefore proposes new rule N.J.A.C. 16:30-10.8 based upon the request from the local government officials and the traffic investigation.

Social Impact

The proposed new rule will establish a mid-block crosswalk along Route N.J. 88 in Point Pleasant Borough, Ocean County for the safe and efficient flow of traffic, the enhancement of safety, and the well-being of the populace. Additionally, this rule establishes a designated area for pedestrians to safely cross a roadway at other than an area which is controlled and directed by a police officer or a traffic control device. Appropriate signs will be erected to advise the motoring public.

Economic Impact

The Department and local government will incur direct and indirect costs for mileage, personnel and equipment requirements. The Department will bear the costs for the appropriate striping along the roadway. Motorists who violate the rules will be assessed the appropriate fine.

Regulatory Flexibility Statement

Since the proposed new rule does not place any bookkeeping, recordkeeping or compliance requirements on small businesses as the term is defined by the Regulatory Flexibility Act, N.J.S.A. 52:14B-19, a regulatory flexibility analysis is not required. The rule primarily affects the motoring public.

Full text of the proposal follows.

16:30-10.8 Route 88

(a) Under the provisions of N.J.S.A. 39:4-34, the certain parts of State highway Route 88 described in this section shall be designated as a mid-block crosswalk.

1. In Point Pleasant Borough, Ocean County:

i. From a point 64 feet east of the easterly curb line of the northerly approach of Benedict Street to a point 10 feet easterly therefrom.

(a)

CONSTRUCTION AND MAINTENANCE UNIT

News Dispensers on State Highway Right-of-Way

Proposed Amendments: N.J.A.C. 16:41B-1 and 2.

Proposed Repeals and New Rules: N.J.A.C. 16:41B-3,4,5 and 6.
Proposed Repeals: N.J.A.C. 16:41B-7,8,9 and 10.
Authority: N.J.S.A. 27:1A-5 and 6.
Proposal Number: PRN 1988-291.

The agency proposal follows:

Summary

On February 6, 1984, the Department promulgated rules concerning "Newspaper Dispensers on State Highway Right-of-Way", as N.J.A.C. 16:41B which were published at 16 N.J.R. 225(a). There were eight comments received regarding said rules, and comments and responses appeared in the Department's adoption published March 4, 1985 at 17 N.J.R. 608(c).

In addition to the results of the responses to comments at the time of adoption, a series of meetings were held with Departmental staff and members of the various newspapers to resolve additional issues. After further review, the Department proposes to repeal the bulk of this chapter and provide new rules governing such newspaper dispensers.

N.J.A.C. 16:41B-1 is amended to remove from the definition of "clear zones" State highway rights-of-way with a posted speed limit of 40 miles per hour or less, to provide definitions for Department, person and permittee and to correct misspellings.

N.J.A.C. 16:41B-2 is amended to provide for the Department conducting a Statewide survey of all news dispensers and contains the permitting requirements for all news dispensers on the State highway rights-of-way.

N.J.A.C. 16:41B-3 provides for indemnification of the State by the news dispenser owners for all injuries and damage involving a news dispenser located on a State highway right-of-way

N.J.A.C. 16:41B-4 sets forth the requirements for the location, installation and maintenance of news dispensers.

N.J.A.C. 16:41B-5 provides that continued placement, use and maintenance of a news dispenser is conditioned upon compliance with this chapter. The contents of a notice of non-compliance with this chapter are set forth, along with the permittee's right to a post-notice meeting to discuss an alleged violation. The circumstances for revocation and the permittee's right of appeal therefrom are also delineated. Lastly, the removal requirements for non-complying dispensers, either by the owner or, due to the owner's inaction, by the Department are set forth.

NOTE: Except where the Department of Transportation has entered into an agreement with a local or county government transferring the authority to regulate news dispensers on the State's right-of-way to said local or county government, the regulation of news dispensers within the State's right-of-way shall be exclusively controlled by these regulations.

Social Impact

The proposed amendments will establish and prescribe standard guidelines and procedures for the placement of newspaper dispensers along the State highways right-of-way. These amendments and new rules will also add to the enhancement of traffic flow and safety along the highway system.

Economic Impact

The proposed amendments will cause the Department to incur direct and indirect costs for personnel, for mileage and equipment requirements in the continued enforcement of the rules. The amendments will also affect local distributors who maintain newspaper dispensers along the State right-of-way, in that they may be required to relocate dispensers, and pay permit fees and costs charged for the removal of dispensers by the Department personnel. Local businesses engaged in the sale of newspapers on premises will not be affected by these amendments and proposed new rules.

Regulatory Flexibility Statement

The proposed amendments and new rules place compliance requirements on newspaper and periodical publishers or other persons owning news dispensers on the State highway right-of-way. Some of these owners may be small businesses as that term is defined in the Regulatory Flexibility Act, P.L. 1986 c. 169. Since the purpose of these rules is to set standards for news dispensers, their installation, maintenance and location, and, by so doing, enhance traffic flow and safety, a differentiation of the standards contained in these rules based upon the size of the owner would serve to defeat the standardization, traffic flow and safety purposes. No such differentiation is, therefore, proposed.

Full text of the proposed repeals may be found in the New Jersey Administrative Code at N.J.A.C. 16:41B-3 through 10.

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

CHAPTER 41B
NEWSPAPER BOXES ON
STATE HIGHWAY RIGHT-OF-WAY

SUBCHAPTER 1. DEFINITIONS

16:41B-1.1 Definitions

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

"Clear zone" means that roadside border area, starting at the edge of the [travelled] **traveled** way, available for safe use by errant vehicles. For the purpose of this chapter, the clear zone shall be as follows:

Posted Speed Limit	Clear Zone
[35 mph or less]	[10 ft.]
[40 mph]	[15 ft.]
45 mph	17.5 [ft.] **feet**
50 mph	20 [ft.] **feet**
55 mph	25 [ft.] **feet**

"Department" means the Department of Transportation of the State of New Jersey.

...

"Person" means corporation, company, association, society, firm, partnership, or individual.

"Permittee" means the owner of the news dispenser.

"Right-of-way" means the entire width of State highway property. This includes the [travelled] **traveled** way and all land on both sides of the [travelled] **traveled** way extending to the abutting owner's property lines.

["Travelled way"] **"Traveled way"** means that portion of the highway provided for the movement of vehicles, exclusive of shoulders, acceleration or deceleration lanes.

SUBCHAPTER 2. PERMIT PROVISIONS

16:41B-2.1 General provisions

(a) It shall be unlawful for any person to operate, erect, place or maintain, on any State highway right-of-way, any news dispenser without obtaining a permit from the Department of Transportation[.]**, as set forth below.**

[(b) Applications for permits may be obtained from the regional maintenance offices or from the Department's principal office, Bureau of Maintenance, Construction and Maintenance Unit, 1035 Parkway Avenue, Trenton, New Jersey 08625. Completed applications along with the required fee are to be forwarded to the regional office having jurisdiction over the area in which the news dispenser is to be located. The regional offices and their jurisdiction are set forth in N.J.A.C. 16:41-1.1(b).

(c) Applications for the placement of news dispensers shall include the following information:

1. Name of applicant;
2. Address of applicant;
3. Sketch showing the location of the news dispenser; distances from shoulder, gutterline, and structures shall be clearly set forth on the sketch;
4. Description of news dispensers, including height, width, and depth of the dispenser; and
5. Method of installation, including proposed attachment to any other structure.

(d) The applicant shall include with the application a fee in the amount of $25.00 per news dispenser. Fees must be in the form of a check or money order made payable to the New Jersey Department of Transportation. Cash will not be accepted.

(e) Within 30 days after receipt of a completed application a permit shall be issued if the applicant has complied with all of the conditions of this chapter, and if the location, installation, design and dispenser of new dispenser meets with the specifications set forth in this chapter.

(f) Permits shall be valid for as long as all of the conditions of this chapter have been observed. If there is a change in conditions such that the location, design, installation or condition of the news dispenser does not comply with the specifications set forth in this chapter, a new application shall be processed and an application fee in the amount of $25.00 provided.]

(b) With regard to news dispensers in place as of the effective date of these amended regulations, the permitting procedure shall be as follows:

1. The Department shall initiate a State-wide survey of news dispensers located on the right-of-way within 30 days of the enactment of these amendments. This survey shall be conducted on a regional basis with one county per region being surveyed every 30 days until completion. The survey shall identify the locations of news dispensers within the State highway right-of-way and shall develop the information, if available, required hereunder. The publisher of the newspaper or periodical being displayed and sold in the news dispenser or the owner of the news dispenser, if different from the publisher and known to the Department, shall be notified within 30 days thereof, as to which news dispensers are found to be in violation of the provisions of these regulations. Notices of non-compliance shall conform with the requirements set forth in subchapter 5 hereunder.

2. All other news dispensers identified during the initial State-wide survey of news dispensers shall be deemed in compliance with these regulations. The Department shall prepare and provide to the publisher of the newspaper or periodical being displayed and sold in the news dispenser or the owner of the news dispenser, if different from the publisher and known to the Department, a list of those news dispensers deemed in compliance with these regulations within 30 days. Said list shall be incorporated into the format of a single application per publisher, or owner if different from the publisher and known to the Department. A permit shall be issued by the Department immediately upon the return of the application, provided that it bears the owner's signature; includes the information required hereunder that was not available to the Department during the State-wide survey; and is accompanied by payment of the appropriate fee(s) established hereunder. In the event the aforesaid application, accompanied by the requisite information and fee(s) is not returned to the Department within 30 days, the news dispensers listed thereon shall be deemed in violation of these regulations.

(c) With regard to news dispensers placed on the State right-of-way after the effective date of these amendments, the owner shall, on the day of the placement of a news dispenser, submit an application for a permit. The application shall include the owner's name, address, telephone number and location of the news dispenser and a certification that such location is in conformity with these regulations. The Department shall issue a permit or a notice of non-compliance within 30 days of receipt of the application. Notices of non-compliance shall conform with the requirements set forth in subchapter 5 hereunder. In the event no action is taken within the aforesaid 30 day period, the continued use and maintenance of the news dispenser in question shall be permissible until such time as a notice of non-compliance, if any, is issued.

(d) Application forms may be obtained from the regional maintenance offices or from the Department's principal office, Bureau of Maintenance, Construction and Maintenance Unit, 1035 Parkway Avenue, Trenton, New Jersey 08625. Completed forms shall be forwarded to the regional office having jurisdiction over the area in which the news dispenser is located. The regional offices and their jurisdiction are set forth in N.J.A.C. 16:41-1.1(b).

(e) The owner shall include with the application a fee in the amount of $25.00 per news dispenser. Fees must be in the form of a check or money order made payable to the New Jersey Department of Transportation. Cash will not be accepted.

(f) Permits shall be valid for as long as all of the conditions of these regulations have been observed. In the event of change of ownership of a news dispenser(s), the permit(s) shall remain valid as long as the location(s) remain the same and the Department is notified, in writing, of such change and the new owner accepts the terms and conditions of the permit(s).

SUBCHAPTER 3. INDEMNIFICATION

16:41B-3.1 General requirements

(a) The owner of the news dispenser, upon the placement of a news dispenser within the State highway right-of-way, assumes the unconditional obligation and thereby agrees to defend, indemnify and save harmless the State, its agents, servants and employees from all suits, actions or claims of any character brought because of death or any injury received or sustained by any person or persons or because of any damage received or sustained by any property, irrespective of fault, arising out of the installation, use or maintenance of any news dispenser located on State highway right-of-way, or where such suit, action or claims arise out of such installation, use of maintenance of any news dispenser being a contributing factor to any such injury or damage, or on account of any act, omission, neglect or misconduct by the permittee, its employees, agents, distributors or servants relating to the installation, use or maintenance of any news dispenser within the State highway right-of-way.

(b) The aforesaid indemnification provision shall be contained in each permit issued by the Department pursuant to these regulations.

SUBCHAPTER 4. LOCATION, INSTALLATION AND MAINTENANCE OF NEWS DISPENSERS

16:41B-4.1 General requirements

(a) News dispensers may be placed adjacent to the wall of a building but shall not be separated from such wall by more than six inches. Unless otherwise prohibited herein, news dispensers may be placed within one and one-half feet of a gutterline or within one foot thereof in areas where the distance from the gutterline to the far edge of the sidewalk is less than six and one-half feet wide.

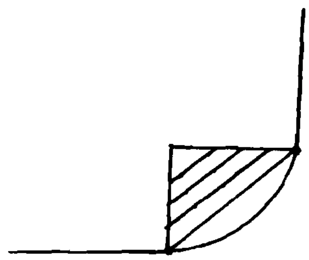
(b) Placement of news dispensers within State highway right-of-way is prohibited in the following locations:

1. Within the traveled way, shoulders, acceleration or deceleration lanes of any State highway;

2. Within medians, jug handles, channelizing islands and along ramps;

3. Within three feet of any marked crosswalk;

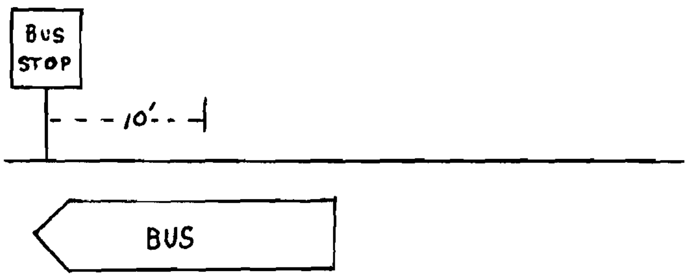
4. Within the curved portion of a curb return (from point of tangency to point of tangency) except that news dispensers may be placed adjacent to the wall of a building as set forth in (a) above notwithstanding the foregoing;



5. Within five feet of any fire hydrant, fire call box, police call box, or other emergency facility;

6. Within three feet of any driveway;

7. Within 10 feet to the rear of any sign or other demarcation marking the beginning of a designated bus stop;



8. Within three feet of any bus bench, except where such bench is within a bus shelter, in which event this restriction shall not apply provided that the news dispenser is not placed within such bus shelter;

9. Where the speed limit is 45 mph or above, placement of news dispensers is prohibited within the clear zone, subject to the following exceptions:

i. News dispensers shall be permitted within the clear zone in close proximity to fixed objects which might operate to impede the safe recovery of errant vehicles to the traveled way, or bus shelters, but shall be no closer to the traveled way than said fixed object or bus shelter. For the limited purpose of this (b)9i, clusters or rows of a maximum of three news dispensers positioned adjacent to one another are permissible, provided that at least one of the aforesaid news dispensers in each row or cluster be at least partially within five feet of the aforesaid object. As to bus shelters only, there shall be no restrictions placed upon the number of news dispensers permitted within close proximity thereto, provided they be positioned adjacent to one another and provided that at least one of the aforesaid news dispensers be within five feet of the bus shelter.

ii. Even where there are no fixed objects which might operate to impede the safe recovery of errant vehicles, news dispensers shall be permitted within the clear zone where there are sidewalks or walkways, but shall be placed on the far side thereof.

iii. News dispensers shall be permitted within the clear zone on the near side of a sidewalk or walkway, or in the grassy area, as close to the sidewalk or walkway as practicable, but only where it is not practicable to be on the far side of the sidewalk or walkway or in close proximity to a fixed object.

iv. News dispensers shall be permitted in areas within the clear zone where there are no fixed objects which might operate to impede the safe recovery of an errant vehicle to the traveled way, sidewalks or walkways but only in areas where pedestrians gather for other purposes. These areas include bus stops and park and ride facilities. Placement of a news dispenser pursuant to this exception shall be at least seven and one half (7½) feet away from the gutterline where practicable and shall be placed to service only the area where pedestrians gather.

v. Circumstances referred to in (b)9iii and iv above which will render placement of news dispensers not "practicable" include, for example, where news dispensers would encroach upon private property, block display windows, or where there are unacceptable ground conditions, such as a ditch, which prevent the placement of or access to a news dispenser.

(c) Any news dispenser which in whole or in part rests upon, in, or over any right-of-way shall comply with the following standards:

1. Unless otherwise agreed to by the Department, news dispensers shall not exceed five feet in height, 36 inches in width, or 30 inches in depth;

2. News dispensers may be chained or otherwise attached to one another; however, no more than three news dispensers may be joined together in this manner, and a space of no less than 18 inches shall separate each group of three news dispensers so attached.

3. No news dispenser shall be used for advertising signs or publicity purposes other than that dealing with the display, sale, or purchase of a newspaper or periodical sold therein.

4. Every news dispenser placed on the State highway right-of-way shall have affixed thereto in a place where such information may be easily seen, the name, address, and telephone number of the owner and person (if different from the owner) responsible for maintaining the news dispenser.

5. Any news dispenser maintained on any State right-of-way which creates an imminent, unreasonable hazard to pedestrians or traffic or interferes with the response to an emergency situation by a public officer, fire fighter, ambulance corps or medic, may be summarily relocated to the nearest location not presenting said hazard. Any such relocation shall be reported as soon as reasonably possible to the permittee who shall relocate the news dispenser to any location which is in compliance with the terms of these regulations.

6. Unless otherwise approved by the Department, no news dispenser shall be chained, bolted or otherwise attached to any public fixture located within the State highway right-of-way, including, but not limited to, official signs, sign supports, guide rails, traffic signal supports, highway lighting supports, controller boxes, fire hydrants or bus shelters.

7. News dispensers shall be securely placed so as to reasonably prevent personal injury or property damage due to tilting, tipping or overturning.

8. Every news dispenser shall be maintained so that:

i. It is reasonably free of dirt and grease;

ii. It is reasonably free of chipped, faded, peeling and cracked paint;

iii. It is reasonably free of rust and corrosion;

iv. The structural parts thereof are intact.

SUBCHAPTER 5. CONDITIONS, NOTICE OF VIOLATIONS AND APPEALS

16:41B-5.1 General requirements

(a) The continued placement, use and maintenance of news dispensers is conditioned upon compliance with all of the provisions of this chapter. If any of the provisions of this chapter are alleged to have been violated or if the location, installation, or condition of the news dispenser no longer meets with the specifications of this chapter and any amendments thereto, the permittee shall be notified of the non-compliance by registered mail.

(b) The notice shall state the specific provision(s) of this chapter which it is alleged have been violated.

(c) The notice shall further state, upon request, if made by the permittee within fifteen (15) days of the receipt of said notice, the official issuing the notice of violation shall meet with the permittee to discuss the basis for the determination that a violation exists and any proposed means of eliminating any violations. That meeting shall take place within thirty (30) days of said request. A request for such a meeting shall stay the further enforcement of this chapter, except in emergency situations as set forth in section 4.1(c)5. Following any such meeting, the official issuing the notice of violation may rescind the

notice if it is determined that there was no violation or in the event the alleged violation is otherwise eliminated. The official may also grant time for the correction of any violation upon request.

(d) If, within 30 days after mailing the notice of non-compliance, or within 30 days after the aforesaid meeting, in the event a meeting is requested and does not resolve the dispute in a mutually acceptable manner, the permittee has failed to remove the news dispenser or otherwise correct the violation or reason for non-compliance, the permit shall be revoked and the permittee shall be notified by registered mail that the permit has been revoked.

(e) A permittee or applicant may appeal from a decision to revoke a permit or a decision not to grant a permit within 15 days of the date of receipt of a revocation notice or a notice that a permit has not been granted. The permittee or applicant shall file a letter of appeal from the decision and request either a hearing in accordance with Department procedures or that the letter of appeal be forwarded by the Department to the Office of Administrative Law as a contested case. In the event an informal Department hearing is requested, any decision therefrom may be referred to the Office of Administrative Law for a de novo hearing. Any appeal shall stay enforcement of this chapter except in emergency situations as set forth in section 4.1(c)5.

(f) If the permittee (or applicant where no permit has been issued) fails to appeal from the revocation of a permit or a decision not to grant a permit, and does not remove or have removed the news dispenser in question within 30 days from the receipt of a revocation notice or a notice that a permit has not been granted, the news dispenser shall be removed by the Department of Transportation maintenance forces and stored at a Department of Transportation maintenance yard. The permittee or applicant shall be notified by registered mail of the location of the news dispenser and the hours when it may be obtained. The Department of Transportation shall not be liable for any damage to the news dispenser, to any material contained therein, or for any lost sales caused by the removal, transportation or storage of the news dispenser. A charge of $50.00 shall be levied by the Department. If a permittee (or applicant where no permit has been issued) is unsuccessful on appeal, the permittee or applicant shall have 30 days within which to remove the news dispenser. If the news dispenser is not removed within 30 days, the Department of Transportation shall remove it in accordance with the procedures set forth above.

SUBCHAPTER 6. SEVERABILITY

16:41B-6.1 General requirements

If any provision of this chapter is held invalid, the remainder of the chapter shall not be affected thereby, and shall remain in full force and effect.

TREASURY-GENERAL

DIVISION OF PENSIONS

For the following proposals, submit comments by July 6, 1988 to:
Peter J. Gorman, Esq.
Administrative Practice Officer
Division of Pensions
20 West Front St.
CN 295
Trenton, New Jersey 08625

(a)

Administration
Minimum Adjustments
Proposed Amendment: N.J.A.C. 17:1-1.10

Authorized By: Douglas R. Forrester, Director, Division of Pensions.
Authority: N.J.S.A. 52:18A-96 et seq.
Proposal Number: PRN 1988-279.

The agency proposal follows:

Summary

The proposed amendment adds a new subsection concerning the treatment of bad balances in withdrawn accounts in an amount between $50.01 and $100.00 which are owed to the withdrawn member. Such balances will be paid without further analysis to the employee and sent to the employer of record.

Social Impact

The proposed amendment will only affect members who have withdrawn their contributions from a State-administered retirement system and subsequently it is determined that a bad balance in the range between $50.01 and $100.00 exists in such account. The frequency of such occurrences and the amounts involved are insignificantly small.

Economic Impact

There does not appear to be any significant, adverse, economic impact upon the members affected by this proposal or the retirement systems involved.

Regulatory Flexibility Statement

Since the rules of the Division of Pensions only impact upon public employers and/or employees, this proposal will not affect small businesses or private industry in general.

Full text of the proposal follows (additions indicated in boldface **thus**).

17:1-1.10 Minimum adjustments

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

(c) A bad balance of $50.01 to $100.00 which is owed to a withdrawn member shall be paid without any further analysis of the member's account. Payment will be made to the employee and forwarded to the last employer of record.

Recodify existing (c)-(e) as **(d)-(f)** (No change in text.)

(b)

Teachers' Pension and Annuity Fund
Proposed Readoption: N.J.A.C. 17:3

Authorized By: Anthony Ferrazza, Secretary, Teachers' Pension and Annuity Fund.
Authority: N.J.S.A. 18A:66-56.
Proposal Number: PRN 1988-273.

The agency proposal follows:

Summary

The Board of Trustees of the Teachers' Pension and Annuity Fund and the Division of Pensions are constantly reviewing N.J.A.C. 17:3, which governs the Teachers' Pension and Annuity Fund, and which is scheduled to expire pursuant to Executive Order No. 66(1978) on June 6, 1988. When the Division of Pensions becomes aware of a change in the laws or a court decision that possibly could affect the Teachers' Pension and Annuity Fund, steps are taken to propose amendments to N.J.A.C. 17:3 to conform to the new laws or court decision. Additionally, the rules have been periodically reviewed within the Division of Pensions to ascertain if the current rules are necessary and/or cost efficient. After careful scrutiny of the current rules in N.J.A.C. 17:3, the Division and the Board of Trustees are satisfied that the rules are necessary for the efficient operation of the Teachers' Pension and Annuity Fund. Accordingly, the Division of Pensions, in conjunction with the Board of Trustees of the Teachers' Pension and Annuity Fund, proposes to readopt without change the current rules within N.J.A.C. 17:3.

The current rules within N.J.A.C. 17:3 outline the procedures governing the administration, enrollment, insurance and death benefits, membership, purchases and eligibile service, retirement and transfers in the Teachers' Pension and Annuity Fund.

Social Impact

The rules governing the administration of the Teachers' Pension and Annuity Fund affect past, present and future members of the Teachers' Pension and Annuity Fund. Since public funds are utilized to pay for a portion of the benefits and claims paid to retirants and members of the system, the taxpaying public also can be affected by these administrative rules.

Economic Impact

While the readoption of the rules in itself will not present any adverse economic impact to the public, the payments of the benefits and claims mandated by the statutes are funded by public employer contributions and thus indirectly by the taxpayers. If the administrative rules are not readopted, the benefits and claims that are mandated in the laws must still be paid. Without the administrative rules to provide for the efficient operation of the system, financial chaos would occur.

Regulatory Flexibility Statement

Since the rules of the Division of Pensions only impact upon public employers and/or employees, this proposal will not have any adverse effect upon small businesses or private industry in general.

Full text of the proposed readoption can be found in the New Jersey Administrative Code at N.J.A.C. 17:3.

(a)

State Health Benefits Program Retired Employee Defined

Proposed Amendment: N.J.A.C. 17:9-6.1

Authorized By: Gaius Mount, Secretary, State Health Benefits Commission.

Authority: N.J.S.A. 52:14-17.27.

Proposal Number: PRN 1988-274.

The agency proposal follows:

Summary

The purpose of this proposed amendment is to change the pre-retirement coverage requirement for eligibility for continuation of coverage into retirement under the State Health Benefits Program. Under the current rule, a person must be covered under the program immediately preceding retirement to continue coverage into retirement. The rules also provide for continuation of coverage in situations where a person did not have coverage immediately preceding retirement but was on an official leave of absence without pay because of illness, or there was a delay in approval of retirement or a lapse in coverage through no fault of the employee. However, aside from these exceptions, the basic requirement is that an employee has to be covered under the program at the time of retirement in order to continue the coverage into retirement.

Participation in the State Health Benefits Program is optional with the employees of participating employers and may be elected during any annual enrollment period. Some employees eligible for coverage choose not to participate because they are adequately covered under their spouses' policies. These employees save both their employers and the program money because the employer does not have to pay premiums on their behalf and the program incurs no liability for their health care coverage. If these employees do not elect the coverage in the year immediately preceding retirement, they will not be eligible for coverage in retirement. This would also make them ineligible for employer payment of the premiums for the coverage if they otherwise qualify for it. Employees in such a situation should not be harmed by their choice not to avail themselves of the benefits of the program if the employees felt they did not need the benefits. Nor should these employees be required to take the coverage in the year preceding retirement just to qualify for continuation of coverage into retirement.

This proposed amendment provides that an employee would only have to be eligible for coverage immediately preceding retirement to be eligible for coverage in retirement. Pre-retirement eligibility would be determined under the rules concerning eligibility for employees to participate in the program. Retirees under the Teachers' Pension and Annuity Fund (TPAF) who are eligible to participate in the program and eligible for state payment of the premiums under P.L. 1987, c.384 regardless of whether their employers participated in the program would have to be eligible for coverage under their employers' health insurance plans immediately preceding retirement.

Social Impact

This proposed amendment will be beneficial to all employees eligible to participate in the State Health Benefits Program because the amendment provides that these employees will be eligible for coverage in retirement regardless of whether they availed themselves of the opportunity to have the coverage while they were employed, provided that they were eligible for the coverage as an employee.

Economic Impact

It is anticipated that this proposed amendment will not have any significant economic impact on the State Health Benefits Program. The number of employees affected by this amendment is expected to be small. Most employees who might be affected by the change would have to pay for their coverage in retirement. For those affected employees who qualify for state or local employer payment of the premiums for coverage in retirement, any additional cost could well be offset by savings from not requiring all employees to participate in the program in the year immediately preceding retirement to qualify for continued coverage in retirement.

Regulatory Flexibility Statement

The rules of the State Health Benefits Commission affect only public employers and employees. Thus, this proposed amendment will not have any adverse effect upon small businesses or private industry in general. A regulatory flexibility analysis is not required.

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

17:9-6.1 Retired employee defined

(a) "Retired employee" means a person who is [covered] **eligible for coverage** under the program, **or under the health insurance plan of the person's employer where the employer is not participating in the program and the person is eligible to participate under P.L. 1987, c.384,** immediately preceding retirement and receives a periodic retirement allowance from a State or locally administered retirement system or plan upon retirement. This "retired employee" status, once established, will continue in effect even though the employer is subsequently disbanded and no successor agency is created upon the dissolution of such employer. An employee who continued his or her coverage while on an official leave of absence for illness without pay but whose coverage terminated when his or her leave exceeded the period established by the statute for the continuation of coverage for such leave, will be permitted to elect to continue [Health Benefits] **health benefits** coverage into retirement provided such leave was in effect immediately preceding the date of his or her retirement.

(b)-(h) (No change.)

RULE ADOPTIONS

PERSONNEL

(a)

MERIT SYSTEM BOARD

General Rules and Department Organization Definitions

Adopted Amendment: N.J.A.C. 4A:1-1.3

Proposed: February 16, 1988 at 20 N.J.R. 326(a).
Adopted: May 3, 1988 by the Merit System Board, Eugene J. McCaffrey, Sr., Commissioner, Department of Personnel.
Filed: May 12, 1988 as R.1988 d.258, **without change.**
Authority: N.J.S.A. 11A:2-6(d), 11A:4-1 and 11A:4-3.
Effective Date: June 6, 1988.
Expiration Date: October 5, 1992.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows.

4A:1-1.3 Definitions
The following words and terms, when used in these rules, shall have the following meanings unless the context clearly indicates otherwise.

. . .

"Closing date for examination" means the date by which an applicant for an examination must meet all of the requirements contained in the examination announcement.

. . .

"Filing date for examination" means the date by which an application for an examination must be received in the office designated in the announcement. When mailed, the filing date is the date by which a properly addressed application must be postmarked.

. . .

"Title scope" means a defined group of job titles used as a factor in determining eligibility for promotional examinations. Title scope may also include educational, experience and other specific requirements.

. . .

"Unit scope" means a defined part of a governmental agency used as a factor in determining eligibility for promotional examinations.

(b)

MERIT SYSTEM BOARD

Selection and Appointment

Adopted New Rules: N.J.A.C. 4A:4

Adopted Repeals: N.J.A.C. 4:1-8, 4:1-9, 4:1-10.2 through 4:1-10.5, 4:1-11, 4:1-12, 4:1-13, 4:1-14, 4:1-15, 4:1-16.13, 4:2-6.3, 4:2-11, 4:2-13, 4:2-14.1, 4:2-15.1, 4:3-6.4, 4:3-11.1, 4:3-13.2 and 4:3-14

Proposed: February 16, 1988 at 20 N.J.R. 327(a).
Adopted: May 3, 1988 by the Merit System Board, Eugene J. McCaffrey, Sr., Commissioner, Department of Personnel.
Filed: April 20, 1988 as R.1988 d.259, **with substantive and technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).
Authority: N.J.S.A. 11A:2-6(d), 11A:2-11, 11A:2-12, 11A:2-13 through 11A:2-15, 11A:2-20, 11A:4-1 et seq., 11A:7-13, 40A:14-127, 40A:14-12 and 38:23A-2.
Effective Date: June 6, 1988.
Expiration Date: June 6, 1993.

Summary of Public Comments and Agency Responses:
COMMENT: A group of employees from the Division of Motor Vehicles in Ledgewood and three representatives of Communications Workers of America (CWA) Local 1037 expressed opposition to the title consolidation process currently being undertaken by the Department of Personnel. The Ledgewood employees stated that broader job titles would dilute the identity of individual jobs.
RESPONSE: Title consolidation is a classification issue, which is not addressed in this chapter. Classification issues are addressed in the proposed Chapter N.J.A.C. 4A:3. See the April 18, 1988 New Jersey Register at 20 N.J.R. 846(a).
COMMENT: A representative of CWA Local 1037 suggested that there should be a rule prohibiting the adoption of any rule or the taking of any action that "weakens" any provisions of a union contract. Along these lines, this representative, along with another representative of Local 1037, opposed the Performance Assessment Review (PAR) grievance procedures outlined in N.J.A.C. 4A:6-5.3 because such procedures interfere with collectively bargained labor contracts. A third representative of Local 1037 opposed any rules which interfere with CWA contracts.
RESPONSE: The Commissioner of Personnel and the Merit System Board are bound by Title 11A of the New Jersey Statutes to adopt rules consistent with that statute. Thus, these rules are intended to implement the law faithfully. It should be noted that the PAR procedures are not part of this adoption, but instead were effective on January 4, 1988 as part of N.J.A.C. 4A:6.
COMMENT: The President of the Civil Service Association (CSA) commented that N.J.A.C. 4A:4-1.1 should be amended to include eligibility criteria for unclassified appointments and that the appointing authority should be required to present documentation to the Department of Personnel that unclassified appointees meet these criteria.
RESPONSE: The Department of Personnel does have authority to review unclassified appointments to ensure appropriate job functions and such could not be listed in a rule due to the number of titles at issue.
COMMENT: Camden Council No. 10 commented that N.J.A.C. 4A:4-1.3(c) should be clarified with respect to what promotional examination procedures would be utilized for the appointment of permanent employees serving in the noncompetitive division.
RESPONSE: Promotional examination procedures are described in N.J.A.C. 4A:4-2.4 and 4A:4-2.5.
COMMENT: A representative of CWA Local 1033 proposed that N.J.A.C. 4A:4-1.3(c) be amended to require consent of a negotiations unit representative before an employee in the noncompetitive division may be promoted to a title in the competitive division.
RESPONSE: The rule is a codification of statutory authority and, as such, cannot include a provision permitting another party, management or labor, to perform an additional approval procedure.
COMMENT: Camden Council No. 10 stated that the phrase "in appropriate situations" in N.J.A.C. 4A:4-1.3(c)2 should be taken out because it invites wide interpretation. A representative of CWA Local 1038 suggested that "appropriate" be better defined.
RESPONSE: Since every possible situation could not be set in the rules, "in appropriate situations" addresses the discretionary function of the Commissioner in these matters.
COMMENT: The CWA Area Director and a representative of CWA Local 1037 opposed the adoption of N.J.A.C. 4A:4-1.4 because conditional appointments, which the rule authorizes, are not permitted by statute. A representative of CWA Local 1038 opposed N.J.A.C. 4A:4-1.4 because it would codify problems encountered concerning tentative titles.
RESPONSE: A conditional regular appointment is intended to provide employees with notice of a challenge that could affect their appointments. Furthermore, the conditional regular appointment is necessary to deal effectively and fairly with the numerous instances in which appeals and other challenges exist which may affect final appointments. Conditional appointments have no relationship to tentative titles.
COMMENT: Camden Council No. 10 proposed that N.J.A.C. 4A:4-1.4(a) be changed to read that a "conditional regular appointment shall be made" where an appeal may influence final appointment decisions.
RESPONSE: The language of the rule should remain to best address different situations, depending on the nature and merits of a pending appeal.

COMMENT: The Director of Personnel of Camden County opposed N.J.A.C. 4A:4-1.4(d), which requires the appointing authority to advise conditional appointees of their "status and rights." He stated that if the Department of Personnel is responsible for appellate decisions, that department should inform conditional appointees of their status and rights.

RESPONSE: Ultimately, appointments are made by individual appointing authorities which can best inform appointees of any encumbrances which may be placed on their employment.

COMMENT: The CWA Area Director and representatives of Local 1037 and 1038 stated that N.J.A.C. 4A:4-1.5 should include a rule codifying the 12-month limitation on provisional appointments. One representative of CWA Local 1037 suggested standards be placed in the rule for permitting an appointing authority to make a provisional appointment. Another representative of Local 1037 proposed that an appointing authority be fined if it did not adhere to the one-year limitation. The President of CSA proposed that provisional appointments last no more than six months and that an appointing authority who wishes to appoint a provisional employee be required to file a request with the Department of Personnel that an examination for the subject title be conducted and to certify that the provisional appointee meets the minimum requirements of the title.

RESPONSE: It is not necessary to repeat the statutory provision of N.J.S.A. 11A:4-13(b) and enforcement mechanisms are already found in N.J.A.C. 4A:10. Standards for the appropriate use of provisional appointments are found at N.J.A.C. 4A:4-1.5(a). It should be noted, however, that the appointment of a provisional is considered a request for an examination. Further, the appointing authority is required to certify the qualifications of the provisional appointee.

COMMENT: The President of CSA proposed that a limit be placed on the total number of provisional appointments and the aggregate time that an employee of one appointing authority may hold provisional employment for any number of titles.

RESPONSE: The number of provisionals has been steadily decreasing. The comment has merit if measures to eliminate abuses in provisional appointments are not successful, such as aggressive enforcement actions. The Department intends to monitor this situation.

COMMENT: A representative of CWA Local 1033 expressed support for N.J.A.C. 4A:4-1.5(a)1, but urged that a clause be added to N.J.A.C. 4A:4-1.5(a)3 stating that an appointing authority must specify the reasons why a failure to make a provisional appointment will "seriously impair its work." The Director of Personnel of Camden County opposed N.J.A.C. 4A:4-1.5(a)1 because it would effectively limit the choice an appointing authority has in appointing competent employees and limit the use of the "rule of three." A local government manager stated that the provision should instead permit an appointing authority to show the Department of Personnel that eligibles on a list have been interviewed and that a remaining eligible is not appropriate for a vacancy, so that the appointing authority may be excused from appointing the remaining eligible provisionally.

RESPONSE: The language of the rule tracks the statutory provision found at N.J.S.A. 11A:4-13(b). The suggested changes would be inconsistent with the statute, which is aimed at limiting provisional appointments.

COMMENT: A representative of CWA Local 1033 proposed an amendment to N.J.A.C. 4A:4-1.5 which would prohibit the disqualification of a provisional employee who has not applied for the examination for his or her title from taking the examination where the appointing authority has not made a good faith effort to make the employee aware of the examination announcement. Camden Council No. 10 stated that N.J.A.C. 4A:4-1.5(b) should not make it mandatory that a provisional employee who fails to apply for and take an examination for the employee's title be removed. A representative of CWA Local 1037 stated that this provision is unfair.

RESPONSE: The Department of Personnel has examined many ways of reducing the number of provisional appointments which still exist in the career service. One effective way, incorporated in this provision, is to reduce the number of situations when the issuance of a certification forces displacement of a provisional appointee. It would run counter to the notion of a merit system to permit a provisional employee to stay in a title from which the employee will have to be removed once an eligible list is promulgated and a certification is issued. Moreover, it is not burdensome to require the provisional appointee to apply for the examination.

COMMENT: The President of CWA Local 1085 proposed that N.J.A.C. 4A:4-1.5(b) include a "good cause" exception to the mandatory removal of a provisional employee who has not applied for the examination for his or her title. He also proposed that, to help reduce the number of provisional employees pursuant to N.J.S.A. 11A:4-13(b), a provisional employee receive permanent status if an examination has not been scheduled for the employee's title within 12 months.

RESPONSE: The intent of this rule is to reduce numbers of provisional appointments. It is recognized that an individual case may present a legitimate basis to not invoke this rule on petition to the Board.

COMMENT: The CWA Area Director and the President of CWA Local 1085 opposed the inclusion of a rule on interim appointments found at N.J.A.C. 4A:4-1.6, because this type of appointment is not expressly authorized by N.J.S.A. 11A:4-13. The President of CWA Local 1085 proposed that the layoff rules be amended, in lieu of a rule on interim appointments, to permit an employee seniority credit for time the employee spent on a leave of absence. He also commented that N.J.A.C. 4A:4-1.6(a) would read better if it stated that an interim appointment is to be made to a position, rather than to a title, in local service. A representative of CWA Local 1033 opposed interim appointments because they would promote favoritism.

RESPONSE: The intent of this rule is to codify a procedure that was upheld in *In re Viviani,* 184 N.J. Super. 582 (App. Div. 1982). The commenter's proposal with respect to the layoffs should be considered when the layoff rules are reviewed in the near future.

COMMENT: A representative of CWA Local 1038 opposed the language in N.J.A.C. 4A:4-1.6 which permits the appointing authority to create an interim appointment. He proposed that such an appointment be mandatory where the conditions of the rule are met. He also proposed that the employee who receives an interim appointment receive retroactive seniority in the title he or she is serving in on an interim basis.

RESPONSE: The rule is worded as it is to give the appointing authority the option of making an interim appointment or leaving a vacancy. Since the interim appointee maintains seniority in his or her permanent title, it is not possible to also accrue seniority in another title.

COMMENT: The President of CSA proposed that N.J.S.A. 4A:4-1.6 include a provision requiring the appointing authority to certify to the Department of Personnel that the interim appointee meets the minimum requirements of the title to which he or she is to be appointed.

RESPONSE: N.J.A.C. 4A:4-1.6(b) already requires that an interim appointee possess the minimum qualifications for the title at issue. Subsection (c) also requires that an interim appointment to a title be made from an existing, complete eligible list for the title. Furthermore, N.J.A.C. 4A:10 includes enforcement mechanisms for requirements under the law and rules.

COMMENT: The Executive Director of the Housing Authority of the City of Camden suggested that N.J.A.C. 4A:4-1.6(c), which requires that an interim appointment to a title be made from an existing, complete eligible list, be limited to promotional lists. In the case of an open competitive list, he stated, the appointing authority should have the flexibility to appoint another employee to the title in question to whom the appointing authority wishes to give a training opportunity.

RESPONSE: The commenter's proposal would be inconsistent with the statutory preference for filling vacancies through competitive procedures. Moreover, experience with this procedure has shown that appointments are usually made from within the agency, since those not currently employed by the agency are generally not interested in a position which is interim in nature.

COMMENT: The President of CWA Local 1085 commented that N.J.A.C. 4A:4-1.7, which concerns temporary appointments, must include more stringent criteria for the approval of such appointments, because the rule would permit one position to be filled on a temporary basis perpetually. The CWA Area Director also stated that the right to make temporary appointments has been abused by appointing authorities, particularly in local service. The President of CWA Local 1085 further stated, along with a representative of CWA Local 1037, that no statutory authority exists for making a temporary appointment to a permanent position, as provided in N.J.A.C. 4A:4-1.7(d). A representative of CWA Lcoal 1038 stated that the phrase "appropriate circumstances" in subsection (d) should be defined.

RESPONSE: The rule has been revised to reflect current procedures as well as to respond to the comments. As originally proposed, the language of the rule was inaccurate since the Department of Personnel does not establish positions in either State or local service. In local service, the appointing authority generally authorizes job titles and in some cases establishes positions. In State service, positions are established through the budget process. In either case, it is the Department of Personnel's responsibility to examine whether the job assignment is ongoing or of limited duration (regardless of the label placed on the position) and, on that basis, determine whether the position may be filled through a temporary appointment. As revised, N.J.A.C. 4A:4-1.7 would not permit a position to be filled on a temporary basis beyond the statutory limit.

COMMENT: The President of CSA commented that the appointing authority should be required to document for the Department of Personnel that a temporary appointee possesses the minimum qualifications for the title to which he or she is to be appointed.

RESPONSE: N.J.A.C. 4A:4-1.7(b) already requires that a temporary appointee possess the minimum qualifications necessary for the title at issue. Enforcement mechanisms exist in N.J.A.C. 4A:10 in the event of a specific violation.

COMMENT: A representative of CWA Local 1033 opposed language in N.J.A.C. 4A:4-1.9(a) which would sanction the return of an employee serving in a working test period to the employee's permanent title.

RESPONSE: This provision is not intended as a mechanism for the shortening of a working test period. It simply clarifies the rights of permanent employees who choose to leave their probationary title or who do not successfully complete the working test period. For other rules on the working test period, see N.J.A.C. 4A:4-5.

COMMENT: A presentative of CWA Local 1038 proposed that the phrase "within current continuous service" in N.J.A.C. 4A:4-1.9(a)1 be deleted so that an employee could be returned to an earlier permanent title from which there had been a break in service.

RESPONSE: The implementation of this comment would adversely affect other employees without notice, which would be inequitable.

COMMENT: Camden Council No. 10 and the President of CSA suggested that N.J.A.C. 4A:4-1.9(a)2 be changed to state that an organizational unit in local service is coextensive with the local jurisdiction.

RESPONSE: An organizational unit is not defined in local service as an entire jurisdiction since the size and organization of local governments vary greatly. N.J.A.C. 4A:4-1.9(c)1 permits an employee and appointing authority to agree to the return of the employee to employment in a different organizational unit if the employee's original organizational unit does not have openings or has changed.

COMMENT: The President of the CSA and a representative of CWA Local 1038 stated that the employee should be permitted to choose one of the two options in N.J.A.C. 4A:4-1.9(c) rather than reach an agreement with the appointing authority as to which procedure will be used for the employee's return to a permanent title. The CWA Area Director stated that N.J.A.C. 4A:4-1.9(b) and (e) should be changed to provide that all optional procedures for an employee's return to a permanent title be the employee's choice, rather than that of the appointing authority.

RESPONSE: The appointing authority must participate in all of the above-referenced procedures because it is not only the employee who is affected by his or her return to a permanent title, but other employees, as well as the agency's operations.

COMMENT: The Director of Personnel of Camden County stated that N.J.A.C. 4A:4-1.10(a), which requires that all "appointments, promotions and related personnel actions" are subject to the Department of Personnel's approval, is not authorized by statute because it seems to cover the unclassified service. He objected to N.J.A.C. 4A:4-1.10(b) because the Department of Personnel, rather than the appointing authority, should advise employees of personnel actions approved by the Department.

RESPONSE: The Department of Personnel has a role in reviewing unclassified appointments and the Department must reserve the right to review such matters. As for N.J.A.C. 4A:4-1.10(b), since the appointing authority is the employer of those affected by personnel actions, the appointing authority is best suited to communicate the approval or disapproval of personnel actions. In the case of disapproval, it is certainly appropriate for the appointing authority to inform the affected employee of the fact as well as the reason for the Department of Personnel's action.

COMMENT: Camden Council No. 10 proposed that time periods be added to N.J.A.C. 4A:4-1.10(a) and (b) concerning the time within which paperwork for personnel actions may be processed.

RESPONSE: Time periods are generally found in other rules which deal with specific personnel actions.

COMMENT: A representative of CWA Local 1038 stated that N.J.A.C. 4A:4-1.10 should include provisions on how the Department of Personnel will enforce its approval of appointments, promotions and related personnel actions. A representative of CWA Local 1038 stated that the rule should be amended to provide that the Department of Personnel will be responsible for any error, misapplication or blatant disregard of rules by appointing authorities.

RESPONSE: N.J.A.C. 4A:10 includes the provisions on rule enforcement.

COMMENT: Representatives from CWA Locals 1037 and 1038 criticized N.J.A.C. 4A:4-2.1(a), and a group of employees in the Division of Motor Vehicles opposed the provision, which permits the notice of an open competitive examination to be announced by appropriate means other than in the monthly job bulletin. The President of Local 1085 suggested that any means of posting a job opportunity other than in a monthly bulletin should be an additional, rather than substitute, measure.

RESPONSE: The monthly job bulletin will remain the primary means of announcing open competitive examinations, but the rule as proposed recognizes the need to reach targeted recruitment groups as appropriate and where announcements may be necessary between monthly job listings because of an emergent situation.

COMMENT: A representative of CWA Local 1033 proposed that N.J.A.C. 4A:4-2.1 be amended to include a provision that examination announcements and applications be available at every State and local government jobsite where more than five people work. The President of CSA suggested that the appointing authority should mail or otherwise provide individual notice of promotional examinations to all employees who are eligible for these examinations.

RESPONSE: The Merit System Board believes that the provisions for examination announcements found in N.J.A.C. 4A:4-2.1(a) and (b) allow for widespread and effective publicity of the announcements. Furthermore, delivery to every State and local government jobsite in New Jersey of announcements and applications beyond what the rule provides for would be costly and not administratively feasible. With regard to promotional examinations, subsection (b) already provides for delivery of announcements and applications to each eligible employee.

COMMENT: A representative of CWA Local 1033 stated that N.J.A.C. 4A:4-2.1(b) should be deleted because the posting of job notices is solely within the province of collective bargaining.

RESPONSE: N.J.S.A. 11A:4-1(a) permits the Commissioner of Personnel to provide for the announcements of examinations. The provision in N.J.A.C. 4A:4-2.1(b) on the posting of promotional job notices codifies the Commissioner's statutory authority to provide for examination announcements.

COMMENT: A representative of CWA Local 1033 proposed that N.J.A.C. 4A:4-2.1(c) include a provision requiring that the type of examination to be administered be included in the examination announcement.

RESPONSE: The elements required to be included in the examination announcement pursuant to N.J.A.C. 4A:4-2.1(c) do not comprise an exhaustive list but instead present items to be included in all announcements. It generally has been the practice of the Department of Personnel to specify in the announcement the type of examination to be given.

COMMENT: The Director of Personnel of Camden County stated that N.J.A.C. 4A:4-2.1(g) should be amended to permit the appointing authority to have access to examination applications because the appointing authority may have information that a particular applicant has falsified an application. A representative of CWA Local 1038 proposed that unions be given access to copies of examination applications so that labor representatives may determine whether an applicant is not qualified.

RESPONSE: To promote a more efficient examination admission process, the Department of Personnel makes the initial admission decision. However, if an appointing authority has information that an applicant has falsified an application, the appointing authority should inform the Department of this situation. Likewise, the appointing authority would have the right to request that an eligible's name be removed from a list if the appointing authority believes that the eligible does not possess the minimum qualifications for a given title. A labor representative may represent an applicant in an examination disqualification appeal. Examination candidates deserve confidentiality and any release of applications to a labor representative would require general release of applications to others.

COMMENT: Camden Council No. 10 suggested that N.J.A.C. 4A:4-2.2(a) include guidelines for choosing types of examinations to be utilized for different titles. She also stated that the testing process characterized by an evaluation of education, training or experience has been overutilized and is not an objective measure of an applicant's qualifications.

RESPONSE: The Department of Personnel is involved in a continual process of evaluating testing modes and constructing examinations. The rules could not contain set provisions on how certain types of examinations may be designated for different titles. The validity of an examination which measures education, training or experience has been recognized in the merit systems of various states and the Federal government.

COMMENT: The President of CSA proposed that N.J.A.C. 4A:4-2.2(a)5 include procedures for the verification of education, training or experience information on an examination application.

RESPONSE: Verification may be performed at any time, but is generally most useful prior to actual appointment rather than for every application.

COMMENT: A representative of CWA Local 1038 stated that N.J.A.C. 4A:4-2.2(b) is an impermissible delegation of examination responsibilities to subject matter specialists, pursuant to N.J.S.A. 11A:2-12.

RESPONSE: The language of N.J.A.C. 4A:4-2.2(b) is taken directly from N.J.S.A. 11A:4-1(d), which expressly permits the Commissioner of Personnel to select special examiners to act as subject matter specialists. Such specialists are subject to the directions of the Department and the Department retains its decision-making control.

COMMENT: The President of CSA stated that N.J.A.C. 4A:4-2.3(a) should be amended to include a provision permitting an open competitive examination to be announced when the total number of permanent employees qualified for promotion exceed by fewer than three the total number of anticipated vacancies.

RESPONSE: In response to the comment, this information has been added to the rule.

COMMENT: A representative of CWA Local 1033 opposed having a total of four possible criteria in N.J.A.C. 4A:4-2.3(a) for determining whether to announce an open competitive examination. He proposed that only N.J.A.C. 4A:4-2.3(a)1 be retained.

RESPONSE: All of the criteria are necessary in light of varying circumstances where open competitive examinations are appropriate.

COMMENT: Camden Council No. 10 urged that N.J.A.C. 4A:4-2.3(a) include more restrictive guidelines as to when an announced examination will be promotional and when it will be open competitive. She also commented that the term "promotional unit scope" should be defined.

RESPONSE: N.J.A.C. 4A:4-2.3(a) already includes specific guidelines on when a promotional versus open competitive examination will be appropriate. However, that subsection of the rule makes the promotional course a priority and the open competitive choice a secondary one to open up more promotional possibilities for current career service employees. Next, "unit scope" for promotional examination eligibility is defined in a proposed amendment to N.J.A.C. 4A:1-1.3. (See 20 N.J.R. 326(a)).

COMMENT: A representative of CWA Local 1038 proposed N.J.A.C. 4A:4-2.3(a)4 be amended to include a provision providing for a mechanism by which clerical employees could attain upward mobility into professional jobs.

RESPONSE: This is an issue pertinent to changes in the trainee rule, dealt with in the proposed N.J.A.C. 4A:3 (See 20 N.J.R. 846(a)), and human resource development programs, already provided for in N.J.A.C. 4A:6.

COMMENT: A representative of CWA Local 1033 opposed the inclusion of a residency provision in the rules.

RESPONSE: Residency requirements for State employees are authorized by N.J.S.A. 11A:4-3. Also, N.J.S.A. 40A:9-1.4 permits local jurisdictions to adopt appropriate residency resolutions or ordinances.

COMMENT: The President of CWA Local 1085 proposed that N.J.A.C. 4A:4-2.3(c) be changed to require that an open competitive examination always be announced when a promotional examination is announced. Camden Council No. 10 urged that N.J.A.C. 4A:4-2.3(c) be deleted so that if it has been determined that a promotional examination is the appropriate method for filling vacancies, then only that method should be utilized.

RESPONSE: N.J.A.C. 4A:4-2.3(c) permits, but does not mandate, that an open competitive examination be announced when a promotional examination is announced. This is appropriate in certain cases since open competitive recruitment may be needed to fill future vacancies. The remainder of the rule emphasizes promotional opportunities for current career service employees and regards the open competitive process as a secondary measure. It should also be noted that N.J.A.C. 4A:4-3.7 provides that promotional eligible lists will always have priority over open competitive eligible lists for the same title.

COMMENT: The President of CWA Local 1085 proposed that N.J.A.C. 4A:4-2.4(a) be changed to state that promotional examinations will be open to titles only within the same organizational unit. Further, he suggested that the rule should permit promotions from titles outside the title series. He suggested that this be done when an employee has been promoted provisionally from outside the title series, when no in-line titles exist for the title in question, when the Commissioner of Personnel determines that an insufficient number of employees are serving in in-line titles and when the appointing authority requests that promotions be made from outside the title series. A representative of CWA Local 1038 suggested that N.J.A.C. 4A:4-2.4(a) have more liberal prerequisites.

RESPONSE: First, with regard to unit scopes, see 20 N.J.R. 326(a) for the proposed amendment of the definition of unit scope at N.J.A.C. 4A:1-1.3. In response to the comments, N.J.A.C. 4A:4-2.4 has been modified in accordance with current procedures to provide options for title scopes.

COMMENT: Camden Council No. 10 commented that N.J.A.C. 4A:4-2.4(a) and (b) should be changed to eliminate the title series concept altogether for purposes of promotional eligibility, in favor of a focus on skills and abilities.

RESPONSE: The title series has been found to be an effective promotional tool, which emphasizes skills and abilities, and which provides predictable career paths for employees.

COMMENT: The President of CSA suggested that N.J.A.C. 4A:4-2.4(b) be amended to state that applicants need meet the one year continuous permanent service and open competitive requirements by the date of the examination rather than by the closing date for examination applications.

RESPONSE: The examination date is usually not certain at the time an examination is announced. Even if the date is known, the question of which applicants would amass the required education and experience by that date could not always be predicted. Finally, to ensure smooth administration of eligibility determinations, a mechanism must be in place to identify the qualifications applicants have at a given time prior to the examination date so that those who are ineligible may be notified of the fact early in the process.

COMMENT: Camden Council No. 10 stated that N.J.A.C. 4A:4-2.4(c) should be clarified by including language describing in more detail what the promotional rights are of employees who serve in the noncompetitive division and guidelines for the type of test that may be chosen to fill a given vacancy.

RESPONSE: This rule is substantially similar to the old rule, N.J.A.C. 4:1-10.2(e), which has worked well. The commenter has not specified particular problems with this promotional process nor has she suggested amendments.

COMMENT: A representative of CWA Local 1037 stated that N.J.A.C. 4A:4-2.5, although it deals with promotional title scopes, is really bureaucratic language for title consolidation, which she opposed.

RESPONSE: Title consolidation is not a subject of N.J.A.C. 4A:4 and is not included in this rule.

COMMENT: A representative of CWA Local 1033 opposed the provision in N.J.A.C. 4A:4-2.5(a)3, which gives the Commissioner of Personnel discretion to decide whether open competitive requirements are necessary for promotional examination eligibility. He also stated that the rule should make it mandatory that applicants serving in titles which are more than four class codes below the class code of the title under test meet open competitive requirements.

RESPONSE: There may be situations in which open competitive requirements will not be appropriate for eligibility for certain titles.

COMMENT: Camden Council No. 10 commented that N.J.A.C. 4A:4-2.6(a)1 also demonstrates the need for more specific guidelines on the type of examination that would be appropriate for a given title. She also stated that this provision, which sets out a continuous permanent service requirement for promotional eligibility, should be subject to the out-of-title work provision in subsection (c).

RESPONSE: As noted above, N.J.A.C. 4A:4-2.3(a) includes specific guidelines on when a promotional examination will be appropriate and when an open competitive examination will be appropriate. It also should be pointed out that N.J.A.C. 4A:4-2.6(c) is more relevant to an applicant's satisfaction of open competitive requirements, if any, rather than to the amount of continuous permanent service an applicant may have in a given title.

COMMENT: A representative of CWA Local 1033 opposed the provision in N.J.A.C. 4A:4-2.6(a)1 which would deduct periods of suspension and leaves of absence without pay from aggregate service for purposes of promotional examination eligibility.

RESPONSE: This provision is designed to give credit to employees for their actual service in a given title. It also ensures that employees who are able to demonstrate at least one year of continuous permanent service have the background experience necessary for the title under test.

COMMENT: The President of CSA stated that N.J.A.C. 4A:4-2.6(a) should be amended to require that an applicant for a promotional examination have one year of continuous permanent service and meet the open competitive requirements by the date of the examination rather than by the closing date for the examination.

RESPONSE: The reasons for requiring that these prerequisites be met by the examination closing date are set out above in response to the commenter's identical proposal concerning N.J.A.C. 4A:4-2.4.

COMMENT: Camden Council No. 10, the personnel officer from the Department of Agriculture and the President of CSA all urged the adoption of Option Four with respect to N.J.A.C. 4A:4-2.6(c), which would permit out-of-title work to be accepted from applicants for promotional examinations with open competitive requirements in all situations. The representative of Camden Council No. 10 added that the Department of Personnel could require verification of the out-of-title work. Representatives of CWA Locals 1033, 1038, 1085, and the CWA Area Director urged the adoption of Option One, which would not permit out-of-title work to be accepted in any situation. A representative of CWA Local 1037 stated that a rule permitting out-of-title work, if accepted, would promote political favoritism. Two representatives from CWA Local 1037 expressed opposition to all of the options for N.J.A.C 4A:4-2.6(c) concerning the acceptance of out-of-title work for promotional examination eligibility. The CWA Area Director also stated that no statutory basis exists for the acceptance of out-of-title work for promotional examination eligibility. The Director of Personnel for Camden County urged the adoption of Option Three, which would authorize the Department of Personnel to accept out-of-title work for good cause and with verification.

RESPONSE: Option Two, which is basically the present procedure, has worked well and will be continued. In addition, good cause now specifically includes an affirmative action basis. The Director of EEO/AA or other Departmental officials could provide information in this area to the Board.

COMMENT: Camden Council No. 10 recommended the deletion of N.J.A.C. 4A:4-2.6(g) which permits the shortening of the continuous service requirement for promotional examinations to the duration of the working test period if certain strict criteria are met.

RESPONSE: This provision is employee oriented to cases where too few or virtually no applicants will be deemed eligible for a given promotional examination.

COMMENT: A representative of CWA Local 1033 opposed N.J.A.C. 4A:4-2.7, which permits a candidate's promotion upon waiver of competitive examination.

RESPONSE: This rule mandates that certain criteria be met before such a waiver of competitive examination may take place. These criteria are designed to ensure that waiver will take place only when competitive rankings are not likely.

COMMENT: A representative of CWA Local 1038 stated that N.J.A.C. 4A:4-2.8 should be amended to include a provision that an examination must be announced and conducted within nine months of a provisional appointment, and that the following three months be reserved for the disposition of the certification. He stated that this proposal would enforce the statutory requirement that provisional appointments last no more than 12 months.

RESPONSE: As noted elsewhere, enforcement mechanisms for the rules are found in N.J.A.C. 4A:10. Also, implementation of the 12-month limit is best accomplished by operational changes, which have been and continue to be made.

COMMENT: A local government manager opposed the provision in N.J.A.C. 4A:4-2.9(a)5 which prohibits the granting of a make-up examination where the reason for a candidate's need for a make-up is a vacation in a state contiguous to New Jersey. He stated that use of a mileage formula, to be calculated from New Jersey's borders, is a better way to determine whether a vacationing candidate will be permitted to take a make-up examination.

RESPONSE: A mileage formula would be too difficult to apply and is subject to various and possibly differing calculations.

COMMENT: The President of CSA stated that N.J.A.C. 4A:4-2.9(c) should include a provision for an extension of the five-day time period for requesting a make-up examination.

RESPONSE: It is necessary to expedite make-up tests so that employment lists and appointments will not be delayed. Five days is a reasonable period of time within which a candidate may submit a make-up request.

COMMENT: Camden Council No. 10 suggested that the language of N.J.A.C. 4A:4-2.9(d) be changed to state that "[m]ake-up examinations will be administered, to the extent possible . . . ."

RESPONSE: The adopted rule has been changed to address the commenter's concerns.

COMMENT: A representative of CWA Local 1033 stated that N.J.A.C. 4A:4-2.10(c) should not require punishment of an applicant who breaches examination security beyond a disqualification from the examination at issue and possible disqualification from future examinations.

RESPONSE: Depending on the seriousness of the applicant's misconduct, punishment beyond mere examination disqualification may be required under the criminal code.

COMMENT: Camden Council No. 10 proposed that N.J.A.C. 4A:4-2.11(b) be changed to state a residency requirement must be met by a certain time following appointment of an eligible.

RESPONSE: Most residency requirements applicable in local government services are statutory, and these statutes require that residency requirements be met by the examination closing date. See N.J.S.A. 40A:9-1.4 for residency requirements for municipal employees.

COMMENT: The CWA Area Director and a representative of CWA Local 1038 stated that the Department of Personnel does not have the statutory authority to delegate the verification of an applicant's residency to an appointing authority.

RESPONSE: The verification of residency upon and after appointment, pursuant to N.J.A.C. 4A:4-2.11, is properly the function of the employer since the appointing authority sets residency by resolution or ordinance.

COMMENT: A representative of CWA Local 1038 opposed N.J.A.C. 4A:4-2.11(d), which establishes procedures for restricting an employee to residency within a specific distance of a work site.

RESPONSE: Distance restrictions are not a common practice and this rule does not authorize such restrictions as a general principle. The rule simply codifies a procedure by which such restrictions may be established where they are a bona fide qualification.

COMMENT: Camden Council No. 10 proposed that N.J.A.C. 4A:4-2.12(a) include guidelines as to when appropriate work experience may be substituted for an educational requirement.

RESPONSE: It is not possible to put such specific matters in the rule to apply to each of the thousands of job titles.

COMMENT: Camden Council No. 10 commented that N.J.A.C. 4A:4-2.12(a)1 should be amended to further define "major field of study" to permit the institution which grants the degree to make the determination as to whether an applicant had a specific major in college.

RESPONSE: Where there are disputes on this issue, they may be resolved through the appeals process.

COMMENT: A representative of CWA Local 1033 proposed that N.J.A.C. 4A:4-2.15(a)1 be amended to require that education and experience examination rating scales be provided, upon request, to an examinee or to the examinee's employee representative.

RESPONSE: Examinees are given the right to review their examination papers within 20 business days following notification by the Department of Personnel of examination results, pursuant to N.J.A.C. 4A:4-6.4(c). In the case of education and experience rankings, access to rating scales is provided.

COMMENT: A representative of CWA Local 1038 stated that N.J.A.C. 4A:4-2.15(a)2 should include a provision making affirmative action a factor in breaking ties in final earned ratings.

RESPONSE: N.J.A.C. 4A:4-2.15(a)2 merely states that ties shall not be broken as set forth in N.J.S.A. 11A:4-8. However, appropriate affirmative action considerations would be applicable in the selection process.

COMMENT: A representative of CWA Local 1033 proposed that N.J.A.C. 4A:4-2.15(b) be amended to include a subsection (b)3, which would require that all components of multi-part examinations be administered as quickly as possible, but in no case should the administration of all components take longer than six weeks.

RESPONSE: It is the intention of the Department of Personnel to administer all components of a multi-part examination as quickly as possible. However, there may be exigent circumstances to justify a longer timeframe than ordinarily may be desired. For this reason, a specific time constraint would not be appropriate.

COMMENT: Camden Council No. 10 and the President of CSA stated that N.J.A.C. 4A:4-2.15(c) should not permit performance ratings to be used as a scoring tool for promotional examinations. It is urged that any scoring criteria not be used in a discretionary way, but consistently. A representative of CWA Local 1038 proposed that seniority be a mandatory factor in the scoring of a promotional examination.

RESPONSE: Seniority and performance ratings are consistently applied in State service. In local service, performance ratings presently are not utilized. The comments raise a need for possible further explanation of these matters in the rules which the Department will extensively review.

COMMENT: A representative of CWA Local 1033 proposed that N.J.A.C. 4A:4-2.16 be amended to require that all examination records be available for public inspection.

RESPONSE: As the rule now reads, only the examination announcement, a description of the examination and the eligible list are available for public inspection. To permit applications and examination papers to be available for public inspection would infringe on the privacy rights of applicants. Further, public access to examination papers would compromise necessary security measures.

COMMENT: A representative of CWA Local 1033 stated that N.J.A.C. 4A:4-3.1(a) be amended to state that the Commissioner of Personnel "shall" establish the eligible lists enumerated in the rule, rather than "may," because the Commissioner should not have the discretion to establish types of eligible lists not specifically enumerated in the rule. He also proposed the deletion of the phrase found in (a)3 and (a)4 that, as one prerequisite to being placed on a regular reemployment list or police or fire reemployment list, the former permanent employee's reemployment must be "certified by the appointing authority as being in the best interests of the service . . . ." He stated that all former permanent employees should have the chance to be reemployed.

RESPONSE: The language of this rule tracks the statutory language found at N.J.S.A. 11A:4-9 with respect to all of the commenter's concerns.

COMMENT: The Executive Director of the Housing Authority of the City of Camden proposed that N.J.A.C. 4A:4-3.1(a)5 and the layoff rules be amended to limit special reemployment rights to the same organizational unit in which the employee originally held the title.

RESPONSE: This comment is beyond the scope of the rule, which merely sets forth the types of eligible lists that the Commissioner of Personnel may establish. The comment is relevant to review of the layoff rules.

COMMENT: The President of CSA suggested that N.J.A.C. 4A:4-3.3 should be amended to make the duration of all regular reemployment lists, rather than just police and fire reemployment lists, unlimited.

RESPONSE: N.J.S.A. 11A:4-7 only permits police and fire reemployment lists to be of unlimited duration.

COMMENT: The President of CSA stated that the phrase in N.J.A.C. 4A:4-3.4(a)1, which permits the Commissioner of Personnel to revive an eligible list pursuant to a court order in a suit filed prior to the expiration of the list, should be deleted. She stated that the time that suit was filed should not be relevant to whether a list may be revived. A representative of CWA Local 1033 proposed that a subsection (a)5 be added to the rule to include providing relief in a civil rights matter as a reason for the revival of a list.

RESPONSE: The rule tracks the statutory language found in N.J.S.A. 11A:4-6. This section of the law only permits the Commissioner of Personnel to revive a list pursuant to a court order where a suit has been filed during the "life of the list." As to a list revival as a form of relief in a civil rights matter, an amendment to this effect is not necessary because the current language of both N.J.S.A. 11A:4-6 and N.J.A.C. 4A:4-3.4(a)1 and (a)2 would permit such relief.

COMMENT: The President of CSA proposed that N.J.A.C. 4A:4-3.5(a)3 should be more specific on how eligible lists may be consolidated through the combining of names by scores.

RESPONSE: The language of this subsection is taken directly from N.J.S.A. 11A:4-4(c), which provides the combining of eligibles' names by scores as an example of how the Commissioner of Personnel may consolidate eligible lists. Subsections (a)1 and (a)2 of the rule state more specific ways which the Commissioner may use to consolidate eligible lists.

COMMENT: Camden Council No. 10 stated that while the Council does not oppose N.J.A.C. 4A:4-3.5(a), another provision should be added concerning successive eligible lists for the same title. This provision should provide for the cancellation of the original list where later examinations were administered because of a flaw in the original examination.

RESPONSE: This rule addresses situations where the original examination administered is valid. If the original examination is invalid, N.J.A.C. 4A:4-3.3(b) applies and permits cancellation of the resultant eligible list.

COMMENT: Camden Council No. 10 urged that N.J.A.C. 4A:4-3.7(a)1 give special reemployment lists absolute preference over all other lists regardless of the department in which an available position is located. The President of CSA opposed N.J.A.C. 4A:4-3.7(a)2 which gives promotional eligible lists priority over special reemployment lists when the available position is in a department other than that from which an eligible was laid off, laterally displaced or demoted in lieu of layoff. The Executive Director of the Housing Authority of the City of Camden proposed that the rule be changed to state that a special reemployment list will have priority over an open competitive list, only, when the available position is in a different jurisdiction from that which the eligible was laid off, laterally displaced or demoted in lieu of layoff.

RESPONSE: The rule as proposed reflects the same priority of eligible lists set by N.J.S.A. 11A:4-12.

COMMENT: Camden Council No. 10 stated that N.J.A.C. 4A:4-4.1(b) should require that the Department of Personnel determine when a certification is needed in a case where a permanent position has been filled on a nonpermanent basis. She also urged that the appointing authority be required to provide notice to the Department of Personnel of any such appointments.

RESPONSE: This rule already requires that the Department of Personnel determine when a certification is needed. As for requiring notice to the Department of Personnel, this is provided for in N.J.A.C. 4A:4-1.10.

COMMENT: A representative of CWA Local 1038 stated that the provision in N.J.A.C. 4A:4-4.2(b), which permits the Department of Personnel to authorize the notification of eligibles when a certification is issued, is an improper delegation of authority.

RESPONSE: The intent of the rule is to expedite the permanent appointment process. Any concern or problem is immediately reviewable as an appeal, grievance or enforcement action.

COMMENT: Camden Council No. 10 commented that N.J.A.C. 4A:4-4.2(c)2 should be clarified to state how a complete certification would be determined where eligibles with the same score have "more than one rank."

RESPONSE: This rule is taken from the statutory language found in N.J.S.A. 11A:4-8. All eligibles with identical scores would have the same rank on the eligible list. For example, if five eligibles had the identical highest score, they would have the same ranking for selection. The Department of Personnel is planning to prepare an appendix to the rules which would provide more specific examples of this rule's application.

COMMENT: A representative of CWA Local 1033 opposed the last sentence in N.J.A.C. 4A:4-4.2(c)2, which states, "If three or more eligibles can be certified as a result of this ranking without resorting to all three highest scores on the list, then only those eligibles will be certified."

RESPONSE: The language of this provision is taken directly from N.J.S.A. 11A:4-8. The Department of Personnel must work within statutory requirements.

COMMENT: A representative of CWA Local 1033 opposed the use of eligible lists to fill vacancies in titles other than those for which the lists were issued, as set forth in N.J.A.C. 4A:4-4.3. Camden Council No. 10 urged the deletion of N.J.A.C. 4A:4-4.3(a) and (b).

RESPONSE: This rule is expressly authorized by N.J.S.A. 11A:4-4(b). This rule provides a valuable tool for limiting provisional appointments.

COMMENT: The President of CWA Local 1085 urged that N.J.A.C. 4A:4-4.3 be amended to require the Department of Personnel to identify titles which may have to be filled with eligibles from lists for other titles and that announcements for examinations for those titles state that certain other eligible lists may be used.

RESPONSE: It would not always be possible to identify in advance titles that may be filled by eligible lists for other titles. How lists are used often will depend on a given situation. Nevertheless, the only people who would be affected by the use of lists provided for here are eligibles on a list, not people who have already been appointed from lists.

COMMENT: The President of CWA Local 1085, a representative of Local 1038, and Camden Council No. 10, all opposed N.J.A.C. 4A:4-4.4(a) because they believe that an eligible should not be removed from a list simply for being bypassed by an appointing authority three times.

RESPONSE: The rule does not require that an eligible's name be removed from a list in this situation. However, it does put a limit on the number of times an eligible may be certified to and bypassed for appointment by the same appointing authority. The eligible still may be certified to other appointing authorities for appointment.

COMMENT: The President of CSA urged that N.J.A.C. 4A:4-4.4(a) be amended to require that an appointing authority who bypasses an eligible for appointment for a third time must provide a good cause justification for this decision to the Department of Personnel. A representative of CWA Local 1033 stated that an appeal mechanism should be included in the rule.

RESPONSE: We believe there is merit to this suggestion and we will be considering future amendments to this section. It should be noted that an appeal mechanism for bypasses as well as many other selection matters is found in N.J.A.C. 4A:4-6.6.

COMMENT: A representative of CWA Local 1033 proposed that N.J.A.C. 4A:4-4.5 be amended to require that information on numbers of positions designated as bona fide occupational qualifications (BFOQ) positions be provided to affected negotiations representatives.

RESPONSE: The rule already provides two important safeguards. First, an appointing authority which requests that a position receive a BFOQ designation has the burden of proof to show that such a designation is necessary. Second, any person who has been denied an employment opportunity because of a BFOQ designation may appeal the designation in the form of a discrimination appeal. Further technical changes have been made in the rule to strengthen this process and a listing of BFOQ positions will be made available for inspection.

COMMENT: Camden Council No. 10 expressed opposition to N.J.A.C. 4A:4-4.7(a)4 which permits an eligible's name to be removed from an eligible list where the eligible has a criminal record.

RESPONSE: The criteria for removal under these circumstances are more specifically enumerated in this adoption than they were in the old rules, based on the standards found in N.J.S.A. 11A:4-11. In this way, it is hoped that problems with the former rules will be satisfactorily addressed.

COMMENT: Camden Council No. 10 objected to N.J.A.C. 4A:4-4.7(a)8 because an employee who leaves employment in a particular unit scope should not be removed from a promotional eligible list for that reason. The President of CSA opposed the removal of an eligible's name from a list provided for in N.J.A.C. 4A:4-4.7(a)9, which permits the removal of an eligible's name where the eligible has had an opportunity to take a promotional examination in the new unit scope or has been appointed from the list. A representative of CWA Local 1033 opposed a removal of an eligible's name from a list pursuant to the catch-all provision in N.J.A.C. 4A:4-4.7(a)11.

RESPONSE: If an employee voluntarily transfers or is reassigned, then the employee's promotional opportunities will exist in the new unit scope. If the employee is involuntarily transferred, then the employee will have the chance of being appointed to a title in the original unit scope or pursuing a promotional opportunity in the new unit scope. The Merit System Board attempted to address the employee's concerns in both instances discussed here. Finally, the catch-all provision found in N.J.A.C. 4A:4-4.7(a)11 is necessary in case there exists a valid reason for removal other than what is expressly enumerated in the rule.

COMMENT: A representative of CWA Local 1038 proposed that N.J.A.C. 4A:4-4.7(b) be amended to require that a plenary hearing be held before an eligible's name may be removed from a list.

RESPONSE: Safeguards for validity are built into the rule. The appointing authority which requests the removal of an eligible's name is required to provide copies of all relevant documents to the Department of Personnel and to the affected eligible. The affected eligible may appeal the removal pursuant to procedures outlined in N.J.A.C. 4A:4-6.3.

COMMENT: A local government manager and the Director of Personnel of Camden County both objected to the requirement found in N.J.A.C. 4A:4-4.8(b)1iv which mandates that whenever an appointing authority bypasses a higher ranked eligible in a certification, the appointing authority must submit a statement of reasons for the personnel action to the Department of Personnel.

RESPONSE: The provision ensures that only merit and fitness are factors in appointments, and that no impermissible reason is used for bypassing an eligible on a list. However, an appointing authority retains the appropriate exercise of its "rule of three" discretion.

COMMENT: A representative of CWA Local 1033 expressed support for N.J.A.C. 4A:4-4.8(c) which cross-references penalties provided for in N.J.A.C. 4A:10 for an appointing authority's failure to dispose of a certification by the due date. The CWA Area Director asked why the statutory provision found in N.J.S.A. 11A:4-5, which requires that an appointing authority reimburse the Department of Personnel for examination costs where the appointing authority is permitted to keep a vacancy despite a complete eligible list, is not codified in the rules.

RESPONSE: The statutory provision in N.J.S.A. 11A:4-5 appears at N.J.A.C. 4A:10-2.2(a)2.

COMMENT: A representative of CWA Local 1033 commented that N.J.A.C. 4A:4-4.9(a) should be amended to include a subsection (a)4, which would state that an eligible shall be appointed and start work after the eligible list's expiration date "as a result of the disposition of a contested case resulting from an appeal deemed timely by the Merit System Board." He also proposed that a proviso be added to the rule that an administrative law judge will have the discretion to order a specific regular appointment date as a remedy.

RESPONSE: In a matter referred to the Office of Administrative Law, an administrative law judge would be able to recommend an appointment date in an appropriate situation, subject to a final decision by the Merit System Board. This decision generally would also include any list revival.

COMMENT: A representative of CWA Local 1038 proposed that N.J.A.C. 4A:4-4.10 be amended to require that an eligible begin work within four weeks of accepting employment, rather than three. A representative of CWA Local 1033 stated that the rule should provide an exception where an eligible is ill. The President of CSA suggested that the rule be amended to permit an eligible to receive an extension of the time period where an eligible presents good cause for an extension.

RESPONSE: The purpose of the rule is to provide a reasonable time period, three weeks, within which an eligible who has accepted employment must begin work. It also permits an appointing authority to specify another longer time period for a given situation. If, as one commenter remarked, an eligible is too ill to begin work within three weeks after accepting employment, it is impossible for an appointing authority to agree to an alternative date for the eligible to start work.

COMMENT: The Executive Director of the Housing Authority of the City of Camden proposed that an exception be added to N.J.A.C. 4A:4-5.1(b)1, requiring an eligible to complete a new working test period in a situation where an eligible from a special reemployment list is reappointed to a different organizational unit, authority, office or commission. He stated that such an exception would preclude a situation where the eligible had previously worked for a much smaller entity where he or she had fewer responsibilities and consequently could not handle the greater responsibilities of the new job.

RESPONSE: Even if an eligible is reappointed to a job with a different, and larger, appointing authority, the eligible should not be required to do work above and beyond what is required in the job specification. An eligible who is reappointed to a position with substantially higher responsibilities may very well be doing nonpermitted out-of-title work.

COMMENT: Camden Council No. 10 proposed that an enforcement mechanism be added to the language of N.J.A.C. 4A:4-5.1(c). A representative of CWA Local 1038 urged that a provision be added to the subsection which would make an employee's release at the end of the working test period a bad faith action where the appointing authority assigned out-of-title work to the employee during the working test period.

RESPONSE: Enforcement mechanisms for all rules are found in N.J.A.C. 4A:10. Furthermore, if an employee is assigned inappropriate duties and is then found to have been unsatisfactory at the conclusion of the working test period, the employee has redress through the appeals process.

COMMENT: The President of CSA stated that N.J.A.C. 4A:4-5.2(a) should be amended to permit an employee's service time as a provisional, temporary or emergency appointee to be considered part of the employee's working test period.

RESPONSE: N.J.S.A. 11A:4-15(a) only permits the working test period to commence following an employee's regular appointment to a given title.

COMMENT: Camden Council No. 10 stated that N.J.A.C. 4A:4-5.2(b)1 should be clarified as to the exact number of days in the working test period for local employees.

RESPONSE: The rule now states that the working test period for local service will be three months of "active service," pursuant to N.J.S.A. 11A:4-15(a).

COMMENT: The CWA Area Director and a representative of CWA Local 1038 urged that N.J.A.C. 4A:4-5.2(b)2 be amended to require that an appointing authority present good cause for the need for an extension of an employee's working test period.

RESPONSE: Under existing procedures, the appointing authority must furnish a reason for the extension which may be accepted or rejected by the Department of Personnel.

COMMENT: Camden Council No. 10 urged that N.J.A.C. 4A:4-5.3(a) should include mechanisms that may be used to enforce the provisions of the rule. The representative stated that the rule should provide for penalties against an appointing autority which does not prepare working test period progress reports, does not make these reports available to the employee and does not suggest to the employee how the employee may improve job performance. It was recommended that if the appointing authority does not follow these procedures, the employee automatically should be deemed to have passed the working test period. Similarly, a representative of CWA Local 1038 urged that an appointing authority's failure to complete the required progress reports would be considered a bad faith action in a working test period appeal. A local government manager asked whether an appointing authority's failure to complete a progress report would constitute a "fatal defect" in a working test period appeal.

RESPONSE: If the employer does not follow the above procedures and the employee is released at the conclusion of the working test period, this situation may be addressed through the appeals process. Such matters would be factors in the layoff appeal on the issue of the good faith of the layoff.

COMMENT: A local government manager asked whether the Department of Personnel would assist local government in its efforts to comply with the progress report requirement of N.J.A.C. 4A:4-5.3(a) by providing a sample form.

RESPONSE: The Department of Personnel will provide local governments with copies of forms now used in State service for an employee's working test period progress report.

COMMENT: A local government manager asked whether an employee has the right under N.J.A.C. 4A:4-5.3 to respond to an interim report completed by the appointing authority.

RESPONSE: The employee has the right to be put on notice of the appointing authority's views on his or her performance, pursuant to N.J.A.C. 4A:4-5.3(c). The employee also has the right to appeal his or her release at the end of the working test period and challenge any progress reports, a procedure which is cross-referenced in N.J.A.C. 4A:4-5.4(a).

COMMENT: The Director of Personnel of Camden County stated that the phrase "or is separated due to unsatisfactory performance" should be deleted from N.J.A.C. 4A:4-5.5(a) because it contradicts paragraph (a)2. Specifically, the personnel director stated that if an employee who was removed for disciplinary reasons cannot be restored to an eligible list, pursuant to paragraph (a)2, then an employee who is separated at the end of a working test period for unsatisfactory performance should not be able to request a return to an eligible list, pursuant to subsection (a).

RESPONSE: Separation of an employee due to failure to satisfactorily complete the working test period is distinct from removal during the working test period for disciplinary reasons, such as the employee's misconduct. In the former case, future public employment in another setting may be appropriate.

COMMENT: The President of CSA proposed that N.J.A.C. 4A:4-5.5(a) be amended to require that an employee who fails the working test period automatically be restored to the eligible list.

RESPONSE: The rule permits the restoration of an employee's name to the eligible list, upon request of the employee, if the Commissioner of Personnel approves this action. Criteria are set forth in the rule which the Commissioner may use to make a determination. Any further rights to a place on the eligible list, such as automatic restoration, may not take into account the particular circumstances of an employment situation. For example, the title may not exist in any department other than the one where the employee completed the working test period. If that were the case, it may not be appropriate to put the employee in line to be placed in the situation where he or she was not successful.

COMMENT: Representatives of the CSA and CWA Locals 1033 and 1038 objected to several of the reasons for disqualifications from examination or appointment listed in N.J.A.C. 4A:4-6.1(a), in particular: (a)5, disciplinary removal from public service after opportunity for hearing; (a)7, prior employment history which relates adversey to the title; and (a)8, other sufficient reasons. The representative of CWA Local 1033 suggested that disqualification for making false statements of any material fact or attempting deception or fraud in the selection or appointment process, as set forth in (a)6, be restricted only to the test at issue.

RESPONSE: The rule as proposed provides that a person may be disqualified for the reasons listed. Thus, whether or not a person is disqualified and whether the disqualification extends to more than one examination are dependent upon a number of factors, such as the extent of the attempted deception, the nature of the prior disciplinary removal, and the type of job which the person is seeking. The category "other sufficient reasons" appeared in the predecessor rule as well, in recognition of the possibility that other valid reasons may exist for disqualification. Appeal mechanisms remain available for any person who believes he or she has been improperly disqualified.

COMMENT: A representative of CWA Local 1033 urged that the words "5 and 7 above" be deleted from N.J.A.C. 4A:4-6.1(b), on the grounds that a person should be barred from public employment only because of a violation of law.

RESPONSE: This subsection does not mandate that a person be barred from public employment. Rather, it provides that an appointing authority may choose to accept the employee despite the possible disqualification.

COMMENT: A representative of CWA Local 1033 urged that N.J.A.C. 4A:4-6.2(a)6, which provides for removal of a disqualified person from employment, be amended by the addition of the phrase "only for an employee with no other permanent status," since a tenured employee should be subject to removal only after charges have been made. Further, he objected to (a)7, which provides for "other appropriate action" against disqualified persons.

RESPONSE: In response to the comment on (a)6 a new subsection (b) has been added clarifying that the rules on major discipline are applicable in the case of removal of a permanent employee or an employee serving in a working test period. With regard to (a)7, a contention that an action against a disqualified person is inappropriate can be addressed in the appeal process.

COMMENT: A representative of CWA Local 1033 urged the addition of a subsection (a)4 to N.J.A.C. 4A:4-6.3, which would provide for appeals of examination methodology or the conduct of a particular examination. In subsection (d), he requested deletion of the last sentence, which provides that examination results for a person appealing disqualification but allowed to sit for an exam will not be processed while the review is pending.

RESPONSE: The suggested amendment to subsection (a) is unnecessary, since (a)3 is unrestrictive as to the type of examination issues which may be appealed. The last sentence of (d) does not impair the rights of any appellant and a make-up examination or other procedure can be utilized.

COMMENT: Camden Council No. 10 stated that N.J.A.C. 4A:4-6.3(c) should require that a conditional appointment be made where an appeal has been filed contesting an appointment.

RESPONSE: Although the Department of Personnel wishes to give every attention to all appeals filed concerning the selection and appointment process, it would be unduly disruptive of that process, and ultimately also unfair to eligibles who are reachable for appointment, to require conditional appointments in every appeal situation.

COMMENT: Two CWA representatives criticized the provisions of N.J.A.C. 4A:6-6.4, which concerns review of scoring keys and examination papers, as being too restrictive as applied to those who wish to challenge examination results.

RESPONSE: The procedures contained in this section represent an effort to balance the opportunity to appeal test questions with the need to preserve examination security. These procedures are substantially similar to the predecessor rule, and have been found to allow substantial opportunity to challenge exam questions without breaching necessary security.

COMMENT: The President of CSA stated that N.J.A.C. 4A:6-4 through 6.6 were inconsistent with a recent decision of the Appellate Division of Superior Court, which held that a full evidentiary hearing should be held in a particular case.

RESPONSE: Review of examination appeals on the written record is specifically authorized by N.J.S.A. 11A:2-6(b). However, the previously adopted rules on appeals provide for a hearing in certain matters where a material and controlling dispute of fact exists. See N.J.A.C. 4A:2-1.1(d).

COMMENT: A representative of CWA Local 1038 suggested that N.J.A.C. 4A:4-6.5(a)1, which concerns medical or psychological unfitness appeals, should read that a removal request shall be denied where such professional report and recommendation is not provided.

RESPONSE: The word "may" is used to address situations where, for example, the failure to provide such reports is inadvertent and corrective measures or relief can be made.

COMMENT: A representative of CWA Local 1033 urged that N.J.A.C. 4A:4-6.5(a)2 not contain any exception to the provision that the candidate receive copies of all materials furnished to the Department of Personnel.

RESPONSE: In the very rare circumstances where disclosure of information would be injurious to the candidate's health, the rule provides that the examining physician, psychologist or psychiatrist must certify so in writing.

COMMENT: A local government manager urged that 30 rather than 20 days should be provided in N.J.A.C. 4A:4-6.5(c) for the appointing authority to furnish all background material in a medical or psychological unfitness appeal.

RESPONSE: Subsection (c)3 allows for extensions of time where the appointing authority is unable to assemble the background material within 20 days.

COMMENT: A representative of CWA Local 1033 suggested that N.J.A.C. 4A:4-6.6(a) be amended to provide that all examination appeals, other than medical or psychological unfitness appeals, follow the same procedure.

RESPONSE: As stated in response to the comments on N.J.A.C. 4A:4-6.4, distinct procedures are necessary for appeals on test questions in order to ensure the security of the examination process.

COMMENT: A representative of CWA Local 1033 argued that the entire contents of N.J.A.C. 4A:4-7, concerning transfers and reassignments, should be subject to negotiations, rather than rulemaking.

RESPONSE: These matters are appropriate for rulemaking in view of the explicit statutory language found in N.J.S.A. 11A:4-16, which provides that the rules of the Merit System Board "shall define and establish the procedures for transfer, reassignment and lateral title change."

COMMENT: Camden Council No. 10 stated that N.J.A.C. 4A:4-7.1(a)2, which defines an organizational unit in local service as a separate department or agency, is acceptable as long as this definition does not affect layoff rights.

RESPONSE: Layoff rights are proposed in N.J.A.C. 4A:8 (see 19 N.J.R. 1363(a)).

COMMENT: Camden Council No. 10 expressed support for N.J.A.C. 4A:4-7.1(c), and noted no objection to N.J.A.C. 4A:4-7.1(c)2, as long as the personnel action permitted in that provision is "scrutinized" by the Department of Personnel.

RESPONSE: Any abuses or problems that exist may be addressed through the appropriate appeals mechanisms or enforcement actions.

COMMENT: The Director of Personnel of Camden County commented that N.J.A.C. 4A:4-7.1(c), which requires employee consent for permanent transfer, is inconsistent with the statute. In particular, he contended that N.J.S.A. 11A:4-16, by mandating 30 days notice of transfer, implies that the appointing authority can transfer employees without their consent, since 30 days' notice to the employee would be unnecessary for an employee who consents to the transfer. Protection of employee rights in promotional and layoff situations can be achieved, he added, by allowing employees to retain seniority in both organizational units. Further, he contended that the provisions is subsection (e), which require 30 days' notice for involuntary transfer, appear to contradict subsection (c).

Additional comments on N.J.A.C. 4A:4-7.1 were submitted by The President of CSA, who urged that transfers should never take place without employee consent; a representative of the CWA, who criticized the absence of language reflecting the statutory prohibition against using transfers and reassignments for disciplinary reasons, except following an opportunity for a hearing; and a representative of CWA Local 1038, who urged the inclusion of a mechanism to appeal temporary transfers.

RESPONSE: The rules contained in this subchapter are consistent with N.J.S.A. 11A:4-16. The personnel director of Camden County correctly notes that the statutory requirement for 30 days' notice would be superfluous in the case of a voluntary transfer. However, the entire thrust of N.J.S.A. 11A:4-16, especially in view of amendments made during the legislative process, is the protection of employee rights in these situations. In view of this direction, employee consent for permanent transfer is required in most situations.

While continuing to require employee consent for most permanent transfers, the provisions of N.J.S.A. 11A:4-16 would be rendered meaningless if consent were to be required in every transfer situation. Therefore, the rule as adopted does not require employee consent in those limited situations when the permanent transfer results from a combining of functions or operations across organizational unit lines or in the case of a temporary transfer for a maximum of six months.

With regard to the comments on disciplinary situations and appeals, the Merit System Board notes that the statutory provisions have been incorporated in N.J.A.C. 4A:4-7.1(e) and 4A:4-7.7.

COMMENT: Camden Council No. 10 suggested that the phrase "in advance" be added to the last sentence in N.J.A.C. 4A:4-7.1(d), so that the Commissioner of Personnel's approval would be required before a temporary transfer takes effect.

RESPONSE: The Commissioner's preapproval is expected. Any exceptional cases would require explanation and sufficient basis.

COMMENT: A representative of CWA Local 1038 suggested that N.J.A.C. 4A:4-7.2 provide for reassignments to be made in inverse seniority order, and only upon two weeks' notice.

RESPONSE: The suggested changes, if applied to every appointing authority subject to these rules, would unduly affect negotiated agreements and local procedures.

COMMENT: Camden Council No. 10 proposed that the provisions in N.J.A.C. 4A:4-7.2 be "subject to the provisions of a collective bargaining agreement, if applicable."

RESPONSE: N.J.S.A. 11A:4-16 requires that the Merit System Board adopt the rules in this area.

COMMENT: A representative of CWA Local 1038 contended that the provisions of N.J.A.C. 4A:4-7.3 concerning relocation assistance should be subject to negotiations, not rulemaking.

RESPONSE: The authority for rulemaking on this subject is found in N.J.S.A. 11A:4-16.

COMMENT: Camden Council No. 10 stated that N.J.A.C. 4A:4-7.4(d) should be clarified to show how a reassignment of an employee between promotional unit scopes may occur in the face of N.J.A.C. 4A:4-7.2 (reassignments) and N.J.A.C. 4A:4-7.4(c) which deals with a permanent transfer from one organizational unit to another where two or more organizational units have been combined.

RESPONSE: This rule refers to the promotional unit scope. The rule on reassignments, N.J.A.C. 4A:4-7.2, refers to organizational units, as does N.J.A.C. 4A:4-7.4(c). The unit scope and the organizational unit are not necessarily coextensive. There should not be a conflict in such situations.

COMMENT: The President of the CSA urged the deletion of N.J.A.C. 4A:4-7.4(d), which provides that an employee reassigned from one promotional unit scope to another shall retain no promotional rights in the former unit.

RESPONSE: In local service, which is the area of concern of the commenter, promotional unit scopes are generally the same as departments. Since reassignments, by definition (see N.J.A.C. 4A:4-7.1(a)2, and 4A:4-7.2), take place only within departments in local service, a reassignment generally would not result in movement to a different promotional unit scope.

COMMENT: A representative of CWA Local 1033 urged that N.J.A.C. 4A:4-7.5 should be revised to bar all transfers during the working test period.

RESPONSE: The rule as proposed allows transfers during the working test period only in cases of transfer or combining of functions or operations, which would be necessary areas.

COMMENT: A representative of CWA Local 1038 criticized N.J.A.C. 4A:4-7.6 on the grounds that it permits lateral title changes from the noncompetitive to the competitive divisions without examination.

RESPONSE: In response to the comment, the language of the adopted rule has been modified to clarify that lateral title changes are permitted only within the competitive division.

COMMENT: A representative of CWA Local 1033 argued that in N.J.A.C. 4A:4-7.7, when there is a challenge to the good faith of a transfer, reassignment or lateral title change, the burden of proof should be on the employer, not the employee.

RESPONSE: The previously adopted rule on burden of proof is applicable to appeals of this nature and correctly refers to the appellant. See N.J.A.C. 4A:2-1.4(b).

COMMENT: Two CWA representatives objected to N.J.A.C. 4A:4-7.9 on the basis that the requirement of a resignation hampers career mobility.

RESPONSE: The rule as proposed, as well as other rules on employee movement, will foster job mobility. First, the rule does not change existing practice by requiring resignation when a permanent employee accepts an open competitive appointment in a different organizational unit. Rather, it codifies an existing practice in State service which permits employees in such situations to retain service credits for leave entitlements, despite the break in service. Moreover, the resignation/new appointment process will probably be utilized less in the future in light of transfer procedures set forth in N.J.A.C. 4A:4-7.1.

COMMENT: A representative of CWA Local 1038 noted, with respect to N.J.A.C. 4A:4-7.9(a)2, that appointing authorities in State service could promise a higher salary but, after the employee accepts employment, fail to pay the offered salary on the basis that the Commissioner of Personnel declined approval. In such situations, the commenter requested that the appointing authority be required to pay the offered salary.

RESPONSE: Such authorization is necessary for proper application of the pay system. However, mechanisms exist for paying more than the minimum to appointees in such situations, which was not reflected in the rule as proposed. Therefore, a change has been made to refer to this mechanism described in the adopted compensation rules at N.J.A.C. 4A:4-7.9(a)2.

Summary of other changes made between proposal and adoption:

In addition to the changes described above and various technical and typographical corrections, the following changes have been made:

The order of the rules governing types of appointments has been changed to reflect the statute. N.J.A.C. 4A:4-1.1 will now concern career appointments and N.J.A.C. 4A:4-1.3 will concern unclassified appointments.

In N.J.A.C. 4A:4-2.1(d), language has been added to codify existing practice that State service promotional examination applications are filed with the appointing authority, while local service promotional examination applications are filed with the Department of Personnel.

In N.J.A.C. 4A:4-2.2(b), it has been clarified that extra compensation for service outside normal working hours by special examiners is normally paid by the Department of Personnel.

In N.J.A.C. 4A:4-2.5(d), clarifications have been made in the title scope of promotional examinations between the noncompetitive and competitive divisions, to reflect current practice.

In N.J.A.C. 4A:4-2.9, which concerns make-up examinations, language has been added to clarify that errors by appointing authorities in such matters as application processing are considered equivalent to errors by the Department of Personnel.

In N.J.A.C. 4A:4-2.14, concerning accommodation and waiver of examinations for disabled and handicapped persons, language has been added to clarify that a statement regarding the individual's ability to perform job duties may be obtained from an appointing authority utilizing that job title.

In N.J.A.C. 4A:4-4.8(a)3, the work "interested" has been added before "eligible" to clarify that the appointing authority chooses from among the top three eligibles who are interested in appointment.

In N.J.A.C. 4A:4-5.2(d), the phrase "in local service" has been added to clarify that only in county and municipal law enforcement titles, the working test period begins after completion of police training. In State service law enforcement titles which require police training, the current practice has been that the working test period begins upon the date of regular appointment.

In N.J.A.C. 4A:4-5.3(c), modifications have been made regarding the filing with the Department of Personnel of progress reports on probationers in local service upon request.

In N.J.A.C. 4A:4-6.4(b), replacing proposed subsection (c) the period for review for non-multiple choice examinations has been clarified to mean 20 calendar days by the deletion of the word "business." This change reflects current practice. The phrase "business days" was included in the rules proposal in error.

In N.J.A.C. 4A:4-6.4, the incorporation by reference of the appeal procedures in N.J.A.C. 4A:4-6.6 has been replaced by an express listing of these procedures, in order to clarify the requirements of the rule.

Full text of the repealed rules may be found in the New Jersey Administrative Code at N.J.A.C. 4:1-8, 4:1-9, 4:1-10.2 through 4:1-10.5, 4:1-11, 4:1-12, 4:1-13, 4:1-14, 4:1-15, 4:1-16.13; 4:2-6.3, 4:2-11, 4:2-13, 4:2-14.1, 4:2-15.1; 4:3-6.4, 4:3-11.1, 4:3-13.2 and 4:3-14.

Full text of the adoption follows (additions indicated in bold face with asterisks ***thus***; deletion indicated in brackets with asterisks *[thus]*).

CHAPTER 4
SELECTION AND APPOINTMENT

Old Citation	New Citation	Old Citation	New Citation
4:1-8.1	4A:4-2.16	4:1-8.10	4A:4-2.13
4:1-8.2	4A:4-2.2	4:1-8.11	4A:4-2.1
4:1-8.3	4A:4-2.1	4:1-8.12	4A:4-2.1
4:1-8.4	4A:4-2.6	4:1-8.14	4A:4-6.2
4:1-8.5	4A:4-2.7	—	4A:4-6.1
4:1-8.6	4A:4-2.3	—	4A:4-4.7
4:1-8.7	4A:4-2.3	4:1-8.15	4A:4-2.8
4:1-8.8	4A:4-2.11	4:1-8.16	4A:4-2.14
4:1-8.9	4A:4-2.12	4:1-8.17	4A:4-2.14

Old Citation	New Citation	Old Citation	New Citation
4:1-8.18	4A:4-2.10	4:1-12.9	4A:4-4.6
4:1-8.19	4A:4-2.9	—	4A:4-2.9
4:1-8.20	4A:4-2.9	4:1-12.10	4A:4-4.2
4:1-8.21	4A:4-6.3	4:1-12.11	4A:4-4.7
4:1-8.22	4A:4-6.3	4:1-12.12	4A:4-3.6
—	4A:4-6.6	4:1-12.13	(Repealed)
4:1-8.23	4A:4-6.6	4:1-12.14	(Repealed)
4:1-8.24	4A:4-2.16	4:1-12.15	4A:4-4.8
4:1-8.25	4A:4-2.16	4:1-12.16	4A:4-4.9
4:1-8.26	4A:4-6.5	4:1-12.17	4A:4-4.10
4:1-8.27	4A:4-6.5	4:1-12.18	4A:4-4.8
4:1-9.1	4A:4-6.4	4:1-13.1	4A:4-5.1
4:1-9.2	4A:4-6.4	4:1-13.2	4A:4-5.1
4:1-9.3	4A:4-2.15	4:1-13.3	4A:4-5.2
4:1-9.5	4A:4-2.15	4:1-13.4	4A:4-5.2
4:1-9.6	(Repealed)	4:1-13.5	4A:4-5.3
4:1-9.7	4A:4-2.15	4:1-13.8	4A:4-5.5
4:1-9.8	4A:4-6.4	4:1-13.9	(Repealed)
4:1-9.10	4A:4-3.8	4:1-13.10	4A:4-4.5
4:1-10.2	4A:4-1.3	4:1-14.1	4A:4-1.5
—	4A:4-2.5	4:1-14.2	4A:4-1.5
4:1-10.4	(Repealed)	4:1-14.3	4A:4-1.7
4:1-10.5	(Repealed)	4:1-14.4	4A:4-1.7
4:1-11.1	4A:4-3.1	4:1-14.6	4A:4-1.6
4:1-11.2	4A:4-3.2	4:1-14.7	4A:4-1.8
4:1-11.3	4A:4-2.16	4:1-15.1	4A:4-7.1
4:1-11.4	4A:4-3.3	4:1-15.2	4A:4-7.6
4:1-11.5	4A:4-3.3	4:1-15.3	4A:4-7.1
4:1-11.6	4A:4-3.3	4:1-15.4	4A:4-7.1
4:1-11.7	4A:4-3.4	4:1-15.5	4A:4-7.4
4:1-11.8	4A:4-3.5	4:1-15.6	4A:4-7.1
4:1-11.9	(Repealed)	4:1-15.6	4A:4-7.2
4:1-11.10	4A:4-3.6	4:1-16.13	4A:4-7.10
—	4A:4-2.9	4:2-6.3	4A:4-4.5
4:1-11.11	4A:4-4.3	4:2-11.1	4A:4-3.3
4:1-11.12	4A:4-4.3	4:2-11.2	4A:4-3.3
4:1-12.1	4A:4-4.1	4:2-11.3	4A:4-3.3
—	4A:4-1.10	4:2-13.1	4A:4-5.5
4:1-12.2	4A:4-4.2	4:2-14.1	4A:4-1.9
—	4A:4-5.3	4:2-15.1	(Repealed)
4:1-12.3	4A:4-3.7	4:3-6.4	4A:4-4.5
4:1-12.4	4A:4-4.2	4:3-11.1	4A:4-4.3
4:1-12.5	4A:4-4.2	4:3-13.2	4A:4-5.5
4:1-12.6	4A:4-4.3	4:3-14.1	(Repealed)
4:1-12.7	4A:4-4.5	4:3-14.2	4A:4-1.9
4:1-12.8	4A:4-4.4		

SUBCHAPTER 1. TYPES OF APPOINTMENTS

*[4A:4-1.1]***4A:4-1.3*** Unclassified appointments

(a) An unclassified appointment may be made *[at the discretion of the appointing authority,]* to any title or position allocated to the unclassified service by statute or the Board.

(b) The permanent appointment rights of Title 11A, New Jersey Statutes, are not applicable to unclassified appointments. See N.J.A.C. 4A:3.

4A:4-1.2 Senior executive service appointments: State service

(a) A senior executive service appointment may be made to any position allocated to the senior executive service by the Board.

(b) Permanent career service employees and qualified persons without permanent status are eligible for senior executive service appointments. See N.J.A.C. 4A:3-*[2]***1***.

*[4A:4-1.3]***4A:4-1.1*** Career service appointments

(a) Regular appointments to titles allocated to the competitive division of the career service shall be subject to an examination process and successful completion of a working test period.

(b) The Commissioner may authorize an appointing authority to make a regular appointment of a qualified person to a title in the noncompetitive division of the career service without an examination. Preference shall be given to disabled veterans and then veterans. See N.J.A.C. 4A:5 on veterans preference.

(c) The Commissioner may authorize the promotion, through promotional examination procedures, from the noncompetitive division, of permanent employees who meet the open competitive requirements, to:

1. A related entry level title in the competitive division; or

2. In appropriate situations, to a related above-entry level title in the competitive division.

4A:4-1.4 Conditional regular appointments

(a) A conditional regular appointment may be made in the competitive division of the career service when disputes or appeals concerning higher ranking eligibles may affect the final appointments. The names of conditional appointees shall remain on the eligible list for consideration for other employment.

(b) If the rights of a higher ranked eligible are upheld, the conditional regular appointment shall end.

(c) If the final determination of appointment rights causes no change in the selection process, the conditional appointment will be changed to a regular appointment. The original date of appointment will be retained.

(d) The appointing authority shall advise conditional appointees of their status and rights, including any change in appointment status.

4A:4-1.5 Provisional appointments

(a) A provisional appointment may be made only in the competitive division of the career service when all of the following conditions are met:

1. There is no complete list of eligibles, and no one remaining on an incomplete list will accept provisional appointment;

2. The appointee meets the minimum qualifications for the title at the time of the appointment; and

3. The appointing authority certifies that failure to make the provisional appointment will seriously impair its work.

(b) Any employee who is serving on a provisional basis and who fails to file for and take an examination which has been announced for his or her title shall be separated from the provisional title. The appointing authority shall be notified by the Department and shall take necessary steps to separate the employee within 30 days of notification, which period may be extended by the Commissioner for good cause.

4A:4-1.6 Interim appointments

(a) An appointing authority may make an interim appointment to a specific position in State service or a specific title in local service, where a permanent employee is on a leave of absence. The appointing authority may reserve a position/title for the employee on leave as a vacant position/title, rather than make an interim appointment.

1. Any interim appointment shall remain in effect only during the period of time that the permanent employee is on an approved leave of absence.

2. At the end of the interim appointment, the appointee shall return to his or her permanent title.

(b) An interim appointee shall possess the minimum qualifications *[needed]* for *[appointment]* ***the title***.

(c) If a complete eligible list exists for the title, the interim appointment shall be made from that list. An interim appointee's name shall remain on the eligible list for consideration for permanent employment.

(d) An interim appointee shall continue to accrue seniority in his or her permanent title.

(e) The layoff rights of an interim appointee shall be determined from his or her permanent title. See N.J.A.C. 4A:8-2.

(f) The appointing authority shall advise interim appointees of their rights under an interim appointment.

4A:4-1.7 Temporary appointments

(a) The Commissioner may approve *[the establishment of]* temporary ***appointments to*** positions ***in which the job assignment is*** for an aggregate period of not more than six months in a 12-month period. A temporary ***appointment for a maximum of 12 months may be approved by the Commissioner to a*** position *[which is]* established as a result of a short-term grant *[may be established for a maximum of 12 months]*.

(b) *[An]* ***A temporary*** appointee *[to a temporary position]* shall meet the minimum qualifications for the title.

(c) The acceptance or refusal of a temporary appointment shall not affect any future permanent appointment rights.

[(d) In State service, the Commissioner may authorize temporary appointments to permanent positions under appropriate circumstances.]

4A:4-1.8 Emergency appointments

The Commissioner may authorize an emergency appointment for a period not to exceed 30 days*[, where]* ***when*** the appointing authority certifies that the failure to make such appointment will result in harm to persons or property.

4A:4-1.9 Return of employees to their permanent titles

(a) An employee with permanent status in a career service title, who is returned during or at the end of the working test period in another title, or from an appointment under N.J.A.C. 4A:4-*[1.1]* ***1.3***, 1.4, 1.5, 1.6, 1.7 or 1.8, to his or her permanent title, will have rights to a position in the permanent title in the same organizational unit.

1. The employee must have held the permanent title within current continuous service.

2. In State service, an organizational unit shall mean an appointing authority. In local service, an organizational unit shall mean a department or separate agency within the same governmental jurisdiction. A school district shall be considered a separate jurisdiction.

(b) The appointing authority shall use the following procedures, to effect the return of the permanent employee:

1. Reassign the employee to a vacant position/title;

2. Separate a provisional employee with no permanent status and reassign the returning employee to the position/title; or

3. Return an employee serving provisionally in the permanent title of the returning employee to his or her permanent title and reassign the returning employee to the position/title.

(c) The appointing authority and the returning employee may agree to use the following optional procedures to effect the return of the permanent employee.

1. The employee may accept appointment to other titles ***at the same or lower level,*** in the same or a different series for which the employee qualifies in the same or another organizational unit.

2. The status and compensation rights of the returning employee shall be determined in accordance with normal merit system rules and policies.

(d) When the appointing authority offers the employee options under (b) and (c) above, the employee may choose to accept either option.

(e) If the appointing authority offers only an option under (b) above, the employee must accept the option offered.

(f) Layoff procedures must be utilized when the appointing authority cannot effect the return of a permanent employee under (b) or (c) above. See N.J.A.C. 4A:4-4.8*[(c)]****(d)*** on certification procedures.

4A:4-1.10 Approval of appointments by Department of Personnel

(a) All appointments, promotions and related personnel actions are subject to the approval of the Department of Personnel.

(b) Following submission and review of personnel actions, the appointing authority shall be notified by the Department of Personnel whether the action has been approved or disapproved and the reasons for any disapproval. The appointing authority shall provide written notice to all affected employees of such personnel actions.

SUBCHAPTER 2. COMPETITIVE EXAMINATIONS

4A:4-2.1 Announcements and applications

(a) Notice of open competitive examinations shall be announced in a monthly job listing or by other appropriate means as approved by the Commissioner to secure sufficient qualified candidates. Copies of notices for all open competitive examinations shall be available in each regional office of the Department of Personnel.

(b) In order to notify all employees of promotional opportunities, notices of promotional examinations and applications shall be provided to eligible employees by the Department of Personnel or as directed by the Department of Personnel through the *[appointed]* ***appointing*** authority. The appointing authority shall conspicuously post notices at all geographic locations within the unit scope to which the examination is open. Appointing authorities shall maintain a record of such posting.

(c) Examination announcements shall include at least the following information:

1. Title of the examination;
2. Salary information;
3. Minimum qualifications for admission to the examination;
4. Filing information; and
5. In open competitive examinations, a reference to duties and responsibilities.

(d) Applications for open competitive ***and local service promotional*** examinations shall be filed with the Department of Personnel and applications for ***State service*** promotional examinations shall be filed with the appointing authority no later than the announced filing date, which in no case shall be less than two weeks after the announcement. When mailed, the postmark date will be considered the date on which the application is filed.

(e) Prior to the filing date, an applicant may amend a previously submitted application.

(f) The Department ***of Personnel*** may request clarifying information from an applicant.

(g) All examination applications shall remain confidential, except as the Commissioner may determine to be in the public interest.

4A:4-2.2 Types of examinations

(a) The Commissioner of the Department of Personnel shall administer examinations for appointment in the competitive division of the career service which may include any one or more of the following:

1. Written tests;
2. Oral tests;
3. Performance tests;
4. Physical performance tests;
5. Evaluation of education, training or experience;
6. Assessment exercises; and
7. Other appropriate measures of knowledge, skills and abilities.

(b) The Department ***of Personnel*** may select special examiners to act as subject matter specialists or to provide other assistance. Employees of the State or local jurisdictions may be so engaged as part of their official duties during normal working hours with the approval of their appointing authority. Extra compensation may be provided ***by the Department of Personnel*** for such service outside normal working hours.

(c) See N.J.A.C. 4A:4-2.14 for rules regarding the accommodation and waiver of examinations for disabled or handicapped persons.

4A:4-2.3 Open competitive examinations

(a) Vacancies shall be filled by promotional examination unless the Commissioner determines that it is in the best interest of the career service to hold an open competitive examination. The determination to announce an open competitive examination shall be based on at least one of the following conditions:

1. The vacancy is in an entrance level title;
2. There are fewer than three qualified permanent employees in appropriate lower titles in the *[promotional]* unit scope ***(See N.J.A.C. 4A:1-1.3 for definition of unit scope)***;

3. If more than one vacancy, the total number of qualified permanent employees in appropriate lower titles in the unit scope exceed by fewer than three the total number of vacancies.

*[3.]***4.*** A list resulting from a promotional examination will be exhausted before all present or anticipated vacancies are filled; or

*[4.]***5.*** The title requires special, technical or professional training or qualifications which are not required in lower titles.

(b) Unless otherwise specified, an applicant shall meet the following criteria by the announced closing date:

1. Be a resident of the State or specified local jurisdiction (see N.J.A.C. 4A:4-2.*[10]***11***), except when:

i. A different residency requirement is specified by law or provided by the Commissioner; or

ii. It appears that there is an inadequate number of qualified residents available for the title.

2. Meet all requirements specified in the examination announcement:

i. Applicants for the titles of Municipal Firefighter and Municipal Police Officer must be under the age of 35 on the announced closing date for an open competitive examination to be eligible to take the examination. Former Municipal Police Officers under 45 years of age and who resigned in good standing may adjust their age by subtracting previous years of service from their actual age on the closing date.

ii. Veterans who are above a maximum age requirement, may recalculate their age for recording purposes pursuant to N.J.S.A. 38:23A-2; and

3. File an application with all supporting documents or proofs by the announced filing date.

(c) When a promotional examination is announced, an open competitive examination may also be announced.

4A:4-2.4 Promotional title scope: local service

(a) If a title which is the subject of a promotional examination is part of a title series, then the examination shall be open to *[either the next lower or next two lower in series titles]* ***one of the following***.

***1. The next lower or next two lower in-series titles; or**

2. All applicants in the unit scope who meet the open competitive requirements and all applicants in the next lower or next two lower in-series titles.

(b) The title scope described in (a)2 above may be used when the appointing authority requests a wider title scope or provisionally promotes an employee who does not have permanent status in an in-series title.*

*[(b)]***(c)*** When the title which is the subject of the promotional examination is not part of a title series, the examination shall be open to all applicants having a total of one year permanent service who meet the open competitive requirements.

*[(c)]***(d)*** When a promotion is to be made from the noncompetitive division of the career service to a related entry level title in the competitive division of the career service, the examination shall be open to all applicants who meet the open competitive requirements and, if appropriate, employees serving in the next lower or next two lower in-series noncompetitive titles.

*[(d)]***(e)*** In extraordinary circumstances, the Commissioner may set another appropriate title scope.

4A:4-2.5 Promotional title scope: State service

(a) For the purpose of announcing promotional examinations, all titles will be divided into one of the following categories:

1. Professional, which requires a Bachelor's or higher level degree;
2. Para-professional, which requires at least 60 general college credits or 12 or more specific college credits (but less than a full degree); or
3. Non-professional, which requires less than 60 general college credits or less than 12 specific college credits.

(b) When a promotion is within the same category, the examination, with or without open competitive requirements, as appropriate, shall be open to one of the following:

1. The next lower or next two lower in-series titles. See N.J.A.C. 4A:1-1.3 for definition of title series.
2. All titles at or up to four class codes below the class code of the title which is the subject of the examination. See N.J.A.C. 4A:1-1.3 for definition of class code.
3. All titles to a level that is more than four class codes below the class code of the title which is the subject of the examination. In such case, applicants must meet the open competitive requirements unless the Commissioner finds sufficient justification not to require one or all of the open competitive requirements.
4. All applicants in the unit scope who meet the open competitive requirements.
5. To related titles, pursuant to an established plan approved by the Commissioner.
6. In extraordinary circumstances, the Commissioner may set another appropriate title scope.

(c) When a promotion is between categories as listed in (b) above, the Department shall open the examination to either all applicants having a total of one year permanent service who meet the open competitive requirements, or to all titles at or up to three class codes below the class code of the title which is the subject of the examination, with or without open competitive requirements, as appropriate.

(d) When a promotion is to be made from the noncompetitive division of the career service to a related entry level title in the competitive division of the career service, the examination shall be open to all applicants who meet the complete open competitive requirements and who are either:

1. Serving in the next lower or next two lower in-series noncompetitive titles; or

2. Serving in ***all related*** noncompetitive titles *[at or up to three class codes below the title which is the subject of the examination]*.

(e) The movement of a permanent employee in the noncompetitive division to a related title with the same class code in the competitive division of the career service shall be considered a promotion for purposes of this subchapter. The examination shall be open to all applicants who meet the complete open competitive requirements and who are either:

1. Serving in a related noncompetitive title with the same class code as the promotional title, the next lower in-series noncompetitive title and related lower competitive titles; or

2. Serving in competitive and noncompetitive titles with the same class code or up to three class codes below the title which is the subject of the examination.

4A:4-2.6 Eligibility for promotional examination

(a) Applicants for promotional examinations shall meet all of the following criteria by the announced closing date:

1. *[Shall have]* ***Have*** one year of continuous permanent service for an aggregate of one year in a title or titles to which the examination is open. Aggregate service does not include periods of suspension, leaves of absence without pay and periods of layoff or furlough;

2. Meet all other requirements contained in the announcement. If an examination announcement is amended, all requirements must be met by the announced closing date; and

3. File an application on or before the application filing date.

(b) In local service, applicants for promotion from entry level law enforcement or firefighter titles shall have three years of continuous permanent service in a title to which the examination is open, except as otherwise provided by law.

***[OPTION ONE**

(c) Applicants for promotional examinations with open competitive requirements may not use experience gained as a result of out-of-title work to satisfy the requirements for admittance to the examination or for credits in the examination process.]*

[OPTION TWO]

(c) Except when permitted by the Merit System Board for good cause, ***such as a documented affirmative action basis,*** applicants for promotional examinations with open competitive requirements may not use experience gained as a result of out-of-title work to satisfy the requirements for admittance to the examination or for credit in the examination process. ***The Department of Personnel may recommend to the Board good cause situations where out-of-title work should be accepted.***

***[OPTION THREE**

(c) Except when permitted by the Department of Personnel for good cause, applicants for promotional examinations with open competitive requirements may not use experience gained as a result of out-of-title work to satisfy the requirements for admittance to the examination or for credit in the examination process.

1. An applicant who has been found ineligible due to out-of-title work may, at the second level of a disqualification appeal (see N.J.A.C. 4A:4-6.6(b)), submit a detailed statement from his or her supervisor describing the out-of-title duties performed and the reasons why it was necessary to perform such duties. A statement shall also be submitted from the personnel officer of the appointing authority verifying the supervisor's statement.

OPTION FOUR

(c) Applicants for promotional examinations with open competitive requirements may use experience gained as a result of out-of-title work to satisfy the requirements for admittance to the examination or for credit in the examination process.]*

(d) Employees who have accepted a voluntary demotion to or are appointed from a special reemployment list to a title to which the examination is open, may, in order to satisfy the requirement of (a)1 above, include continuous permanent service in any higher related or comparable title.

(e) An employee who has established eligibility for a promotional examination with a closing date earlier than the effective date of a layoff shall be permitted to take such examination.

(f) Employees who are laid off and who subsequently return to a title to which a promotional examination is open between the filing deadline and the examination date, shall be allowed to file for the examination.

(g) The time requirements specified in (a) and (b) above may be reduced to completion of the working test period if:

1. There is currently an incomplete promotional list and/or the number of employees eligible for examination will result in an incomplete list;

2. It appears that vacancies to be filled within the duration of the promotional list will exceed the maximum number of eligibles that could result from examination; or

3. Other valid reasons as determined by the Commissioner.

4A:4-2.7 Promotion upon waiver of competitive examination

(a) The Commissioner may authorize the promotion of a qualified permanent employee in the competitive division of the career service by regular appointment without competitive examination if:

1. The employee has been successfully tested in the basic skills required for the promotional title;

2. The employee has not failed, within one year prior to the announced closing date, a promotional examination for that title. However, an employee who subsequently passed an examination for that title shall be eligible for promotion;

3. The number of interested eligibles does not exceed the number of promotional appointments by more than two; and

4. Veterans preference rights are not affected.

4A:4-2.8 Scheduling of examinations

(a) Examinations may be scheduled for one or more sessions on a Statewide, regional or local basis.

(b) Candidates will be notified in an appropriate manner of the time and place of the examination, and of any postponement or cancellation.

(c) Candidates shall be at the examination site at the designated time. Candidates arriving late shall only be admitted as follows:

1. Candidates for written examinations or examinations containing written and performance parts shall be admitted to the examination if they arrive at the test room within 30 minutes after the designated time.

2. Candidates for a timed performance test shall be admitted to the examination if they arrive at the test room within five minutes of the designated time.

3. Candidates for oral examinations or examinations containing oral and performance parts shall be admitted to the examination if they arrive at the test room within 30 minutes after the designated time, provided the last scheduled candidate has not started the examination.

(d) A candidate who arrives late and is admitted to the examination shall receive the full allotted time to complete the examination.

(e) Jurisdictions operating under Title 11A, New Jersey Statutes, shall furnish sufficient facilities for the conduct of examinations when requested by the Department ***of Personnel***.

4A:4-2.9 Make-up examinations

(a) Make-up examinations may be authorized for the following reasons:

1. Error by the Department of Personnel ***or appointing authority***;

2. Serious illness or disability of the candidate on the test date, provided the candidate submits a doctor's certificate specifying that the candidate was not able to take the test on that day for medical reasons;

3. Documented serious illness or death in the candidate's immediate family;

4. Natural disaster;

5. Prior vacation or travel plans outside of New Jersey or any contiguous state, which cannot be reasonably changed, as evidenced by a sworn statement and relevant documentation; and

6. Other valid reasons.

(b) Employees returning from military leave shall have an opportunity to take promotional examinations that have not yet been administered, or make-up examinations for active promotional lists for which they were eligible while on military leave. If the eligible passes the examination, his or her name will be placed on the eligible list based upon the score obtained, as if the examination had been taken when originally held.

(c) In situations involving illness, death or natural disasters, a candidate must request, in writing, a make-up examination, within five days after the examination date. In case of military leave or prior vacation plans, a written request for a make-up examination must be submitted prior to the examination date.

(d) Make-up examinations will be administered *[as far as]* ***to the extent*** possible under the same conditions as the original examination, except that:

1. Skilled trade performance examinations and physical performance examinations will be held with the next scheduled test and the eligibles will be added to the original list; and

2. For examinations which are held more than once a year and which may be scheduled again within six months, make-up examinations may be held with the next regularly scheduled examination and the eligibles will be added to the original list for the same title and jurisdiction.

(e) The name of any candidate passing a make-up examination will be added to the eligible list. Except for error by the Department ***of Personnel or appointing authority***, prior appointments from the eligible list will not be affected by the addition of a name to the list.

(f) All candidates taking make-up examinations, except physical performance examination and those under (d)2 above, shall, as a precondition to taking the make-up examination, be required to sign a statement that they have no knowledge of the content of the examination as a result of information gained from or furnished by other candidates who participated in the original examination.

(g) When an examination requires a multiple assessment of a candidate which results in a group consensus rating by a panel of experts, a make-up examination shall not be held. The only exception to this will be documented error on the part of the Department of Personnel ***or appointing authority***. In this case, a make-up may be granted if practicable.

4A:4-2.10 Conduct and security of examinations

(a) The Department shall insure that all applicants for an examination are given equal opportunity to demonstrate their relative merit and fitness.

(b) In the conduct or administration of an examination, the following shall be considered prohibited actions:

1. Securing, by unauthorized persons, of questions or materials, unless the same are available to all applicants;

2. Securing, by unauthorized persons, of information concerning the number or identity of applicants until all parts of the examination have been held and a resulting eligible list issued;

3. Identification of an applicant's examination papers or work before all examinations have been rated, where anonymity is required;

4. Impersonation of an applicant, either in person or by the improper exchange of applicant numbers or in any other manner;

5. Use or attempted use of any unauthorized aids, information or assistance, including copying or attempting to copy from, or helping or attempting to help another applicant in any part of an examination or performance of work assigned;

6. A candidate's participation in an examination if it would likely result in physical injury to the candidate or others, or damage to property; or

7. Copying, recording or transcribing any examination question or answer, and/or the removal from any examination room of any question sheet, answer sheet, scrap paper, notes or other papers or materials related to the content of an examination.

(c) Anyone participating in a prohibited action under (b) above shall be disqualified from the examination and may be rejected from future examinations and subject to punishment as provided by law.

4A:4-2.11 Residence standards

(a) Where residence requirements have been established, residence means a single legal residence. The following standards shall be used in determining legal residence:

1. Whether the locations in question are owned or rented;

2. Whether time actually spent in the claimed residence exceeds that of other locations;

3. Whether the relationship among those persons living in the claimed residence is closer than those with whom the individual lives elsewhere. If an individual claims a parent's residence because of separation from his or her spouse, a court order or other evidence of separation may be requested;

4. Whether, if the residence requirement of the anticipated or actual appointment was eliminated, the individual would be likely to remain in the claimed residence;

5. Whether the residence recorded on a driver's license, motor vehicle registration, or voter registration card and other documents is the same as the claimed legal residence. Post office box numbers shall not be acceptable; and

6. Whether the school district attended by child(ren) living with the individual is the same as the claimed residence.

(b) Unless otherwise specified, residency requirements shall be met by the announced closing date for the examination.

(c) The Department of Personnel will review residence requirements for examination candidates. It is the responsibility of the appointing authority to review and enforce residence requirements relating to appointment and continued employment.

(d) When there is a requirement that an employee reside within a specific distance of the work site, a written request must be submitted by the appointing authority to the Department for ***approval of*** such a restriction.

1. A request must be received and approved prior to the announcement of the examination.

2. However, the Department may, in appropriate circumstances, add special residency limitations after an eligible list is promulgated.

(e) An applicant seeking to appeal a residency determination shall utilize the procedures contained in N.J.A.C. 4A:4-6.6. The applicant shall have the burden of proving his or her residence.

4A:4-2.12 Professional qualifications substitution program

(a) Applicants for designated open competitive or promotional examinations for professional titles may be permitted to substitute appropriate work experience, on a year-for-year basis, for specified higher educational requirements.

1. For titles requiring specific coursework or major fields of study, the successful completion of the coursework or fields of study shall be required.

2. Examination announcements shall contain, when appropriate, general information on the eligibility requirements and use of this program.

3. Appointing authorities shall conspicuously post information about this program.

(b) The Department shall make the determination whether prior work experience may be substituted for specified education requirements.

4A:4-2.13 College Level Examination Program (CLEP)

(a) College Level Examination Program (CLEP) scores are acceptable as a substitution for college credits required for open competitive or promotional examinations. Acceptable scores are those consistent with scores accepted for credit by Thomas A. Edison College as published annually in its catalog.

(b) The following standards shall be considered:

1. Applicants may be considered eligible to take open competitive and promotional examinations by substituting a combination of education, appropriate work experience and acceptable CLEP scores;

2. Acceptable scores on the CLEP General Examination and Subject Examinations will be considered the same as college undergraduate credits;

3. Acceptable scores on the five-part CLEP General Examination may be substituted for up to 30 undergraduate college credits;

4. Where specific course work and/or a major field of study are required in the job specification or examination announcement:

i. An acceptable score on an appropriate CLEP Subject Examination may be substituted for college credit hours;

ii. An acceptable subscore on an appropriate subsection of the CLEP General Examination may be substituted for undergraduate college credit hours for the course work requirement;

5. Acceptable scores achieved on any of the CLEP Subject Examinations shall be viewed to correspond to those credits normally earned during the final two years of a four-year college curriculum;

6. Acceptable scaled scores or subscores on the CLEP General Examination shall be viewed to correspond to those credits normally earned during the first two years of a four-year college curriculum.

(c) Information about testing site locations and application procedures may be obtained from the CLEP Educational Testing Service (ETS), Princeton, New Jersey and Thomas A. Edison College, Trenton, New Jersey.

(d) Examination announcements shall contain general information on eligibility requirements and utilization of CLEP.

(e) Appointing authorities shall conspicuously post information about CLEP.

4A:4-2.14 Accommodation and waiver of examinations for disabled or handicapped persons

(a) Otherwise qualified applicants who have a disability or handicap may request accommodation in taking an examination by indicating their request for accommodation on the examination application.

1. Upon receipt of the request for accommodation, the Department shall make reasonable accommodation where appropriate and notify the candidate of the arrangements.

(b) The Commissioner may waive an examination for an otherwise qualified candidate or provisional who suffers from a physical, mental or emotional affliction, injury, dysfunction, impairment or disability which makes it physically or psychologically not practicable to undergo the testing procedure for a particular title, but does not prevent satisfactory performance of the title's responsibilities under conditions of actual service.

1. A request for waiver shall be in writing, filed with the Department and contain:

i. The examination's title and symbol number, or in the case of a provisional, his or her title and employer;

ii. A statement from *[the]* ***an*** appointing authority ***utilizing the title*** that the individual can satisfactorily perform the duties of that title under actual conditions of service;

iii. A physician's statement with supporting medical documentation;

iv. Whether the individual has previously filed for or taken an examination for that title, the results, if any, and whether an accommodation has previously been made; and

v. Agreement to undergo any additional physical or psychological examinations that the Department deems appropriate.

(c) If reasonable accommodation can be made, the waiver request will be denied and arrangements made for such accommodation.

(d) If reasonable accommodation is not possible, the Commissioner will decide whether to grant a waiver, and if granted, whether the candidate will be employed or placed on an eligible list and in appropriate cases, granted seniority.

4A:4-2.15 Rating of examinations

(a) Ratings may be computed by a valid statistical method based on the use of scoring formulas and/or conversion tables.

1. When education and experience are to be rated as part of an examination, that which exceeds the minimum shall be graded through the use of scales prepared by the Department.

2. Ties in final earned ratings shall not be broken.

(b) Examinations consisting of more than one part may be rated independently.

1. Candidates failing to meet minimum standards on one part of the examination shall be ineligible for the remaining parts.

2. Candidates who do not receive a passing score on one part of an examination shall be deemed to have failed the entire examination.

(c) *[Promotional examinations may include an]* ***The Commissioner shall set procedures for the*** evaluation of seniority and performance ratings ***in promotional examinations***.

4A:4-2.16 Retention and inspection of examination records

(a) The following examination records shall be retained until the expiration of the eligible list:

1. The public announcement;

2. All applications;

3. The examination papers;

4. A description of the examination, including the date held, rating system, scoring keys and minimum score required, if any;

5. The list of eligibles; and

6. Any other pertinent information.

(b) All examination records listed in (a)1, 4 and 5 above shall be open to public inspection. The Commissioner shall determine which other records may be open to public inspection and the conditions for such inspection.

SUBCHAPTER 3. ELIGIBLE LISTS

4A:4-3.1 Types of eligible lists

(a) The Commissioner may establish the following types of eligible lists:

1. Open competitive, which shall include all qualified eligibles following examination procedures.

2. Promotional, which shall include permanent employees who meet qualification requirements;

3. Regular reemployment, which shall include former permanent employees who resigned in good standing, retired, or were voluntarily demoted, who timely request reemployment and whose reemployment is certified by the appointing authority as being in the best interests of the service;

4. Police or fire reemployment, which shall include former permanent uniformed members of a police or fire department who resigned in good standing and whose reemployment is certified by the appointing authority as being in the best interests of the service; and

5. Special reemployment, which shall include former and current permanent employees who were laid off, laterally displaced or demoted in lieu of layoff.

4A:4-3.2 Order of names on eligible lists

(a) The order of names on an open competitive list shall be:

1. Eligibles entitled to disabled veterans preference in order of their scores;

2. Eligibles entitled to veterans preference in order of their scores; and

3. Non-veteran eligibles in order of their scores.

4. Eligibles who receive the same score shall have the same rank. See N.J.A.C. 4A:4-4.2(c).

5. See N.J.A.C. 4A:5-2.1 for examples on use of open competitive list.

(b) Eligibles on a promotional list shall appear in the order of their scores.

1. When scores are tied, veterans shall be listed first within each rank. See N.J.A.C. 4A:4-4.2(c).

2. See N.J.A.C. 4A:5-2.2 for examples on use of a promotional list.

(c) Eligibles on special reemployment lists shall be ranked in order of seniority in the permanent title from which they were displaced, with the name of the person with the greatest seniority in the highest class code/level title appearing first on the list.

(d) Eligibles on regular or police and fire reemployment lists shall be ranked in the order of seniority in the permanent title from which they resigned, retired or were voluntarily demoted, with the name of the person with the greatest seniority appearing first on the list.

(e) It shall be the responsibility of an eligible to keep a current address on file with the Department of Personnel.

4A:4-3.3 Duration and cancellation of eligible lists

(a) Open competitive and promotional lists shall be promulgated for three years from the date of their establishment, unless the Commissioner determines that, under the circumstances, a shorter time period is appropriate.

1. An eligible list may, for good cause, be extended by the Commissioner prior to its expiration date, except that no list shall have a duration of more than four years.

2. The name of any employee shall not remain on a regular reemployment list for more than three years from the date of resignation, except as provided in (a)1 above.

3. Special reemployment, police reemployment and fire reemployment lists shall have unlimited durations.

(b) The Commissioner may, in cases of fraud, illegality, test invalidity, error by the Department or other good cause, cancel an eligible list prior to its expiration date by issuing a public notice and entering such notice in the minutes of the Merit System Board.

4A:4-3.4 Revival of eligible lists

(a) The Commissioner may revive an expired eligible list under the following circumstances:

1. To implement a court order, in a suit filed prior to the expiration of the list;

2. To implement an order of the Commissioner or Board in an appeal or proceeding instituted during the life of the list;

3. To correct an administrative error; or

4. For other good cause.

4A:4-3.5 Consolidation of eligible lists

(a) The Commissioner may consolidate successive eligible lists for a given title which result from successive open competitive or promotional examinations by one or more of the following methods:

1. Placing the first name on the later list after the last name of the prior list;

2. Supplementing an incomplete list with an eligible list for an appropriate title; or

3. Combining of names of eligibles by scores.

(b) When eligible lists are consolidated, the part of the eligible list which was promulgated first shall not continue beyond its expiration date.

4A:4-3.6 Additions to eligible lists

(a) The Commissioner may add names to an eligible list at any time during the life of the list under the following circumstances:

1. A make-up examination has been given and a candidate has received a passing score;

2. To correct an error by the Department of Personnel;

3. To implement an appeal decision; or

4. Where a third party, such as a college or the Veterans Administration, has submitted documents to correct an administrative error.

(b) When the name of an eligible is added to an existing list to correct an error made by the Department of Personnel, the Department shall determine the retroactive certification and/or appointment rights. When the name of an eligible is added to an existing list for any other reason, the Commissioner shall determine the effect of the action on certifications and prior permanent appointments. See also N.J.A.C. 4A:4-1.4 for conditional regular appointments.

4A:4-3.7 Priority of eligible lists

(a) When there is more than one current eligible list for a title, the priority of the lists shall be as follows:

1. Special reemployment, when the available position/title is in the department from which the eligible was laid off, laterally displaced or demoted in lieu of layoff;

2. Promotional;

3. Special reemployment, when the available position/title is located in a department other than that from which the eligible was laid off, laterally displaced or demoted in lieu of layoff;

4. Regular reemployment, police or fire reemployment; and

5. Open competitive.

4A:4-3.8 Correction of errors

(a) The Department may correct an error at any time during the life of an eligible list.

(b) The Commissioner shall determine whether such correction shall affect any prior appointments or certifications.

(c) Corrections of errors may result in a change in ranking. See N.J.A.C. 4A:4-3.6.

SUBCHAPTER 4. CERTIFICATION FROM ELIGIBLE LISTS

4A:4-4.1 Need for certification

(a) When a vacancy is to be filled in the competitive division of the career service from an eligible list, the appointing authority shall request a certification of names for regular appointment. Such request shall be submitted in advance under procedures set by the Department of Personnel to enable the Department to issue or authorize the necessary certification or advise that there is no appropriate eligible list.

(b) When a permanent competitive position has been filled on a nonpermanent basis, the Department of Personnel shall determine whether there is a need to issue a certification.

4A:4-4.2 Issuance of certification

(a) Upon determining that there is a need for a certification as provided in N.J.A.C. 4A:4-4.1, the Department of Personnel shall issue or authorize the issuance of a certification to the appointing authority containing the names and addresses of the eligibles with the highest rankings *[and]* ***on*** the appropriate list.

(b) When a certification is issued, the Department shall notify or authorize the notification of the eligibles whose names appear on the list, at the last known address. See N.J.A.C. 4A:4-3.2(e) for address change notification.

(c) An appointing authority shall be entitled to a complete certification for consideration in making a permanent appointment, which means:

1. From special, regular and police and fire reemployment lists, the name of one interested eligible for each permanent appointment; or

2. From promotional and open competitive lists, the names of three interested eligibles for the first permanent appointment, and the name of one additional interested eligible for each additional permanent appointment. Eligibles who receive the same score shall have the same rank. If three or more eligibles can be certified as a result of this ranking without resorting to all three highest scores on the list, then only those eligibles will be certified.

i. When fewer than three interested eligibles are certified, the appointing authority may either: make a permanent appointment; make a provisional appointment from the list; make a provisional appointment of another qualified person if no eligible on the list is interested; or vacate the position/title.

ii. When a certification is comprised of multiple lists and an eligible's name appears more than once, the eligible will only be counted once for purposes of making a complete certification.

(d) See N.J.A.C. 4A:10-2.2 for penalties for failure to appoint from a complete certification.

4A:4-4.3 Certification from appropriate lists

(a) When an eligible list for a title is either unavailable or incomplete, the Department may authorize a certification from an eligible list for an appropriate title of the same or higher level, in the same or related series under the following conditions:

1. The education and experience requirements for both titles are substantially similar;

2. The necessary knowledge, skills and abilities were evaluated in the examination process;

3. The geographic scope of eligibility to which the announcement was limited is the same as or includes the geographic location of the original title; and

4. The appropriate eligible list may be used to supplement any existing list in order to establish a complete certification.

(b) The Department of Personnel may also authorize a certification from a common or similar State or local service eligible list under the following circumstances:

1. The appointing authority has requested the use of such list in writing;

2. The examination requirements of the titles for which the eligible lists may be certified shall be appropriate for the title in the requesting jurisdiction;

3. The State or local lists will be used to supplement the existing list in order to create a complete certification; and

4. Only those persons on the eligible list who have expressed an interest in working in the jurisdiction shall be certified.

(c) In local service, regular reemployment lists may be used to certify against vacancies in the same or comparable titles in all appointing authorities in the respective jurisdiction, except school districts.

(d) See N.J.A.C. 4A:8-2.3 for uses of special reemployment lists in State and local service.

4A:4-4.4 Limitation on number of times eligible is certified

(a) A non-veteran eligible who has been certified to the same appointing authority from an open competitive list on three occasions and who has been passed over in favor of a lower ranked eligible on each occasion, shall have his or her name withheld from future certification to the same appointing authority. The appointing authority may request that such eligible be recertified, in which case only that eligible and any higher or equal ranking veteran eligible shall be certified.

(b) All eligibles on a promotional list shall be certified, in order of rank, as long as they remain on the list.

4A:4-4.5 Certifications limited to persons of a particular sex, religion or national origin

(a) A certification may be issued limited to persons of a particular sex, religion or national origin of the eligibles, where such factors are bona fide occupational qualifications (BFOQ) that are essential to successful job performance and the normal operation of the appointing authority.

(b) The appointing authority shall determine those positions in State service and those specific titles in local service for which BFOQ designations are essential.

*[(b)]****(c)*** A request for a BFOQ designation shall be ***signed by the agency or department head, or designee, and the affirmative action officer, and*** submitted by the appointing authority to the Department of Personnel, Division of Equal Employment Opportunity and Affirmative Action (EEO/AA) and shall include:

1. The purpose of the BFOQ being requested;

2. An accurate description of the employment for which the BFOQ is sought, including:

i. The position number in State service ***and the specific title in local service***;

ii. The duties of the position and percentage of time required to perform those duties;

iii. The post location; and

iv. The shift designation.

3. A statement why a person without the specific BFOQ cannot perform the position's duties;

4. What accommodations were considered to permit persons without the BFOQ to perform the duties and why the accommodations were not adopted; and

5. Such other information as requested by the Division.

*[(c)]****(d)*** The appointing authority shall have the burden of proof that a BFOQ designation is necessary.

*[(d)]****(e)*** The Director, Division of EEO/AA shall review the request and advise the appointing authority in writing of his or her decision ***to either accept the BFOQ request or not accept the request based on insufficient justification***.

(f) The Division of EEO/AA will audit BFOQ positions to eliminate artificial barriers that may exist to equal employment opportunity and particular BFOQ designations may be reconsidered or eliminated.

*[(e)]****(g)*** Any person who has been denied an employment opportunity as a result of a BFOQ designation may contest the designation as a discrimination appeal in State service (N.J.A.C. 4A:7-3.2 et seq.) or a general appeal in local service (N.J.A.C. 4A:2-1.1).

4A:4-4.6 Eligibles on military leave

(a) Interested eligibles on military leave shall continue to be certified. The appointing authority may consider such eligibles immediately available for appointment even though reporting for work may be delayed.

(b) On return from military duty, an appointed eligible shall, after successful completion of the working test period, have the same rights, privileges and obligations as if the eligible had served continuously in the title from the original effective date of appointment.

4A:4-4.7 Removal of names

(a) The name of an eligible may be removed from an eligible list for any of the following reasons:

1. The causes for disqualification listed in N.J.A.C. 4A:4-6.1;

2. Permanent appointment through certification to the title for which the list was promulgated or made appropriate, except that the appointment to a lower title will not be cause for removal;

3. Inability, unavailability or refusal of eligible to accept appointment. An eligible who has declined appointment may, upon written request, have his or her name withheld from future certifications until available for appointment. The Department of Personnel must be notified when the eligible wishes to be considered for certification;

4. The eligible has a criminal record which adversely relates to the employment sought.

i. The following factors may be considered in determining whether a criminal record adversely relates to employment:

(1) The nature and seriousness of the crime;

(2) The circumstances under which the crime occurred;

(3) The date of the crime and age of the eligible when the crime was committed;

(4) Whether the crime was an isolated event; and

(5) Evidence of rehabilitation.

ii. The presentation of a pardon or an expungement shall prohibit removal from a list, except for law enforcement, correction officer or firefighter titles and other titles as the Commissioner may determine.

5. Notice by the postal authorities that they are unable to locate or deliver mail to the eligible;

6. Non-compliance with the instructions listed on the notice of certification;

7. Discontinuance of an eligible's residence in the jurisdiction to which an examination was limited or for a title for which continuous residency is required;

8. Discontinuance of the eligible's employment in the unit scope to which a promotional examination was limited. An employee who subsequently returns to the *[promotional]* unit scope within current continuous service may request, in writing to the Department ***of Personnel***, that his or her name be restored to the promotional list;

9. Employees who are involuntarily transferred shall be retained on a promotional list until they have had an opportunity to take a promotional examination in the new promotional unit scope or have been appointed from the list;

10. Failure to maintain interest in a geographical area or choice; and

11. Other valid reasons as determined by the Commissioner.

(b) An appointing authority that requests removal of an eligible's name from a list shall submit to the Department, no later than the date for disposition of the certification, all documents and arguments upon which it bases its request.

1. Unless otherwise provided, the appointing authority shall provide the eligible with copies of all materials sent to the Department.

2. If the appointing authority fails to provide either the Department or the eligible with copies of materials, the request for removal may be denied.

(c) The Department of Personnel shall determine if there are sufficient grounds for removal, notify the appointing authority and the eligible of its decision, and advise the eligible of his or her appeal rights.

(d) An eligible may appeal his or her removal from an eligible list utilizing the procedures in N.J.A.C. 4A:4-6.3.

(e) The removal of names from an eligible list will advance the rank order of all names below it. The Department may supplement a certification to provide the appointing authority with the number of names necessary for a complete certification.

4A:4-4.8 Disposition of a certification

(a) Upon receipt of a certification, an appointing authority shall take whichever of the following actions is appropriate when a permanent appointment is to be made:

1. Appoint the eligible whose name has been certified from the special reemployment list;

2. Appoint the eligible whose name has been certified from regular or police or fire reemployment lists; or

3. Appoint one of the top three ***interested*** eligibles (rule of three) from an open competitive or promotional list, provided that:

i. Disabled veterans and then veterans shall be appointed in their order of ranking from an open competitive list;

ii. If the eligible who ranks first on a promotional list is a veteran, then a non-veteran may not be appointed; and

iii. See N.J.A.C. 4A:4-2(c)2 for tie scores.

(b) The appointing authority shall notify the Department of Personnel of the disposition of the certification by the disposition due date in the manner prescribed by the Department.

1. The report of disposition of the certification shall include:

i. Name of the eligibles to be permanently appointed;

ii. The effective date of the requested permanent appointments;

iii. In local service, the appointee's salary;

iv. A statement of the reasons why a higher ranked eligible was not selected;

v. In situations where an appropriate list is used, the title and functions of the appointee's employment; and

vi. Any other requested information.

(c) Failure to dispose by the due date may result in constructive appointment or other remedial action as set forth in N.J.A.C. 4A:10-2.

(d) If the certification will result in the displacement of a provisional employee who has permanent status, and it is necessary to institute layoff procedures, the Department may, upon written request from the appointing authority, extend the time for disposing of the certification for an additional 45 days. See N.J.A.C. 4A:8-1.1 et seq. for layoff procedures.

(e) See N.J.A.C. 4A:10-2.2 for penalties for failure to appoint from a complete certification.

4A:4-4.9 Date of appointment

(a) An eligible shall not be appointed and begin work after the expiration date of the eligible list except:

1. When the eligible is on military leave, or, in the case of promotional appointments, is on an approved leave of absence. Persons returning from military leave or an approved leave of absence may begin work upon their return to active service.

2. When there is limited revival or statutory extension of an employment list, except that no appointment shall be made beyond the statutory extension date; or

3. When the certification is made just prior to the expiration of the eligible list, in which case the date of appointment and the date the eligible begins work shall coincide with the disposition due date.

4A:4-4.10 Certification of additional eligibles

If, after accepting employment, an eligible cannot begin work within three weeks or such other reasonable time as specified by the appointing authority, the appointing authority may consider the eligible unavailable and request that the Department certify additional names.

SUBCHAPTER 5. WORKING TEST PERIOD

4A:4-5.1 General provisions

(a) The working test period is part of the examination process designed to permit an appointing authority to determine whether an employee can satisfactorily perform the duties of the title.

(b) All regular appointments to a title in the career service shall be subject to a working test period, except:

1. Appointments from special, police and fire and regular reemployment lists;

2. Appointments to a comparable or lower related title in lieu of layoff; or

3. Appointments to titles previously held on a permanent basis within current permanent continuous service.

4. For lateral title changes, see N.J.A.C. 4A:4-7.6(b).

(c) During the working test period, an employee shall perform the duties of the title for which appointment was made.

(d) An employee who is serving a working test period shall not be eligible for a promotional examination from that title.

4A:4-5.2 Duration

(a) The working test period shall not include any time served by an employee under provisional, temporary, interim or emergency appointment. The working test period shall begin on the date of regular appointment. See N.J.A.C. 4A:1-1.3 for definition of regular appointment.

(b) The length of the working test period, except as provided in (c) through (e) below, shall be as follows:

1. In local service, a period of three months of active service, which may not be extended.

2. In State service, a period of four months of active service, which the Commissioner may extend on request of an appointing authority for an additional two months. Such request must be submitted at least five working days before the end of the four month period. The appointing authority shall notify the employee of the extension.

i. Regularly appointed employees serving in intermittent titles shall serve a working test period of 88 work days, which, upon the request of the appointing authority, may be extended by the Commissioner for an additional 44 work days. For purposes of this subsection, any part of a day shall constitute a work day.

ii. An employee serving in an intermittent title who is furloughed prior to completing the working test period, shall resume the working test period upon return from furlough.

(c) When notice of termination is served following the last day of the working test period pursuant to N.J.A.C. 4A:2-4.1(c), the working test period shall end on the date of service of the notice.

(d) Persons appointed to entry level law enforcement, correction officer and firefighter titles shall serve a 12-month working test period. A law enforcement title is one that encompasses use of full police powers.

1. *[Law]* ***In local service, law*** enforcement officers who are required by N.J.S.A. 52:17B-66 et seq. (Police Training Act) to complete a police training course shall not begin their working test period until notification is received by the appointing authority from the Police Training Commission of the successful completion of the police training course.

[2.] Law enforcement officers who have successfully completed the police training course prior to appointment shall begin their working test period on the date of regular appointment.

*[3.]****2.*** Appeals from failure to successfully complete the police training course shall be in accordance with procedures established by the Police Training Commission. See N.J.A.C. 13:1-11.

(e) An approved leave of absence shall extend the completion of the working test period for a period of time equal to that leave.

4A:4-5.3 Progress reports

(a) The appointing authority shall prepare a progress report on the employee at the end of two months and a final report at the conclusion of the working test period. If the Commissioner has extended the working test period in State service pursuant to N.J.A.C. 4A:4-5.2(b)2, the appointing authority shall also prepare a progress report at the end of five months and a final report at the conclusion of the extended working test period.

(b) For entry level law enforcement, correction officer and firefighter titles, the appointing authority shall prepare a progress report on the employee at the end of six months and a final report at the conclusion of the working test period.

(c) The appointing authority shall furnish the employee with a copy of all reports and ***in State service furnish*** the Commissioner with a copy of the final report. ***In local service, such reports shall be furnished to the Commissioner upon request.***

4A:4-5.4 Working test period appeals

(a) An employee may be separated for unsatisfactory performance at the end of the working test period. See N.J.A.C. 4A:2-4 for procedures.

(b) An employee may be disciplined during the working test period. See N.J.A.C. 4A:2-2 and 3 for procedures.

4A:4-5.5 Restoration to eligible list or former title

(a) An employee who, either during or at the end of a working test period, resigns in good standing or is separated due to unsatisfactory performance may, upon request, be restored to an eligible list, if the Commissioner determines that the employee is suitable for appointment to another position.

1. The Commissioner may consider:

i. Whether the list can be certified to another appointing authority;

ii. The recommendation of the employee's former appointing authority; and

iii. Any other relevant factors.

2. Any employee who has been removed for disciplinary reasons shall not be restored to an eligible list.

3. Any employee who has filed an appeal pursuant to N.J.A.C. 4A:2-4 shall have his or her request for restoration held in abeyance pending the appeal.

(b) An employee with permanent status in a title with the same or lower class code/level shall continue to accrue seniority in his or her permanent title for the duration of the working test period. See N.J.A.C. 4A:4-1.9 for procedures on restoration to a former title.

SUBCHAPTER 6. EXAMINATION AND SELECTION DISQUALIFICATION AND APPEALS

4A:4-6.1 Examination and selection disqualification

(a) A person may be denied examination eligibility or appointment when he or she:

1. Lacks the job requirements;

2. Is ineligible, by law, for employment in the title;

3. Is physically or psychologically unfit to perform effectively the duties of the title. However, an injury incurred in the armed forces shall not be considered a disqualification unless the Commissioner considers the condition incapacitating;

4. Has failed to pass examination procedures;

5. Has been removed from the public service for disciplinary reasons after an opportunity for a hearing;

6. Has made a false statement of any material fact or attempted any deception or fraud in any part of the selection or appointment process;

7. Has a prior employment history which relates adversely to the title; or

8. Other sufficient reasons.

(b) Except where precluded by law, a person who is disqualified pursuant to (a)5 and 7 above may, for good cause, be admitted to an examination and, with the appointing authority's concurrence, certified for appointment.

(c) Any action specified in this section shall be effective upon receipt of written notice of disqualification.

4A:4-6.2 Actions against disqualified persons

(a) A disqualification under N.J.A.C. 4A:4-6.1 may result in:

1. Rejection of examination application;

2. Refusal to test an individual;

3. Refusal to place a candidate's name on an eligible list;

4. Refusal to certify an eligible's name;

5. Removal of an eligible's name from the eligible list;

6. Removal from employment; or

7. Other appropriate action.

(b) Major disciplinary procedures shall be applicable to removal of an employee who is permanent or serving in a working test period.

4A:4-6.3 Examination and selection appeals

(a) Appeals may be made on:

1. Examination items and scoring (see N.J.A.C. 4A:4-6.4);

2. Disqualification for medical or psychological reasons (see N.J.A.C. 4A:4-6.5); and

3. *[Other examination]* ***Examination*** related matters ***other than (a)1 and (a)2 above*** (see N.J.A.C. 4A:4-6.6) including:

i. *[Other disqualification]* ***Disqualifications*** under N.J.A.C. 4A:4-6.1;

ii. List extension or revival; and

iii. Denial of veterans preference.

(b) The appellant shall have the burden of proof, except for medical or psychological disqualification appeals, where the appointing authority shall have the burden of proof.

(c) Unless ordered by the Commissioner, the filing of an appeal shall not affect the promulgation of a list, a certification or an appointment. See N.J.A.C. 4A:4-1.4 for conditional appointments.

(d) A person who has filed an appeal concerning an examination disqualification may, where appropriate, be admitted to the examination. However, the person's examination results will not be processed while the review is pending.

(e) All appeals shall be in writing and include the examination title and symbol number where appropriate, the action being appealed, the specific objections and requested relief.

(f) A party to an appeal must serve copies of all materials on every other party.

4A:4-6.4 Review of ***examination items and*** scoring *[key and examination papers]*

(a) Candidates for multiple choice examinations shall be permitted to review the scoring key for a period of five business days beginning on the second business day after the examination has been held.

*[1. Candidates for tests other than multiple choice shall use the procedures in (b) below.

2. Candidates shall not be permitted to copy any of the questions and answers, but shall be allowed to make such limited notes as the Department of Personnel permits.

3. In order to maintain the security of the examination process, the Commissioner may, on a particular examination, modify or eliminate the review of examination questions and answers.]*

*[(b)]****1.*** Within the review period set forth in (a) above, candidates may file an appeal against the scoring key and/or *[test content]* ***examination items***.

*[1.]****2.*** The appeal shall be in writing, specify the question(s) being challenged and must be received by the Department of Personnel by the end of the review period.

*[2.]****3.*** All questions under appeal shall be reviewed by the Department of Personnel and, when necessary, appropriate action taken to modify the examination scoring.

*[3.]****4.*** No appeal relating to the scoring key ***or a multiple choice examination*** shall be permitted after the review period.

*[(c) Within 20 business days after the Department provides notification of examination results, candidates may review their examination papers.

1. Candidates shall be permitted only one review within this time and shall not be permitted to copy any questions or answers.

2. Candidates may file an appeal regarding the examination results pursuant to N.J.A.C. 4A:4-6.6.]*

(b) Candidates for tests other than multiple choice may review their examination papers and the scoring key and may file an appeal in writing of examination items and scoring 20 days after the Department of Personnel provides notification of examination results. Candidates for multiple choice examinations may review their examination papers and the scoring key during this 20 day period, but may file appeals during this period only with respect to the scoring of their test papers. See (a) above for multiple choice scoring key and/or examination item appeals.

(c) Candidates shall not be permitted to copy any of the questions and answers, but shall be allowed to make such limited notes as the Department of Personnel permits.

(d) In order to maintain the security of the examination process, the Commissioner may, on a particular examination, modify or eliminate the review of examination questions and answers.

(e) The appropriate section of the Department to which the appeal is assigned shall review the appeal and render a written decision and include notification of a right of appeal to the next level.

(f) A party may appeal the first level decision to the next level, as indicated in the decision, within 20 days of its receipt.

1. The appeal shall include all information which was presented at the first level.

2. The appeal shall be reviewed and a written decision rendered which shall advise of a right to appeal to the Merit System Board.

(g) A party may appeal the second level decision to the Board within 20 days of its receipt.

1. The appeal shall contain all information which was presented to the other levels, plus a copy of the decisions below and shall be forwarded to the Merit System Board, CN 312, Trenton, New Jersey 08625.

2. The Board shall decide any appeal on the written record or such other proceeding as the Board deems appropriate.

(h) The Board may bypass any other level of appeal for its direct review.*

4A:4-6.5 Medical and/or psychological unfitness appeals

(a) An appointing authority may request that an eligible's name be removed from an eligible list due to medical or psychological unfitness to effectively perform the duties of the title.

1. The appointing authority shall furnish a copy of the certification and the report and recommendation or its appropriate excerpts of a New Jersey licensed physician, psychologist or psychiatrist to the Department of Personnel. A removal request may be denied where such professional report and recommendation is not provided.

2. The candidate shall also receive copies of all materials furnished to the Department of Personnel, unless the examining physician, psychologist or psychiatrist states, in writing, that such disclosure would be injurious to the candidate's health.

(b) Upon receipt of satisfactory documentation, the Department of Personnel shall notify the eligible that:

1. *[A request has been made by the appointing authority to remove his or her name from the list]* ***He or she has been disqualified for appointment***;

2. He or she may file an appeal with the Merit System Board within 20 days of such notification;

3. If no appeal is received within the specified time, his or her name will be removed from the eligible list; and

4. If the eligible does file an appeal, it is advisable to submit a report from a physician, psychologist or psychiatrist of his or her own choosing.

(c) Upon receipt of a notice of a candidate's appeal, the appointing authority shall submit to the Department of Personnel, within 20 days, all background information, including any investigations and all complete medical, psychological and/or psychiatric reports which were the basis for the removal request. The appointing authority shall also furnish the appellant with all of the information supplied to the Department of Personnel, upon receipt of a written request from the appellant's attorney or doctor.

1. All professional reports submitted shall include the following:

i. The professional's signature and the date;

ii. The length of the examination or interview;

iii. A specific diagnosis or statement of behavioral pattern relating to appellant's ability to effectively perform the specific duties of the title, or the specific reasons for a recommendation; and

iv. All tests that have been administered (for example, EKG, EEK, X-ray, *[M.M.R.I.]* ***M.M.P.I.***, Rorschach and T.A.T.) and all raw data, protocols, computer printouts and profiles from these tests.

2. Any appointing authority failing to submit the required materials within the specified time may have its request for removal denied, and the eligible's name may be retained on the eligible list.

3. The Department of Personnel may extend the time period for filing the required reports for good cause.

(d) The Department of Personnel shall present all psychological appeal documents to the New Jersey Personnel Medical Review Panel (Review Panel), which is composed of professionals in the medical or psychological field. All medical appeal documents shall be presented to the New Jersey Personnel Medical *[Examination]* ***Examiners*** Panel (*[Examination]* ***Examiners*** Panel), which is composed of medical professionals. Either panel may request additional psychological or medical reports, examinations or other materials.

1. Both the appellant and the appointing authority may present information, in person, to either the Review Panel or *[Examination]* ***Examiners*** Panel, whichever is appropriate.

2. *[If both parties agree]* ***Unless a party objects***, the appeal shall be reviewed upon the written record.

(e) The Review Panel or *[Examination]* ***Examiners*** Panel, whichever is appropriate, shall prepare a written report, including recommendations, for the Merit System Board.

1. The appellant and appointing authority shall be provided with copies of the report.

2. Both parties may file written exceptions with the Merit System Board within 10 days of receipt of the report.

(f) The Merit System Board shall review the written report and exceptions, if any, and render a written final decision.

4:4A-6.6 Disqualification appeals

(a) Appeals other than scoring and item appeals (N.J.A.C. 4A:4-6.4) and medical and/or psychological unfitness appeals (N.J.A.C. 4A:4-6.5), shall follow the following procedures:

1. An appeal must be filed within 20 days of notice of the action, decision or situation being appealed.

2. The appeal shall be filed with Department of Personnel as indicated on the notice advising of disqualification.

3. The appropriate section of the Department to which the appeal is assigned shall review the appeal and render a written decision and include notification of a right of appeal to the next level.

(b) A party may appeal the first level decision to the next level, as indicated in the decision, within 20 days of its receipt.

1. The appeal shall include all information which was presented at the first level.

2. The appeal shall be reviewed and a written decision rendered which shall advise of a right to appeal to the Merit System Board.

(c) A party may appeal the second level decision to the Board within 20 days of its receipt.

1. The appeal shall contain all information which was presented to the other levels, plus a copy of the decisions below and shall be forwarded to the Merit System Board, CN 312, Trenton, New Jersey 08625.

2. The Board shall decide any appeal on the written record or such other proceeding as the Board deems appropriate.

(d) The Board may bypass any other level of appeal for its direct review.

SUBCHAPTER 7. OTHER APPOINTMENTS OR EMPLOYEE MOVEMENTS

4A:4-7.1 Transfers

(a) A permanent transfer is the movement of a permanent employee between organizational units within the same governmental jurisdiction.

1. In State service, an organizational unit shall mean an appointing authority.

2. In local service, an organizational unit shall mean a department or separate agency within the same county or municipality. A school district shall be considered a separate jurisdiction.

(b) If the transferred employee is concurrently appointed to a title other than that held on a permanent basis at the time of transfer to accurately reflect new duties, the permanent transfer shall be made in combination with appropriate promotional, lateral title change or voluntary demotion procedures. See N.J.A.C. 4A:4-2.4 et seq., 4A:4-7.6 and 4A:4-7.8, respectively.

1. The employee shall retain permanent status in the previously held permanent title with the recipient organizational unit until examination and working test period procedures are concluded.

2. If the employee does not successfully complete the examination or working test period procedures, the recipient organizational unit shall return the employee to his or her permanent title within this organizational unit pursuant to N.J.A.C. 4A:4-1.9 unless the employee has been disqualified for further employment.

(c) A permanent transfer shall require the consent of both organizational units, the affected employee, and the approval of the Department of Personnel.

1. Consent may be withdrawn by any party prior to the effective date of the transfer.

2. The consent of the employee shall not be required when there is a transfer or combining of functions or operations across organizational unit lines.

(d) A temporary transfer may be voluntary or involuntary and is the movement of a permanent employee between organizational units within the same governmental jurisdiction for a maximum of six months to effect economies, make available a needed service for short periods or for any other documented purpose which is in the best interest of the public service. All temporary transfers must be approved by the Commissioner of the Department of Personnel.

(e) Any affected employee must be given at least 30 days' written notice of an involuntary transfer.

1. The notice shall contain the following:

i. The organizational unit to which the transfer is being made;

ii. The effective date of the transfer; and

iii. The reason for the transfer.

2. Less than 30 days' notice may be given where the employee gives his or her consent for a shorter notice period or the Commissioner of the Department of Personnel finds that an emergent condition requires a more immediate transfer.

4A:4-7.2 Reassignments

A reassignment is the in-title movement of an employee to a new job function, shift, location or supervisor within the organizational unit. Reassignments shall be made at the discretion of the head of the organizational unit. See N.J.A.C. 4A:4-7.7 for appeals.

4A:4-7.3 Relocation assistance: State service

(a) Subject to available appropriations, the Commissioner may allow relocation assistance for permanent employees who are transferred or reassigned on a permanent basis to a new work location due to either a closing or phasedown in anticipation of closing of a State operation.

1. In order to be eligible to participate in the program, an employee's new job site must be at least 25 miles from the prior job site.

2. Relocation assistance will be paid and verified by the receiving appointing authority.

(b) Such assistance may consist of all or part of the following:

1. A commutation allowance applied to the round trip mileage between an employee's domicile and new job site, reduced by the normal commutation mileage between the domicile and the previous job site.

i. The allowance shall be equal to the standard State Mileage Allowance for operating a personal motor vehicle, and shall be limited to a period of six months from the effective date of the transfer.

ii. An employee who is offered fully paid car, van pooling or mass transit options shall not be eligible for a commutation allowance.

2. A one-time moving expense allowance which is to be set by the Commissioner not to exceed $1,000 for the shipment of household items from the employee's prior domicile to a domicile established as a result of the new work assignment.

i. The employee must demonstrate that the change in domicile was for the sole purpose of establishing a domicile closer to the job site.

ii. The move must be made within one year of the effective date of the transfer.

3. The relocation allowance which is to be set by the Commissioner not to exceed $1,000 for costs involved in terminating a lease, in rental situations, or costs involved in the sale and purchase of a home, including but not limited to broker's fees and closing costs.

i. The employee must demonstrate that the change in domicile was for the sole purpose of establishing a domicile closer to the new job site.

ii. The move must be made within one year of the effective date of the transfer.

(c) Relocation assistance shall be limited at the employee's option to commutation allowance under (b)1 above or the moving expense allowance and the relocation allowance under (b)2 and 3 above.

4A:4-7.4 Retention of rights

(a) An employee who is temporarily transferred shall retain promotional rights in the promotional unit scope from which he or she has transferred.

(b) An employee who is either transferred or reassigned shall retain accumulated seniority or service for purposes of determining promotional, layoff or demotional rights and sick and vacation leave entitlements. In State service, an employee's rate of compensation, anniversary date and administrative leave entitlements shall be retained.

(c) An employee who is permanently transferred due to a combining of functions or operations of two or more organizational units shall retain promotional rights in the prior promotional unit scope only for promotional examinations he or she has filed for or taken.

(d) An employee who is reassigned from one promotional unit scope to another shall retain no promotional rights in the former unit.

4A:4-7.5 Transfer during a working test period

(a) An employee who is serving a working test period may only be transferred due to a transfer or combining of functions or operations.

(b) An employee who is permanently transferred due to a combining of functions or operations during the working test period shall be permitted to complete the working test period in the new organizational unit.

4A:4-7.6 Lateral title change

(a) A lateral title change is the movement of a permanent employee from his or her permanent ***competitive*** title to an equivalent ***competitive*** title within the same organizational unit. Such procedures are also applicable to certain transfers under N.J.A.C. 4A:4-7.1.

1. In State service, a lateral title change may only be made if the titles are assigned the same class code.

2. Movement between variants of a title shall be considered a lateral title change.

(b) If the nature of the work, education and experience requirements of both titles are substantially similar, the employee shall retain his or her permanent status.

1. The employee shall retain accumulated seniority or service for purposes of determining promotional, layoff or demotional rights and sick and vacation entitlements.

2. In State service, the employee's rate of compensation on direct movement as adjusted or workweek, work year and the employee relations grouping, anniversary date and administrative leave entitlement shall be retained.

(c) If the nature of the work, education and experience qualifications of both titles are dissimilar, then the employee shall be appointed pending examination and satisfactory completion of the working test period. An employee who fails the examination or is released at the end of the working test period shall be restored to his or her permanent title, unless disqualified for further employment.

1. Examination procedures may be waived by the Commissioner of the Department of Personnel if the employee has previously held the title on a permanent basis during current continuous service.

2. The employee shall retain accumulated service for purposes of determining sick and vacation leave entitlements.

3. In State service, the employee's rate of compensation on direct movement as adjusted for workweek, work year and employee relations grouping, anniversary date and administrative leave entitlement shall be retained.

4. A lateral title change pending examination shall not be permitted at the entry level of a title series, or when either a special reemployment or complete promotional list exists or when the Department of Personnel has received a request to conduct a promotional examination.

(d) A lateral title change shall require the consent of the employee, the head of the organizational unit and the approval of the Department of Pesonnel except when the title change results from changes in the Department of Personnel Classification Plan.

4A:4-7.7 Appeals

Transfers, reassignments or lateral title changes shall not be utilized as part of a disciplinary action, except when disciplinary procedures have been utilized. When an employee challenges the good faith of a transfer, reassignment or lateral title change, the burden of proof shall be on the employee.

4A:4-7.8 Voluntary demotion

(a) A voluntary demotion is the voluntary movement of a permanent employee from his or her permanent title to a lower title in local service or, in State service, to another title with a lower class code, within the same organizational unit.

(b) Permanent status and seniority shall be retained when the demotion is to any title previously held on a permanent basis during current continuous service or to a lower related title.

(c) If the criteria set forth in (b) above are not met, the employee shall be appointed pending examination and satisfactory completion of the working test period. An employee who fails the examination or is released at the end of the working test period shall be restored to his or her permanent title, unless disqualified for further employment.

1. An employee who seeks to return to his or her prior permanent title at the end of the working test period in the lower title may request placement on a regular reemployment list.

(d) The employee shall retain accumulated service for the purpose of determining sick and vacation leave entitlements, and in State service, administrative leave entitlement.

(e) With the Commissioner's approval, this section may also apply to employees with permanent status in titles in the non-competitive division who take a voluntary demotion to a title in the competitive division of the career service.

4A:4-7.9 Resignation/new appointment

(a) A permanent employee who is appointed from an open competitive list to a title in a different organizational unit within the same governmental jurisdiction shall be considered to have resigned from the previous permanent title.

1. Accumulated service for purposes of determining sick and vacation leave, and in State service, administrative leave, entitlements shall be retained.

2. *[In State service, appointing authorities shall make the appointment at the minimum or authorized hiring rate, unless a higher rate is approved by the Commissioner.]* ***See N.J.A.C. 4A:3-4.4(b) for salary placement in State service.***

(b) The employee may request placement on the regular reemployment list for the previous title.

4A:4-7.10 Regular reemployment

(a) A permanent employee who has resigned in good standing, retired or voluntarily demoted, may, within three years of such action, request consideration for reemployment by indicating availability to his or her appointing authority. Upon recommendation of the appointing authority that such reemployment is in the best interest of the service, the employee shall have his or her name placed on a regular reemployment list for up to three years from the date of resignation, retirement or voluntary demotion except if the list is extended under N.J.A.C. 4A:4-3.3(a)1.

(b) A permanent employee who has been placed on disability retirement may be reinstated following a determination from the Division of Pensions that the retiree is no longer disabled.

(c) Seniority commences as of the date of regular reemployment.

HEALTH

(a)

LOCAL HEALTH DEVELOPMENT SERVICES

Licensure of Persons for Public Health Positions

Adopted Repeal: N.J.A.C. 8:7-1.2

Adopted New Rule: N.J.A.C. 8:7-1.2

Proposed: February 16, 1988 at 20 N.J.R. 364(a).
Adopted: April 25, 1988 by Molly J. Coye, M.D., MPH, Commissioner, Department of Health.
Filed: May 3, 1988 as R.1988 d.236, **without change.**
Authority: N.J.S.A. 26:1A-39.
Effective Date: June 6, 1988.
Expiration Date: September 16, 1990.

Summary of Public Comments and Agency Responses.
No comments received.

Full text of the repealed rule appears at N.J.A.C. 8:7-1.2

Full text of the adopted new rule follows.

8:7-1.2 New Jersey Public Health Licensing and Examination Board

(a) There shall be established within the New Jersey Department of Health, a board of examiners to be known as the Public Health Licensing and Examination Board.

(b) On behalf of the New Jersey Public Health Council and the New Jersey Commissioner of Health, the Board shall conduct examinations for the licensing of:

1. Health Officer; and
2. Sanitary Inspector, First Grade

(c) The Public Health Council shall prescribe the qualifications necessary for the licensing of Health Officers and Sanitary Inspector, First Grade and shall prescribe the qualifications necessary for the renewal of any license permitted to remain in effect under N.J.S.A. 26:1A-41.

(d) The Board shall be composed of 11 members appointed by the Commissioner of Health as follows:

1. One of the members of the Board shall represent the Commissioner of Health. The Commissioner's representative shall be the Deputy Commissioner or Assistant Commissioner responsible for Local Health Development Services or shall be selected from professional staff of that unit. The individual shall serve as Chairperson of the Board.

2. Three members of the Board shall be licensed Health Officers. Individuals will be recommended to the Commissioner of Health by the Executive Committee of the New Jersey Health Officers Association.

3. Three members of the Board shall be licensed as Sanitary Inspector, First Grade. Individuals will be recommended to the Commissioner of Health by the Executive Committee of the New Jersey Environmental Health Association.

4. One member of the Board shall be a representative of the Commissioner of the New Jersey Department of Environmental Protection.

5. One member of the Board shall be a representative of the New Jersey Department of Personnel.

6. One member of the Board shall be a health professions educator.

7. One member of the Board shall be a consumer representative.

(e) With the exception of the Chairperson, who shall serve in this capacity until replaced by the Commissioner of Health, a Board member is:

1. Appointed for a term of two years; and
2. Permitted to serve for no more than three consecutive terms.

(f) As vacancies occur, the Commissioner of Health shall appoint a person representing the constituency similar to that of the person being replaced. The replacement appointment shall be for completion of the unexpired term.

(g) For the purpose of conducting business, six members of the Board shall be required for a quorum and no actions shall be taken by the Board in the absence of a quorum.

(h) In the absence of the Chairperson at a business meeting, the members of the Board shall elect a Chairperson pro tem to direct the business of that meeting.

(i) Any action of the Board shall require a majority vote of members present and no proxy votes shall be permitted. In order to provide a timely response to issues before the Board, under special circumstance, Board members may be polled by the Chairperson via telephone.

(j) Members of the Board shall serve without compensation, but shall be reimbursed for necessary expenses incurred in the performance of their duties.

(k) The Board shall keep minutes of all meetings and shall transmit the record of all transactions and recommendations to the Public Health Council and the Commissioner of Health.

(l) All business transactions of the Board shall be done with the signature of the Chairperson.

INSURANCE

DIVISION OF THE REAL ESTATE COMMISSION

(a)

Advertising Rules

Adopted Amendment: N.J.A.C. 11:5-1.15

Proposed: March 7, 1988 at 20 N.J.R. 497(a).

Adopted: April 12, 1988 by the New Jersey Real Estate Commission, Daryl G. Bell, Executive Director.

Filed: May 3, 1988 as R.1988 d.237, **with technical changes** not requiring additional public notice and comments (see N.J.A.C. 1:30-4.3).

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

Effective Date: June 6, 1988.

Expiration Date: November 7, 1988.

Summary of Public Comments and Agency Responses:

The New Jersey Real Estate Commission (Commission) received two comments from interested persons on this proposed amendment.

The first comment acknowledged that the amendment comported with the terms of a Settlement Agreement entered into between Coldwell Banker, which had submitted petitions for rule changes and other relief, and the Commission.

The second comment contained a suggestion that the Commission make a grammatical change within N.J.A.C. 11:5-1.15(j)2ii.

Upon review, the Commission agreed to add a period after the words "than two properties" and before the phrase beginning with "a line is defined". A new sentence now begins with "A line is defined".

Full text of the adoption follows (additions to proposal shown in boldface with asterisks ***thus***; deletions from proposal shown in brackets with asterisks *[thus]*).

11:5-1.15 Advertising rules

(a)-(i) (No change.)

(j) Any use of an insignia, emblem, logo, trade name or other form of identification in any advertising or public utterance, either by a single licensee or any group of licensees, which suggests or otherwise implies common ownership or common management among such licensees, shall be prohibited except in the case of branch offices controlled by a single broker or licensee and duly licensed as branch offices pursuant to the provisions of N.J.S.A. 45:15-1 et seq. Nothing herein provided is intended to preclude or inhibit the use, advertising or display of any insignia, emblem, logo or trade name of any bona fide trade association by any licensee provided that such licensee is a member of such trade association.

1. Any franchised licensee using in any advertising the trade name of the franchisor shall include in such advertising in a manner reasonably calculated to attract the attention of the public the franchised licensee's operating name under which the individual, firm or corporation is licensed to do business.

2. Any licensee including the franchisor using the trade name of a franchisor in any advertising shall also include in a manner reasonably calculated to attract the attention of the public the following legend or a substantially similar legend: "each office is independently owned and operated", except in the following categories of advertising:

i. "For sale" signs located on the premises of specific properties for sale;

ii. Small "spot" classified advertising by a licensee in newspapers, magazines or other publications advertising specific properties. A small "spot" classified advertisement is defined as an advertisement which is no more than one column wide and 20 lines long and which describes no more than two properties*[; a]* **. A*** line is defined as a standard newspaper classified advertising line of the newspaper, magazine or other publication in which the advertisement is published;

iii. Business cards; and

iv. Advertising placed or distributed by offices which are wholly owned by the franchisor, which contains the office address and contains language which identifies the office as being wholly owned by the franchisor.

3. (No change in text.)

(k)-(m) (No change.)

(b)

Education Requirements for Salespersons and Brokers in Making Application for Licensure Examination

Adopted Amendment: N.J.A.C. 11:5-1.27

Proposed: June 15, 1987 at 19 N.J.R. 1051(a).

Adopted: April 19, 1988 by the New Jersey Real Estate Commission, Daryl G. Bell, Executive Director.

Filed: May 3, 1988 as R.1988 d.254, **with substantive and technical changes** not requiring additional public notice and comments (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 45:15-6 and 45:15-10.1.

Effective Date: June 6, 1988.

Operative Date: December 1, 1989 (See note below).

Expiration Date: November 7, 1988.

Summary of Public Comments and Agency Responses:

The New Jersey Real Estate Commission (Commission) received three comments from interested persons on this proposed amendment. All three comments in general supported the adoption of the amendment; however, the commenters made certain suggestions to improve specific portions.

COMMENT: The first comment recommended that N.J.A.C. 11:5-1.27(g)1iv and xx include specific references to "State claims regarding "tidelands" and "timesharing", respectively. This commenter also pointed out a spelling error in the proposal as published which has now been corrected. Finally, it was suggested that the reference in subparagraph (g)1xvi "total six hours" be relocated from the end to the beginning of that subparagraph, so as to avoid any confusion.

RESPONSE: The Commission considered these recommendations as valid and, accordingly, amended the rule text to include the suggested revisions.

COMMENT: The second commenter urged that the total length of the brokers pre-licensure course be lengthened from 90 to at least 120 hours, with the 120 hours broken into three 40 hour blocks of instruction with separate testing requirements. This commenter also urged that the number of hours alloted to some of the various topics of instruction included within N.J.A.C. 11:5-1.27(g)1 be revised upward so as to afford instructors and students additional time within which to cover the material in those subparagraphs. Finally, this commenter urged that a directive be added to the proposed amendment compelling all courses to allocate a specific period of time for instruction on the procedures applicable to sitting for the broker license examination and applying for the issuance of a license.

RESPONSE: The Commission recognizes the validity of the basic premise which underlies the initial portion of this comment, that is, that it would be preferrable to have additional time in the brokers pre-licensure course to cover the material in the revised syllabus. However, by statute the Commission is compelled to limit the brokers pre-licensure course to 90 hours. Until the applicable statutory provision is amended, it is not possible for the Commission to, by rule, require that broker pre-licensure courses extend beyond 90 hours.

With regard to the portion of the comment referring to a specific time within which to conduct instructions on examinations and licensing procedures, the Commission notes that there is a reference to this requirement in N.J.A.C. 11:5-1.27(g)3. The total block of time allocated for all of the material in that paragraph is four hours. After considering the basis for this suggestion, the Commission concluded that it was not necessary to mandate a more specific breakdown of the time to be spent on all of the items included in paragraph 3.

COMMENT: The third comment received on this proposed amendment urged that the number of hours allocated to several of the topics within the broker syllabus be revised either upward or downward, so as to allot more or less time to various topics. The commenter also suggested the addition of language to N.J.A.C. 11:5-1.27(g)1xx in order to assure that coverage was provided to the various aspects of condominium or cooperative transactions. The commenter also suggested that a reference to the "truth in renting law" be added to subparagraph (g)1xxi. Finally, it was suggested that more specific language be added to paragraph (g)4 to replace the general language concerning other topics not covered in a general textbook, and that the decision as to what other topics would be included not be left to the discretion of a course instructor.

RESPONSE: The Commission noted the validity of most of the textual revisions suggested by the commenter and incorporated those suggestions into the amendment as adopted. The only textual revision not included was the suggestion that more specific language be added in place of the reference to other topics. The Commission felt it was necessary to keep such general language in the rule so as to provide a means to cover new topics which may arise in the future. The Commission added language to make clear that it is the Commission, and not individual instructors, which will determine what other topics will be discussed.

With regard to the suggested changes concerning the number of hours allocated to different topics, the Commission determined that it would not attempt to revise the number of hours allocated to the various subjects reflected in the initial proposal. N.J.A.C. 11:5-1.27(i) states that, "All course hours are suggested and may be modified at the discretion of the director of the approved school subject to written notice to and written approval by the Real Estate Commission". Given the flexibility afforded by this subsection, the Commission determined to enact the proposed amendment with the time allocations reflected in the proposal as initially published. If in practice the time allocations prove inappropriate, school directors who, through experience, have become aware of such problems can so advise the Commission. The Commission can then approve some revisions to the allocated hours by the schools themselves or, should the difficulties prove to be so substantial or arise so frequently as to warrant further Commission action, the Commission can, at that point, consider again amending the rule.

NOTE ON EFFECTIVE DATE: The New Jersey Real Estate Commission has directed that this rule amendment requiring the teaching of a revised syllabus in brokers pre-licensure courses is to become operative on December 1, 1989. All such courses then in progress are to be concluded by teaching that portion of the syllabus prescribed prior to this amendment which has not been covered in the course as of that date. All broker pre-licensure courses commenced after December 1, 1989 shall be conducted in accordance with the new syllabus reflected in N.J.A.C. 11:5-1.27(g) as revised by this amendment.

OAL NOTE: To avoid confusion in the regulated community, this adopted amendment to N.J.A.C. 11:5-1.27(g) will not be published in the New Jersey Administrative Code until December 1989, when it will become operative. In its stead, a note explaining when the new subsection will be operative, and that a copy of it can be obtained from either the Real Estate Commission or the Office of Administrative Law, will follow N.J.A.C. 11:5-1.27 in the Code.

Full text of the adoption follows (additions indicated in boldface with asterisks ***thus***; deletions indicated in brackets with asterisks *[thus]*).

11:5-1.27 Educational requirements for salespersons and brokers in making application for licensure examination

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

(g) The 90 hour broker's pre-licensure course prescribed by N.J.S.A. 45:15-10.1(b) shall be conducted in accordance with the following syllabus and directives:

1. Substantive instruction shall be provided on the following topics for approximately the number of hours indicated:

i. Review license laws and regulations including provisions of the Land Sales Full Disclosure Act and N.J.A.C. 11:5-1.25 (six hours);

ii. Listing contracts—sales and rentals (three hours);

iii. Sale contracts (three hours);

iv. Deeds and real property rights and interests including nature of ownership, legal description, chain of title, restrictions, consideration, various types, acknowledgments and recording, land and land elements, water rights (including riparian rights), ***State claims regarding tidelands*** estates and other interests, methods of ownership, dower and courtesy, wills and descent, adverse possession and fixtures (three hours);

v. Advanced financing techniques including qualification formulae, various types, typical prerequisites (insurance, flood insurance, if applicable, certificate of occupancy, etc.) and income tax ramifications (six hours);

vi. Liens, foreclosures and redemptions (one hour);

vii. Easements, restrictions, etc. (one hour);

viii. Condemnation (one hour);

ix. Zoning, including non-conforming uses, variances, subdivisions, planning, zoning issues raised by condominium construction or conversion and other types of real estate development (five hours);

x. Surveys (non-government type) and legal descriptions (one hour);

xi. Property taxes, assessment, re-valuations, assessment appeals and special appeals (three hours);

xii. Real estate valuation including techniques and distinctions between comparative market analyses and formal appraisals (three hours);

xiii. Settlement/closing procedures, RESPA forms (six hours);

xiv. Mathematics relative to real estate (six hours);

xv. Laws: Federal Fair Housing and New Jersey "Mount Laurel" requirements, the New Jersey Law Against Discrimination, RESPA, Truth in Lending, rent control and New Jersey Land Use Law (total three hours).

xvi. Business and management practices including:

(1) Company structure including single ownership, partnership, corporate, requirements to establish, employees vs. independent contractors;

(2) Office management including bookkeeping and accounting relative to real estate, escrow responsibilities, company dollars, ledgers, records and computers;

(3) Personnel management including recruiting, hiring, training, supervising, compensation and termination;

(4) Advertising and promotions;

(5) Community involvement by the company, broker and salespersons; and

(6) Insurance including errors*[,]* ***and*** omissions, etc. *[(total six hours).]*

xvii. Principles of agency including ethics and legal liability, disclosure requirements and case studies (six hours);

xviii. Commercial and industrial real estate including small scale, large scale, leasing, financing, site analysis, advertising, remuneration, bulk sales, U.C.C., considerations in franchise transactions, E.C.R.A., BOCA Code, construction financing and other commercial construction concerns (three hours);

xix. Property management including responsibilities and information regarding repairs and maintenance, public relations, collection of rents, government regulations, business trends, personnel, recordkeeping, advertising, etc. (three hours);

xx. Residential real estate development ***including*** requirements of New Jersey's Planned Real Estate Development Act ***including timesharing***, the Home Owner's Warranty program and other concerns regarding single-family and condo/*[townhouse]* ***co-op*** development*, **conversion, marketing and financing*** (two hours);

xxi. Leases and landlord/tenant laws ***including Truth in Renting Law*** (four hours);

xxii. Real estate investments, syndications, REIT's, limited partnerships and S.E.C. licensing requirements (two hours); and

xxiii. Income tax considerations and ramifications of various real estate transactions (three hours).

2. Instruction shall also be provided on the following topics for the hours indicated in such a manner as to familiarize students with their basic elements, to impart to students an awareness of their scope and effect, to inform students of the sources which can be contacted in order to obtain additional general information and/or specific data concerning their applicability or impact upon particular locations, and to educate the students on their obligations and responsibilities as licensees to ascertain and disclose such information:

i. Radon contamination, which instruction shall also include testing techniques, remediation techniques and the New Jersey DEP confidentiality statute (one hour);

ii. Ground water contamination, which instruction shall also include testing and remediation techniques (one hour);

iii. Problems posed by a property's proximity to solid waste disposal and/or toxic waste sites (one hour);

iv. Ground water percolation and private sewage disposal systems, which instruction shall also include testing methods (one hour);

v. Problems posed by lands officially designed as Wetlands, Pinelands, or within any other special classifications (one hour); and

vi. New Jersey's Coastal Areas Facilities Review Act (one hour).

3. Instructors conducting brokers pre-licensure courses shall provide general information to their students concerning the procedures through which students can arrange to sit for the State license examination and through which licenses are issued by the Commission, and shall give at least two spot quizzes and a comprehensive final exam on the material covered in the course (four hours).

4. In addition to classroom instruction and assigned reading from a general textbook, students shall also be assigned additional outside reading on various topics which shall include, but not to be limited to, informational publications of the New Jersey Department of Environmental Protection on the various environmental topics covered, those sections of the New Jersey Law Against Discrimination which directly relate to the activities of real estate professionals, and other topics *[which are not adequately covered in the general textbook utilized in a given course]* ***as directed by the New Jersey Real Estate Commission***.

LAW AND PUBLIC SAFETY

NEW JERSEY RACING COMMISSION

(a)

Thoroughbred Racing
Respiratory Bleeders
Adopted Repeal: N.J.A.C. 13:70-6.55

Proposed: March 7, 1988 at 20 N.J.R. 506(a).
Adopted: April 20, 1988 by New Jersey Racing Commission, Bruce H. Garland, Director.
Filed: May 9, 1988 as R.1988 d.245, **without change.**
Authority: N.J.S.A. 5:5-30.
Effective Date: June 6, 1988.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adopted repeal may be found in the New Jersey Administrative Code at N.J.A.C. 13:70-6.55.

(b)

Thoroughbred Racing
Administering Medication to Respiratory Bleeders
Adopted Amendment: N.J.A.C. 13:70-14A.9

Proposed: March 7, 1988 at 20 N.J.R. 506(b).
Adopted: April 20, 1988 by New Jersey Racing Commission, Bruce H. Garland, Director.
Filed: May 9, 1988 as R.1988 d.244, **without change.**
Authority: N.J.S.A. 5:5-30.
Effective Date: June 6, 1988.
Expiration Date: February 25, 1990.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows.

13:70-14A.9 Administering medication to respiratory bleeders

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

(d) A horse placed on the veterinarian's list for bleeding must remain on the list for 14 calendar days; a second time bleeder must remain on the respiratory list for 30 days; and a third time bleeder must remain on the respiratory list for three months. A bleeder in the above categories is automatically released from the veterinarian's list after these dates; however, a horse which evidences respiratory bleeding a fourth time is barred from further racing in New Jersey.

(c)

Harness Racing
Respiratory Bleeders
Adopted Repeal: N.J.A.C. 13:71-11.9

Proposed: March 7, 1988 at 20 N.J.R. 507(a).
Adopted: April 21, 1988 by New Jersey Racing Commission, Bruce H. Garland, Director.
Filed: May 9, 1988 as R.1988 d.246, **without change.**
Authority: N.J.S.A. 5:5-30.
Effective Date: June 6, 1988.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adopted repeal may be found in the New Jersey Administrative Code at N.J.A.C. 13:71-11.9.

TRANSPORATION

(d)

NEW JERSEY TRANSIT CORPORATION

Bus Allocation Guidelines and Procedures
Readoption: N.J.A.C. 16:75

Proposed: March 21, 1988 at 20 N.J.R. 635(b).
Adopted: May 13, 1988 by Jerome C. Premo, Executive Director, New Jersey Transit Corporation.
Filed: May 10, 1988 as R.1988 d.249, **without change.**
Authority: N.J.S.A. 27:25-5(e), (h) and (k).
Effective Date: May 13, 1988.
Expiration Date: May 13, 1993.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the readoption may be found in the New Jersey Administrative Code at N.J.A.C. 16:75.

TREASURY-GENERAL

DIVISION OF PENSIONS

(a)

General Administration

Readoption: N.J.A.C. 17:1

Proposed: March 21, 1988 at 20 N.J.R. 636(a).
Adopted: April 28, 1988 by Douglas R. Forrester, Director, Division of Pensions.
Filed: May 6, 1988 as R.1988 d.243, **without change.**

Authority: N.J.S.A. 52:18A-96 et seq.

Effective Date: May 6, 1988.
Expiration Date: May 6, 1993.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the readoption may be found in the New Jersey Administrative Code at N.J.A.C. 17:1.

(b)

Claims and Credit
Disability Applications: Medical Examination
Adopted New Rule: N.J.A.C. 17:1-4.37

Proposed: March 7, 1988, at 20 N.J.R. 510(a).
Adopted: April 12, 1988 by Douglas R. Forrester, Director, Division of Pensions.
Filed: April 27, 1988 as R.1988 d.231, **without change.**

Authority: N.J.S.A. 52:18A-96 et seq.

Effective Date: June 6, 1988.
Expiration Date: May 6, 1993.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows.

17:1-4.37 Ordinary disability applications; medical examinations

(a) Applicants for ordinary disability retirement shall submit with their applications all the medical information they can supply relative to their disability, including reports of their personal physicians and consulting physicians, hospital records, diagnostic test results, and any other medical information which would assist the Medical Review board and the board or commission of the retirement system in determining eligibility of the applicants for disability retirement. The Disability Review Section shall forward the applications and the accompanying medical information to the Medical Review Board.

(b) If the medical information supplied by the applicant is sufficient for the Medical Review Board to make a medical recommendation, it shall return the case to the Disability Review Section with its recommendation. If the Medical Review Board deems that the medical information supplied by the applicant is not sufficient for it to make a medical recommendation, it shall advise the Disability Review Section to arrange to have the applicant examined by a physician or physicians under contract with the Division of Pensions to perform disability examinations, or to obtain additional information needed to make its medical recommendation.

(c) The board or commission which governs the pension fund or retirement system may request that an applicant be examined or reexamined by a physician or physicians under contract with the Division of Pensions, or that additional information be obtained, if it deems that the medical information available is insufficient to make a decision on the eligibility of the applicant for ordinary disability retirement.

(c)

Judicial Retirement System
Readoption: N.J.A.C. 17:10

Proposed: March 7, 1988, at 20 N.J.R. 510(b).
Adopted: April 28, 1988, by the Judicial Retirement System, Douglas R. Forrester, Secretary.
Filed: May 6, 1988 as R.1988 d.242, **without change.**

Authority: N.J.S.A. 43:6A-29(d).

Effective Date: May 6, 1988.
Expiration Date: May 6, 1993.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the readoption may be found in the New Jersey Administrative Code at N.J.A.C. 17:10.

DIVISION OF INVESTMENT

(d)

Common Pension Fund A
Limitations
Adopted Amendment: N.J.A.C. 17:16-32.12

Proposed: April 4, 1988 at 20 N.J.R. 741(b).
Adopted: May 5, 1988 by Roland M. Machold, Director, Division of Investment and State Investment Council.
Filed: May 9, 1988 as R.1988 d.248, **without change.**

Authority: N.J.S.A. 52:18A-91.

Effective Date: June 6, 1988.
Expiration Date: December 2, 1990.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows.

17:16-32.12 Limitations

(a) The Common Pension Fund A shall be permitted to invest in the Cash Management Fund and in such securities subject to the limitations and conditions contained in the rules of the State Investment Council, N.J.A.C. 17:16 particularly N.J.A.C. 17:16-17 except for the condition as to classification of funds contained in N.J.A.C. 17:16-5.

(b) (No change.)

(e)

Common Pension Fund B
Limitations
Adopted Amendment: N.J.A.C. 17:16-36.12

Proposed: April 4, 1988 at 20 N.J.R. 742(a).
Adopted: May 5, 1988 by Roland M. Machold, Director, Division of Investment and State Investment Council.
Filed: May 9, 1988 as R.1988 d.247, **without change.**

Authority: N.J.S.A. 52:18A-91.

Effective Date: June 6, 1988.
Expiration Date: December 2, 1990.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows.

17:16-36.12 Limitations

(a) The Common Pension Fund B shall be permitted to invest in the Cash Management Fund and in such securities subject to the limitations and conditions contained in the rules of the State Investment Council, N.J.A.C. 17:16 except for the condition as to classification of funds contained in N.J.A.C. 17:16-5.

(b) (No change.)

OTHER AGENCIES

CASINO CONTROL COMMISSION

(a)

Applications
Readoption with Amendments: N.J.A.C. 19:41

Proposed: April 4, 1988 at 20 N.J.R. 763(a).
Adopted: May 11, 1988 by W. David Waters, Vice Chairman, Casino Control Commission.
Filed: May 12, 1988 as R.1988 d.255, **without change.**
Authority: N.J.S.A. 5:12-63(c), 69, 70(a), (b), (c) and (e), 92, 93, 130.1, 139, 141 and 142.
Effective Date: May 12, 1988 for Readoption. June 6, 1988 for Amendments.
Operative Date: For amendments to N.J.A.C. 19:41-9.11 and 9.12, July 1, 1988.
Expiration Date: May 12, 1993.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the readoption may be found in the New Jersey Administrative Code at N.J.A.C. 19:41.

Full text of the adoption follows.

19:41-9.11 Casino key employee license fees

(a) Under Section 89 of the Act, no person may be employed as a casino key employee unless such person is the holder of a valid casino key employee license.

(b) The fee for the issuance of a casino key employee license shall be as follows:

1. A minimum application charge of $500.00, which shall be credited to the total fee; and

2. Payment for the efforts of professional agents and employees of the Commission and Division at the rate of $40.00 per hour spent on matters directly related to the applicant; and

3. Payment for all unusual or out of pocket expenses incurred by the Commission and the Division on matters directly related to the applicant; provided, however, that the amount of the issuance fee shall not exceed $3,000.

(c) The fee for the renewal of a casino key employee license shall be $500.00.

19:41-9.12 Gaming school resident director license fees

(a) (No change.)

(b) The issuance fee or renewal fee for a three-year resident director license shall be as follows:

1. A minimum application charge of $500.00, which shall be credited to the total fee; and

2.-3. (No change.)

19:41-9.16 Employee license position additions

(a) Under Sections 89(c), 90(a) and 90(d) of the Act, casino key employee licenses and casino employee licenses shall have endorsed upon them the particular position which the licensee is qualified to hold. In addition to any other fee or charge imposed by the Act and this subchapter, a request to endorse any additional authorized position upon a license shall require payment of $60.00 for each such additional position. Where an additional position would change the license from a gaming school employee to casino employee gaming related, the applicant shall pay an added $55.00. Where an additional position would change the license from casino employee non-gaming related to casino employee gaming related, the applicant shall pay an added $80.00; provided, however, that if such request is made in the period before licensure, the applicant shall only be required to pay the additional $80.00 fee for the first position which is added to the license.

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

19:41-9.17 Miscellaneous administrative fees

(a) (No change.)

(b) Requests to change a name or address on a license shall require a fee of $4.00.

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

(b)

Hearings
Readoption: N.J.A.C. 19:42

Proposed: April 4, 1988 at 20 N.J.R. 764(a).
Adopted: May 11, 1988 by W. David Waters, Vice Chairman, Casino Control Commission.
Filed: May 12, 1988 as R.1988 d.256, **without change.**
Authority: N.J.S.A. 5:12-63(a), (b), (c) and (g), 64, 66, 69(a), 70(d), 71, 72, 80, 86, 89, 90, 91, 107 through 109, 129; 52:14B-4(a), (f) and 8.
Effective Date: May 12, 1988.
Expiration Date: May 12, 1993.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the readoption may be found in the New Jersey Administrative Code at N.J.A.C. 19:42.

(c)

Gaming Equipment
Readoption: N.J.A.C. 19:46

Proposed: March 21, 1988 at 20 N.J.R. 638(a).
Adopted: April 27, 1988 by Walter N. Read, Chairman, Casino Control Commission.
Filed: April 28, 1988 as R.1988 d.232, **without change.**
Authority: N.J.S.A. 5:12-63(c), 5:12-69, 5:12-70(f) and (i) and 5:12-100.
Effective Date: April 28, 1988.
Expiration Date: April 28, 1993.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the readoption may be found in the New Jersey Administrative Code at N.J.A.C. 19:46.

(d)

Rules of the Games
Readoption: N.J.A.C. 19:47

Proposed: March 21, 1988 at 20 N.J.R. 639(a).
Adopted: April 27, 1988 by Walter N. Read, Chairman, Casino Control Commission.
Filed: April 28, 1988 as R.1988 d.233, **without change.**
Authority: N.J.S.A. 5:12-63(c), 5:12-69, 5:12-70(f) and 5:12-100.
Effective Date: April 28, 1988.
Expiration Date: April 28, 1993.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the readoption may be found in the New Jersey Administrative Code at N.J.A.C. 19:47.

(a)

Casino Hotel Alcoholic Beverage Control

Readoption with Amendments: N.J.A.C. 19:50

Proposed: April 4, 1988 at 20 N.J.R. 770(a).
Adopted: May 11, 1988 by W. David Waters, Vice Chairman, Casino Control Commission.
Filed: May 12, 1988 as R.1988 d.257, **with technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).
Authority: N.J.S.A. 5:12-69(a), -70(q), and -103.
Effective Date: May 12, 1988 (for readoption). June 16, 1988 (for amendments).
Expiration Date: May 12, 1993.

Summary of Public Comment and Agency Responses:

The Division of Gaming Enforcement recommended that the Commission readopt the amended casino hotel alcoholic beverage rules as proposed.

Full text of the adopted amendments to the readoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*).

SUBCHAPTER 1. GENERAL PROVISIONS

19:50-1.1 Definitions

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

(c) For the purposes of these regulations, the following definitions shall apply:

...

"Authorized location" means any room or area which is in, on, or about the premises, and which has been approved by the Commission for the service, sale, consumption, or storage of alcoholic beverages pursuant to N.J.S.A. 5:12-103 and this chapter.

"Casino hotel alcoholic beverage (CHAB) licensee" means a person who is licensed to serve, sell or store alcoholic beverages pursuant to N.J.S.A. 5:12-103 and this chapter.

...

"Illicit beverage" means any alcoholic beverage manufactured, distributed, bought, sold, bottled, rectified, blended, treated, fortified, mixed, processed, warehoused, possessed or transported in violation of the law, or on which any Federal tax or tax imposed by the laws of this State has not been paid; and any alcoholic beverage possessed, kept, stored, owned or imported with intent to manufacture, sell, distribute, bottle, rectify, blend, treat, fortify, mix, process, warehouse or transport in violation of the law.

...

"Meals" means any food other than sandwiches, salads, crackers, chips, nuts, or similar snacks.

"Original container" means any container in which an alcoholic beverage has been delivered to a CHAB licensee.

"Premises" means the premises licensed as an approved hotel pursuant to N.J.S.A. 5:12-27.

...

"Sale" means every delivery of an alcoholic beverage otherwise than by purely gratuitous title, including deliveries from without this State and deliveries by any person without this State intended for shipment by carrier or otherwise into this State and brought within this State, or the solicitation or acceptance of an order for an alcoholic beverage, and including exchange, barter, traffic in, keeping and exposing for sale, serving with meals, delivering for value, peddling, possessing with intent to sell, and the gratuitous delivery or gift of any alcoholic beverage by any CHAB licensee.

"Unlawful alcoholic beverage activity" means the manufacture, sale, distribution, bottling, rectifying, blending, treating, fortifying, mixing, processing, warehousing or transportation of any alcoholic beverage in violation of the law, or the importing, owning, possessing, keeping or storing in this State of alcoholic beverages with intent to manufacture, sell, distribute, bottle, rectify, blend, treat, fortify, mix, process, warehouse or transport alcoholic beverages in violation of the law, or the owning, possessing, keeping or storing in this State of any implement or paraphernalia for the manufacture, sale, distribution, bottling, rectifying, blending, treating, fortifying, mixing, processing, warehousing or transportation of alcoholic beverages with intent to use the same in the manufacture, sale, distribution, bottling, rectifying, blending, treating, fortifying, mixing, processing, warehousing or transportation of alcoholic beverages in violation of the law, or to aid or abet another in the manufacture, sale, distribution, bottling, rectifying, blending, treating, fortifying, mixing, processing, warehousing or transportation of alcoholic beverages in violation of the law, or the aiding or abetting of another in any of the foregoing activities.

"Unlawful property" means all illicit beverages and all implements, vehicles, vessels, airplanes, and paraphernalia for the manufacture, sale, distribution, bottling, rectifying, blending, treating, fortifying, mixing, processing, warehousing or transportation of illicit beverages used in the manufacture, sale, distribution, bottling, rectifying, blending, treating, fortifying, mixing, processing, warehousing or transportation of illicit beverages or owned, possessed, kept or stored with intent to use the same in the manufacture, sale, distribution, bottling, rectifying, blending, treating, fortifying, mixing, processing, warehousing or transportation of illicit beverages, whether such use be by the person owning, possessing, keeping or storing the same, or by another with the consent of such person; and all alcoholic beverages, fixtures and personal property located in or upon any premises, building, yard or enclosure connected with a building, in which an illicit beverage is found, possessed, stored or kept.

"Wholesaler" means any person who sells an alcoholic beverage for the purpose of resale to a licensed wholesaler, a licensed retailer, or a CHAB licensee.

(d) (No change.)

19:50-1.2 Saving regulations

(a) Title 33 of the Revised Statutes and the rules, regulations and bulletins promulgated thereunder by the Director of the Division of Alcoholic Beverage Control shall, except as otherwise provided in section 103 of the Act or the rules and regulations of the Commission, apply to any casino hotel and to any CHAB licensee licensed under the Act and these regulations.

(b) Notwithstanding subsection (a), all persons required to obtain casino hotel alcoholic beverage (CHAB) licenses shall make all informational and other filings required by Title 33 of the Revised Statutes and Title 13 of the New Jersey Administrative Code to the Commission, in accordance with prescribed procedures, and to the Division of Alcoholic Beverage Control.

(c) (No change.)

19:50-1.3 License and authorization as conditions precedent to operation

(a) No casino licensee, nor any of its lessees, agents or employees, nor any other person or entity, shall expose for sale, solicit or promote the sale of, possess with intent to sell, sell, give, dispense, or otherwise transfer or dispose of alcoholic beverages in, on or about the premises unless said person possesses a CHAB license. Any CHAB license issued or renewed after July 1, 1986, shall be granted for a term which coincides with the term of the casino license or casino service industry license held by the licensee.

(b) No CHAB licensee, nor any of its agents, servants or employees, shall expose for sale, solicit, or promote the sale of, possess with intent to sell, sell, give, dispense or otherwise transfer or dispose of alcoholic beverages except in an authorized location.

(c) In issuing a CHAB license or any authorization thereunder, or any permit pursuant to N.J.S.A. 5:12-103 and 33:1-1, et seq., the Commission may impose any conditions, limitations and restrictions as it deems necessary and reasonable.

19:50-1.4 Classification of authorized locations

(a) Authorized locations shall be classified as follows:

1. All locations authorized pursuant to N.J.S.A. 5:12-103(g)(1) shall be classified as Type I.
2. All locations authorized pursuant to N.J.S.A. 5:12-103(g)(2) shall be classified as Type II.
3. All locations authorized pursuant to N.J.S.A. 5:12-103(g)(3) shall be classified as Type III.

4. All locations authorized pursuant to N.J.S.A. 5:12-103(g)(4) shall be classified as Type IV.

5. All locations authorized pursuant to N.J.S.A. 5:12-103(g)(5) shall be classified as Type V.

6. All locations authorized pursuant to N.J.S.A. 5:12-103(g)(6) shall be classified as Type VI.

7. All locations authorized pursuant to N.J.S.A. 5:12-103(g)(7) shall be classified as Type VII.

(b) The activities permitted in each type of authorized location, subject to applicable laws, rules, and regulations, are as follows:

1. In a Type I location, a CHAB licensee shall be entitled to sell any alcoholic beverage by the glass or other open receptacle, but not in an original container, for on-premises consumption within a casino.

2. In a Type II location, a CHAB licensee shall be entitled to sell any alcoholic beverage by the glass or other open receptacle for on-premises consumption within an enclosed room, not in a casino, used primarily for the purpose of providing entertainment, including but not limited to live cabaret, show, revue, performing arts or sports entertainment available to the public, with or without the availability of food.

3. In a Type III location, a CHAB licensee shall be entitled to sell any alcoholic beverage by the glass or other open receptacle for on-premises consumption within an enclosed room or a series of enclosed connected rooms, with or without an adjacent outdoor dining area, not in a casino, used primarily for the purpose of providing meals to the public.

4. In a Type IV location, a CHAB licensee shall be entitled to sell any alcoholic beverage by the glass or other open receptacle for on-premises consumption within a pub, tavern or similar room, not in a casino, or from one fixed location outside a building or structure containing a casino but on a casino hotel premises; provided, however, that the primary purpose of a Type IV location shall not be for the consumption of meals by customers or for banquets.

5. In a Type V location, a CHAB licensee shall be entitled to sell any alcoholic beverage in original containers for consumption outside the Type V authorized location from one enclosed room, not in a casino.

6. In a Type VI location, a CHAB licensee shall be entitled to sell any alcoholic beverage from a fixed location within an enclosed room, not in a casino, for delivery to a guest room or to any other room in the premises authorized by the Commission, other than a Type I, II, III, IV or V location.

7. In a Type VII location, a CHAB licensee shall be entitled to possess or to store in a fixed location on the premises, not in a casino, alcoholic beverages intended but not actually exposed for sale.

(c) Notwithstanding any other provision of this chapter to the contrary, a CHAB licensee shall be entitled to possess or store within any of its authorized locations alcoholic beverages intended but not actually exposed for sale in that authorized location, without obtaining a separate or additional Type VII authorization.

(d) The Commission may, consistent with the requirements of (b) above, issue two or more alternative types of authorizations for the same authorized location, or different types of authorizations for different areas of the same authorized location. This subsection shall not apply to Type I or Type V authorized locations.

19:50-1.5 Standards for qualification

(a) No CHAB license shall issue unless each person required to qualify shall have first qualified in accordance with the CHAB license standards set forth in section 103 of the Act, the regulations of the Commission, Title 33 of the Revised Statutes, and the rules, regulations and bulletins of the Division of Alcoholic Beverage Control, except where inconsistent with the Act or the regulations of the Commission.

(b) No Type I authorization shall issue to any applicant who does not hold a casino license issued pursuant to the Act.

(c) No Type II, III, IV, V, VI, or VII authorization shall issue to any applicant who would not qualify under the standards for licensure of a casino employee except that such applicant need not be an employee of the casino licensee.

(d) Every employee and agent of a CHAB licensee*[,]* whose employment or agency includes duties in a Type I location shall be licensed or registered in accordance with the Act. Every employee and agent of a CHAB licensee whose employment or agency includes duties*[,]* in, on, or about the premises*,* but not in a Type I authorized location, shall be registered as a casino hotel employee in accordance with section 91 of the Act.

(e) No Type VII authorization shall issue to any applicant who does not hold a Type I, II, III, IV, V or VI authorization.

(f) No CHAB licensee shall allow, permit or suffer any wholesaler to sell, give, dispense, or otherwise transfer or dispose of alcoholic beverages to it unless the wholesaler has:

1. Obtained a valid license from the New Jersey Division of Alcoholic Beverage Control; and

2. Complied with all applicable requirements of N.J.S.A. 5:12-92, N.J.S.A. 5:12-104, N.J.A.C. 19:41-11 and N.J.A.C. 19:43.

SUBCHAPTER 2. CONDUCT OF CHAB LICENSEES

19:50-2.1 Operating conditions of CHAB licensees

(a) No CHAB licensee shall:

1. (No change.)

2. Allow, permit, or suffer the consumption of any alcoholic beverage by such person in or upon its authorized location.

(b) No employee or agent of a CHAB licensee shall work in any capacity in, on or about the premises while actually or apparently intoxicated, and no CHAB licensee shall allow, permit or suffer any actually or apparently intoxicated person employed by that CHAB licensee to work in any capacity in, on, or about the premises.

(c) No CHAB licensee shall sell, serve or deliver or allow, permit or suffer the sale, service, delivery, or consumption of any alcoholic beverage in or upon its authorized location, or allow, permit or suffer its authorized location to be open, during any period for which any duly constituted state, county or municipal law enforcement authority, because of a public emergency or investigation of crime, has ordered its authorized location to be closed, unless excepted by such authority to permit continuing conduct of business other than the sale of alcoholic beverages.

(d) No CHAB licensee shall directly or indirectly solicit from house to house, personally or by telephone, the purchase of any alcoholic beverage, or allow, permit or suffer such solicitation.

(e) No CHAB licensee shall allow, permit or suffer in or upon its authorized location or compensate any male or female prostitute, pickpocket, swindler, confidence man, or any notorious criminal, gangster, racketeer, or other person of ill repute; nor shall any CHAB licensee allow, permit or suffer in or upon its authorized location any unlawful possession of or any unlawful activity pertaining to narcotic or other drugs or other controlled dangerous substances as defined by the New Jersey Controlled Dangerous Substances Act (N.J.S.A. 24:2-1, et seq.) or any prescription legend drug, in any form, which is not a narcotic, depressant or stimulant drug or controlled dangerous substance as heretofore defined; nor shall any CHAB licensee allow, permit or suffer its authorized location to be accessible to any place where any illegal activity or enterprise is carried on, or its authorized location or business to be used in furtherance or aid of, or accessible to any illegal activity or enterprise.

(f) No CHAB licensee shall engage in or allow, permit or suffer in or upon its authorized location any lewdness, immoral activity, or foul, filthy, indecent or obscene language or conduct, or any brawl, act of violence, disturbance or unnecessary noise; nor shall any CHAB licensee allow, permit or suffer its authorized location to be conducted in such manner as to become a nuisance.

(g) No CHAB licensee shall manufacture, transport, possess, sell, barter, give away, offer for sale or furnish any alcoholic beverage adulterated with any foreign or harmful substance.

(h) No CHAB licensee shall receive, possess or sell any alcoholic beverage transported into this State in violation of N.J.A.C. 13:2-21.

(i) No CHAB licensee shall conduct business unless:

1. The current CHAB license certificate is at all times conspicuously displayed on the premises;

2. A photostatic or other true copy of the application for the current CHAB license is kept on the premises; and

3. A list, in form prescribed by the commission containing the names and addresses of, and required information with respect to, all persons currently employed on its authorized location is kept on the authorized location. Such application copy and such list shall be available for inspection by the Commission and the Division.

(j) No CHAB licensee shall allow, permit or suffer in or upon its authorized location or have in its possession or distribute or cause to be distributed any obscene, indecent, filthy, lewd, lascivious or disgusting recording, printing, writing, picture or other matter.

(k) No CHAB licensee shall serve or allow, permit or suffer the service of any alcoholic beverage other than ordered or substitute a non-alcoholic beverage when an alcoholic beverage has been ordered, or serve or allow, permit or suffer the service of any alcoholic beverage, except beer or wine, containing less than a measured amount of alcohol, which measured amount the CHAB licensee shall either print on the menu, or post in a prominent place, or both.

(l) No CHAB licensee shall allow, permit or suffer any tap in or upon its authorized location to be connected with any barrel or other container of a malt alcoholic beverage unless such tap bears a marker which truly indicates the name or brand of the manufacturer of such malt alcoholic beverage, and unless such name or brand is in full view of the purchaser when the tap is located at a bar at which consumers are served.

(m) No CHAB licensee shall possess, have custody of, or allow, permit or suffer in or upon its authorized location any alcoholic beverage manufactured, distributed, bought, sold, bottled, rectified, blended, treated, fortified, mixed, processed, warehoused, possessed or transported in violation of the law, or any alcoholic beverage in any keg, barrel, can, bottle, flask, similar container or other receptacle which:

1. Does not bear any label describing its contents; or

2. Bears a label which does not truly describe its contents; or

3. Does not bear any indicia of tax payments as required by the laws of the United States.

(n) No CHAB licensee shall place any order within this State for the purchase of any alcoholic beverage or allow, permit or suffer any of its employees or agents to place any order for the purchase of any alcoholic beverage with any individual soliciting in violation of N.J.A.C. 13:2-16.

(o) No CHAB licensee shall employ or have connected with it in any business capacity whatsoever any person interested, directly or indirectly, in the manufacturing or wholesaling of any alcoholic beverage within or without this State, nor shall any CHAB licensee be employed by or connected in any business capacity whatsoever with any person interested, directly or indirectly, in the manufacturing or wholesaling of any alcoholic beverage within or without this State; provided, however, that notwithstanding the provisions of this section, the provisions of Title 33 of the Revised Statutes and Title 13 of the New Jersey Administrative Code, the Commission may, in its discretion, issue to an applicant a CHAB license when the following conditions have been met:

1. The applicant has furnished to the Commission a list of all brands of alcoholic beverages manufactured or sold at wholesale by the applicant or by any person employed by or connected in any business capacity whatsoever with the applicant, and the applicant has agreed in writing to provide the Commission with prior written notice of any change in said list occurring at any time hereafter;

2. The applicant has agreed in writing not to sell or permit the sale at its authorized location of any alcoholic beverage manufactured or sold at wholesale by the applicant or by any person employed by or connected in any business capacity whatsoever with the applicant;

3. Any CHAB license issued pursuant to this section shall contain a legend making reference to the provisions of this section and stating that the issuance of such license is conditioned upon the continuing fulfillment of all of the conditions set forth herein.

(p) No CHAB licensee, during the suspension of its license or any authorization issued thereunder, shall:

1. Allow, permit or suffer the sale, service, delivery or consumption of any alcoholic beverage or any other alcoholic beverage activity in or upon its authorized location, except the storage of alcoholic beverages on hand or, if permitted by the Commission, the return of alcoholic beverages to wholesalers; or

2. Receive delivery of any alcoholic beverage; or

3. Advertise that its authorized location is closed or the business stopped because of repairs or alterations or for any reason other than the suspension.

(q) The holder of any CHAB license authorizing the sale of alcoholic beverages for consumption in an authorized location may transfer wine from an original tax paid barrel, cask, keg or other container in the authorized location to another barrel, cask, keg, decanter, bottle or similar container for purposes of interim storage and serve such wine therefrom; provided, however, that each barrel, cask, keg, decanter, bottle or other interim storage container shall have affixed thereto at all times a gummed label clearly identifying the contents thereof; and provided further, however, that nothing herein shall be deemed to prohibit the transfer of wine to unlabeled carafes, glasses or similar open receptacles for immediate service to patrons for consumption in the authorized location. The prescribed label shall be substantially in the form set forth below, and each statement made shall be true:

This tax paid ______________________ contains
(type of container)
______________ wine, received from ______________
(type and brand) (name and address
______________ on ______________
of seller) (date of receipt)
____
(signature)

(r) No CHAB licensee shall, directly or indirectly, allow, permit or suffer any practice or promotion that:

1. Offers to the public at large unlimited availability of any alcoholic beverage for a set price; or

2. Offers to a patron or consumer a free drink, gift, prize or anything of value, conditioned upon the purchase of an alcoholic beverage or product, except branded or unique glassware or souvenirs in connection with a single purchase; or

3. Requires or allows a consumer to prepurchase more than one drink or product at a time via tickets, tokens, admission fees, two for one, or the like, as a condition for entry into its premises or its authorized location, or as a requirement for service or entertainment therein.

19:50-2.2 Additional operating conditions of CHAB licensees

(a) No CHAB licensee shall sell, serve, deliver or store alcoholic beverages in, on, or about its authorized location without first submitting and receiving approval of a system of internal controls therefor.

1. Each CHAB licensee shall submit to the Commission a description of its system of internal procedures and administrative and accounting controls. Such submission shall be made at least 120 days before operations are to commence or 90 days before changes in previously submitted control plans are to become effective, unless otherwise directed by the Commission. Each such submission shall contain both narrative and diagrammatic representations of the internal control system to be utilized, including but not limited to:

i. Accounting controls, including the standardization of forms and definition of terms to be utilized in the operations;

ii. Procedures, forms, and, where appropriate, formulas covering the calculation of taxes, revenue, expense and overhead schedules, complimentary services, cash equivalent transactions, salary structure and personnel practices;

iii. Job descriptions and the system of personnel and chain-of-command, establishing a diversity of responsibility among employees engaged in operations and identifying primary and secondary supervisory positions for areas of responsibility, which areas shall not be so extensive as to be impractical for an individual to monitor;

iv. Procedures concerning receipts from patrons;

v. Procedures for the physical security of its authorized location and all alcoholic beverages therein.

2. The Commission shall review each submission and shall determine whether it conforms to the requirements of the Act and to the regulations and whether the system submitted provides adequate

and effective controls for the operation of the CHAB licensee submitting it. If the Commission finds any insufficiencies, it shall specify them in writing to the CHAB licensee, who shall make appropriate alterations. When the Commission determines a submission to be adequate in all respects, it shall notify the CHAB licensee. No CHAB licensee shall commence operations, or alter in fact its internal controls, unless and until such system of controls is approved by the Commission.

(b) No employees or agents of a CHAB licensee, except those which have been approved by the Commission, shall consume alcoholic beverages during their hours of employment or agency by a CHAB licensee, including overtime.

(c) No CHAB licensee shall store or allow, permit or suffer the storage of any alcoholic beverages in, on, or about the premises except at a Type VII authorized location or any other authorized location pursuant to N.J.A.C. 19:50-1.4(c).

(d) No CHAB licensee shall alter any aspect of the physical structure of its authorized location without first submitting a description of such proposed alteration to the Commission and receiving written permission therefor.

(e) Combination sales of any kind, consisting of more than one article, whether it be an alcoholic beverage or something else, at a single aggregate price are prohibited, except that a combination sale consisting of a meal and an alcoholic beverage is permitted, provided that:

1. The alcoholic beverage shall not be advertised as "free", but may be advertised as "included" or "complimentary";

2. The container in which the alcoholic beverage is served shall be limited to a single unit, although the size of the container is not limited.

SUBCHAPTER 3. CONDITIONS OF OPERATION IN AUTHORIZED LOCATIONS

19:50-3.1 Conditions of operation in Type I locations

(a) No food or alcoholic beverage, other than nonalcoholic beverages or garnishments used in the preparation of alcoholic beverages for consumption by the glass, shall be sold, given or be available for consumption, offered, delivered or otherwise brought to a patron within a casino room unless so requested by the patron.

(b) No alcoholic beverage in an original container shall be brought into a Type I location except by the CHAB licensee authorized to sell alcoholic beverages in that Type I location.

(c) No CHAB licensee shall *[service]* *serve* any alcoholic beverage in a Type I location except by the glass or other open receptacle, but not in an original container, for on-premises consumption within the authorized location.

(d) No alcoholic beverage or food shall be displayed in a Type I location except incidental to delivery or consumption by a patron.

(e) Alcoholic beverages shall be served in a Type I location only when the casino room is open for business as provided in section 97(a) of the Act, but not later than 15 minutes prior to the closing of the casino room.

(f) Every CHAB licensee authorized to sell alcoholic beverages in a Type I location shall have on duty at all times when alcoholic beverage service is available at least one person whose duties shall include supervision of all alcoholic beverage service provided pursuant to that Type I authorization.

19:50-3.2 Conditions of operation in Type II locations

(a) A CHAB licensee may sell alcoholic beverages and meals for consumption in a Type II location only as an adjunct to entertainment within the authorized location.

(b) No CHAB licensee shall include any alcoholic beverage charges within the price charged for admission, nor shall any admission charge entitle the patron to any alcoholic beverage in a Type II location.

(c) No CHAB licensee shall serve any alcoholic beverage in a Type II location except by the glass or other open receptacle for on-premises consumption within the authorized location.

19:50-3.3 Conditions of operation in Type III locations

(a) A CHAB licensee may sell alcoholic beverages in a Type III location only as an adjunct to meals for consumption within the authorized location.

(b) A CHAB licensee may sell alcoholic beverages in a Type III location only on the following basis:

1. During the preparation, consumption and to the completion of meals; and

2. In the dining area.

(c) No CHAB licensee shall serve any alcoholic beverage in a Type III location except by the glass or other open receptacle for on-premises consumption within the authorized location.

(d) Every CHAB licensee shall prepare a menu which shall be posted adjacent to the entrance of each of its Type III locations, except when the authorized location is being used for a prearranged banquet or convention.

19:50-3.4 Conditions of operation in Type IV locations

(a) No CHAB licensee shall provide meals for consumption to the public in a Type IV location.

(b) No CHAB licensee shall sell any alcoholic beverage in a Type IV location except by the glass or other than receptacle for on-premises consumption within the authorized location.

19:50-3.5 Conditions of operation in Type V locations

(a) No CHAB licensee shall, in a Type V location, sell any alcoholic beverage for delivery to any other area in, on or about the premises.

(b) No CHAB licensee shall, in a Type V location, sell any alcoholic beverage in other than original containers or for consumption within the Type V authorized location.

(c) Sale of alcoholic beverages may include the retail sale of distillers' and vintners' packaged holiday merchandise prepacked as a unit with suitable glassware as gift items to be sold only as a unit, cigars, cigarettes, packaged crackers, chips, nuts and similar snacks, ice and non-alcoholic beverages as accessory beverages to alcoholic beverages.

(d) No CHAB licensee shall allow, permit or suffer any alcoholic beverage to be consumed in or upon a Type V location, nor shall any CHAB licensee possess or allow, permit or suffer any open containers of alcoholic beverages in or upon its Type V location; provided, however, that opened bottles of alcoholic beverages returned by a customer as allegedly defective may be so possessed pending return to the manufacturer or wholesaler; and further provided that the container is immediately resealed and labeled with the name and address of the customer and the date of return by the customer.

(e) No Type V location shall be used for any purpose other than that for which it is authorized.

19:50-3.6 Conditions of operation in Type VI locations

(a) A Type VI location shall not have direct access to or from a casino.

19:50-3.7 Conditions of operation in Type VII locations

(a) A CHAB licensee may, in a Type VII location, store alcoholic beverages intended for sale at other authorized locations in, on, or about the premises.

(b) A CHAB licensee shall transfer or deliver such alcoholic beverages from a Type VII location only to authorized locations in, on or about the premises.

(c) A CHAB licensee shall not allow, permit or suffer access to or from a Type VII authorized location, except to the extent that such access is necessary in the normal course of business to employees or agents of the CHAB licensee or to licensed employees or agents of wholesalers or distributors licensed pursuant to Title 33 of the Revised Statutes, Title 13 of the New Jersey Administrative Code, the Act and the regulations of the Commission.

(d) All Type VII locations shall be fixed, enclosed areas within the premises, not in a casino, and not otherwise authorized for the sale, service or consumption of alcoholic beverages.

(e) No alcoholic beverage shall be sold, served or consumed in a Type VII location.

(f) A CHAB licensee shall maintain its Type VII locations at an appropriate temperature and in a secure manner.

SUBCHAPTER 4. DISCIPLINARY PROCEEDINGS

19:50-4.1 General provisions

(a) Any violation of Title 33 of the Revised Statutes or Title 13 of the New Jersey Administrative Code by an applicant or CHAB licensee, or its agents or employees shall be grounds for penalty, suspension, revocation, or other disciplinary action by the Commission unless the conduct involved is specifically permitted by the Act or by these regulations.

(b) In disciplinary proceedings it shall be sufficient, in order to establish the guilt of the licensee, to show that the violation was committed by an agent, servant or employee of the CHAB licensee. The fact that the CHAB licensee did not participate in the violation or that its agent, servant or employee acted contrary to instructions given by the CHAB licensee or that the violation did not occur in the CHAB licensee's presence shall constitute no defense to the charges preferred in such disciplinary proceedings.

(a)

Equal Employment Opportunity and Affirmative Action

Readoption: N.J.A.C. 19:53

Proposed: March 21, 1988 at 20 N.J.R. 640(a).

Adopted: April 27, 1988 by Walter N. Read, Chairman, Casino Control Commission.

Filed: April 28, 1988 as R.1988 d.234, **without change.**

Authority: N.J.S.A. 5:12-63(c), 5:12-69, 5:12-134 and 5:12-135.

Effective Date: April 28, 1988.

Expiration Date: April 28, 1993.

Summary of Public Comments and Agency Responses:

No comments received.

Full text of the readoption may be found in the New Jersey Administrative Code at N.J.A.C. 19:53.

HUMAN SERVICES

DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

(b)

Transportation Services Manual
Livery Service, Prior Authorization

Adopted Amendments: N.J.A.C. 10:50-1.1, 1.2, 1.3, 1.5, 2.5, 2.6, 3.1 and 3.2

Adopted Repeal: N.J.A.C. 10:50-1.4, 2.3, 2.4 and 2.7

Adopted New Rules: N.J.A.C. 10:50-1.4, 2.7 and 2.8

Proposed: November 16, 1987 at 19 N.J.R. 2103(a).

Adopted: May 13, 1988 by Drew Altman, Commissioner, Department of Human Services.

Filed: May 13, 1988 as R.1988 d.262, **with substantive and technical changes** not requiring additional public notice and comment (N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 30:4D-6b(15), 7a, b, c; 30:4D-12; 42 CFR 440.170(a).

Effective Date: June 6, 1988.

Operative Date: July 1, 1988.

Expiration Date: March 3, 1991.

Summary of Public Comments and Agency Responses:

There were two comments on the proposed rule. One comment was submitted by Molly Joel Coye, M.D., Commissioner, New Jersey Department of Health. The Department of Health requested that livery service be limited to ambulatory patients. The Division has added this requirement to N.J.A.C. 10:50-1.4(a) on adoption. If a Medicaid patient is wheelchair bound, Medicaid patients have been, and will continue to be, transported by invalid coach. Rules already promulgated by the Department of Health indicate that invalid coach is an appropriate mode of transportation for wheelchair patients (N.J.A.C. 8:40-4.1(a)2). The Division believes this change is necessary for the health, safety, and welfare of Medicaid patients being transported for medical treatment.

Comments were also submitted by John L. Tweed, Executive Director, Medical Transportation Association of New Jersey. Mr. Tweed requested an overall fee increase for all three modes of transportation (ambulance, invalid coach, livery service). The Division's response is that there will be no change in reimbursement between proposal and adoption at this time, due to budgetary constraints.

Mr. Tweed requested that the requirement for a prescription signed by a physician for ambulance or invalid coach be deleted. The Division agreed to remove this requirement, and therefore deleted N.J.A.C. 10:50-1.5. Providers must now attach a certification to the claim form (MC-12). The provider will prepare the certification in accordance with the sample submitted with the adoption (see N.J.A.C. 10:50-2.7).

The Division believes these changes do not violate N.J.A.C. 1:30-4.3. Ambulatory Medicaid patients may be transported by either invalid coach or livery service. The Division anticipates the majority of ambulatory patients will be transported via livery service. Wheelchair patients will continue to be transported by invalid coach. The removal of the requirement for a prescription should benefit transportation providers.

Summary of Changes Between Proposal and Adoption:

In addition to those changes that were made in response to public comment, the Division has made the following changes on its own initiative.

The Division has amended several definitions in N.J.A.C. 10:50-1.2. The definition of livery service was amended to refer the reader to N.J.A.C. 10:50-1.4, which is the section listing the requirements for livery service providers. The definition of "passenger" has been amended to indicate that it means a Medicaid-eligible individual being transported (via livery service) for the purpose of obtaining a Medicaid-covered service. The definition of "prescription" was deleted because this is no longer a requirement for transportation.

The definition of "transportation" was revised to delete the phrase "medical care" and add the phrase "a Medicaid covered service". This amended phraseology is consistent with a federal policy interpretation which indicates that states are not obligated to provide transportation to secure medical care not included in the State's Title XIX State Plan. Therefore, New Jersey is defining the provision of providing transportation to and/or from providers of medical services to mean those services covered under the Title XIX State Plan.

In N.J.A.C. 10:50-1.3(a) the word "approved" was changed to "approval".

The requirements for prior authorization were deleted from N.J.A.C. 10:50-1.4. Authorization for transportation now appears in N.J.A.C. 10:50-1.5, which was section 1.6 in the proposal. This section is basically the same in the proposal as on the adoption, except for some amendments to the procedures for obtaining either prior authorization or "retroactive authorization" for invalid coach. Providers may now make verbal requests, in addition to the current policy of written requests, as indicated in N.J.A.C. 10:50-1.5(b) and 10:50-1.5(e). With respect to retroactive requests, which are used when the MDO (Medicaid District Office) is closed or there is an urgency for the service, they must be made within 10 days, and can be either written or verbal. This time period is really an extension of the five day time period which appears in N.J.A.C. 10:50-1.4(b)3. Therefore, the Division believes the five day extension for retroactive authorization, as well as the provision for a verbal request, are both less burdensome to the providers and to the recipients, who may need to be transported in the evenings or on weekends.

In addition, authorization can be granted for a period not to exceed six months. The proposal had indicated prior authorization could only be granted for up to three months (reference is made to N.J.A.C. 10:50-1.5(d)). The Division believes this additional three months authorization will benefit both the recipient and providers, especially for those Medicaid patients whose condition requires regular, periodic transportation to a provider of medical care services.

The Division made other changes upon adoption. N.J.A.C. 10:50-1.6, entitled Basis of payment, was N.J.A.C. 10:50-1.5 in the proposal. In addition, N.J.A.C. 10:50-1.6(e) was recodified as (f) and the subsequent subsections were renumbered accordingly.

Full text of the adoption follows (additions are indicated in boldface with asterisks ***thus***; deletions from the proposal are indicated in brackets with asterisks *[thus]*).

10:50-1.1 Scope

This manual describes the policies and procedures of the New Jersey Medicaid Program for reimbursement of providers of transportation services. Questions about this manual may be directed to any Medicaid District Office ***MDO*** listed in this Subchapter or to the Division of Medical Assistance and Health Services, CN 712, Trenton, New Jersey 08625.

10:50-1.2 Definitions

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

...

"Provider" means ambulance service, invalid coach service, or livery service.

...

"Ambulance service" means the provision of emergency or non-emergency medical transportation in a vehicle that is licensed, equipped, and staffed in accord with New Jersey Department of Health regulations, as specified in N.J.A.C. 8:40.

...

"Invalid coach service" means the provision of non-emergency medical transportation in a vehicle that is licensed, equipped, and staffed in accord with New Jersey Department of Health *[regulations]* ***rules***, as specified in N.J.A.C. 8:40.

["Livery service" means non-emergency, curb-to-curb transportation provided to a Medicaid-eligible individual who requires a ride to and/or from a medical care provider.]

"Livery service" means the provison of non-emergency, curb-to-curb transportation in a vehicle that meets the requirements of the Medicaid Program as specified in N.J.A.C. 10:50-1.4.

"Multiple loading" means that more than one patient/passenger is being transported in the same vehicle at the same time.

"Passenger" means a Medicaid-eligible individual who is transported in a livery service vehicle *[to and/or from a medical care provider]* ***for the purpose of obtaining a Medicaid-covered service***.

"Physician" means a doctor of medicine or osteopathy licensed to practice medicine and surgery by the New Jersey State Board of Medical Examiners, or similarly licensed by comparable agencies of the state in which he or she practices.

["Prescription" means a certification of a patient's medical need for ambulance or invalid coach service.]

"Transportation" means the use of an approved vehicle to move a Medicaid-eligible individual from place to place for the purpose of obtaining *[medical care]* ***a Medicaid-covered service***.

10:50-1.3 General policies

(a) The *[approved]* ***approval*** process for becoming a transportation service provider is as follows:

1. Each transportation provider must be individually approved for each type of service provided. The New Jersey Department of Human Services, Division of Medical Assistance and Health Services, with the Prudential Insurance Company of America acting as *[agent]* ***Fiscal Agent*** for the Division, must approve each provider before reimbursement can be made to that provider for transportation service.

2. Prerequisite for a New Jersey-based ambulance or invalid coach company for Title XIX (Medicaid) approval is possession of a Certificate of Need and license issued by the New Jersey Department of Health.

3. As a condition of participation, the transportation provider agrees to bill the Medicaid program for services provided by the billing entity only. If the provider seeks reimbursement for services performed by any other organization or entity, whether a franchise, independent contractor, etc., full disclosure in writing of the financial and organizational arrangement between said entities must be made to, and approved in advance by, the Division of Medical Assistance and Health Services.

4. "Medicaid Provider Application" (Form FD-20), "Provider Agreement" (Form FD-62) and the "Ownership and Control Interest Disclosure Statement" (HCFA-1513) may be obtained from The Prudential Insurance Company of America, Provider Enrollment Unit, P.O. Box 5007, Millville, New Jersey 08332.

i. An applicant seeking approval to provide livery service must attach to the "Medicaid Provider Application" (Form FD-20) a photocopy of each Vehicle Registration issued by the New Jersey Division of Motor Vehicles. The applicant must also indicate on the photocopy of the Vehicle Registration the respective vehicle fleet number.

ii. A Medicaid-enrolled provider of ambulance and/or invalid coach service seeking approval to provide livery service must complete another "Medicaid Provider Application" (Form FD-20).

5. The completed provider agreement, disclosure statement, and/or provider application shall be submitted to:

The Prudential Insurance Company of America
Provider Enrollment Unit
P.O. Box 5007
Millville, New Jersey 08332

6. Once approved, the applicant will receive a Medicaid provider number and an initial supply of pre-printed claim forms from The Prudential Insurance Company of America.

Redesignate existing (a)-(b) as *[(d)]****(b)***-(c) (No change in text.)

(d) Helicopters or aircraft, under extenuating circumstances, may be used as a carrier to transport the sick, injured or disabled Medicaid-eligible patient.

1. Reimbursement is restricted to the emergency condition where transportation by air is medically considered the only acceptable form of travel and the conditions are such so that its implementation is feasible. The Division of Medical Assistance and Health Services retains the option to utilize this form of transportation in such situations where, at its discretion, it could represent a significant cost *[of]* savings *[factor]* when compared to ambulance or invalid coach service involving trips covering similarly long distances.

Redesignate existing (d)-(f) as (e)-(g) (No change in text.)

10:50-1.4 Livery service

(a) Livery service provided to an individual to and/or from non-medical facilities, such as educational, vocational or nutritional sites, is not Medicaid reimbursable. ***Livery service shall be limited to the transport of ambulatory passengers.*** Only a New Jersey-based company is eligible to participate in the New Jersey Medicaid Program as a provider of livery service.

(b) Vehicle requirements are as follows:

1. The vehicle used to provide livery service must not be more than five model years old at the time the service is provided and must have a seating capacity of not less than five nor more than ten persons, inclusive of the driver.

2. Any passenger car used to provide livery service must be a four-door vehicle.

3. In addition, every vehicle used to provide livery service must meet all of the following requirements:

i. Display a valid inspection decal issued by the New Jersey Division of Motor Vehicles;

ii. Display livery license plates; and

iii. Display external markings to indicate company name and vehicle number.

(c) The Division of Medical Assistance and Health Services will conduct periodic vehicle inspections to ensure compliance with these requirements.

(d) All drivers must be appropriately licensed as follows:

1. In accordance with N.J.S.A. 39:3-10.1, a driver of a motor vehicle with a capacity of more than six passengers used for the transportation of passengers for hire must possess a special driver's license issued by the New Jersey Division of Motor Vehicles.

2. An out-of-state resident who drives a livery service vehicle in the State of New Jersey must conform to the statutes relevant to livery service in his/her state of residence.

SAMPLE

TRANSPORTATION CERTIFICATION

SECTION I

1. Recipient Name ______________________ (Last) (First)
2. HSP (Medicaid) Case No. ______________________
3. Date of Service ____________ ☐ One Way ☐ Return Trip ☐ Round Trip
4. Origin ______________________ (Address)
5. Destination ______________________ (Address)
6. Returned To ______________________ (Address)

7. **MODE OF TRANSPORT**

☐ Emergency Ambulance ☐ Invalid Coach
☐ Transport Ambulance ☐ Livery ☐ Other (Specify) ____________

8. **REASON FOR TRANSPORT**

☐ Examination / Treatment
☐ Hospital Admission
☐ Hospital Discharge
☐ Inter-Hospital Transfer
☐ Other
(Specify) ____________

9. **SERVICES REQUIRED EN ROUTE**

☐ Stretcher
☐ Wheelchair / Stairchair
☐ Restraints
☐ Supervision
☐ Monitoring
☐ Suctioning
☐ Oxygen
☐ Other
(Specify) ____________

SECTION II

Ambulance / Invalid Coach — Complete A / B / C
Livery — Complete A / B

A. *I certify that the transportation service listed above was received, and I request that payment for this service be made on my behalf. I authorize any holder of medical or other information about me to release to the Division of Medical Assistance and Health Services or its authorized agents any information needed for this or any related claim.*

______________________ *Recipient's Signature*

B. *I certify that I provided the transportation service as described above in a vehicle that fully complies with all Title XIX (Medicaid) program requirements.*

____________ *Driver's Signature* ____________ *Printed Name* ____________ *Vehicle Fleet Number*

C. *I certify that the above-named recipient arrived at* ☐ *, departed from* ☐ *, this office/facility on the above-cited date.*

____________ *Office/Facility Representative's Signature* ____________ *Printed Name and Title*

____________ *Name of Office / Facility*

(e) All providers must make available their livery service to Medicaid-eligible individuals from 6 A.M. to 10 P.M., Monday through Saturday.

*[10:50-1.5 Prescription for transportation service

(a) A prescription is a certificate of a patient's medical need for ambulance or invalid coach service.

(b) A prescription may be furnished by any licensed physician/practitioner who has sufficient knowledge of the Medicaid-eligible individual's condition that necessitates transportation by ambulance or invalid coach. The prescription shall contain:

1. The certifying physician/practitioner's name (printed or typed) and Individual Medicaid Practitioner (IMP) Number.

2. The Medicaid-eligible individual's name.

3. The reason(s) the trip is necessary, including the Medicaid-eligible individual's condition that necessitates transportation by ambulance or invalid coach.

4. The signature of the certifying physician/practitioner or his or her authorized designee and the date. The authorized designee may be anyone so appointed by the physician/practitioner to carry out his/her orders and to sign on his or her behalf.]*

10:50-*[1.6]***1.5** Authorization for transportation services

(a) Prior authorization from the Medicaid District Office is required for all transportation services except for ambulance service and livery service.

(b) Procedures for obtaining prior authorization are as follows:

1. Written request: The provider submits a "Transportation Claim" (Form MC-12) *[together with a prescription signed by a licensed physician/practitioner or his/her authorized designee.]* **to the Medicaid District Office.** Upon receipt of this *[information]* **document**, the Medicaid District Office Medical Consultant reviews the information to verify medical necessity*[, checks the mode of transportation, and if the request is authorized,]* **. If the request is approved, the mode of transportation is checked, an authorization number is assigned, and the Medical Consultant** signs the **Form** MC-12 in Item 16. If denied, however, the Medical Consultant indicates in the space provided the reason for the denial. The Medicaid District Office retains the third copy **of the Form MC-12** and forwards the Fiscal Agent and Provider copies to the provider.

2. Verbal request *[for invalid coach service:]* **The provider calls the Medicaid District Office and requests prior authorization. The Medicaid District Office completes a "Transportation Services—Information Sheet" (Form FD-60) and the Medicaid District Office Medical Consultant approves or denies the request. The provider is apprised by telephone of the Medicaid District Office Medical Consultant's decision. If the request is approved, an authorization number is given to the provider and is also entered on the Form FD-60 which is signed by the Medicaid District Office Medical Consultant or the Medicaid District Office Director. If denied, however, the Medical Consultant indicates in the space provided the reason for the denial. The Medicaid District Office retains the third copy of the Form FD-60 and forwards the Fiscal Agent and Provider copies to the provider. After rendering the invalid coach service, the provider forwards a claim, accompanied by the Form FD-60, to The Prudential Insurance Company of America for processing.**

*[i. The provider calls the Medicaid District Office and requests prior authorization.

ii. The Medicaid District Office completes a "Transportation Services—Information Sheet" (Form FD-60). The Medicaid District Office Medical Consultant approves or denies the request.

iii. The provider is apprised by telephone of the Medicaid District Office Medical Consultant's decision. If the request is approved, an authorization number is given to the provider and is also entered on the Form FD-60 which is signed by the Medicaid District Office Medical Consultant or the Medicaid District Office Director and is forwarded to the provider.

iv. The provider performs the invalid coach service and obtains a prescription signed by a licensed physician/practitioner or his/her authorized designee.

v. The provider forwards the "Transportation Claim" (Form MC-12), the prescription, and the "Transportation Services—Information Sheet" (Form FD-60) signed by the Medicaid District Office Medical Consultant or the Medicaid District Office Director to The Prudential Insurance Comapny of America for processing.

3. Prior authorization may be given for more than one invalid coach trip on a single physician's prescription, when, in the opinion of the Medicaid District Office Medical Consultant, the diagnosis is such that multiple trips would be required in a short period of time. A single authorization is limited to a maximum time period of one calendar month, with the exception of invalid coach services to patients requiring dialysis treatments, which may be authorized up to three calendar months. Such authorizations require a prescription covering the period of time that invalid coach services are requested.

4. Prior authorization for air ambulance and helicopter service must be obtained from the Medicaid District Office.

i. If verbal authorization is given by the MDO, the provider may perform the service, but must submit a "Transportation Claim" (Form MC-12) and prescription to the MDO for written authorization as specified in (c)1 above.]*

(c) Prior authorization for air ambulance and helicopter service must be obtained from the Medicaid District Office.

1. If verbal authorization is given by the Medicaid District Office, the provider may perform the service, but must submit a "Transportation Claim" (Form MC-12) and complete medical documentation to the Medicaid District Office for written authorization as specified in (b)1 above.

(d) A request for invalid coach authorization may be approved for an extended period of time when, in the opinion of the Medicaid District Office Medical Consultant, the Medicaid-eligible individual's health condition will not improve to the extent that a lower mode of service would be appropriate during the period under consideration. An extended authorization may range from one month through six months in duration.

1. When a provider of invalid coach service requests authorization for an extended period of time, either in writing or by telephone, the Form MC-12 or Form FD-60 shall be labeled "RECORD SHEET". It is not necessary for the provider to indicate the number of trips or the destination on the "RECORD SHEET", as this information will not be known in advance. Claims for actual trips provided during the extended period of time shall be forwarded by the provider directly to The Prudential Insurance Company of America for processing.

*[5.]***(e)** Retroactive request for authorization: When communication between the provider and the Medicaid District Office can not be established because the Medicaid District Office is closed and the provision of the service can not be delayed, the provider may perform the service. In such instances, the provider must *[submit a written request for retroactive authorization to the Medicaid District Office for evaluation. The Medicaid District Office will inform the provider in writing that the request has been approved or denied.]* **request retroactive authorization from the Medicaid District Office within ten working days from the date of service. The request for retroactive authorization may be written or verbal, following the procedures specified in (b)1 or (b)2 above. The Medicaid District Office will inform the provider in writing or by telephone that the request has been approved or denied, as specified in (b)1 or (b)2 above.**

10:50-1.*[7]***6** Basis of payment

(a) "Transportation reimbursement allowance" is on a fee-for-service basis. The base allowance for ambulance and invalid coach services includes the placement and removal of a patient into and out of the vehicle at the point of origin and the point of destination. Livery service is designed for individuals who require no assistance in entering or exiting the vehicle.

(b) Transportation service provided to a Medicaid-eligible individual is reimbursable by Medicaid under the following conditions only:

1. The medical care provider/facility to which and/or from which the individual is being transported either participates as a provider in the Medicaid program or meets the requirements for participation as a provider in the Medicaid program, and

2. The medical service rendered to the Medicaid-eligible individual by the provider/facility is a covered Medicaid service (as listed in the N.J.A.C. 10:49-1.4) at the time the transportation is provided.

*[(b)]**(c)* "Loaded mile" is mileage accrued when a vehicle is actually carrying a patient/passenger. Mileage is measured as a straight line between two points on a map, that is, from the point at which the patient/passenger enters the vehicle to the point at which he or she exits the vehicle.

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

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

*[(e)]**(f)* Hospital-based transportation service is reimbursable when a Medicaid-eligible individual is transported to the base hospital and admitted as an inpatient or treated as an outpatient. If the Medicaid-eligible individual is admitted, the hospital submits a claim for the service on Form UB-82 as a trailer. If the Medicaid-eligible individual is not admitted, the hospital submits a claim for the service on Form UB-82 as an outpatient service. A revenue code shall be used to identify the transportation service.

1. Hospital-based transportation service provided to a Medicaid-eligible individual who is transported to other than the base hospital is reimbursable on a fee-for-service basis in the same manner as a non-hospital-based transportation provider. In such instances, the hospital shall be enrolled as a transportation provider as defined in N.J.A.C. 10:50-1.2. A "Transportation Claim" (Form MC-12) shall be used when submitting a claim for transportation services, as described in N.J.A.C. 10:50-2.5.

2. Hospital-based transportation service provided to an individual eligible for the Medically Needy Program is reimbursable only when the individual is treated in the outpatient department of a hospital. Exception: Transportation service provided to an individual eligible for the Medically Needy Program as a pregnant woman is reimbursable when the individual receives either inpatient or outpatient care.

*[(f)]**(g)* Transportation service provided to an inpatient of a hospital by an outside provider shall be billed by the hospital as a "rebundled" service. When a transportation provider renders a round trip service to an individual whose status remains "inpatient", the transportation provider bills the hospital for the service. The hospital reimburses the transportation provider and submits a claim to the New Jersey Medicaid Program on Form UB-82 as a trailer. A revenue code shall be used to identify the transportation service as a "rebundled" service.

*[(g)]**(h)* (No change in text.)

*[(h)]**(i)* No additional payment is made for the use of medical supplies and/or equipment with the exception of oxygen. (See N.J.A.C. 10:50-3.2(g).

10:50-2.3 (Reserved)

10:50-2.4 (Reserved)

10:50-2.5 Transportation Claim (Form MC-12)

(a) A "Transportation Claim" (Form MC-12) shall be used when submitting a claim for transportation services. See *[Exhibit]* ***Appendix*** I at the end of this Chapter for a copy of the "Transportation Claim" (Form MC-12) and the instructions for the proper completion of the form.

10:50-2.6 Combination Medicare/Medicaid claims

[(a)] Ambulance services reimbursable under Medicare and provided to a Medicare/Medicaid-eligible individual must be billed on the "Request for Medicare Payment-Ambulance" (Form HCFA-1491C). Claims must be sent directly to the Medicare Carrier, The Prudential Insurance Company of America, Medicare B Division, P.O. Box 3000, Linwood, New Jersey 08221. The provider must indicate the Health Insurance Claim Number in Item 2 and the HSP (Medicaid) Case Number and *[Patient]* Person Number in Item 5 on Form HCFA-1491C.

10:50-2.7 Transportation Certification *[(Form FD-305)]*

(a) A *["Transportation Certification" (Form FD-305)]* ***transportation certification form*** must be used in conjunction with the "Transportation Claim" (Form MC-12) when billing for ***ambulance, invalid coach, and*** livery service *[only. See Exhibit II at the end of this Chapter, Chapter 50, for a copy of the "Transportation Certification" (Form FD-305) and the instructions for the proper completion of the form.]* ***Appendix II at the end of this Chapter (N.J.A.C. 10:50) contains a sample transportation certification form and instructions for the form's proper completion. At a minimum, the elements appearing on the sample transportation certification form shall appear on the certification form furnished and prepared by the transportation provider.***

10:50-2.8 Automated Data Exchange

(a) Any approved provider may request approval to submit claims for reimbursement via an approved method of Automated Data Exchange ***(ADE)***. All costs of rental and/or purchase of a terminal, installation, maintenance, and usage of telephone lines are the responsibilty of the provider.

(b) Any provider approved for an Automated Data Exchange (ADE) claim submission system must comply with all regulations and restrictions set forth by The New Jersey Medicaid Program as indicated in the ADE documentation.

(c) Requests for approval shall be submitted to:

The Prudential Insurance Company of America
P.O. Box 471
Millville, New Jersey 08332

SUBCHAPTER 3. HCFA COMMON PROCEDURE CODING SYSTEM (HCPCS)

10:50-3.1 Introduction

(a) The New Jersey Medicaid Program adopted the Health Care Financing Administration's (HCFA) Common Procedure Coding System (HCPCS). The HCPCS codes as listed in this Subchapter are relevant to Medicaid transportation services and must be used when filing a claim.

1. The responsibility of the transportation services provider when rendering services and requesting reimbursement is listed in Subchapter 1. and Subchapter 2. of this manual.

2. The column titled Maximum Fee Allowance indicates the amount of reimbursement or the symbol B.R.:

i. "B.R." (By Report) is listed instead of a dollar amount. It means that additional information will be required in order to properly evaluate the service. Attach a copy of the report to the MC-12 claim form.

10:50-3.2 HCPCS CODE NUMBERS AND MAXIMUM FEE SCHEDULE

HCPCS Code	Description	Maximum Fee Allowance
	(a) AMBULANCE SERVICE	
A0010	Ambulance Service, Basic Life Support (BLS) Base Rate, Emergency Transport, One Way	$30.00
A0222	Ambulance Service, Return Trip, Transport	30.00
	Ambulance Service, Air, Helicopter Service, Transport	†B.R.
†B.R.—By Report		
	(b) INVALID COACH SERVICE	
A0130	Non-Emergency Transportation: Wheelchair Van	20.00
	NOTE: Invalid Coach Service, One Way, Per Patient	
Y0060	Invalid Coach Service, Round Trip, Per Patient	40.00
	(c) LIVERY SERVICE	
Y0250	One Way, Per Passenger	5.00
Y0255	Round Trip, Per Passenger	10.00
	NOTE: Waiting time is not reimbursable for livery service.	

(d) MILEAGE

A0020	Ambulance Service, (BLS) Per Mile, Transport, One Way	per loaded mile	1.00
	NOTE: For Medicaid reimbursement purposes, mileage both one way and return/round trip is payable at $1.00 per loaded mile in both the ambulance and invalid coach.		
	NOTE: In a multiple-load situation, the charge for loaded mileage is applicable to "one" patient only. Reimbursement is limited to the distance traveled by the patient whose point of origin and point of destination represent the greatest distance. No mileage charge is permitted for additional patients whose distance traveled lies between these two points.		
Y0260	Livery Service, Per Mile, Per Passenger		0.50
	NOTE: The amount reimbursable for vehicle mileage accrued is on a per-passenger basis. However, when two or more passengers are transported in the same vehicle at the same time from the same departure point to the same destination point, mileage may only be charged for one passenger.		

(e) WAITING TIME—AMBULANCE SERVICE—ONE WAY TRIP ONLY

Y0050	Waiting Time—Ambulance Service—One Way Trip Only	
	1/4 hour	2.50
	1/2 hour	5.00
	3/4 hour	7.50
	1 hour	10.00
	NOTE: Reimbursable only on one way trips and only after 30 minutes have elapsed. It is reimbursable in 1/4 hour increments. Maximum reimbursement for waiting time is $10.00 (1 hour).	

(f) WAITING TIME—INVALID COACH SERVICE—ONE WAY TRIP ONLY

Y0010	Waiting Time—Invalid Coach Service—One Way Trip Only	
	1/4 hour	1.25
	1/2 hour	2.50
	3/4 hour	3.75
	1 hour	5.00
	NOTE: Reimbursable only on one way trips and only after 30 minutes have elapsed. It is reimbursable in 1/4 hour increments. Maximum reimbursement for waiting time is $5.00 (1 hour).	

(g) OXYGEN

A0070	Ambulance Service, Oxygen, Administration and Supplies, Life Sustaining Situation	6.00 per 1/2 hour
	Invalid Coach Service—Oxygen	6.00 per 1/2 hour
	NOTE: Reimbursable in 1/2 hour increments after the first 1/2 hour has elapsed, for ambulance and invalid coach service.	

[EXHIBIT] ***APPENDIX*** 1

Instructions for the completion of the "Transportation Claim" (Form MC-12).

Items 1 through 4: Name, address, HSP (Medicaid) Case Number, and Patient Person Number. Copy the patient's name, HSP (Medicaid) Case Number and Patient Person Number exactly as they appear on the Medicaid eligibility validation form.

Items 5 and 6: Self-explanatory; must be completed.

Item 7: Other insurance or liability coverage. Check appropriate block to indicate whether the patient has other health insurance, liability coverage or no fault auto coverage. If yes, you must attach a copy of the decline notice or a copy of the explanation of payment from carrier. (When the patient is covered by both Medicare and Medicaid, see Section 2.6.)

Item 8: Employment related. Check as appropriate. If patient's illness or injury is work related, enter name and address of employer.

Item 9: Provider name, address, telephone number and provider number.

Item 10: Indicate whether or not injury resulted from an automobile accident by checking appropriate block.

Item 11: Practitioner ordering transportation. *[Enter the name and Individual Medicaid Practitioner (IMP) Number of the physician/practitioner who ordered the transportation service. Note: Claims will be rejected if the above information is not entered in item 11. (Not applicable for livery service.)]* ***Not applicable.***

Item 12: Report of services. Insert information under the following subsections:

Item 12A: Date of service.

Item 12B: Insert HCPCS (procedure) code as specified in Subchapter 3 of this manual. The HCPCS (procedure) code must accurately reflect the service provided.

Item 12C: Place of origin. From the list provided in Item 12, select the applicable place of origin and insert the corresponding number under C.

Item 12D: Indicate the street address and city of both the origin and destination points. Indicate name and address of hospital or long-term care facility, if applicable. Indicate the total number of miles being billed. Indicate waiting time, if any, in accordance with Subchapter 3 of this manual and attach an explanation of the need for waiting time to the MC-12 claim form. (Waiting time for livery service is not reimbursable.)

Item 12E: Fee requested. Indicate here your usual and customary charge.

Item 13: Required information.

Item 13A: Indicate the primary diagnosis. Must be completed as part of the written request for prior authorization. (Not applicable for livery service.)

Item 13B: Reason for transportation must indicate the nature and degree of the limitation(s) which necessitates such mode of transportation and the specific purpose of the trip(s). Must be completed as part of the written request for authorization.

Item 13C: Self-explanatory. (For the definition of emergency conditions, see *[Section 2.1]* ***N.J.A.C. 10:50-1.2***.) (Not applicable for livery service.)

Item 13D: Self-explanatory.

Item 14: Authorization request information. (Not applicable for livery service.)

*[Indicate the number of trips for which you are requesting prior authorization, and the month(s) and year in which the service is expected to be provided. In requesting authorization for dialysis trips, the provider must request authorization on the claim form covering the first trip. Claims for subsequent trips covered by the authorization must be sent directly to The Prudential Insurance Company of America.

When telephone authorization is given, indicate the MDO-assigned authorization number in the space provided in Item 14.]*

When requesting authorization for less than one month, indicate the number of trips and the month and year in which the service is expected to be provided. When telephone authorization is given, indicate the MDO-assigned authorization number in the space provided in Item 14.

In a multiple-load situation, the charge for loaded mileage and waiting time is applicable to one patient only and must be billed on the claim form corresponding to that patient only. All other claim forms in a multiple-load situation must include only a base charge. Providers must submit all claims in a multiple-load situation batched together in one envelope.

Occupancy: Indicate the number of patients in the vehicle.

Item 15: Provider certification and penalties for fraud. Please read the provider certification carefully. Note that the provider certifies that mileage is being charged only for one patient in a multiple-load situation and a "Medicaid Patient-Certification Form", signed by the patient, is on file for each service billed. (Not applicable for livery service.) The provider must sign and date the claim.

NOTE: Payments for services rendered to Medicaid-eligible individuals will be from both Federal and State funds and any false claims, statements or documents, or concealment of a material fact, is punishable under Federal and State laws. Under Federal law, whoever furnishes items or services to an individual for which payment is or may be made in whole or in part out of Federal funds under a State Medicaid plan approved under Title XIX of the Social Security Act, and who solicits, offers or receives any kickback or bribe in connection with the furnishing of such items or services or the making or receipt of such payment, or rebate or any fee or charge for referring any such individual to another person for the furnishing of such items or services, shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $10,000 or imprisoned not more than one year, or both.

Item 16: For Division use only. Authorization or denial: Make certain that you have obtained the approval of the Medicaid District Office Medical Consultant for those claims requiring prior authorization before submitting the claim for payment.

[EXHIBIT] ***APPENDIX*** II

Instructions for the completion of the "Transportation Certification" *[(Form FD-305)]*.

Section I, Items 1 and 2: Copy passenger's (recipient's) name, HSP (Medicaid) Case Number and Patient Person Number exactly as they appear on the Medicaid eligibility validation form.

Section I, Item 3: Indicate date of service and check appropriate box to indicate one way, round trip, or other.

Section I, Item 4: Enter address from which the passenger is transported.

Section I, Item 5: Enter address to which the passenger is transported.

Section I, Item 6: Enter address to which the passenger is returned, if different from Item 4.

Section I, Item 7: Check *[livery]* ***appropriate*** box.

Section I, Item 8: Check appropriate box.

Section I, Item 9: ***Check appropriate box.*** Not applicable ***for livery service***.

Section II, Item A: Passenger's (recipient's) signature.

Section II, Item B: Driver's signature, printed name***. In addition, the vehicle's fleet number is required for livery service.*** *[and vehicle fleet number.]*

Section II, Item C: ***Office/facility representative's signature, printed name and title.*** Not applicable*[.]* ***for livery service.***

(a)

DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

Hearing Aid Assistance for the Aged and Disabled

Adopted New Rules: N.J.A.C. 10:69

Proposed: March 7, 1988 at 20 N.J.R. 519(a).

Adopted: May 10, 1988 by Drew Altman, Commissioner, Department of Human Services.

Filed: May 10, 1988 as R.1988 d.250, **without change.**

Authority: N.J.S.A. 30:4D-20, 22, 24, 36 through 42; P.L. 1987 c.298, approved November 4, 1987.

Effective Date: June 6, 1988.

Expiration Date: June 6, 1993.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows.

CHAPTER 69
HEARING AID ASSISTANCE
FOR THE AGED AND DISABLED

SUBCHAPTER 1. GENERAL PROVISIONS

10:69-1.1 Purpose

(a) The purpose of this chapter, Hearing Aid Assistance to the Aged and Disabled (HAAAD), is to provide a payment of up to $100.00 in a calendar year in which a hearing aid is purchased to offset the cost of the hearing aid for individuals who meet the age or disability, income and residency requirements of the Pharmaceutical Assistance to the Aged and Disabled (PAAD) Program.

(b) This chapter has been developed as a statement of policy and procedures and is applicable only to eligibility for the HAAAD Program.

10:69-1.2 Legal authority

The New Jersey Program of Hearing Aid Assistance to the Aged and Disabled (HAAAD) is established by Chapter 198, Laws of 1987, (N.J.S.A. 30:4D-36 et seq.) effective February 4, 1988.

SUCHAPTER 2. DEFINITIONS

10:69-2.1 Definitions

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

"Annual income" means all income from whatever source derived, actually received or anticipated.

"Applicant" means an individual who applies for HAAAD, either personally or through an authorized agent.

"Beneficiary" means an individual who has been found eligible for HAAAD benefits.

"Calendar year" means a year beginning January 1 and ending on December 31. "Calendar year" is the base period utilized to determine annual income and HAAAD eligibility.

"Resident" means a person legally domiciled within the State of New Jersey for a period of 30 days immediately preceding the date of application for inclusion in the HAAAD program. Mere seasonal or temporary residence within the State, of whatever duration, does not constitute domicile.

SUBCHAPTER 3. ADMINISTRATIVE ORGANIZATION

10:69-3.1 Department of Human Services

The Department of Human Services is the administrative unit of the State government which has control over the administration of HAAAD. Under the terms of the HAAAD law, the Department is responsible for the general policies governing administration of HAAAD, and for effecting the issuance of rules and procedures in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., for implementing the statutory provisions.

10:69-3.2 Division of Medical Assistance and Health Services

The Division of Medical Assistance and Health Services is the administrative unit of the Department of Human Services responsible for the administration of the HAAAD Program.

10:69-3.3 Bureau of Pharmaceutical Assistance to the Aged and Disabled

The Bureau of Pharmaceutical Assistance to the Aged and Disabled is the unit of the Division of Medical Assistance and Health Services which has the direct responsibility for the processing of eligibility applications and for authorizing payment of HAAAD benefits.

10:69-3.4 Agency controls

(a) The Division Director shall establish operating policies to expedite the processing of applications and to assure the maximum possible compliance with the standards set forth in this chapter.

(b) The Bureau of Medical Care Surveillance of the Office of Program Integrity within the Division of Medical Assistance and Health Services is assigned the responsibility for investigating beneficiaries in matters involving potential fraud and/or abuse.

SUBCHAPTER 4. APPLICATION PROCESS

10:69-4.1 General provisions

The application process includes all activity relating to a request for eligibility determination. The application process begins with the receipt by the Division of Medical Assistance and Health Services of an eligibility application and continues in effect until there is an official disposition of the request by the Division of Medical Assistance and Health Services.

10:69-4.2 Authorized agent

(a) In those instances where the applicant is incompetent or incapable of filing an eligibility application on his or her own behalf, the Division shall accept any one of the following, listed in the order of priority, as an authorized agent for the purpose of initiating such application:

1. A close relative by blood or marriage, that is, parent, spouse, son, daughter, brother, sister;
2. A representative payee designated by the Social Security Administration;
3. A staff member of a public or private social service agency, of which the person is a client, who has been designated by the agency to so act;
4. A friend.

10:69-4.3 Responsibilities in the application process

(a) The Department of Human Services through the Division of Medical Assistance and Health Services, Bureau of Pharmaceutical Assistance to the Aged and Disabled establishes procedures on the application process consistent with law and supervises the operation with the policy and procedures so established.

(b) The Bureau of Pharmaceutical Assistance to the Aged and Disabled has responsibility in the application process to:

1. Explain the purposes and eligibility requirements of the program and indicate the applicant's rights and responsibilities under its provisions.
2. Process the AP-2 or HA-1 application.
3. Certify to the Treasurer, State of New Jersey, the names of eligible residents and authorize the payment of HAAAD benefits.
4. Microfilm eligibility applications and supporting documents and retain microfilm for audit purposes.

(c) The applicant has the responsibility to do the following:

1. Complete the PAAD eligibility application (AP-2) for those applicants not enrolled in the PAAD Program, or the HAAAD eligibility application (HA-1) for those applicants already enrolled in the PAAD Program. The application shall be legible and accurate. The applicant shall:
   i. Answer all questions fully;
   ii. Present all necessary evidentiary documents, including physician's prescription or letter attesting to the medical necessity for obtaining a hearing aid and a receipt for the recent purchase of the hearing aid;
   iii. Read the certification and authorization statement;
   iv. Sign or mark the application.
2. Assist the Division of Medical Assistance and Health Services in securing evidence that corroborates the statements when necessary.

(d) The beneficiary has the responsibility to repay the State of New Jersey, upon request, for the cost of benefits incorrectly paid on his or her behalf.

SUBCHAPTER 5. ELIGIBILITY REQUIREMENTS

10:69-5.1 Age and income standards

(a) To be eligible for HAAAD, the applicant must be 65 years of age or older or must be under 65 and over 18 years of age and receive Social Security Title II disability benefits and have an annual income below $13,650 if single or $16,750 combined income if married.

(b) HAAAD eligibility is conferred based upon annual income for the current calendar year.

(c) The HAAAD program shall take necessary action to recover the full amount of payments made on behalf of beneficiaries during an ineligible period, when appropriate.

10:69-5.2 Citizenship and residence

(a) A person shall not be required to be a citizen of the United States in order to be eligible for HAAAD.

(b) Any resident of this State shall be eligible for HAAAD. (See 10:69-2.1.)

10:69-5.3 Recipient of other assistance and hearing aid coverage

(a) Any person shall be ineligible for HAAAD if he or she is otherwise qualified for assistance for the New Jersey Title XIX (Medicaid) program.

(b) If an otherwise eligible person's hearing aid costs are covered in whole by any other State or federal government program or insurance contract, the person is not eligible for hearing aid assistance under these rules. If an eligible person's hearing aid costs are covered in part by any other State or federal government program or insurance contract, the person may be entitled to receive a reduced hearing aid assistance. HAAAD will pay full client liability up to $100.00. The program will recover from the third party payor in cases where an applicant has partial coverage and total client out-of-pocket expense is less than $100.00.

10:69-5.4 Certification

The applicant for HAAAD benefits must sign a certification that all the answers to the questions and items on the application form are true and accurate to the best of his or her knowledge.

10:69-5.5 Authorization

By signing or marking the certification and authorization statement on the application form, the applicant authorizes assignment of benefits to the State of New Jersey if he or she or his or her spouse has any other plan of assistance or insurance that covers, at least in part, the cost of hearing aids.

10:69-5.6 Eligibility period

A person eligible for HAAAD is entitled to receive a payment of up to $100.00 in a calendar year. Only one benefit may be issued in the period between January 1 and December 31 of any year. No benefits will be granted for hearing aids purchased prior to February 4, 1988.

10:69-5.7 Recoveries for benefits incorrectly paid

(a) The Division may take all necessary action to recover the cost of benefits incorrectly paid on behalf of a beneficiary.

1. The term "incorrect payment" includes, but is not limited to:
   i. Payment made on behalf of a beneficiary whose hearing aid costs are wholly covered by another source;
   ii. Payment made on behalf of a beneficiary who is no longer eligible, or has been incorrectly determined to be eligible to receive benefits;
   iii. Payment made as a result of fraud perpetrated by a beneficiary, his or her authorized agent and/or provider.

(b) The Division shall take all reasonable measures to ascertain the legal liability of third parties to pay for hearing aids arising out of injury, disease, or disability, where it is known that a third party is or may be liable to pay all or part of the hearing aid costs for a beneficiary.

DIVISION OF PUBLIC WELFARE

(a)

Public Assistance Manual
Voluntary Restricted Payments
Adopted Amendment: N.J.A.C. 10:81-4.5

Proposed: March 21, 1988 at 20 N.J.R. 620(a).
Adopted: May 10, 1988 by Drew Altman, Commissioner, Department of Human Services.
Filed: May 10, 1988 as R.1988 d.253, **with technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3)).
Authority: N.J.S.A. 44:7-6 and 44:10-3; 45 CFR 234.60.

Effective Date: June 6, 1988.
Expiration Date: October 15, 1989.

Summary of Public Comments and Agency Responses:
No comments received.

Summary of Changes Subsequent to Proposal:
Technical change to eliminate an obsolete reference.

Full text of the adoption follows (deletions from proposal indicated in brackets with asterisks *[thus]*).

10:81-4.5 Payees in AFDC
(a) (No change.)
(b) Vendor payments may be made directly to a person or facility for providing goods and services to or for the client representing payment for such goods or services. Vendor payments are limited to the following situations only:
1. (No change.)
2. Payments directly to day care providers or providers of transportation incident to authorized training or education when requested by the client as a voluntary restricted payment (see (c) below).
(c) Voluntary restricted payments may be made in the form of a vendor payment, at the request of the recipient, to day care providers *[(see N.J.A.C. 10:82-5.3 regarding payment limitations)]* and transportation providers only. Such vendor payments shall not be extended to any other providers of goods or services.
1.-2. (No change.)

(a)

General Assistance Manual Hospital Payments

Adopted Amendment: N.J.A.C. 10:85-5.2

Proposed: March 7, 1988 at 20 N.J.R. 521(a).
Adopted: May 10, 1988 by Drew Altman, Commissioner, Department of Human Services.
Filed: May 10, 1988 as R.1988 d.251, **without change.**
Authority: N.J.S.A. 44:8-111(d).
Effective Date: June 6, 1988.
Expiration Date: January 30, 1990.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows.

10:85-5.2 Inpatient hospital care
(a)-(e) (No change.)
(f) Payment for hospitalization: Upon certification of hospitalization, the director of welfare shall approve payment as approved by DPW/BMA which shall cover all items listed in (c) above.
1.-2. (No change.)
3. Reporting requirements: Each month the municipal director of welfare shall submit Form GA-6 (Report of Assistance Commitments) to the Division of Public Welfare, recording actual payments to hospitals for inpatient care made from the Public Assistance Trust Fund Account. Starting July 8, 1988, State Aid matching will be available for the payment of inpatient hospital bills for a period not to exceed six months from the date in which the Bureau of Medical Affairs approval is granted. Payments made after six months from the approval date will be denied General Assistance State Aid matching unless an extension for good cause has been granted. Written requests for extension may be directed to DPW.
i. (No change.)

(b)

General Assistance Manual Pharmaceutical Assistance to the Aged and Disabled Information

Adopted Amendment: N.J.A.C. 10:85-8.4

Proposed: March 7, 1988 at 20 N.J.R. 522(a).
Adopted: May 10, 1988 by Drew Altman, Commissioner, Department of Human Services.
Filed: May 10, 1988 as R.1988 d.252, **without change.**
Authority: N.J.S.A. 44:8-111(d).
Effective Date: June 6, 1988.
Expiration Date: January 30, 1990.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows.

10:85-8.4 Referral to State agencies
(a)-(f) (No change.)
(g) Division of Medical Assistance and Health Services: The Division of Medical Assistance and Health Services, which is a division of the New Jersey Department of Human Services, administers the following programs:
1. Pharmaceutical Assistance to the Aged and Disabled (PAAD) program: Under the Pharmaceutical Assistance to the Aged and Disabled (PAAD) program, eligible persons pay their pharmacists a fixed copayment at the time of purchase of prescription drugs, insulin, insulin syringes and needles, and certain diabetic testing materials. Pharmacists are then reimbursed by the PAAD program for the reasonable cost of the prescription drug or pharmacy item which exceeds the copayment amount.
i. Eligibility requirements: This program restricts eligibility to residents of New Jersey who are 65 years of age or older and to Social Security Disability benefits recipients (eligibility limited to the person actually disabled) whose annual income is less than specified limits. Current information and leaflets explaining details are available from the Medicaid District Office.
ii. (No change.)
2. (No change.)
(h)-(j) (No change.)

CORRECTIONS

THE COMMISSIONER

(c)

Administration, Organization and Management General Provisions

Adopted New Rules: N.J.A.C. 10A:1-2

Proposed: March 7, 1988 at 20 N.J.R. 493(a).
Adopted: May 4, 1988 by William H. Fauver, Commissioner, Department of Corrections.
Filed: May 4, 1988 as R.1988 d.240, **with technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.5).
Authority: N.J.S.A. 30:1B-6 and 30:1B-10.
Effective Date: June 6, 1988.
Expiration Date: July 6, 1992.

Summary of Public Comments and Agency Responses:
The Department of Corrections received one comment which is addressed below.
COMMENT: A commenter suggested that the title of "Administrator" be added to N.J.A.C. 10A:1-2.2 Definitions.

RESPONSE: The term "superintendent" is used by the Department of Corrections to refer to the chief executive officer of any New Jersey State correctional facility. The term "superintendent" has been further clarified.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*).

SUBCHAPTER 2. GENERAL PROVISIONS

10A:1-2.1 Scope

(a) Unless otherwise stated, N.J.A.C. 10A:1 through N.J.A.C. 10A:30 shall be applicable to State correctional facilities under the jurisdiction of the Department of Corrections.

(b) Unless otherwise stated, N.J.A.C. 10A:31 through N.J.A.C. 10A:34 shall be applicable to municipal and county correctional facilities within the State of New Jersey.

10A:1-2.2 Definitions

The following words and terms, when used in N.J.A.C. 10A:1 through N.J.A.C. 10A:30, shall have the following meanings, unless the context clearly indicates otherwise.

"Assistant Commissioner" means the chief executive officer of a Division within the Department of Corrections.

"Commissioner" means the Commissioner of the New Jersey Department of Corrections.

"Contraband" means any item, article or material found in the possession of or under the control of an inmate which is not authorized for retention or receipt.

"Custody status" means the degree of supervision that is required for an inmate to enter or leave a correctional facility.

"Department" means the New Jersey Department of Corrections.

"Deputy Commissioner" means Deputy Commissioner of the New Jersey Department of Corrections.

"Deputy Director" means the executive officer next in rank to the Assistant Commissioner (Chief Executive Officer) of a Division within the Department of Corrections.

"Division of Adult Institutions" means an administrative unit of the Department that is responsible for the administration of adult correctional facilities.

"Division of Juvenile Services" means an administrative unit of the Department that is responsible for the administration of juvenile correctional facilities.

"Indeterminate sentence" means a sentence of imprisonment which contains no fixed terms of duration (see N.J.S.A. 30:4-148).

"Institutional Classification Committee (I.C.C.)" means the group of staff members within a correctional facility that is responsible for monitoring an inmate's progress and assigning the inmate to appropriate programs or activities.

"Inter-institutional Classification Committee (I.I.C.C.)" means the representatives, from different correctional facilities, that are responsible for determining the correctional facility to which an inmate is assigned and approving requests for transfer from one correctional facility to another.

"Prison Complex" means state correctional facilities designated to house inmates serving prison sentences.

"Prison sentence" means a definite term of imprisonment having fixed minimum and maximum time limits.

"Prohibited act" means conduct in violation of rules and regulations, which will result in imposition of sanctions.

"Superintendent" means ***a superintendent or an administrator who serves as*** the chief executive officer of any State *[Correctional]* ***correctional*** facility within the New Jersey Department of Corrections.

"Youth Complex" means State correctional facilities designated to house young adult offenders with indeterminate sentences as set forth in N.J.S.A. 30:4-146.

10A:1-2.3 Chief Executive Officer

Pursuant to N.J.S.A. 30:1B-1 et seq., the Chief Executive Officer of the Department of Corrections is the Commissioner of Corrections.

10A:1-2.4 Rule making and exemption authority

(a) The Commissioner, pursuant to N.J.S.A. 30:1B-1 et seq., is authorized to formulate, adopt, issue and promulgate rules and regulations for the administration of institutions and noninstitutional operational units within the Department of Corrections.

(b) The Commissioner is authorized to determine all matters of policy and regulate the administration of institutions and noninstitutional operational units and modify policies and regulations so that all operational units can function effectively within the Department of Corrections.

(c) The Commissioner may exempt an institution or a noninstitutional operational unit from adherence to a rule or certain requirements of a rule in instances when strict compliance with a rule or all of its requirements would result in undue hardship to the overall management of an institution or a noninstitutional operational unit.

10A:1-2.5 Expiration of rule exemptions

(a) All rule exemptions shall expire two years from the date of approval by the Commissioner.

(b) A rule exemption may be terminated prior to its expiration date when:

1. The special circumstances making the rule exemption necessary no longer exist; or

2. The Commissioner no longer approves the rule exemption.

(c) A rule exemption may be extended beyond its expiration date when:

1. The Superintendent or Unit Head reapply for the rule exemption; and

2. The approval of the Commissioner is given for an extension of the rule exemption.

(d) An institution or noninstitutional operational unit shall return to compliance with the New Jersey Administrative Code when rule exemptions terminate or expire.

10A:1-2.6 Effective dates of adopted and exempted rules

(a) Unless otherwise noted in the New Jersey Register, an adopted rule is effective on the date of its publication in the New Jersey Register.

(b) The effective date of a rule exemption shall be the date of the Commissioner's signature in Section 7 on FORM 911-II REQUEST FOR RULE EXEMPTION.

10A:1-2.7 Procedure for requesting rule exemptions

(a) Requests for rule exemptions may be submitted by staff members or committees to the Superintendent for review.

(b) Requests for rule exemptions may be submitted by inmates or inmate groups to the Institutional Classification Committee (I.C.C.) for review. The I.C.C. shall review and submit inmate requests for rule exemptions to the Superintendent along with recommendations for approval or disapproval.

(c) Requests for rule exemptions may be submitted by staff members, individually or as a group, to the administrative head of a noninstitutional operational unit for review.

(d) The Superintendent or the head of a noninstitutional operational unit shall review and determine whether to submit requests for rule exemptions to the appropriate Assistant Commissioner and the Commissioner for consideration.

(e) If the Superintendent or the head of a noninstitutional operational unit approves a request for a rule exemption, he or she shall complete, in duplicate, Sections 1 through 6 of FORM 911-II REQUEST FOR RULE EXEMPTION, sign and date Section 7 and submit FORM 911-II to the Special Assistant for Legal Affairs, Office of the Deputy Commissioner for legal review.

(f) The Special Assistant for Legal Affairs shall review FORM 911-II REQUEST FOR RULE EXEMPTION and submit FORM 911-II to the appropriate Assistant Commissioner along with recommendations for approval or disapproval.

(g) The Assistant Commissioner shall review FORM 911-II REQUEST FOR RULE EXEMPTION and determine whether to approve or disapprove the request. If the Assistant Commissioner approves the request, he or she shall sign and date Section 7 of FORM 911-II and shall submit it to the Commissioner for review. If the Assistant Commissioner disapproves the request, he or she shall sign and date Section 8 of Form 911-II and return it to the Superintendent or the head of a noninstitutional operational unit.

(h) The Commissioner shall review FORM 911-II REQUEST FOR RULE EXEMPTION, submitted by an Assistant Commissioner, and determine whether to authorize a rule exemption. The Commissioner shall approve or disapprove a rule exemption by signing and dating the appropriate section on Form 911-II and returning it to the Assistant Commissioner.

(i) The Assistant Commissioner shall be responsible for notifying the Superintendent or head of a noninstitutional operational unit of the Commissioner's approval or disapproval of requests for rule exemptions.

(a)

Inmate Discipline
Scope; Training School at Skillman
Adopted Amendment: N.J.A.C. 10A:4-1.2
Adopted Repeal: N.J.A.C. 10A:4-13

Proposed: March 7, 1988 at 20 N.J.R. 496(a).
Adopted: May 4, 1988 by William H. Fauver, Commissioner, Department of Corrections.
Filed: May 4, 1988 as R.1988 d.239, **without change.**
Authority: N.J.S.A. 30:1B-6 and 30:1B-10.
Effective Date: June 6, 1988.
Expiration Date: July 21, 1991.

Summary of Public Comments and Agency Responses:
No comments received.

Agency Note: The title of N.J.A.C. 10A:4-5.3 has been amended to conform with this adoption. Since subchapter 13 has been repealed, the scope of chapter 4 now includes the Girls' Unit and the Boys' Unit of the Training School for Boys at Skillman. Since these Units are covered by the sanctions listed in N.J.A.C. 10A:4-5.3, the title of the rule is being administratively corrected to reflect the adoption of the amendment to N.J.A.C. 10A:4-1.2.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated 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 Girls' Unit and the Boys' Unit of the Training School for Boys at Skillman and the Juvenile Medium Security Facility unless otherwise indicated.

(b) (No change.)

10A:4-5.3 Schedule of sanctions for prohibited acts committed at the Training School for Juveniles at Jamesburg *[or]**,* the Juvenile Medium Security Unit ***and the Girls' Unit and the Boys' Unit of the Training School for Boys at Skillman***

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

(b)

Social Services
Volunteer Service Program
Religion
Institutional Chaplaincy
Adopted New Rules: N.J.A.C. 10A:17-2; 10A:17-5; 10A:17-6

Proposed: January 19, 1988 at 20 N.J.R. 167(a).
Adopted: May 4, 1988 by William H. Fauver, Commissioner, Department of Corrections.
Filed: May 4, 1988 as R.1988 d.241, **with substantive and technical changes** not requiring additional notice and comment (see N.J.A.C. 1:30-4.5).
Authority: N.J.S.A. 30:1B-6, 30:1B-10.
Effective Date: June 6, 1988.
Expiration Date: December 15, 1991.

Summary of Public Comments and Agency Responses:

The Department of Corrections received eight comments. The comments concerning the content of the rules are summarized and addressed below:

COMMENT: A commenter suggested that the annual automatic expiration of the volunteer identification card, required by N.J.A.C. 10A:17-2 13(d), be eliminated because of the inconvenience this requirement presents to volunteers and prospective volunteers who would have to leave their places of employment to come into the institution for the identification process.

RESPONSE: N.J.A.C. 10A:17-2.13(d) will be amended in a future proposal so that the volunteer identification card will expire only when a volunteer no longer provides services.

COMMENT: A commenter suggested that N.J.A.C. 10A:17-5.3 be amended to permit institutional religious choirs, under guidelines established by the Institutional Classification Committee (I.C.C.), to attend religious activities in the community to render music.

RESPONSE: For reasons relating to security and safety to the public, the Department of Corrections shall not permit inmates within the Division of Adult Institutions to participate in any community based trips.

COMMENT: Two commenters suggested that N.J.A.C. 10A:17-5.3 be amended to permit inmates with full minimum custody status to participate in religious activities in the community.

RESPONSE: For the same reasons stated above, the Department will not permit inmates with full minimum custody status to participate in religious activities in the community.

COMMENT: A commenter suggested that N.J.A.C. 10A:17-5.3 be amended to permit inmates in halfway houses such as Newark House and Essex Houses, to attend religious activities in the community.

RESPONSE: The rule cannot be amended at this time upon adoption because the amendment would be a substantial change. Since the requested change is substantial, the Department of Corrections will amend the rule in an upcoming proposal.

COMMENT: A commenter suggested that N.J.A.C. 10A:17-5.7 include the Chaplain, along with the Institutional Classification Committee (I.C.C.) and the Superintendent, among the persons who may limit, cancel, deny or terminate the attendance of one or more inmates at group worship services if there is substantial evidence that disruptive or illicit activity has occurred or is likely to occur.

RESPONSE: The Department of Corrections must reject this suggestion. The Chaplain is not a decision making authority in this situation, although he or she is a valuable source of information and advice and may often be consulted prior to the decision to limit, cancel, deny or terminate the attendance of group worship services by one or more inmates.

COMMENT: A commenter suggested that N.J.A.C. 10A:17-5.8 be amended to designate the Institutional Chaplain to be responsible for the use, secure storage and/or return of sacramental elements to the local community.

RESPONSE: The Department of Corrections believes that the responsibility for the security of sacramental elements should be assigned to custody personnel who are trained in the appropriate methods for maintaining security.

In addition to the specific changes stated above, there are a number of minor, non-substantive changes in language or grammar. For consistency, modifications have also been made to N.J.A.C. 10A:17-5.6, N.J.A.C. 10A:17-5.20, N.J.A.C. 10A:17-6.3 and N.J.A.C. 10A:17-6.8 thus clarifying the reporting, scheduling and responsibilities for the conduct of religious activities.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*).

SUBCHAPTER 2. VOLUNTEER SERVICE PROGRAM

10A:17-2.1 Definitions

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

"Community residential facility" means a facility, other than a satellite of a main institution, which houses inmates in the community as a part of an inmate's preparation for release and reintegration into society (such as Essex House, Newark House, Camden Community Service Center).

"Coordinator of Volunteer Services" means the Central Office staff person, within the Office of the Deputy Commissioner, who is responsible for coordinating the administration of Volunteer Service Programs within the Department of Corrections.

"Institution" means a correctional facility and its satellite unit(s), within the Department of Corrections, which have been designated to house offenders committed by the courts.

"Supervisor of Volunteer Services" means a staff member, within an institution, who is responsible for coordinating and supervising the Volunteer Service Program of the institution and its satellite unit(s).

"Volunteer" means a person who provides goods or services to inmates in a correctional facility without receiving monetary or material gain.

10A:17-2.2 Coordinator of Volunteer Services

(a) The Coordinator of Volunteer Services shall provide consultation, support and coordination to all administrative units on matters related to the Volunteer Service Program.

(b) The Coordinator of Volunteer Services shall monitor and evaluate Volunteer Service program activities.

10A:17-2.3 Supervisor of Volunteers

(a) The Supervisor of Volunteer Services shall be responsible for the coordination and supervision of the Volunteer Service Program of the institution.

(b) The Supervisor of Volunteer Services shall:

1. Recruit volunteers;
2. Coordinate the screening, interviewing and approval of volunteers;
3. Develop, schedule and conduct volunteer orientation and training programs;
4. Assign volunteers to appropriate activities;
5. Coordinate and monitor the supervision of volunteers; and
6. Prepare monthly and annual reports of volunteer services pursuant to N.J.A.C. 10A:17-2.23.

(c) If there is no Supervisor of Volunteer Services position, the Superintendent shall designate a staff person to be responsible for the coordination and supervision of the Volunteer Service Program.

10A:17-2.4 Selecting the Supervisor of Volunteer Services

(a) When a vacancy in the position of full time Supervisor of Volunteer Services occurs or when a new position becomes available, the Superintendent or his or her designee shall notify the Coordinator of Volunteer Services.

(b) The Superintendent shall select the applicant to fill the position of Supervisor of Volunteer Services in accordance with procedures established by the Department of Personnel after consultation with the Coordinator of Volunteer Services.

10A:17-2.5 Recruiting volunteers

(a) Volunteers may be recruited by the Supervisor of Volunteer Services or by other interested individuals.

(b) When recruiting volunteers, emphasis shall be placed on the service to be provided and the following qualifications of the prospective volunteer:

1. Motivation;
2. Interest;
3. Background;
4. Training; and/or
5. Other qualifications which make him or her the appropriate person to provide a needed service.

(c) Assistance in recruiting volunteers may be provided by the Coordinator of Volunteer Services.

10A:17-2.6 Eligibility for Volunteer Service Program

(a) A volunteer must be at least 18 years old to be eligible to participate in the Volunteer Service Program of any institution except the Training School for Boys at Skillman.

(b) A volunteer must be at least 16 years old and have parental consent to be eligible to participate in the Volunteer Service Program at the Training School for Boys at Skillman.

(c) A relative or a friend of an inmate shall not be permitted to participate in the Volunteer Service Program at the institution where that inmate is housed.

(d) An ex-offender may participate in the Volunteer Service Program if his or her volunteer application is approved by the Supervisor of Volunteer Services, the Superintendent and the Office of the Deputy Commissioner.

(e) A disabled person may participate in the Volunteer Service Program if his or her disability does not interfere with his or her ability to provide a service.

(f) Any group may participate in the Volunteer Service Program if each member submits an application pursuant to N.J.A.C. 10A:17-2.7 individually and the members are approved by the Supervisor of Volunteer Services.

10A:17-2.7 Volunteer application

(a) Any person desiring to serve as a volunteer may obtain from the Supervisor of Volunteer Services the following forms:

1. 450-I Volunteer Application;
2. 450-II Volunteer Rules and Responsibilities; and
3. SBI-212 Request for Criminal History Record Information.

(b) The applicant shall complete and sign forms in (a) above and return such forms to the Supervisor of Volunteer Services for review.

(c) Applicants offering volunteer services in specialized fields requiring licensure or certification shall submit current and valid credentials for verification along with the application.

10A:17-2.8 Screening process

(a) Applicants shall be evaluated on the basis of the information provided at the interview, and the information entered on Form 450-I Volunteer Application.

(b) The Supervisor of Volunteer Services shall verify all pertinent information and approve or reject applicants after a thorough review has been made of the qualifications of the applicants and the needs of the institution.

(c) If the Supervisor of Volunteer Services has reason to believe that an applicant's physical or mental disability may interfere with providing volunteer services, the applicant may be required to submit a confidential report of his or her current health status that has been prepared by a medical health care specialist in the area of the applicant's disability. The report shall be reviewed by the Supervisor of Volunteer Services and submitted to the Superintendent or his or her designee with a recommendation for approval or disapproval for participation in the Volunteer Service Program.

(d) The Supervisor of Volunteer Services shall notify all applicants, in writing, of whether they have been approved or disapproved for participation in the Volunteer Service Program.

10A:17-2.9 Volunteer Handbook

(a) Each institution shall develop and publish a Volunteer Handbook which shall bear the date of publication on the cover or front page.

(b) Each volunteer shall receive a copy of the Volunteer Handbook prior to assignment of any institutional activity.

(c) The contents of the Volunteer Handbook shall be updated every two years.

(d) Prior to publishing or republishing the Volunteer Handbook, the final draft shall be submitted to the Coordinator of Volunteer Services for review and written approval.

(e) When the approved Volunteer Handbook has been printed, the institution shall submit a copy to the Coordinator of Volunteer Services and to the appropriate Assistant Commissioner's office to be maintained on file.

(f) The Volunteer Handbook shall include, but is not limited to:

1. An introduction which summarizes the history, goals and objectives of the Department of Corrections and the institution;
2. A summary of institutional rules, regulations and useful practices;
3. The guidelines for interaction with inmates;
4. The responsibilities of volunteers;

5. A summary of services currently being provided by volunteers; and

6. An explanation of the volunteer performance evaluation.

10A:17-2.10 Orientation and training of volunteers

(a) Each institution shall provide orientation and training sessions to all volunteers prior to assignment to any institutional service.

(b) Orientation and training sessions shall include, but are not limited to, the following topics:

1. Rules of the Department of Corrections;
2. Rules of the institution;
3. Philosophy, goals, resources and programs of the institution;
4. Duties and responsibilities of volunteers; and
5. Appropriate exercise of volunteer authority.

10A:17-2.11 Volunteer assignments

(a) Volunteers shall be assigned to institutional services in accordance with the volunteer's interests and capabilities, and in accordance with the needs of the institution. Services to which volunteers may be assigned shall include, but are not limited to:

1. Tutoring;
2. Crafts;
3. Recreation;
4. Vocational placement;
5. Group or individual counseling; and
6. Religious activities.

10A:17-2.12 Scheduling

(a) The services of the Volunteer Service Program shall be coordinated and scheduled by the Supervisor of Volunteer Services and approved, in writing, by the Superintendent or his or her designee.

(b) The Supervisor of Volunteer Services shall post a schedule of current volunteer services on each housing unit's bulletin area. The schedule of volunteer services shall indicate the following:

1. Kind of service provided;
2. Day(s) provided;
3. Time (beginning/ending);
4. Location; and
5. Individual or group(s) providing service.

(c) Any additions or changes in volunteer services shall be promptly posted on each housing unit's bulletin area by the *[supervisor of volunteer services]* ***Supervisor of Volunteer Services***.

(d) When time or space is limited, or when the delivery of volunteer services conflicts with the normal operation of the institution, the Superintendent or his or her designee shall determine whether volunteer services shall be limited, suspended or discontinued.

10A:17-2.13 Volunteer identification cards

(a) A volunteer identification (I.D.) card shall be prepared for each volunteer.

(b) The volunteer I.D. card shall include:

1. A photograph of the volunteer;
2. The name and address of the volunteer;
3. The home and work telephone number of the volunteer;
4. The agency or group represented by the volunteer;
5. The volunteer service provided; ***and***
6. The preparation date of volunteer I.D. card*[; and]* ***.***

[7. The expiration date of volunteer I.D. card.]

(c) The volunteer I.D. card shall be kept at the front entrance of the institution, and shall be used only by the person on duty at the front entrance for identifying volunteers. The volunteer I.D. card shall never be carried by the volunteer on or off the premises of the institution.

(d) *[The volunteer I.D. card shall automatically expire in one year from the date of issue, and the]* ***The*** Supervisor of Volunteer Services shall retain all inactive volunteer I.D. cards.

10A:17-2.14 Institution identification card

(a) When entering the institution, the volunteer shall obtain, at the front entrance, an institution identification (I.D.) card in exchange for some form of personal identification, such as:

1. A driver's license;
2. An employment photo I.D. card;
3. A passport; or
4. Any other item or document which clearly identifies the volunteer.

(b) While in the institution, the volunteer shall visibly wear an institution I.D. card.

(c) When the volunteer leaves the institution, the volunteer shall return the institution I.D. card in exchange for his or her personal identification material.

(d) The staff member on duty at the institution's front entrance shall record the following:

1. Volunteer's name;
2. Date; and
3. Time volunteer entered and left institution.

10A:17-2.15 Supervision of volunteers

The Department head to whom the volunteer is assigned shall be considered the volunteer's supervisor.

10A:17-2.16 Performance evaluation

(a) The Supervisor of Volunteer Services, along with the volunteer's immediate supervisor, shall evaluate the performance of the volunteer after a trial period of four months using Form 450-III Volunteer Performance Evaluation.

(b) If the evaluation in (a) above is unsatisfactory, a consultation shall be scheduled between the volunteer, the Supervisor of Volunteer Services, the immediate supervisor and any other appropriate staff *[members]* ***member(s)***.

(c) After the consultation with the volunteer in (b) above has been completed, the Supervisor of Volunteer Services shall recommend to the Superintendent the retention or termination of the volunteer.

10A:17-2.17 Recognition of volunteers

Each institution should schedule an annual event to acknowledge the contribution of volunteers.

10A:17-2.18 Curtailing, suspending or discontinuing the services of a volunteer

(a) The Superintendent may curtail, suspend or discontinue the services of a volunteer for reasons which include, but are not limited to:

1. Any breach of confidentiality;
2. Unlawful conduct or breach of institutional rules and regulations;
3. Physical or emotional illness;
4. Inability to cooperate with staff;
5. Erratic, unreliable attendance;
6. Violation***(s)*** of the rules of the Volunteer Service Program;
7. Any prohibited conduct contained in the volunteer contract; and
8. Any conduct which threatens the order or security of the institution or the safety of the volunteer.

10A:17-2.19 Inmate violation of Volunteer Service Program rules

(a) Inmates shall be advised, in writing, of the rules governing the Volunteer Service Program.

(b) Failure of the inmate to comply with the rules of the Volunteer Service Program may result in disciplinary action being taken against the inmate involved.

10A:17-2.20 Volunteer Service Program in community residential facilities

(a) Each community residential facility which uses the services of volunteers shall develop written policies and procedures which govern the following:

1. Recruiting, screening and selecting of volunteers;
2. Orientation and training of volunteers;
3. Supervision of the services provided by volunteers; and
4. Termination of volunteers.

(b) The policies and procedures outlined in (a) above shall be revised when necessary, and submitted to the Coordinator of Volunteer Services and the appropriate Assistant Commissioner's office for review and written approval on or before September 30 of each year.

10A:17-2.21 Volunteer in Parole Program (V.I.P.P.)

This subchapter shall not apply to bona fide participants in the Volunteer In Parole Program (V.I.P.P.), Bureau of Parole, New Jersey Department of Corrections.

10A:17-2.22 Records

(a) The Supervisor of Volunteer Services shall maintain a current record of the following:

1. All volunteer services;
2. Names and photos of volunteers; and
3. Inmates receiving volunteer services.

10A:17-2.23 Reporting responsibilities

(a) The Supervisor of Volunteer Services shall prepare monthly and annual reports of volunteer services and submit the reports in accordance with N.J.A.C. 10A:21, *[Reports]* ***REPORTS***.

(b) A list of volunteer applicants who have been approved or rejected shall be included in the Supervisor of Volunteer Services' monthly report.

(c) The Supervisor of *[Voluntary]* ***Volunteer*** Services shall submit *[a copy]* ***copies*** of *[each Volunteer Service Program's]* ***his or her*** monthly and annual report***s*** to the ***Superintendent and the*** Coordinator of Volunteer Services.

10A:17-2.24 Procedures and post orders

(a) Each institution shall develop written procedures and post orders to govern the Volunteer Service Program.

1. The Superintendent shall review and sign the procedures and post orders at least annually. Each institution shall update the procedures and post orders in (a) above as necessary.

(b) Each institution shall submit a copy of the written procedures governing the Volunteer Service Program to the Coordinator of Volunteer Services for review and approval on or before September 30 of each year.

SUBCHAPTER 5. RELIGION

10A:17-5.1 Freedom of religious affiliation and voluntary worship

(a) Each inmate has the right to freedom of religious affiliation and voluntary religious worship while incarcerated, but the exercise of such right may be subject to reasonable restrictions.

(b) Any inmate in the general population of a correctional facility who desires to participate in a religious service, meeting or activity shall be permitted to do so.

10A:17-5.2 Religious proselytizing of inmates

(a) No person shall disparage an inmate's religious beliefs or deliberately seek to persuade an inmate to change his or her religious affiliation.

(b) While under the jurisdiction of the New Jersey Department of Corrections, an inmate shall not be prevented from voluntarily changing religious preference.

(c) An inmate may change his or her religious affiliation upon approval by the chaplain who represents the faith group to which the inmate is seeking affiliation.

10A:17-5.3 Inmate attendance of community religious activites

Inmates within the Division of Adult Institutions, including satellite units, and adult inmate paraprofessionals assigned to juvenile correctional facilities shall not be permitted to attend worship services and/or religious activities in the community.

10A:17-5.4 Physical facilities and equipment

(a) Dependent upon available resources and consistent with internal discipline, order, safety and security, the correctional facility shall provide adequate space and equipment so as to enable inmates to:

1. Participate in worship services or other religious rites;
2. Receive religious education; and
3. Receive religious counseling.

(b) During all phases of any religious program, the rules and policies related to the internal discipline, order, safety and security of the correctional facility shall be in effect.

10A:17-5.5 Inmate orientation

(a) During orientation, inmates shall be informed of the following:

1. Chaplaincy services;
2. Religious activities; and
3. Other aspects of the religious program.

10A:17-5.6 Scheduling of religious activity

(a) All religious services, activities or meetings shall be coordinated and scheduled by the ***Supervisor of Chaplaincy Service,*** Chaplain, or other *[appropriate]* ***designated*** staff person, subject to the approval of the Superintendent or his or her designee.

(b) Factors to be considered when scheduling religious activities shall include, but are not to be limited to:

1. Availability of staff;
2. Availability of space;
3. Availability of time; and
4. The maintenance of a secure and orderly operating correctional facility.

(c) The weekly schedule of religious services and activities shall be posted on each housing unit's bulletin area, and in conspicuous and accessible areas of the correctional facility. The schedule shall indicate the following:

1. Kind of religious service or activity being held;
2. Day(s) provided;
3. Time (beginning and ending);
4. Location; and
5. Person or group conducting activity.

(d) Any additions or changes in religious services and activity shall be promptly posted.

10A:17-5.7 Restrictions on congregate religious services

When, in the opinion of the Institutional Classification Committee (I.C.C.) and the Superintendent, there is substantial evidence that disruptive or illicit activity has occurred or is likely to occur, one or more inmates may have their attendance at group worship restricted or denied, or a scheduled religious service, activity or meeting may be cancelled or terminated.

10A:17-5.8 Control of religious ritualistic elements

(a) Religious ritualistic elements, including but not limited to wine, oil and matzo, which are necessary as part of a religious service, shall be brought into the correctional facility only by the Chaplain or a volunteer religious group leader from the community.

(b) The custody shift supervisor shall be responsible for the secure storage of sacramental elements.

(c) When sacramental elements are to be used, these elements shall be issued by the custody shift supervisor only to the Chaplain or a volunteer religious group leader from the community.

(d) The Chaplain or a volunteer religious group leader from the community shall be responsible for the use and return of sacramental elements to the custody staff supervisor.

10A:17-5.9 Religious diets

Inmates may abstain from eating food items, served to the general population, which are prohibited by the inmate's religion. In such instances, an alternate food item shall be provided.

10A:17-5.10 Religious holidays

(a) Religious holidays of recognized faith groups shall be acknowledged.

(b) Special religious services or activities may be scheduled for inmates of a particular faith so those inmates may observe their religious holidays. The scheduling of these special religious services and activities shall depend upon the following:

1. Availability of correctional facility space;
2. Availability of staff for supervision; and
3. Other essential operational considerations.

10A:17-5.11 Receiving and sending religious material

(a) Inmates shall be permitted to receive through the mail and retain religious literature and the indicia of religion, such as missals, prayer books, shawls and prayer rugs.

(b) Inmates shall be permitted to send out of the correctional facility religious literature or indicia of religion, such as missals, prayer books, shawls and prayer rugs.

(c) The receipt, retention or sending out of religious material is subject to the restrictions and procedures in N.J.A.C. 10A:3-6 CONTRABAND AND DISPOSITION OF CONTRABAND AND N.J.A.C. 10A:18 MAIL, VISITS AND TELEPHONE.

10A:17-5.12 Interfaith religious activity within the correctional facility

(a) Although the Chaplain shall serve the correctional facility as a minister of the faith which he or she represents, the Chaplain shall not limit counseling, pastoral or other ministerial activities and/or responsibilities to inmates of the Chaplain's religious preference and affiliation.

(b) Where only one Chaplain serves the correctional facility, he or she shall cooperate with representatives of other faith groups that have been approved to minister to inmates in the correctional facility.

(c) Inmates of various religious preferences and affiliations shall be permitted to participate in the religious activities and services of other faith groups whenever it is feasible and appropriate.

10A:17-5.13 Community volunteers for religious activities

(a) Community volunteers for religious activities shall be recruited, oriented, trained and evaluated in accordance with N.J.A.C. 10A:17-2 VOLUNTEER SERVICE PROGRAM.

(b) The Chaplain shall be the immediate supervisor of volunteers for religious activities, and he or she shall familiarize the volunteers with the rules in this subchapter and any other rules pertaining to religious activities.

10A:17-5.14 Chaplaincy services for inmates confined to the infirmary, hospital or Close Custody Units

(a) Inmates confined to the infirmary, hospital or *[close]* ***Close*** Custody Units of an institution shall be provided religious counseling or pastoral services upon request. These services shall be provided by the Chaplain or a volunteer religious group leader from the community.

(b) Inmates who are patients in a community hospital shall be visited by the Chaplain, upon request, to receive religious counseling or other pastoral services.

(c) The procedure for requesting religious counseling or pastoral services shall be outlined in the Inmate Handbook published pursuant to N.J.A.C. 10A:8-3.

10A:17-5.15 Chaplaincy services for inmates in satellite units

Inmates assigned to satellite units may receive counseling or pastoral services provided by the Chaplain or a volunteer religious group leader from the community.

10A:17-5.16 Nontraditional religions

(a) Institutional officials shall not be required to provide every religious sect or group with:

1. Outside clergy;
2. Space; and/or
3. Schedule time for religious activity.

(b) An inmate belonging to a nontraditional religion may be permitted to practice his or her religion if the Superintendent determines, after consultation with the Chaplain and the Coordinator, Chaplaincy Services, that the religion is entitled to official recognition within a correctional facility, and that the practice of this religion would not threaten or otherwise interfere with the internal discipline, safety, security or orderly operation of the correctional facility.

10A:17-5.17 Initiating religious groups within the correctional facility

(a) An inmate who wishes to organize a religious group which is not recognized in the correctional facility shall submit a written request to the Superintendent which contains the following information:

1. The official name of religious organization or religion;
2. The names of all present members;
3. The name, address and affiliation of the person(s) who is to lead the religious service.
   i. Such person must be able to pass a security check;
4. A description of religious beliefs or theology, including religious literature or scripture utilized;
5. A description of ritual practices, including time and manner of conducting religious services;
6. A statement of the group's religious goals and objectives; and
7. A list of the religious holidays, with explanations as to purpose of each.

(b) The Superintendent shall, after consultation with the Chaplain and the Coordinator, Chaplaincy Services, consider all relevant factors which shall include, but are not limited to, the following:

1. Safety of inmates and staff;
2. Security and the orderly operation of the correctional facility; and
3. The availability of time and space.

(c) The Superintendent shall determine whether the religious group shall be granted official recognition within the correctional facility, and shall provide a written notice of his or her decision to the following:

1. The Chaplain;
2. The Coordinator, Chaplaincy Services; and
3. The inmate(s) who submitted the request.

10A:17-5.18 Ministerial services to the staff

[(a)] Upon request, the Chaplain shall provide pastoral services to the correctional facility staff, and shall be available for counseling especially in periods of bereavement, emergencies and other crisis situations.

10A:17-5.19 Files and records

(a) During reception into a correctional facility, each inmate's religious preference shall be recorded in his or her classification record.

(b) The inmate shall promptly notify the Classification Officer of any change in religious affiliation, which shall then be entered into the inmate's classification record.

(c) In accordance with the written procedures of the institution, the Chaplain shall have access to records of inmates. The Chaplain may enter into the records any information he or she may deem pertinent to the treatment of inmates.

(d) The Chaplain shall maintain a record of the following:

1. All religious denominations or groups which are represented in the correctional facility;
2. The names, addresses and religious affiliation of all part-time Chaplains;
3. Volunteer religious group leaders or groups from the community who are permitted to conduct religious activities in the correctional facility; and
4. Worship services and related activities that are scheduled weekly.

10A:17-5.20 *[Chaplains' reports]* ***Reports***

(a) The ***Supervisor of Chaplaincy Services,*** Chaplain ***or other designated staff person*** shall submit monthly and annual reports of chaplaincy activities to the Superintendent or his or her designee.

(b) *[A copy]* ***Copies*** of monthly and annual reports shall be forwarded by the ***Supervisor of Chaplaincy Services,*** Chaplain ***or designated staff person*** to the Coordinator, Chaplaincy Services.

SUBCHAPTER 6. INSTITUTIONAL CHAPLAINCY

10A:17-6.1 Coordinator, Chaplaincy Services

(a) The Coordinator *[of]* ***,*** Chaplaincy Services shall be responsible to the Office of the Deputy Commissioner for the overall planning and implementation of religious programs within State correctional facilities.

(b) The Coordinator, Chaplaincy Services, shall provide consultation, support and coordination to all administrative units on matters related to chaplaincy services and religious activities.

(c) The Coordinator, Chaplaincy Services, shall monitor and evaluate chaplaincy services and religious activities.

10A:17-6.2 Consultation with the Coordinator, Chaplaincy Services

The Superintendent or his or her designee shall consult with the Coordinator, Chaplaincy Services, on professional, technical and administrative matters related to institutional chaplaincy and religious activities.

10A:17-6.3 *[Supervisor of Chaplaincy Services]* ***Coordination and supervision of religious activities***

(a) The Supervisor of Chaplaincy Services***, Chaplain or other designated staff person*** shall be responsible to the Superintendent or his or her designee for coordinating and supervising the religious activities of the institution, and ensuring that the requirements of N.J.A.C. 10A:17-5, RELIGION, are fulfilled.

(b) If the institution does not have a Supervisor of Chaplaincy Services, the Superintendent shall designate a staff person to be responsible for coordinating and supervising the religious activities of the institution.

10A:17-6.4 Institutional Chaplains

(a) Each institutional chaplain shall:

1. Serve as minister of the faith he or she represents;

2. Serve as liaison between institutional authorities, the inmates whose faiths are not represented in the institution and the representatives of those faiths in the community;

3. Provide ministerial services to staff members when requested;

4. Represent the institution in matters regarding religious activities in the community as they relate to the programs of the institution; and

5. Serve as liaison to community clergy, to encourage their understanding of confined persons with special needs, and to enlist the cooperation of community clergy in planning institutional religious activities.

(b) Each Chaplain shall keep informed of new developments and trends in institutional chaplaincy services.

(c) Each Chaplain shall remain in good standing with his or her denomination, and he or she shall be permitted to attend meetings and conferences that are essential to his or her professional standing.

(d) As a professional staff member, the Chaplain, along with his or her professional colleagues, may participate in therapy programs for inmates.

(e) The Supervisor of Chaplaincy Services or a staff person designated by the Superintendent shall prepare monthly and annual reports on the religious activities of the institution pursuant to N.J.A.C. 10A:17-5.20 and 10A:17-6.8.

10A:17-6.5 Recruiting chaplains

(a) The Coordinator, Chaplaincy Services, and the Chaplaincy Consulting Committee shall be responsible for recruiting candidates for institutional chaplaincy positions and for increasing the public awareness of the vital need for chaplaincy services in an institutional setting. Recruitment may be done on a personal basis and/or by advertising.

(b) The Coordinator, Chaplaincy Services, may place advertisements for a vacant institutional chaplaincy position in the "Clinical Pastoral Education Newsletter", a national interdenominational newspaper which is published by the Association of Clinical Pastoral Education, and other appropriate publications.

(c) When recruiting on a personal basis for a vacant institutional chaplaincy position, or when application is made through a member of the institutional staff or a member of the Chaplaincy Consulting Committee, all documents obtained from the applicant, such as applications and resumes, shall be forwarded to the Coordinator, Chaplaincy Services, for review, verification of credentials, filing and reference pursuant to N.J.A.C. 10A:17-6.9.

(d) When recruiting candidates for institutional chaplaincy positions, emphasis shall be placed on the following:

1. Academic credentials;

2. Experience; and

3. Other qualifications needed to provide the services of the position.

10A:17-6.6 Chaplaincy Consulting Committee

(a) The purpose of the Chaplaincy Consulting Committee is to ensure that high quality religious ministry is provided for persons in the institutions of the Departments of Corrections and Human Services, and to represent the concerns of the religious community in the development and implementation of religious policies practiced in institutions.

(b) The Chaplaincy Consulting Committee shall be responsible for recruiting, interviewing and recommending candidates to fill all institutional chaplaincy positions.

(c) The Chaplaincy Consulting Committee shall consist of the following:

1. Representatives from the religious community appointed as official representatives of their respective faith groups;

2. Representatives from the Departments of Corrections and Human Services designated by their respective Commissioners;

3. Representatives from the New Jersey State Institutional Chaplains Association; and

4. The Coordinator, Chaplaincy Services, who shall serve as an ex officio member of the Committee.

10A:17-6.7 Selecting chaplains

(a) The Coordinator, Chaplaincy Services, shall maintain a file of resumes of applicants for chaplaincy positions pursuant to N.J.A.C. 10A:17-6.9.

(b) When a vacancy in a chaplaincy position occurs at an institution, the Superintendent or his or her designee shall notify the Coordinator, Chaplaincy Services, who shall be responsible for notifying the Chaplaincy Consulting Committee.

(c) The Chaplaincy Consulting Committee shall review all applications and arrange interviews for the applicants who meet the qualifications for the institutional chaplaincy position.

(d) Upon completion of the interviews, the Chaplaincy Consulting Committee shall recommend two or more candidates to the Superintendent.

1. The Superintendent may request that the Chaplaincy Consulting Committee submit the names of additional candidates for consideration should the Superintendent deem such action necessary.

(e) The Superintendent shall select the applicant to fill the vacancy.

(f) All requests for personnel actions involving the hiring of full-time or part-time chaplains must be approved by the Coordinator, Chaplaincy Services, prior to processing by the Department of Corrections' Office of Human Resources.

(g) All contracts for religious services must be reviewed and approved by the Coordinator, Chaplaincy Services, prior to processing.

10A:17-6.8 *[Chaplains' reports]* ***Reports***

(a) The Supervisor of Chaplaincy Services***, Chaplain*** or a staff person designated by the Superintendent shall submit monthly and annual reports of chaplaincy activities to the Superintendent or his or her designee.

(b) *[A copy]* ***Copies*** of monthly and annual reports shall be forwarded by the *[Superintendent or his or her designee]* ***Supervisor of Chaplaincy Services, Chaplain or a designated staff person*** to the Coordinator, Chaplaincy Services.

10A:17-6.9 Files and records of the Coordinator, Chaplaincy Services

(a) The Coordinator, Chaplaincy Services, shall maintain files containing up-to-date resumes and applications of qualified candidates who are interested in institutional chaplaincy positions.

(b) The Coordinator, Chaplaincy Services, shall maintain copies of the monthly and annual reports of religious activities submitted to the Superintendent or his or her designee.

(a)

Mail, Visit and Telephone
Telephone Calls Between Incarcerated Family Members

Adopted Amendment: N.J.A.C. 10A:18-8.7

Proposed: March 7, 1988 at 20 N.J.R. 496(c).

Adopted: May 4, 1988 by William H. Fauver, Commissioner, Department of Corrections.

Filed: May 4, 1988 as R.1988 d.238, **without change.**

Authority: N.J.S.A. 30:1B-6 and 30:1B-10.

Effective Date: June 6, 1988.

Expiration Date: July 6, 1992.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows.

10A:18-8.7 Telephone calls between incarcerated family members
(a) Telephone calls shall be permitted between incarcerated family members. Family members are defined as:
1.-3. (No change.)
4. Siblings.
(b) (No change.)

LABOR

(a)

DIVISION OF VOCATIONAL REHABILITATION SERVICES

Legal Authority; Administration; Advisory Councils; Services; Appeals

Readoption with Amendments: N.J.A.C. 12:45 through 12:49

Proposed: March 21, 1988 at 20 N.J.R. 620(a).
Adopted: May 2, 1988 by Charles Serraino, Commissioner, Department of Labor.
Filed: May 2, 1988 as R.1988 d.235, **with technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).
Authority: N.J.S.A. 34:1-20, 34:16-20 et seq., Rehabilitation Act of 1973 (29 U.S.C. 701 et seq.), and 34 CFR §361.1 et seq.
Effective Date: May 2, 1988 for readoption; June 6, 1988 for amendments.
Expiration Date: May 2, 1993.

Summary of Public Comments and Agency Responses:
The Department of Labor received one comment on the proposed readoption with amendments of N.J.A.C. 12:45 through 12:49. The commenter, the Department of the Public Advocate, Division of Advocacy for the Developmentally Disabled (DADD), represents persons with developmental and other disabilities pursuant to N.J.S.A. 52:27E, as well as serving as the State's federally funded Protection and Advocacy System and Client Assistance Program pursuant to 42 U.S.C. 6042, 29 U.S.C. §732.

COMMENT: The Public Advocate suggested that N.J.A.C. 12:46-5.8(d), which requires the Department to disclose client information in response to certain investigations, should be amended to provide clients with notification of a request for information. The Public Advocate argued that the language "in response to investigations in connection with" is vague and invites abuse and harassment of clients. Notifying clients when a request for information is received, and prior to the release of information, would provide clients with an opportunity to secure appropriate protective orders, should they desire.

The Public Advocate also suggested that N.J.A.C. 12:46-5.8(e), which concerns disclosure of client information "in order to protect the individual or others when the individual poses a threat to his or her safety or the safety of others," should be more narrowly drafted. The Public Advocate suggested that the Department list the standards to be employed when determining whether a safety threat is present, and whether it is of a nature which would warrant disclosure. The Public Advocate then listed factors which could be considered: nature of the alleged harm, its seriousness, its probability, its imminence, and the extent to which measures other than unauthorized disclosure could be employed to prevent it from occurring.

RESPONSE: The Department believes that the language and meaning of 34 CFR 361.49(e)(3) and (4) are clear. Therefore, the Department has incorporated this federal language verbatim as part of the rule.

Furthermore, the amendments suggested by the Public Advocate to N.J.A.C. 12:46-5.8(d) and (e) would allow the client or his or her representative to delay the release of information. Such a delay might hamper an investigation or result in harm to the client or to the safety of others.

COMMENT: The Public Advocate argued that N.J.A.C. 12:46-5.9(c) is in conflict with 34 CFR §361.49(c)(1). N.J.A.C. 12:46-5.9(c) excludes counselor's notes from the client's records that may be released with the client's written consent. Subsection (c) also sets forth that the Department may release medical, psychological or other harmful information only to a physician or licensed psychologist. 34 CFR §361.49(c)(1) requires the State Unit to make all information in the case record accessible to the individual or release it to him or her or a representative in a timely manner. This rule also forbids the State Unit from releasing medical, psychological, or other harmful information directly to the client, but requires such information to be released through the client's representative, physician or licensed or certified psychologist.

The Public Advocate argued that N.J.A.C. 12:46-5.9(c) hampers the ability of a client or his or her representative to inquire into the propriety of the agency's decision regarding the handling of the client's case.

RESPONSE: The Department promulgated N.J.A.C. 12:46-5.9(b) and (c) to clarify an ambiguity that exists in the federal rules. Under the federal rules, the term "representative" is not defined. Thus, anyone can serve as a representative including someone who has no training in the handling of mentally or physically disabled individuals. An unqualified representative may reveal harmful information to the individual thereby undermining the federal intent of 34 CFR 361.49(c)(1) which is to protect individuals from the release of harmful information. The Department is aware of at least one incident where an unqualified representative revealed information to a handicapped individual which resulted in harm to the individual. Therefore, the Department will not release harmful information to an unqualified representative.

In regard to the exclusion of counselor's notes from the record, the Department has always excluded notes which are not required to be maintained as part of the case record as set forth in 34 CFR 361.39.

Finally, it should be noted that the Department is not abrogating an individual's ability to obtain his or her case record so that the individual can review the propriety of the Department's decision. Under N.J.A.C. 12:46-5.9(b), the Department will release a summary of the case record to the individual or his or her representative, and under N.J.A.C. 12:46-5.9(c), if the individual has a qualified representative, the Department will release harmful information through that representative.

COMMENT: The Public Advocate objected to the readoption of N.J.A.C. 12:46-5.10. This section provides a list of situations in which the Department assumes by "necessary implication" that clients have consented to the disclosure of personal information, and for which it will not seek express written consent. The Public Advocate argued that this section is in direct conflict with 34 CFR §361.49(e)(1), which requires that "[u]pon receiving the informed written consent of the individual, the State unit may release to another agency or organization for its program purposes only that personal information which may be released to the involved individual, and only to the extent that the other agency or program demonstrates that the information requested is necessary for its program."

The Public Advocate argued that the Department's "Consent by necessary implication" provision has been problematic for persons with sensitive disabilities such as Acquired Immune Deficiency Syndrome (AIDS) or related conditions since these persons have been discriminated against when their disabilities were made known.

RESPONSE: The Department believes that N.J.A.C. 12:46-5.10 is required under the federal rules. 34 CFR §361.49(a)(3) requires "[i]dentification of those situations where the State unit requires or does not require informed written consent of the individual before information may be released". Pursuant to this federal provision, the Department has listed the situations where informed written consent is not necessary.

Furthermore, implied consent is necessary in certain situations to assure timely delivery of services. If the Department had to obtain informed written consent in every situation, this might result in undue delays in providing services.

COMMENT: The Public Advocate argued that N.J.A.C. 12:48-1.1 contains self-defining language and does not offer any guidelines for the means by which rehabilitation potential is to be evaluated. The Public Advocate suggested that the phrase "evaluation of rehabilitation potential" be defined as set forth in the federal statute.

RESPONSE: The Public Advocate has misinterpreted N.J.A.C. 12:48-1.1. This provision concerns extended evaluation for the purpose of determining rehabilitation potential. Thus, the revision suggested by the Public Advocate is not appropriate.

The Department believes that the title of N.J.A.C. 12:48-1.1 might have caused confusion as to the meaning of this section. Therefore, the Department has amended the title to read "Extended evaluation for the purpose of establishing rehabilitation potential".

COMMENT: The Public Advocate argued that N.J.A.C. 12:48-1.6 conflicts with 34 CFR §361.31 by placing inappropriate limitations upon persons seeking eligibility for services while not providing for adequate assessment of the factors to be considered in making eligibility determinations. The Public Advocate contended that N.J.A.C. 12:48-1.6(a)1, which requires full consideration of medical reports, is inadequate to assess rehabilitation needs. The Public Advocate believes other non-medical information is necessary.

The Public Advocate argued that N.J.A.C. 12:48-1.6(a)2 limits vocational objectives by failing to make reference to other gainful activity, such as supported or sheltered employment.

Finally, the Public Advocate argued that N.J.A.C. 12:48-1.6(a)3 improperly requires a showing that the individual will, rather than may, benefit from service.

RESPONSE: The Public Advocate has misinterpreted N.J.A.C. 12:48-1.6(a)1 and 2. The Department is using the two prong test to determine eligibility for services as set forth in the federal rules. The Department, however, expanded the test to show that medical reports are used to determine whether the applicant has a physical or mental disability.

In regard to N.J.A.C. 12:48-1.6(a)2, the Department considers sheltered or supported employment part of gainful employment. To clarify this position, the Department has added the phrase "including sheltered or supported employment" to paragraph 2.

Finally, the Department agrees with the Public Advocate's comments concerning N.J.A.C. 12:48-1.6(a)3. The word "will" has been deleted and the word "may" has been added to reflect the federal rules.

COMMENT: The Public Advocate objected to the addition of N.J.A.C. 12:48-1.7(c)5 which provides the Director of the Division of Vocational Rehabilitation Services (DVRS) with discretion to list other services which may be exempted from client financial participation. The Public Advocate argued that this paragraph impermissibly delegates rulemaking authority to the Director.

RESPONSE: The Department disagrees. The Director must have discretion to exempt other services from client financial participation because of the difference in service and financial needs of each client, and the availability of funding for services.

Furthermore, it would be impractical to promulgate by rule the services he believes should be exempt for a particular client because of the length of time it takes to promulgate a rule would hamper the ability of the Department to provide services that might be essential for the success of the rehabilitation of the client.

COMMENT: The Public Advocate objected to the deletion of the provision that afforded aggrieved individuals a right to a fair hearing pursuant to the Administrative Procedure Act and the rules governing hearings. The Public Advocate argued that New Jersey's Administrative Procedure Act does not conflict with the hearing requirements set forth in 29 U.S.C. §722(d) and that the Act and federal law are consistent.

RESPONSE: The Department believes that its rule is within the federal law and regulations. The federal Department of Education, Office of Special Education and Rehabilitation Services recently proposed amendments to 34 CFR Part 361 to implement the 1986 amendments to 29 U.S.C. §701 et seq. See Federal Register, Vol. 52, No. 222, p. 44366, Wednesday, November 18, 1987. These proposed amendments implement the 1986 amendments to the appeal procedures set forth in 29 U.S.C. §722(d).

In the summary statement to the proposed federal rules, the Department of Education sets forth that "[t]he proposed regulations in §361.48 would remove current regulatory requirements that States adhere to a two-tier appeal process of providing first an administrative review and then a fair hearing. The proposed regulations would also establish specific timeliness for action by an impartial hearing officer and the director of the State program that are similar to regulatory requirements under the State special education program. The proposed regulations in §361.1(c)(2) define who qualifies as an impartial hearing officer." The summary statement clearly indicates that the federal Department of Education wants to eliminate a two-tier appeal process. This statement and the timeliness for action by an impartial hearing officer and the director indicate that the federal Department of Education is attempting to streamline the appeals process. A streamlined appeal procedure will benefit individuals who are aggrieved by agency action or inaction since they will receive faster appeal determinations.

Upon drafting this readoption with amendments, the Department of Labor reviewed New Jersey's Administrative Procedure Act and the rules of procedure to determine whether the proposed timeliness in the proposed federal rules. The Department determined that they were inconsistent.

After receiving notice from the federal Department of Education that the adoption of the proposed federal rules was imminent, the Department of Labor decided to incorporate the proposed federal appeal procedures in this readoption with amendments.

However, the Department believes that the Office of Administrative Law (OAL) may be an appropriate forum in which to conduct hearings. The Department also realizes that OAL has promulgated special procedural rules for the State's special education program and other types of hearings. The Department has no objection to working with OAL to explore the feasibility of developing special rules of procedure for appeals from DVRS action or inaction. In the interim, the Department must follow the appeal procedures set forth in the federal rules.

Full text of the readoption appears in the New Jersey Administrative Code at N.J.A.C. 12:45 through 12:49.

Full text of the amendments to the readoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*).

12:46-5.8 Release of confidential information

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

(d) D.V.R.S. must release information in response to investigations in connection with law enforcement, fraud or abuse (except where expressly prohibited by Federal or State laws or regulations) and in response to judicial order.

(e) D.V.R.S. may release personal information in order to protect the individual or others when the individual poses a threat to his or her safety or the safety of others.

12:46-5.9 Express written consent; forms

(a) In all instances other than those listed in N.J.A.C. 12:46-5.10 (consent by "necessary implication"), where information concerning a client of the Division is requested, such information shall not be released without the written consent of the client.

(b) When requested in writing by the individual, D.V.R.S. may release a summary of the case record to the client or his representative.

(c) Counselor's notes are not considered part of the case record. Copies of medical or psychological reports may not be released to the individual or his representative without the written consent of the physician or psychologist who wrote the report. Medical, psychological or other information which the agency believes may be harmful to the individual may only be provided to a physician or licensed psychologist.

12:48-1.1 *[Establishment of rehabilitation potential defined]* ***Extended evaluation for the purpose of establishing rehabilitation potential***

"Vocational rehabilitation services" (for the purpose of determination of rehabilitation potential) means any goods or services which are provided to an individual, who has a physical or mental disability which constitutes a substantial handicap to employment during the period (extended evaluation) specified to be necessary for, and which (services) are provided for, the purpose of ascertaining whether it may reasonably be expected that such individual will be rendered fit to engage in a gainful occupation (rehabilitation potential), supported employment or independent living.

12:48-1.2 through 1.5 (No change.)

12:48-1.6 Eligibility for rehabilitation services

(a) Applicants will be found eligible for rehabilitation services only after:

1. Full consideration of medical reports sufficient in all respects to provide a knowledge of the physical and mental conditions of the individual;

2. There is found to exist a physical or mental condition which makes it difficult for the individual to secure or maintain gainful employment***, including sheltered or supported employment***;

3. There is evidence that, through the provision of rehabilitation services, the individual *[will]* ***may*** be able to enter gainful or supported employment within a reasonable period of time or will benefit from independent living services.

12:48-1.7 Economic need

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

(c) The economic need of an applicant for vocational rehabilitation services is considered for determining participation in the cost of all vocational rehabilitation services other than:

1. Evaluation of rehabilitation potential;
2. Counseling, guidance, and referral services;
3. Placement;
4. On-the-job training; and
5. Other services as determined by the Director.

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

12:49-1.1 Appeal of vocational rehabilitation applicant or recipient

(a) Review procedure: Applicants/clients for vocational rehabilitation shall be advised of their right to a review in the event that they are dissatisfied with any action with regard to the furnishing or denial of VR services.

1. A review must be requested in writing by the applicant or client. This written request should be submitted to the Office Manager.
2. The review shall be held at a time and place convenient for the applicant or client.
3. The applicant or client will be notified of the date, time, place of the review. The Notification will be sent in advance of the review and provide enough time for the applicant or client to prepare for the review.
4. The applicant or client may be represented by counsel, friend, Client Assistance Program located in the Department of the Public Advocate, parent, guardian or self. If he or she chooses to represent himself or herself, he or she must be an adult, 18 years of age or older.
5. The applicant or client and his or her representative, if he or she desires to have one, will be given an adequate opportunity for cross examination and to present evidence on his or her behalf during the review.
6. The review shall be held before an impartial hearing officer within 45 days of the request by the applicant or client for a review.
7. The impartial hearing officer shall render a decision in writing and provide a full written report of his or her findings and the grounds for the decision to the client or his or her representative and to the DVRS Director within 30 days of the completion of the review.
8. Within 20 days of the mailing of the impartial hearing officer's decision to the applicant or client and the Director, the Director shall notify the applicant or client in writing of his or her intention to review the initial decision.
9. If the Director fails to notify such individuals within 20 days, the decision of the impartial hearing officer will be considered final.
10. If the Director decides to review the decision, such individuals may submit to the Director additional evidence and information relevant to a final decision within 15 days of the receipt of the Director's notice of intention to review.
11. A final decision shall be made in writing by the Director within 30 days of the mailing of the notice of intention to review and shall include a full report of the findings and the grounds for such decision. A copy of such decision shall be provided to such individuals.

12:49-1.2 (Reserved)

12:49-1.3 (Reserved)

12:49-1.4 (Reserved)

(a)

DIVISION OF WORKPLACE STANDARDS

Safety and Health for Public Employees Telecommunications Training Records; Construction Industry Records; Formaldehyde; Grain Handling Facilities

Adopted Amendments: N.J.A.C. 12:100-4.2, 5.2 and 6.2

Proposed: April 4, 1988 at 20 N.J.R. 726(a).
Adopted: May 13, 1988 by Charles Serraino, Commissioner, Department of Labor.
Filed: May 13, 1988 as R.1988 d.260, **without change.**
Authority: N.J.S.A. 34:6A-25 et seq., specifically 34:6A-30.
Effective Date: June 6, 1988.
Expiration Date: November 5, 1989.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows.

12:100-4.2 Adoption by reference

(a) The standards contained in 29 CFR Part 1910, General Industry Standards with the amendments published in the Federal Register through December 31, 1987 with certain exceptions noted in (b) and (c) below, are adopted as occupational safety and health standards and shall include:

1.-19. (No change.)

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

12:100-5.2 Adoption by reference

(a) The standards contained in 29 CFR Part 1926, Construction Industry Standards with the amendments published in the Federal Register through September 28, 1987, are adopted as occupational safety and health standards and shall include:

1.-22. (No change.)

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

12:100-6.2 Adoption by reference

(a) The standards contained in 29 CFR Part 1928, Agriculture with the amendments published in the Federal Register through July 31, 1987, are adopted as occupational safety and health standards and shall include:

1.-4. (No change.)

(b) (No change.)

LABOR/HEALTH

(b)

OFFICE OF SAFETY COMPLIANCE PREVENTABLE DISEASES

Requirements and Procedures for Obtaining Asbestos Worker or Supervisor Permit

Joint Adopted Repeals: N.J.A.C. 12:120-5 and 8:60-5
Joint Adopted New Rules: N.J.A.C. 12:120-5 and 8:60-5

Proposed: April 4, 1988 at 20 N.J.R. 728(a).
Adopted: May 13, 1988 by Charles Serraino, Commissioner, Department of Labor; and Molly J. Coye, Commissioner, Department of Health.
Filed: May 13, 1988 as R.1988 d.261, **with substantive and technical changes** not requiring additional public notice and comments (see N.J.A.C. 1:30-4.3).
Authority: N.J.S.A. 34:1-20 and 34:5A-39.
Effective Date: June 6, 1988.
Expiration Date: May 3, 1990.

Summary of Public Comments and Agency Responses:

The Department did not receive any written comments in direct response to the proposal. Coincidentally, the Department received, within the allowed comment period, two letters from individuals concerning the Department's current policy which serves as the basis for the proposal. The Department promptly contacted these individuals to discuss the proposal and invited formal written comments. The Department subsequently accepted both writers' original letters as part of the record of public comments after not receiving any further written comments on the proposal.

Both writers questioned the legality of the Department's policy of requiring an individual to certify his or her eligibility to work in the United States (completion of Form I-9) as a precondition to receiving an asbestos permit. Both writers argued that the I-9 Form must only be completed under federal law by employers who hire, recruit, or refer for a fee. And since the Department does not hire employees to do asbestos work, it cannot require individuals to complete the I-9 Form.

The Department agrees that it cannot require individuals to complete an I-9 Form as a precondition to receiving an asbestos permit. The purpose of the Department's policy, as stated in the summary statement to the proposal, was to verify the identity of the applicant taking the permit test and to ensure that every individual performing asbestos work has a valid permit. The eligibility to work requirement is not necessary to implement the purpose of the Department's policy and regulation. Consequently, the Department has clarified its policy and amended the rules on adoption, concerning the eligibility to work requirement.

In the rules and Appendix "B", all references to "eligibility to work in the United States" have been deleted. These references occurred at N.J.A.C. 12:120-5.3(a)2 and (b)2, at N.J.A.C. 8:60-5.3(a)2 and (b)2 and throughout N.J.A.C. 12:120-5.4 and N.J.A.C. 8:60-5.4. The Department has also made some necessary changes in the codification of N.J.A.C. 12:120-5.4 and N.J.A.C. 8:60-5.4, due to the elimination of the "eligibility to work" requirement.

Additionally, the Department of Labor and Department of Health have made other substantive and technical changes not requiring additional public notice and comment.

The substantive and technical changes to the rules are set forth below.

The phrase "or renewing" has been added to the scope of the rules. This addition clarifies that renewal applicants are subject to the requirements of the rules.

Technical changes have been made to N.J.A.C. 12:120-5.3(a)3, N.J.A.C. 8:60-5.3(a)3, N.J.A.C. 12:120-5.5(b) and N.J.A.C. 8:60-5.5(b) to clarify that there are two training courses and that an examination is a written one.

N.J.A.C. 12:120-5.4(a)3i and N.J.A.C. 8:60-5.4(a)3i have been deleted.

The corresponding cites for Title 8 of the N.J.A.C. have been added at N.J.A.C. 12:120-5.4(b)5, 5.5(a)1, (b)1iii and (f)2v.

The reference to Appendix "C" in N.J.A.C. 12:120-5.4 (8:60-5.4) has been changed to Appendix "B". The reference to Appendix "B" in N.J.A.C. 12:120-8:60-5.5) has been changed to Appendix "C".

The phrase "and submit to the Department of Labor the applicant's copy of the OES-24 form" has been added to N.J.A.C. 12:120-5.5(e)1 and N.J.A.C. 8:60-5.5(e)1, to clarify existing procedure.

In N.J.A.C. 12:120-5.5(b)1i, the phrase "which shall be collected by the examination administrator and forwarded to the Department of Health" has been deleted.

In N.J.A.C. 12:120-5.5(b)1ii, the phrase "of the applicant" has been added for clarity.

In N.J.A.C. 12:120-5.5(c)1 and (d)1, technical changes were made to clarify that there is a worker training course and a supervisor training course.

The phrase "asbestos worker" has been deleted at N.J.A.C. 12:120-5.5(f)2 and 3 and N.J.A.C. 8:60-5.5(f)2 and 3 and the word "individual" has been added. This change was made to maintain consistency.

N.J.A.C. 12:120-5.5(g) and N.J.A.C. 8:60-5.5(g) have been added to clarify that individuals taking the asbestos worker or supervisor examination cannot copy questions or retain questions after finishing the examination.

In Appendix A, the phrase "two years" has been changed to "one year".

See following pages for reproduction of Appendices A, B, and C.

Full text of the adoption follows (additions to the proposal indicated in boldface with asterisks ***thus***; deletions from the proposal indicated in brackets with asterisks *[thus]*).

SUBCHAPTER 5. REQUIREMENTS AND PROCEDURES FOR OBTAINING ASBESTOS WORKER OR SUPERVISOR PERMIT

12:120-5.1 (8:60-5.1) Scope

This subchapter shall apply to each person applying for ***or renewing*** either an asbestos worker permit or an asbestos supervisor permit.

12:120-5.2 (8:60-5.2) Definitions

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

"Applicant" means any person seeking to obtain either an asbestos worker or an asbestos supervisor permit.

"Employment Services Office" means any local office or outstation of the New Jersey Department of Labor, Division of Employment Services.

"Experienced asbestos worker" means any person who has worked with either the application, enclosure, encapsulation or removal of asbestos and who has completed an approved New Jersey Department of Health Experienced Asbestos Worker training course prior to June 18, 1985.

12:120-5.3 (8:60-5.3) Requirements for obtaining a permit

(a) The Commissioner shall issue a permit to each applicant who satisfies the requirements listed below. The applicant shall:

1. Be at least 18 years of age;

2. Verify his or her identity *[and eligibility to work in the United States]* at a New Jersey Employment Services Office;

3. Successfully complete *[a]* ***either the worker or supervisor*** training course approved by the Department of Health and pass *[an]* ***a written*** examination ***devised and*** administered by the Department of Health ***for each respective position***;

[i. An applicant for a supervisor permit shall complete the additional fifth-day supervisor training required by the Department of Health and pass an examination administered by the Department of Health for supervisors; and]

4. Complete the permit application, a copy of which is appended to this subchapter as Appendix A.

(b) The Commissioner shall issue a permit to an experienced asbestos worker who satisfies the requirements listed below. The experienced asbestos worker shall:

1. Be at least 18 years of age;

2. Verify his or her identity and eligibility to work in the United States at a New Jersey Employment Services Office;

3. Submit to the Division of Workplace Standards evidence that indicates the applicant has completed a minimum of 24 hours of instructions in a training course which has been approved by the Commissioner of the Department of Health as substantially complying with the asbestos training programs set forth at N.J.A.C. 12:120-6 and 8:60-6;

4. Submit to the Division of Workplace Standards evidence of having taken a qualitative and quantitative respirator fit test administered by a qualified industrial hygienist or health professional;

5. Submit to the Division of Workplace Standards an application as set forth at N.J.A.C. 12:120-5.6 ***and 8:60-5.6***; and

6. Submit to the Division of Workplace Standards documentation of previous asbestos work experience.

12:120-5.4 (8:60-5.4) Procedures for verifying identity *[and employment eligibility]*

(a) Each applicant shall verify his or her identity *[and eligibility to work in the United States]* at a New Jersey Employment Services Office.

(b) Each applicant shall bring to the Employment Services Office *[either one document that establishes both identity and employment eligibility or one document that establishes identity and one document that establishes employment eligibility.]* ***a social security card and one of the following:***

[1. Documents that establish both identity and eligibility are as follows:]

*[i.]****1.*** A United States Passport;

*[ii.]****2.*** A Certificate of United States Citizenship;

*[iii.]****3.*** A Certificate of Naturalization;

*[iv.]****4.*** An unexpired foreign passport with attached employment authorization; or

*[v.]****5.*** An alien registration card with photograph.

[2. Documents that establish identity only are as follows:]

*[i.]****6.*** A state-issued driver's license or a state-issued identification card with a photograph or information including name, sex, date of birth, height, weight, and color of eyes;

*[ii.]****7.*** A United States Military Card; *[or]*

8. A major credit card; or

*[iii.]***9.** Other documentation that the Employment Services employee in his or her discretion believes establishes the applicant's identity, but excluding any asbestos permit issued by either the New Jersey Department of Labor or the New York Department of Environmental Protection.

*[3. Documents that establish employment eligibility only are as follows:

i. An original social security number card (other than a card stating it is not valid for employment);

ii. A birth certificate issued by a state, county or municipal authority bearing a seal or other certification; or

iii. An unexpired Immigration and Naturalization Authorization.]*

(c) Each applicant also shall bring to the Employment Services Office one passport size color photograph.

(d) Upon verification of identity *[and eligibility to work in the United States]*, the Employment Services Office shall mail to the Division of Workplace Standards the following:

1. An asbestos permit referral (see Appendix *[C]***B**) which shall contain certification by an Employment Service employee that the applicant has been identified *[and is eligible to work in the United States]*; and

2. The applicant's passport size color photograph.

12:120-5.5 (8:60-5.5) Procedures for completing training course and examination

(a) Each applicant required by this subchapter to complete asbestos training shall register at a training agency which has been certified by the New Jersey Department of Health to offer such training. A list of certified training agencies is available from the Department of Health.

1. The topics for worker and supervisor training are set forth at N.J.A.C. 12:120-***6.2,*** 6.6, 6.7*,* *[and]* 6.8*[.]* ***and N.J.A.C. 8:60-6.2, 6.6., 6.7 and 6.8.***

(b) Upon completion of the training course, each applicant shall register through the training agency to take *[an]* ***a written*** examination administered by the Department of Health.

1. Each applicant shall bring the following to the examination:

i. The trainee's copy of the Asbestos Trainee Evaluation Form (OES-24), a sample of which is appended to this subchapter as Appendix *[B, which shall be collected by the examination administrator and forwarded to the Department of Health]* ***C***;

ii. A recent passport size color photograph ***of the applicant*** to be surrendered at the examination site; and

iii. Any document with the trainee's signature which establishes the applicant's identification as specified in N.J.A.C. 12:120-5.4(b) *[1 or 2]* ***and N.J.A.C. 8:60-5.4(b)***.

(c) Each applicant who achieves a score of at least 70 on the worker examination shall pass the examination for the worker permit.

1. If an applicant fails to pass the worker examination after three opportunities and still desires to obtain a worker permit, such applicant shall retake the entire five-day ***worker*** training course.

(d) Each applicant for a supervisor permit who achieves a score of at least 70 on the supervisor examination shall pass the examination for the supervisor permit.

1. If an applicant fails to pass the supervisor examination after three opportunities and still desires to obtain a supervisor permit, such applicant shall retake the entire ***five-day supervisor*** training course *[and the additional fifth-day supervisor training]*.

(e) Each applicant for a supervisor permit who achieves a score of from 60 to 69 shall qualify for a worker permit.

1. If an applicant who scores from 60 to 69 decides not to take the supervisor examination within the two remaining opportunities, such applicant shall notify the Department of Labor for purposes of obtaining a worker permit ***and submit to the Department of Labor the applicant's copy of the OES-24 form***. If an applicant selects this option, the applicant will lose his or her opportunity to retake the supervisor examination.

(f) Individuals holding valid permits who have completed the supervisor training prior to January 1, 1988 shall pass the asbestos supervisor exam prior to December 31, 1988 in order to work as a supervisor after the December 31, 1988 deadline.

1. Each individual set forth in this subsection who fails to pass the supervisor exam by December 31, 1988 shall retake the supervisor portion of the asbestos training course.

2. Each *[asbestos worker]* ***individual*** set forth in this subsection shall bring the following to the examination:

i. A valid New Jersey Asbestos Permit;

ii. A letter addressed from the individual's training agency to the examination administrator designated by the Department of Health with an original instructor's signature that certifies the individual has completed supervisor training;

iii. A photocopy of the individual's OES-24 form attached to the letter set forth in (f)2ii above or the individual's original trainee copy of the OES-24 form which indicates completion of supervisor training;

iv. A recent passport size color photograph to be surrendered at the examination site; and

v. Any document with the trainee's signature which establishes the applicant's identification as specified in N.J.A.C. 12:120-5.4(b) *[1 or 2]* ***and N.J.A.C. 8:60-5.4(b)***.

3. Each asbestos worker set forth in this subsection shall receive one opportunity to pass the supervisor exam. If such worker fails to pass the exam, the worker shall retake the supervisor portion of the asbestos training course.

(g) No applicant who takes the worker or supervisor examination shall copy any questions used in the examination nor retain any questions after finishing the examination.

1. The Department of Labor shall disapprove the permit application of any applicant who violates this provision.

2. Any applicant who violates (g) above may be subject to prosecution and penalties pursuant to the Act.*

12:120-5.6 (8:60-5.6) Procedures for completing permit application

(a) Each applicant for a permit shall complete an application which can be obtained from the Division of Workplace Standards.

(b) Each applicant shall provide the following to the Division of Workplace Standards:

1. Name, address, date of birth, age, sex, height, weight, eye color, driver's license number, telephone number, social security number; and

2. The name and location of the course where the applicant has successfully completed asbestos training, the date of completion and number of hours of training.

i. The applicant shall submit to the Division of Workplace Standards documentation that indicates successful completion of the asbestos training course with the application for permit.

ii. If the applicant has not completed the asbestos training course, the applicant shall send to the Division of Workplace Standards evidence that indicates successful completion of the asbestos training as soon as possible.

3. Two recent, identical passport size color photographs with the applicant's face being not less than three quarters of an inch wide. The applicant shall not wear a hat, glasses or any other item which may alter or disguise the overall features of the face in the photographs.

i. The applicant shall print his or her name on the back of both photographs submitted.

ii. The applicant shall attach one passport size color photograph in the space provided on the application.

iii. If a permit is issued, the Department of Labor shall laminate the second photograph on the permit.

4. The name and address of the applicant's present employer, the applicant's position with the employer and the date employment commenced.

(c) The applicant shall sign and date a statement certifying that the information contained in the application is accurate, true and complete to the best of his or her knowledge.

(d) The applicant shall submit a $20.00 non-refundable fee (certified check or money order made payable to the Commissioner of Labor) with the permit application.

APPENDIX A

ASBESTOS CONTROL AND LICENSING ACT, N.J.S.A. 34:5A-32, ET SEQ.

APPLICATION FOR PERMIT

(TYPE OR PRINT LEGIBLY IN INK)

APPLICANT'S NAME

LAST | FIRST | MI

DATE OF BIRTH: MO | DAY | YR

STREET ADDRESS

STREET ADDRESS (CONTINUED)

AGE: YEARS

SEX: M/F

CITY | STATE | ZIP CODE

HEIGHT: FEET | INCHES

SOCIAL SECURITY NUMBER

WEIGHT—CHECK ONE BOX

0 ☐ UNDER 120 LBS   1 ☐ 121 TO 140 LBS.   2 ☐ 141 TO 160 LBS.   3 ☐ 161 TO 180 LBS   4 ☐ 181 TO 200 LBS   5 ☐ 201 TO 220 LBS   6 ☐ OVER 220 LBS

TELEPHONE NUMBER

EYE COLOR—CHECK ONE BOX

1 ☐ BLACK   2 ☐ BROWN   3 ☐ GRAY   4 ☐ BLUE   5 ☐ HAZEL   6 ☐ GREEN   7 ☐ OTHER

DO YOU HAVE A VALID MOTOR VEHICLE DRIVER'S LICENSE FROM ANY STATE?

YES ☐ OR NO ☐
CHECK ONE BOX

IF YES: STATE

IF YES: MOTOR VEHICLE DRIVER'S LICENSE NUMBER

PRIOR TO THE FILING OF THIS APPLICATION, HAVE YOU SUCCESSFULLY COMPLETED AN ASBESTOS TRAINING COURSE APPROVED BY NEW JERSEY DEPARTMENT OF HEALTH?

YES ☐ OR NO ☐
CHECK ONE BOX

IF "YES", COMPLETE TABLE BELOW:

COURSE NAME AND LOCATION	DATE OF COURSE COMPLETION	NUMBER OF HOURS OF TRAINING OR INSTRUCTION

* YOU MUST SUBMIT PROOF/DOCUMENTATION/EVIDENCE THAT YOU HAVE SUCCESSFULLY COMPLETED THE APPROVED TRAINING COURSE LISTED ABOVE (ATTACH TO APPLICATION).

APPLICANT—CONTINUE ON REVERSE—DO NOT WRITE BELOW—FOR INTERNAL OFFICE USE ONLY

RECEIVED			PAYMT. METH. CK. MO.	REJECT CD		APPROVE
REVIEWED			CK/MO NO	REASON		PRINTED
REFERRAL INFO			CK./MO. DATE			ISS. EXP.
			BANK NO.			TYPE
				FORM NO.		PERMIT NUMBER
			ACCT.			CONTROL NUMBER
			TT			CB XREF.
			AMT.			CB PAGE

IN ORDER TO ISSUE YOU A PERMIT, YOU MUST PROVIDE TWO RECENT, RECOGNIZABLE AND IDENTICAL PASSPORT PHOTOGRAPHS WITH YOUR ENTIRE FACE BEING NOT LESS THAN THREE-QUARTERS OF AN INCH WIDE.

ATTACH ONE PHOTOGRAPH TO THE SPACE PROVIDED.

THE SECOND PHOTOGRAPH WILL BE LAMINATED ON THE PERMIT.

IF THE PHOTOGRAPH TO BE LAMINATED ON THE PERMIT CANNOT BE TRIMMED TO THE SIZE OF ONE AND ONE-HALF INCHES BY TWO INCHES, THEN THE PHOTOGRAPH IS NOT ACCEPTABLE.

PHOTOCOPIES OF PHOTOGRAPHS ARE NOT ACCEPTABLE.

PLEASE PRINT YOUR NAME ON THE BACK OF BOTH PHOTOGRAPHS THAT YOU SUBMIT.

ATTACH PHOTOGRAPH HERE

PLEASE INDICATE IN THE TABLE BELOW THE NAME AND ADDRESS OF YOUR PRESENT EMPLOYER	YOUR POSITION WITH EMPLOYER	DATE OF EMPLOYMENT

APPLICANT STATEMENT

THE INFORMATION CONTAINED IN THIS APPLICATION IS ACCURATE, TRUE, AND COMPLETE TO THE BEST OF MY KNOWLEDGE.

I UNDERSTAND THAT IF SUCH INFORMATION CONTAINED IN THIS APPLICATION IS FALSE, I AM SUBJECT TO THE PENALTY PROVISIONS UNDER THE ASBESTOS CONTROL AND LICENSING ACT, P.L. 1984, c. 173.

I UNDERSTAND THAT THIS APPLICATION IS SUBJECT TO VERIFICATION AND I AGREE TO PROVIDE ANY ADDITIONAL DOCUMENTATION AS REQUIRED.

I AGREE THAT OUTSIDE SOURCES MAY BE CONTACTED TO VERIFY THE INFORMATION I HAVE GIVEN IN THIS APPLICATION AND I DO HEREBY GIVE MY PERMISSION FOR DISCLOSURE OF ANY INFORMATION WHICH MAY BE NEEDED TO DETERMINE THE VALIDITY OF THIS PERMIT AND OR MY PERMIT ELIGIBILITY.

SIGNATURE OF APPLICANT DATE

THE PERMIT SHALL BE VALID FOR ONE YEAR FROM THE DATE OF ISSUANCE
A FEE OF $20.00 MUST BE ENCLOSED WITH THIS APPLICATION FOR PERMIT.

APPENDIX B

ASBESTOS PERMIT REFERRAL

To: STATE OF NEW JERSEY
DEPARTMENT OF LABOR
DIVISION OF WORKPLACE STANDARDS
OFFICE OF ASBESTOS CONTROL AND LICENSING
28 YARD AVE, 3rd Fl.
TRENTON, NEW JERSEY 08625-0054

Date: ____________________

This is in response to your request for verification of employment eligibility for Asbestos Permit Applicants.

Name: ____________________

Address: ____________________

Social Security No. ____________________

____

____

Applicant's signature
Executed at State Agency/Date

Whose eligibility for employment in the United States was verified by this office prior to his or her referral.

Expiration of employment authorization (if applicable) [ ] (None) or [ ] (Date expires)

____
Signature of ES Representative

From: (State Employment Agency – Address and Zip Code)

(Local Office Address Stamp)

____
Signature of Authorizing Agent
(and Agency Seal)

APPENDIX C
ASBESTOS TRAINEE EVALUATION

I. GENERAL - To be Completed by Trainee

Name of Trainee (Last, First, MI) | Home Telephone No. ( )

Address | City | State | Zip Code

Social Security Number - - | Date of Birth | Highest Grade of Education Completed

Name and Address of Present Employer | Related Work Experience [ ]Yes [ ]No Length of Time:

Signature | Date

II. RATING - To be Completed by Training Agency

Ratings: 5-Excellent 4-Good 3-Average 2-Fair 1-Poor Minimum Score=15

	Rating Number
General Attitude	______
Demonstrated Understanding of General Work Practices and Technical Requirements	______
Demonstrated Understanding of Need for Personal Protective Equipment and Decontamination Procedures	______
Mechanical Abilities	______
Ability to Work With Others	______
TOTAL	______

Final Comprehensive Test Score: ______________

Instructor's Comments: ______________________________

The above-named student has [ ]Successfully [ ]Not Successfully completed ______ (No.) days of training on ______ (Date), as an asbestos:

[ ]Worker [ ]Inspector [ ]Contractor and Supervisor

[ ]Management Planner [ ]Project Designer [ ]Other______________

Name of Training Agency | Agency No. | Telephone Number ( )

Address | Zip Code

Course Location | Course Dates Beginning: Ending:

Name of Evaluator (Print) | Signature | Date

Distribution; White - Training Agency; Canary - NJ Dept. of Health; Pink - NJ Dept. of Labor; Goldenrod - Trainee

12:120-5.7 (8:60-5.7) Length of permit
Each permit issued by the Commissioner shall be valid for a one year period.

12:120-5.8 (8:60-5.8) Contents of permit
(a) Each permit for an asbestos worker shall be issued in writing and shall contain the following:
1. The date of issuance;
2. The expiration date;
3. The name and address of the worker to whom it is issued;
4. The worker's social security number; and
5. The signature of the Commissioner of the Department of Labor.
(b) Each permit for an asbestos supervisor shall contain, in addition to the requirements set forth in (a) above, "SUPVR" which shall indicate successful completion of the supervisor training course examination and the New Jersey Department of Health supervisor examination.

12:120-5.9 (8:60-5.9) Identification of permit holder
(a) Each worker or supervisor shall carry the permit at all times when working on an asbestos project.
(b) The permit shall be carried upon the worker's person and be readily available for inspection by representatives of the Commissioners of the Departments of Labor and Health and the contracting agency.

12:120-5.10(8:60-5.10) Suspension and revocation of permit
(a) The Commissioner may suspend or revoke any permit for the following reasons:
1. The worker or supervisor is incompetent to perform asbestos work;
2. The worker or supervisor is negligent in performing asbestos work; and/or
3. The worker or supervisor loans the permit, abandons the permit, or allows it to pass from his or her possession.
(b) The Commissioner may order the immediate suspension or revocation of a worker or supervisor permit if there is an imminent danger to the health and safety of the public or employees.
(c) Prior to suspending or revoking a permit, the Commissioner shall provide the worker or supervisor with an oral or written notice of the violations. This subsection shall not apply to situations set forth in (b) above.
1. Each worker or supervisor shall have an opportunity to respond to the charges.
(d) Any individual performing the duties of a worker or supervisor and possessing an expired permit shall be subject to the penalties under the Act.
(e) Any individual using fraudulent means to obtain a permit shall be subject to prosecution under the Act. Any permit acquired through such means shall be invalid.

12:120-5.11 (8:60-5.11) Renewal of permit
(a) Each worker and supervisor shall renew his or her permit within 30 days prior to the date of the expiration of the permit.
(b) The Commissioner shall renew a worker or supervisor permit if the renewal applicant has:
1. Verified his or her identity and eligibility to work in the United States;
2. Completed an application as set forth in N.J.A.C. 12:120-5.6 within three years of the expiration date of the expired permit;
3. Provided evidence of any continuing education that may be required by the Commissioner of the Department of Health in consultation with the Commissioner of the Department of Labor; and
4. Paid all penalties lawfully imposed on the renewal applicant under the Act.
(c) The Commissioner shall treat an application for renewal of a permit which has expired more than three years as an original application.
(d) Any worker or supervisor who alters, defaces, mutilates or loses a permit or has it stolen shall comply with the requirements set forth in (b) above.
1. Any worker or supervisor who loses a permit or has it stolen shall notify the Division of Workplace Standards in writing immediately.
2. Any photostats, photographs or reproductions of a permit shall be invalid.

12:120-5.12 (8:60-5.12) Appeal procedures
(a) Any individual who is aggrieved by any Department of Labor action or inaction under this subchapter may request an informal administrative review for the purpose of resolving the dispute.
1. The aggrieved individual shall submit to the Division of Workplace Standards a written request for a review within five days from the date the individual received the notice of agency action or inaction.
2. The Department of Labor shall conduct the review within 10 days from the date the Division of Workplace Standards received the request for an informal review.
3. The Division of Workplace Standards shall notify the aggrieved individual in writing as to the time and location of the review.
4. The aggrieved individual may be represented by counsel or any other representative, or may represent himself or herself at the review.
5. The aggrieved individual may present evidence, call witnesses and cross examine at the review.
6. The Department of Labor shall mail to the aggrieved individual its written decision in the matter within 10 days from the date of the review.
(b) Any aggrieved individual who disagrees with the Department of Labor's review decision may submit to the Division of Workplace Standards a written request for a formal hearing to be held in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., N.J.S.A. 52:14F-1 et seq., and the Uniform Administrative Rules Practice, N.J.A.C. 1:1 within 10 days from the date of the written decision.
1. The formal hearing shall be held expeditiously, if possible, within 30 days from the date the Division of Workplace Standards receives the written request for a formal hearing.

ENVIRONMENTAL PROTECTION

(a)

DIVISION OF COASTAL RESOURCES
Freshwater Wetlands Protection Act Rules
Adopted New Rules: N.J.A.C. 7:7A

Proposed: December 21, 1987 at 19 N.J.R. 2330(a).
Adopted: May 16, 1988 by Richard T. Dewling, Commissioner, Department of Environmental Protection.
Filed: May 17, 1988 as R.1988 d.267, **with substantive and technical changes** not requiring additional public notice and comment (see N.J.S.A. 1:30-4.3).
Authority: N.J.S.A. 13:1B-3, 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.
Effective Date: June 6, 1988.
Operative Date: July 1, 1988.
Expiration Date: July 1, 1993.

Summary of Public Comments and Agency Responses:
The Department of Environmental Protection (Department) received more than 475 comments from approximately 94 commenters on the proposed Freshwater Wetlands Protection Act Rules. The proposed new rules specified the standards and procedures for the Division of Coastal Resources (Division) to implement the freshwater wetlands and open water fill permit programs under the Freshwater Wetlands Protection Act ("The Act" or "FWPA"), N.J.S.A. 13:9B-1 et seq. Verbal comments were received from approximately 100 people who attended public hearings in Morristown, Hamilton Township, and Camden on January 12, 13, and 14, 1988, respectively. Written comments were received from public

interest groups, trade groups, local governments, mosquito commissions, State agencies and individuals, before the close of the comment period of February 20, 1988.

In general, provisions addressing Definitions (N.J.A.C. 7:7A-1), Letters of Interpretation (N.J.A.C. 7:7A-7), General Permits (N.J.A.C. 7:7A-8) and Mitigation (N.J.A.C. 7:7A-14) received the most attention. However, comments spanned the range of issues addressed in the rules. In many cases, the comments simply endorsed particular provisions of the proposal.

General Comments

1. COMMENT: The wetland delineation criteria used by the Army Corps of Engineers (Corps) are somewhat different than the United States Environmental Protection Agency (EPA) criteria, which will be used in the State Program. How will the State handle the transition when the State assumes the 404 program?

RESPONSE: Both federal agencies (the Corps and EPA) rely on wetland delineation methodologies that involve consideration of three site-specific parameters (vegetation, soils, hydrology). Although there may be some disparity between the two methods in the relative level of emphasis given each parameter, the methods are very similar so there should be little difficulty. In addition, the Department will be working with both the Corps and EPA to coordinate field delineations and verifications and to minimize confusion.

2. COMMENT: In general the proposed rules are fair and likely to accomplish the purposes of the Act.

RESPONSE: The Department acknowledges receipt of this comment in support of the proposed new rules.

3. COMMENT: The proposed new rules should be compared with other existing and proposed rules concerned with water quality, watershed protection and land use planning.

RESPONSE: A major goal of the Act and the rule is the consolidation of the processing of wetlands related aspects of other regulatory programs. Toward that end, the adopted rules reflect significant consultation among programs and explicit consideration of the Department's surface water quality standards and watershed protection mandates.

4. COMMENT: Two commenters felt that, to maximize cooperation between DEP and various local boards and commissions, there should be at least 45 days available for comment submitted at each regulatory step provided for local input.

RESPONSE: Where possible, time is allowed for local input. The Act's deadlines severely restrict the amount of time the Department may wait for and consider local comment.

5. COMMENT: The criteria and information DEP will rely upon to determine what areas are wetlands is inaccurate and misleading.

RESPONSE: The Freshwater Wetlands Protection Act requires the Department to use the three-parameter approach enumerated in the EPA Wetland Identification and Delineation Manual. This technique parallels the Army Corps of Engineers wetland delineation methodology and has been substantiated by scientific literature and field research. Furthermore, the three-parameter approach provides a standardized method for wetland identification purposes. The Department does not believe that this approach is inaccurate or misleading.

6. COMMENT: The State should streamline the process to make less work for the implementing agency and reduce costs to taxpayers.

RESPONSE: The Department has structured the freshwater wetlands permit review process to expedite the process by providing as much information as possible to a potential applicant prior to a formal application through letters of interpretation and pre-application conferences. Determinations as to the extent of wetlands on a specific site, the wetlands classification, and likely buffer requirements will be provided as early as possible to facilitate environmentally sensitive design and development of projects. This process is expected to help the citizenry pursue activities with the minimum time and expense for review.

7. COMMENT: Farmers along the Delaware Bay with farmland protected by berms and dikes along the fresh-salt water interface may be negatively affected by the rules. This should be considered.

RESPONSE: Normal farming operations as defined at N.J.A.C. 7:7A-2.7 are exempt from regulation under this chapter. These activities may, however, be regulated under the authority of the Waterfront Development Law of 1914 or the Wetlands Act of 1970. Consolidated rules concerning the latter two laws have been in place since 1980 and can be found at N.J.A.C. 7:7E-1.

8. COMMENT: The rules should be presented to the Legislature for their approval to see if this is what they intended.

RESPONSE: New Jersey's Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., specifies the process for adopting and amending the New Jersey Administrative Code. N.J.S.A. 52:14B-4.1 provides for submission of rules to the Legislature before adoption. The 60-day legislative review period for this rule ran from December 21, 1987 to February 20, 1988. Accordingly, the Legislature has had a chance to review the rule proposal prior to adoption.

9. COMMENT: The approval process should be accelerated especially for minor projects.

RESPONSE: The Act does not define or make a distinction between major and minor projects. Rather, it recognizes that some common activities will have only minor individual and/or cumulative environmental impacts (see Section 23 of the Act). The Department proposed Statewide general permits which are adopted at N.J.A.C. 7:7A-9.2 for these types of activities. Approval for these activities will be graded on an expedited basis.

10. COMMENT: Once land is purchased and investments have been made one should not have to consider alternatives.

RESPONSE: The Legislature considered this understanding of private ownership of property and determined 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" (N.J.S.A. 13:9B-2). Further, an express goal of the Act is the State's assumption of the regulatory program under section 404 of the Federal Clean Water Act. Federal regulations for transfer of that program require that alternatives be considered.

11. COMMENT: Free standing tidal freshwater wetlands under five acres in size have no effect in moderating floods and, therefore, should not be subject to regulation.

RESPONSE: Tidal freshwater wetlands are generally regulated under the Wetlands Act of 1970 and not under the FWPA. To the extent tidal freshwater wetlands do come under the FWPA, flood capacity is not the sole basis for protecting them. In addition to the storage of flood waters, wetlands serve many valuable functions which have been reiterated in Section 2 of the Act and in many other scientific publications on wetlands. These areas have been deemed worthy of protection by the Legislature.

12. COMMENT: Three commenters stated that the proposed new rules provide for a "taking" of private property without "fair compensation", and that the economic impact of the adoption will be greater on some people than on others.

RESPONSE: Many valid State and Federal statutes and regulations restrict a property owner's use of land. The Freshwater Wetlands Protection Act provides in Section 22 that, should a property owner feel that a permit decision made pursuant to the Act restricts use of the land so as to constitute a taking of the property, that person may bring a court action for compensation. There is no presumption that regulation pursuant to the Act would consititute a taking.

13. COMMENT: The rule should allow municipalities to administer elements of the State permit program. This could be accomplished for smaller projects located within their boundaries similar to existing Stream Encroachment Permit Program procedures. This would reduce workloads on the implementing agency and improve enforcement.

RESPONSE: The Act, at N.J.S.A. 13:9B-27, requires the State to "take all appropriate action to secure assumption of the permit jurisdiction exercised by . . ." the Corps. Discussions with the Federal government, to date, seem to indicate that municipal delegation may jeopardize the assumption of the Federal program. Therefore, at the present time, the rules do not include municipal delegation provisions.

14. COMMENT: Manmade drainage ditches and swales should not be regulated.

RESPONSE: Drainage ditches and swales which exhibit wetland characteristics defined in the EPA three-parameter approach are required to be regulated by the Act. However, some regulated activities involving loss or substantial modification of less than one acre in these areas may be authorized under a Statewide general permit pursuant to N.J.A.C. 7:7A-9.2.

15. COMMENT: "Best management practices" is too vague a term. Reference should be made to an approved conservation plan or other standards to ensure that practices are environmentally sound.

RESPONSE: In recognition of these concerns and EPA requirements for assumption of the 404 program, some best management practices (BMPs) which are used by the federal 404 program have been specified in the adoption. In general, however, BMPs will vary greatly by site and project and thus are not appropriate for codification in a rule. Rather, they will be fashioned for each permit or activity as needed.

16. COMMENT: The transition area requirements of the Act become effective in July 1989. In the interim, the Department should modify their existing transition area/buffer rules in other programs to comply with the standards in the Act.

RESPONSE: The Department is considering how best to coordinate buffer provisions of various programs. However, since transition area requirements do not take effect until July 1, 1989, the question of their coordination is not addressed in this adoption.

7:7A-1.4

17. COMMENT: Place definitions of words that are only used once into the text where they are used.

RESPONSE: The Department convention in rules is to consolidate all definitions in one section. An attempt has been made, however, to cross reference information as much as possible to facilitate understanding and improve clarity.

18. COMMENT: The rule should contain a definition of the term "bridge".

RESPONSE: The Department disagrees. These structures are not treated differently from the roads of which they are a part. There is no need for a separate definition.

19. COMMENT: The definition of "compelling public need" should be relocated to N.J.A.C. 7:7A-3.3(a)1 for clarity.

RESPONSE: The Department finds that the location of the definition at N.J.A.C. 7:7A-1.4 is sufficiently clear, but adds a cross reference to N.J.A.C. 7:7A-3.3(a)1 in order to remove any chance of confusion.

20. COMMENT: The demonstration of "compelling public need" as part of the rebuttal of the Act's presumption of practicable alternatives should be satisfied when the Board of Public Utilities finds that a new utility line is necessary for the service, convenience or welfare of the public.

RESPONSE: The Department will determine a "compelling public need" on a case-by-case basis, including utility lines.

21. COMMENT: The definition of "compelling public need" should be changed from "no alternative available to meet the established public need" to "no practicable alternative" to meet the public need.

RESPONSE: The Department disagrees. The term "practicable alternative" is defined in the rule specifically for use in evaluating alternative projects for applicants to pursue, and does not apply well to the analysis of the "compelling public need" for an activity. Further, the suggested change would significantly weaken the standard required to constitute "compelling public need". This would run counter to the plain meaning of the term, and would contravene the strict protective intent of the Act.

22. COMMENT: Two comments stated that the definition of "compelling public need" should be changed to read "that the public health and safety benefit from the proposed use and that the proposed use is required to serve existing and planned needs of the residents of the State, and that there is no practicable alternative to meet the established public need."

RESPONSE: The Act, at N.J.S.A. 13:9B-10c specific that "public need" only, not public benefit, is the standard to use to challenge the rebuttable presumption provided at N.J.S.A. 13:9B-10a.

23. COMMENT: The definition of "compelling public need" should be revised to reflect regional and future needs as they relate to transportation facilities. Practicability must also be considered for transportation alternative locations since the alternatives are usually at the expense of farmlands, parklands and existing residential or commercial development.

RESPONSE: As with public utility "needs", transportation "needs" will be considered on a case-by-case basis in determining whether there is sufficient "compelling need" to overturn the rebuttable presumption.

24. COMMENT: The definition of "degraded wetland" uses the terms "undisturbed wetlands," "excessive drainage," "partially filled," and "region" without defining them. They should be defined, and distinctions made between slight and major disturbances.

RESPONSE: The definition has been clarified to the extent possible without unduly restricting the consideration of site-specific variations among wetland areas.

25. COMMENT: "Degraded wetland" should include "ditches or swales".

RESPONSE: Ditches and swales are not always degraded environments. Therefore, the definition remains unchanged on adoption.

26. COMMENT: Revise the definition of "discharge of dredged material" by substituting the word "deposition" for the word "addition" in the first line and by deleting "dredged material" in the second and third lines and in their place enter "material that is excavated or dredged from waters of the United States." This change will clarify the definition and remove the need to define dredged material.

RESPONSE: The definition has been excerpted verbatim from Federal 404 program regulations, because the Department elected to adopt to the Federal definitions.

27. COMMENT: Two commenters suggested revising the definition of "discharge of fill material" by removing "fill material" in the second line and substituting "material (for example, soil, sand, earth rocks, soild waste, etc.) into an area which changes the resultant surface elevation in relation to surface or groundwater level." An additional sentence was suggested to clarify that fill material must pass the Corps' "primary purpose" test. The suggested change is intended to clarify that very minor activities such as placing a shovel full of dirt in a wetland or breaches in erosion control measures are not to be considered a regulated activity and to simplify and clarify the definition and remove the need for a separate definition of fill.

RESPONSE: For the reasons detailed in the previous response, the Department has chosen not to modify the definition of "discharge of fill material."

28. COMMENT: Two commenters suggested transferring the definition of "disturbance of the water level or water table" to N.J.A.C. 7:7A-2.3(a)2 where it is used, for clarity and to prevent regulation outside of wetlands.

RESPONSE: The definition has not been moved as suggested. The rule has been clarified, however, by adding a cross-reference to the relevant section of the adoption.

29. COMMENT: The definition of "disturbance of water level or water table" implies that detention facilities would not be a regulated activity as long as no excavation or fill is involved, and as long as existing vegetation, values or functions of the freshwater wetlands are not modified. Is this true?

RESPONSE: No. Detention facilities, by definition, impound water for some length of time, thus disturbing the water level or water table. They are, therefore, regulated activities under Section 3 of the Act whenever they occur in a freshwater wetland.

30. COMMENT: The definition of "disturbance of the water level or water table" is not clear as to whether it prohibits stormwater discharges into freshwater wetlands. If it does, it conflicts with the Division of Water Resource's current position that freshwater wetlands should function as part of stormwater management.

RESPONSE: The definition does not prohibit stormwater discharges into freshwater wetlands. It does, however, confirm that this term constitutes a regulated activity and will therefore require a freshwater wetlands permit.

31. COMMENT: The definition of "disturbance of the water level or water table" implies that a groundwater well could be a regulated activity. This should be clarified.

RESPONSE: A well in a freshwater wetland would involve disturbance of soil and may disturb the water table, thus would be a regulated activity, and would require a permit.

32. COMMENT: Three commenters suggested revising the definition of "ditch or swale" to eliminate the terms "of human construction" to clarify that the human construction criterion can apply both to ditches and to swales, but that swales may also occur naturally.

RESPONSE: The rule has been modified as suggested to provide separate definitions for the terms "ditch" and "swale" and to clarify that the human construction criterion applies only to ditches and not to swales. See N.J.A.C. 7:7A-2.5, and N.J.A.C. 7:7A-1.4.

33. COMMENT: The definition of "drainage" should include groundwater levels, and a comma should be added between "pumping" and "ditching."

RESPONSE: The definition already includes groundwater. However, the comma has been added, and surface water levels have also been included to clarify the definition.

34. COMMENT: The definition of dredging should resemble that in the Coastal Resource and Development Policies at N.J.A.C. 7:7E-4.10(f).

RESPONSE: The Department disagrees. The definition of dredging, as used in the rules on Coastal Resources and Development, applies only to open water areas and is specific to that program, and is not applicable to the freshwater wetlands program.

35. COMMENT: Delete the term wetland from the definition of "dredging" since the activity is not limited to wetlands.

RESPONSE: The definition has been clarified to include dredging in open waters, also.

36. COMMENT: The phrase "for the purpose of disposing of this material" should be added to the end of the definition of "dumping".

RESPONSE: The Department disagrees. Such a limitation is not included in the statutory definition of "regulated activity" and inclusion thereof may unduly narrow the rule definition, thus exempting activities which were intended to be regulated by the Legislature.

37. COMMENT: The definition of "EPA Priority Wetlands" should be clarified to identify if all six criteria must be present or if only one is necessary.

RESPONSE: The definition of EPA Priority Wetlands has been corrected to clarify that EPA's criteria for designating priority wetlands are still being refined. Accordingly, the criteria for their designation cannot be included in the adoption.

38. COMMENT: Two commenters said that EPA priority wetlands should be defined using the proper citation to the federal regulations.

RESPONSE: The criteria used by EPA for determining priority wetlands are not codified and in fact are still being refined. Accordingly, the rule has been modified to reflect this.

39. COMMENT: Eight commenters were concerned that the term "equal ecological value" was too vague and should include additional parameters such as faunal habitat value, floodwater storage capacity, types of vegetation, water quality of adjacent waterways, distance from development, distance from stormwater outfalls and all of the other freshwater wetland functions which are listed in the Act.

RESPONSE: The Department has modified the definition of equal ecological value to include a reference to the value of a wetland as wildlife habitat and to include other values and functions specific to a particular wetland area.

40. COMMENT: Two commenters suggested that satisfaction of any one of the listed criteria should be sufficient to meet the definition of a wetland of equal ecological value.

RESPONSE: The Department disagrees. The value of a wetland is determined by a multi-faceted analysis of several environmental factors and their interactions. No wetland's value can be measured using only one of these factors.

41. COMMENT: Four commenters suggested the Department develop methodology for calculating ecological value.

RESPONSE: The Department has developed a methodology for calculating equal ecological value in the context of mitigation. The methodology, found at N.J.A.C. 7:7A-14, employs acreage ratios of wetlands created versus for wetlands destroyed and is based upon Department mitigation experience and scientific studies.

42. COMMENT: Define exceptional, intermediate, and ordinary resource value wetlands.

RESPONSE: The criteria for these classifications of freshwater wetlands are taken directly from Section 7 of the Act, and are contained in N.J.A.C. 7:7A-2.5.

43. COMMENT: The rule should define "existing climax habitats."

RESPONSE: The term "existing climax habitats" is a commonly used ecological term which refers to mature, well developed natural communities on upland and wetland locations. Technical information on these communities is presented in "Vegetation of New Jersey" (Robich and Buell, 1973), "Wetlands" (Mitsch and Gosselink, 1986) and other technical references.

44. COMMENT: Farm or stock ponds should be defined. It should also be made clear whether a farm pond used or dug for aesthetics and/or recreation would be exempt from permitting standards.

RESPONSE: The rule limits the scope of the farming exemption for ponds to properties which have received or are eligible for a farmland assessment. It has also been modified at N.J.A.C. 7:7A-2.7(a) to further provide that pond construction and maintenance be for a farming operation.

45. COMMENT: Delete the definition of "fill" and replace it with the "discharge of fill material" to reflect that fill is sand, soil, earth, etc.

RESPONSE: The definition has been clarified to indicate that "fill" can refer either to the activity or to the material deposited.

46. COMMENT: The definition of a freshwater wetland should indicate if all three parameters must be present.

RESPONSE: In certain situations, the Wetland Identification and Delineation Manuals developed by USEPA will identify an area as a freshwater-wetland even if all three parameters are not present. Therefore, no change will be made to the definition.

47. COMMENT: Instead of using the EPA delineation manual to define a freshwater wetland, the rules should specify that the Army Corps of Engineers manual be used at least until a combined EPA/Corps manual is issued.

RESPONSE: The use of the EPA manual is specifically required by Section 3 of the Act.

48. COMMENT: Small wet spots in farm fields should not be construed as freshwater wetlands. Such a construction would be contrary to the Act.

RESPONSE: If such areas are used for farming activities as detailed at N.J.A.C. 7:7A-2.7(a) then these areas are exempt from regulation under the Act. If these areas are not used for farming, a case-by-case determination will be made as to whether they meet the three-parameter approach.

49. COMMENT: Two commenters asserted that the definition of "headwaters" contradicts itself by referring to streams that are dry for long periods of the year, and that the definition should be revised to be consistent with the Federal definition.

RESPONSE: Since the Department's definition of headwaters is taken almost verbatim from the federal definition provided in 33 C.F.R. Part 330.2, it is unclear in what way the commenters see the definition as inconsistent with the federal one.

50. COMMENT: Three commenters suggested revising the term "historic documented habitats for endangered or threatened species" by eliminating the word "historic."

RESPONSE: This correction has been made to more accurately reflect the language of the Act.

51. COMMENT: The definition of "historic, documented habitats" should specify that a habitat must still be present, or should specify an applicable time period within which a habitat will remain documented.

RESPONSE: In response to comments received by the Department, the word "historic" has been deleted from the term "historic, documented habitats". Therefore, present and documented habitats for endangered and threatened species will be the basis of exceptional resource value wetlands determinations. The Department, in making determinations as to the continued suitability of a documented habitat, will not impose time limitations, since the appropriateness of a time limit will vary with a given site and species.

52. COMMENT: The last two sentences in the proposed definition of "hydric soils" gives the Department broad discretion in determining which soils are hydric. They should be deleted since it is not clear what criteria will be used to determine if those soils are hydric.

RESPONSE: The Department disagrees. "Alluvial land" and "wet phases of somewhat poorly drained soils" are sufficiently specific terms and reflect the fact that soils gradually change from one type to another. Department consideration of these soil types' occurrence relative to distribution of wetland vegetation and hydrology is appropriate.

53. COMMENT: "Hydric Soils" should be listed by county.

RESPONSE: Hydric soils are listed by county in the U.S. Fish and Wildlife Service publication "Wetlands of New Jersey" (Tiner, 1985). Since the list may change from time to time based upon the current scientific knowledge, it is not appropriate to list them in the adoption.

54. COMMENT: The hydric soils definition should not include soils which have been drained and no longer support hydrophytes.

RESPONSE: Soils that were formerly wet, but are now completely drained, will not usually be considered hydric soils. These soils will be checked in the field to verify whether drainage measures remain functional. Where drainage system failure has occurred such soils can revert to hydric conditions and, therefore are included in the definition.

55. COMMENT: The definition of hydric soils should include a reference to the area of soil to be investigated for evidence of hydrology. The specific area is the upper B horizon or within 10 inches of the surface. The location of hydric soils should also include on-site verification.

RESPONSE: The adoption at N.J.A.C. 7:7A-8.2(b) (in the proposal at 7:7A-7.2(b)) specifies that soil borings must be a minimum of 20 inches deep in most cases. This will provide sufficient data to locate any hydric soils present.

56. COMMENT: Two commenters asserted that the definition of "isolated wetlands" implies that these will be regulated and that isolated wetlands do not have the values or functions of freshwater wetlands and, therefore, need not be regulated, because no positive environmental impact comes from their regulation, but significant negative economic impact does result.

RESPONSE: The Act affords protection to all freshwater wetlands defined through use of the three-parameter criteria, whether they are isolated or not. Certain isolated wetlands are, however, protected in a procedurally less rigorous fashion through the use, of general permitting standards in N.J.A.C. 7:7A-9.

57. COMMENT: Within the definition for "maximum extent practicable", an example or definition of what is meant by "a substantial hardship upon an applicant" must be included so that an applicant will be able to interpret this language and to more closely comport with the Federal program regulations at 40 C.F.R. part 230.3.

RESPONSE: The definition of "maximum extent practicable" has been modified to delete the reference to substantial hardship, in order to minimize redundancy and confusion.

58. COMMENT: Two commenters suggested that items 4 and 5 under the definition for "minor drainage" should be listed as exemptions under N.J.A.C. 7:7A-2.7.

RESPONSE: The Department agrees. This language comes from the federal 404 program. The entire definition of minor drainage has been placed in N.J.A.C. 7:7A-2.7, where it is incorporated as part of the exemption language.

59. COMMENT: The definition of "minor drainage" is not clear as to whether it would allow expansion of existing cranberry and blueberry areas into adjacent or non-adjacent freshwater wetlands. These activities should be considered regulated activities if they involve placement of fill.

RESPONSE: The Act stipulates that where USEPA regulations providing for 404 program delegation require a permit for a class of exempted activities, the Department shall also require a permit. Accordingly, cranberry or blueberry farming will only be exempt if it is part of an existing, ongoing farming operation. (See N.J.A.C. 7:7A-2.7(a)). Any expansion into adjacent or non-adjacent wetlands would be a regulated activity and would require a permit.

60. COMMENT: In the definition of "mitigation", substitute in line five the word "or" for "and." This change will denote that any one of the activities suffices as mitigation versus all of them having to be required.

RESPONSE: The definition has been revised to meet the commenter's concerns.

61. COMMENT: The definition of mitigation in N.J.A.C. 7:7A-1.4 includes practices of uneven value, some of what should not be encouraged as a substitute for permit denial and use of alternative sites. The Department should take the general position that mitigation is rarely to be used. Freshwater wetlands surface area loss is the worst threat to freshwater wetlands and always occurs when enhancement of existing freshwater wetlands is permitted in lieu of freshwater wetlands creation.

RESPONSE: The Department agrees and as provided by the Act and the proposed rules (see N.J.A.C. 7:7A-14), 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 individual permit which is approved.

62. COMMENT: "Normal farming" should be defined in the rule. It is not clear whether cranberry and blueberry production on poorly drained land will be exempt from the requirement of a freshwater wetlands permit.

RESPONSE: Examples of "normal farming" are provided at in N.J.A.C. 7:7A-2.7(a)1. The provision has been augmented for clarity. Cranberry and blueberry farming in wetlands will not be exempt unless they are part of an existing, ongoing farming operation as described at N.J.A.C. 7:7A-2.7(a) or are subject to other exemptions in the adoption.

63. COMMENT: The definition of "onsite" should read as follows: "means within the confines of the property or properties on which the regulated activity is occurring".

RESPONSE: The definition has been clarified.

64. COMMENT: The definition of offsite and onsite should come from the Municipal Land Use Law (MLUL).

RESPONSE: The MLUL definitions are not sufficient for the purposes of the freshwater wetlands program. However, the definitions of "onsite" and "offsite" have been clarified.

65. COMMENT: Four commenters asserted that the reference to flood plains should be deleted from the definition of "placing of obstructions" since this reference expands the jurisdiction of the Act beyond the wetlands proper.

RESPONSE: This provision does not expand the jurisdiction of the Act. The rule only regulates the placing of obstructions in wetlands. However, if that activity in the wetland has harmful offsite effects, the Department may consider them in evaluating the activity.

66. COMMENT: Seven commenters contended that the phrase "or any act or omission proximately causing the following activities" in the proposed definition of "regulated activity" is beyond the scope of the Act and should be strictly limited to activities taking place in wetlands.

RESPONSE: While the Department does not necessarily agree with the interpretation of the Act held by these commenters, the Department has deleted the phrase.

67. COMMENT: Two commenters stated that the definition of "significant adverse environmental consequences" adds an assessment of the negative effects on a wetland, which will be hard to determine without specific criteria for determining "negative effect."

RESPONSE: The determination of negative effects on any ecosystem is a very technical, site-specific task which must be done on a case-by-case basis. At the present time, the Department is not providing specific criteria. Due to the complex technical and site specific nature of this issue, each case will be decided on the basis of the effect on the ecological integrity of the wetland and its biotic components. The definition of this term has been deleted in favor of a case-by-case interpretation.

68. COMMENT: The definition of "significant adverse environmental consequences" should quantify "an increase in surface water runoff" by setting an amount, and a size project which generates the increase.

RESPONSE: The Department disagrees. Project size alone is not a sound basis for quantifying stormwater runoff volumes. Quantifying an increase in surface water runoff would be inappropriate since volume is not the sole determinant of the adverse impact caused by runoff. These technical considerations notwithstanding, the Department has elected to delete this criterion from the definition of "significant adverse impact."

69. COMMENT: The commenter supports the language in the definition of "significant adverse impact" that says that one of the listed items is in itself enough for a signficant adverse impact to exist.

RESPONSE: The Department acknowledges this comment in support of the proposal.

70. COMMENT: The definition of "significant adverse environmental consequence" includes activities outside of wetlands. This is inconsistent with Section 3 of the Act.

RESPONSE: The definition of the term "significant adverse environmental consequence" has been deleted from the rule. The relevant criteria now only apply to "significant adverse impact." The Department disagrees that these criteria are inconsistent with Section 3 of the Act. The definition is limited to activities carried out in a wetland. Under the Act, the Department has the discretion to evaluate regulated activities in wetlands on the basis of their negative effects to non-wetlands areas.

71. COMMENT: What will be the quantitative or qualitative basis for determining "significant adverse environmental consequence" or "significant adverse impact".

RESPONSE: This determination will be based on site specific data, current scientific knowledge, and the expertise of Department staff. Quantitative and qualitative bases may vary depending on the particulars of each site. See the comments immediately preceding for an explanation of the deletion of the definition for "significant adverse environmental consequence."

72. COMMENT: Why are freshwater wetlands excluded from the definition for "special aquatic site," and from the definition of State open waters?

RESPONSE: Freshwater wetlands are regulated separately, under the Act. Therefore, they are not included in the term "special aquatic site" and "State open waters." These terms are used only for regulation under the open water fill permit program, which covers all 404 type activities in State waters except freshwater wetlands. Note that the proposed term "State regulated waters" has been redesignated as "State open waters" to diminish confusion.

73. COMMENT: Clarify the definition of "special aquatic site."

RESPONSE: This definition is taken from the Federal 404 regulations at 40 C.F.R. Part 230, commonly known as the 404(b)1 guidelines. The Federal definition of special aquatic sites includes sanctuaries and refuges, mud flats, vegetated shallows, coral reefs, riffle and pool complexes, and wetlands. For purposes of this rule, however, freshwater wetlands have been excluded from the category of special aquatic sites, because they are regulated separately under the freshwater wetlands permit programs permitting standards.

74. COMMENT: How will waters not defined as State regulated waters be regulated?

RESPONSE: All waters in the state will fall into three categories: State open waters, freshwater wetlands, and those waters for which the State cannot assume the federal 404 program. Freshwater wetlands will be regulated by the freshwater wetlands program. Waters for which the EPA cannot delegate the 404 program will remain under federal jurisdiction, and under the Waterfront Development Act, N.J.S.A. 12A:5.3. State regulated waters (now called state open waters) will be regulated through the open water fill permit program.

75. COMMENT: Two commenters said a listing of "State open waters" should be included in the adopted rules.

RESPONSE: The Department is attempting to obtain such a list from the Corps. As soon as this list is established it will be made available to the public.

76. COMMENT: In consideration of "substantial hardship" and claims of "no practicable alternative" there should be a method or for-

mula that factors in the value and/or functions of the wetland in the development acceptability determination. This assessment should also factor relative project "social cost" acceptability through coordination with the State Development and Redevelopment Plan.

RESPONSE: The value and functions of each wetland have already been included as a consideration in the permit review standards. Different review standards apply depending on the resource value of the wetland (See N.J.A.C. 7:7A-3.3). As to the social cost acceptability of projects as reflected in the State Development and Redevelopment Plan (Plan) it would not be appropriate to reference the Plan in the rule since the Plan is not yet adopted. The Department may refer to the proposed plan in its permit review process, however, to the extent that the Plan is an indicator of development alternatives and patterns in the state.

77. COMMENT: Two commenters requested clarification of the term "reasonable return", in light of its use in defining substantial hardship. The commenters stated that reasonable return varies considerably depending on the degree of risk of the investment, and the rule should include a table of percentages to show what is a reasonable return for each type of potential development.

RESPONSE: The term "reasonable use" has been substituted for "reasonable return" in order to clarify the term "substantial hardship" or "extraordinary hardship," and to provide consistency with case law on the subject.

78. COMMENT: Two comments suggested that the definition of "substantial hardship" should delete items 1 and 2 and replace them with "circumstances which are not the result of any attempt by the owner or applicant to create circumstances of substantial or extraordinary hardship."

RESPONSE: The Department disagrees. The definition as proposed includes guidance regarding the type of hardship which will be considered, whereas the suggested definition would only provide guidance as to the source of the hardship. The definition will remain as proposed except as reflected in the preceding comment.

79. COMMENT: The definition of "threatened or endangered species" should be revised to include species on the Department of the Interior's list of threatened, as well as endangered species. Also, the rule should clarify whether plants are included.

RESPONSE: The definition has been clarified to specifically refer to the Department of Interior lists of Endangered and Threatened Wildlife and Plants found at 50 CFR 17.11(h) or 17.12(h) and amendments thereto.

80. COMMENT: The definition of transition area should be limited to "that land which is essential for continued existence of the wetlands eocsystem."

RESPONSE: The definition in the rule is excerpted verbatim from Section 16 of the Act, and will remain as proposed.

81. COMMENT: "USGS" should be defined as United States Geological Survey.

RESPONSE: The definition has been corrected.

82. COMMENT: The rules should include a definition of "wastewater management facility".

RESPONSE: The commenter requested this definition as part of a request for a general permit covering these facilities. Since the Department has determined that a general permit for this activity is not allowable under the Act, no definition of the term is needed.

83. COMMENT: Subparagraph 3ii under the definition of "Waters of the United States" should be modified to read "from which fish, shellfish or migratory birds are or could be taken" so if a bird happens to land in a waterbody and could be captured or sold, this makes those waters become "waters of the United States."

RESPONSE: The definition has been clarified to meet the commenter's concerns.

84. COMMENT: The terms "watershed" and "sub-watershed" should be better defined.

RESPONSE: The Department has added a narrow definition of the term "watershed" in N.J.A.C. 7:7A-1.4, thus obviating the need for a definition of "subwatershed".

7:7A-1.6

85. COMMENT: Local freshwater wetlands and transition area laws should not be preempted.

RESPONSE: This preemption is specifically required by section 30 of the Act.

86. COMMENT: Two comments stated that the rule should not allow local transition area ordinances to remain in effect until July 1989, as this is contrary to the requirements of the Act.

RESPONSE: The Act's requirements, in section 30, concerning the exact date the Legislature intended for preemption of local ordinances, uses the term "the effective date of the Act." This must be interpreted in light of Section 34, which sets out three effective dates, each for a different part of the Act. However, the overarching legislative intent to increase, not decrease, protection of wetlands is quite clear. After careful analysis of the Act, the Department concludes that the Legislature did not intend to create a gap in preexisting transition area protection during the year prior to the State's assuming responsibility for that protection. Therefore, the provision will remain as proposed.

87. COMMENT: N.J.A.C. 7:7A-1.6 contradicts sections 6 and 30 of the Act by allowing municipalities within the Pinelands to continue to regulate development in the Pinelands.

RESPONSE: The Act, at Section 6, allows the Pinelands Commission (Commission) to continue its current regulatory program for freshwater wetlands. For this reason, a State freshwater wetlands permit is not required in areas under the Commission's jurisdiction. Section 6 explicitly allows the Pinelands Commission to regulate wetlands more strictly than the State regulatory program. The Pinelands program is administered partly through use of locally adopted management plans.

88. COMMENT: In N.J.A.C. 7:7A-1.6(c), it is not clear whether municipalities can continue local regulations of buffers until July 1, 1989.

RESPONSE: The rule states that "... local laws governing transition areas shall remain in effect until July 1, 1989 ...." This allows local laws existing as of July 1, 1987 to remain effective. However, Section 30 of the Act prohibits municipalities from passing new transition area laws after July 1, 1987. The adoption has been clarified to state this.

89. COMMENT: In N.J.A.C. 7:7A-1.6(c) it should be provided that a local wetlands law which requires a larger buffer than the State will not be superseded.

RESPONSE: Preemption of local wetlands laws is specifically required by Section 30 of the Act.

90. COMMENT: Two commenters stated that the clarification of legislative intent to continue local transition area protection until July 1, 1989 is excellent, and that the Department should publish draft transition area rules by July 1, 1988 so the regulated public can prepare.

RESPONSE: The Department agrees with the concerns expressed, but cannot set an exact deadline for publishing draft transition area rules. The transition area rules will be proposed and adopted as soon as possible in order to become operative on July 1, 1989.

91. COMMENT: Six commenters said that N.J.A.C. 7:7A-1.6(e) is clearly contrary to Sections 5 and 30 of the Act in that it allows the Department to continue preexisting regulatory programs that affect activities in wetlands. The rule should require consolidation of all freshwater wetlands rules within one entity which apply to freshwater wetlands.

RESPONSE: The Act requires consolidation of the processing of freshwater wetlands related aspects of other regulatory programs. The rules consolidate wetlands-related aspects of State regulatory programs by providing "one-stop" permitting, through the Office of Freshwater Wetlands within the Division of Coastal Resources. The adoption has been modified to clarify that these other programs will not regulate based on freshwater wetlands protection issues but rather based on concerns addressed in their respective enabling statutes and rules. However, if a project is exempted from the requirements of the Act under an exemption pursuant to N.J.A.C. 7:7A-2.7(d), the wetlands related review standards of other programs will still apply to the project. This effectively carries out the Act's mandate to consolidate, as well as to protect wetlands.

92. COMMENT: Two commenters stated that the intent of N.J.A.C. 7:7A-1.6(e) is unclear. If the intent is to notify people that they must still comply with the terms of other permit programs then this should be explicitly stated and the programs identified. However, the commenter did not support the continuation of existing wetlands policies under other permit programs.

RESPONSE: As explained above, and clarified in the adoption, the permit process has been consolidated so that applicants need not deal with several different review processes for wetlands protection-related matters. A single office in the Division of Coastal Resources will review permit applications for projects in freshwater wetlands. Other state programs, which regulate activities based on non-wetlands related concerns (for example, flood danger) will remain in effect. However, these other State programs will consider the impacts on wetlands only if the activity is exempted under the provisions of N.J.A.C. 7:7A-2.7(d).

93. COMMENT: The provision explaining that other State regulatory programs affecting wetlands are not preempted is excellent.

RESPONSE: The Department acknowledges the support for this provision.

94. COMMENT: In line two of N.J.A.C. 7:7A-1.6(f), deleted "involve a freshwater wetland or State regulated water does not" to clarify this language. As proposed the language is redundant since an activity can only be a "regulated activity" if it involves wetlands or State open waters.

RESPONSE: The Department believes that, though possibly repetitive, this provision is sufficiently clear, and that deletion of the suggested portions might make it less clear.

95. COMMENT: Clarify the rule so that the FWPA does not preempt municipalities from protecting stream corridors, and from including transition areas around stream banks and/or flood hazard areas.

RESPONSE: The FWPA (in Section 30) supercedes local laws regulating freshwater wetlands and freshwater wetland transition areas. Although the ultimate interpretation of the Act will lie with the courts, it is the Department's position that, if local laws, while regulating activities on the basis of non-wetlands related concerns, incidentally affect wetlands those laws will not be superseded by the FWPA. If, for instance, a local ordinance prohibits development within a certain distance from all rivers, the town may prohibit building in that zone regardless of the presence or absence of wetlands, so long as the prohibition is supportable on the basis of concerns other than protection of freshwater wetlands.

7:7A-2.1

96. COMMENT: Only one application should be required for activities throughout the entire Department, not just the Division. N.J.A.C. 7:7A-2.1(d) needs to be clarified to specifically indicate which types of permits can be applied for with one application.

RESPONSE: The Act does not require the Department to consolidate all Department programs into a single application. The Department of Environmental Protection is responsible for a host of additional regulatory programs concerning widely divergent issues such as hazardous waste, air quality, and water quality. Therefore, it would not be feasible to require only one application for all programs. The Department is, however, in the process of consolidating the wetlands related review of projects by establishing the Office of Freshwater Wetlands Protection, by making the Stream Encroachment Program an element of the Division of Coastal Resources and by providing for the submittal of one application for all permits administered by the Division.

97. COMMENT: Stream encroachment permit review should be meshed with freshwater wetlands permit review since many considerations in the two processes are the same. This would reduce delay and expense.

RESPONSE: The Department has placed both programs in the same Division and will work during the coming year to mesh their review as much as possible.

98. COMMENT: N.J.A.C. 7:7A-2.1(e) should recognize the distinction between individual versus general (Statewide) permit approvals. There is no justification for requiring a Statewide general permit approval prior to submission of applications pursuant to the 90 Day Law, since Statewide permits have already been issued.

RESPONSE: The commenter's concerns have been addressed by revision of N.J.A.C. 7:7A-2.1(e) so as to encourage, but not require a freshwater wetlands permit approval prior to application for permits under the 90 day construction law, N.J.S.A. 13:1D-29 et seq.

99. COMMENT: Where freshwater wetlands rules overlap with other State regulatory programs the stricter of the two should apply.

RESPONSE: In such a case, both sets of rules will continue to apply and a permit from each applicable program will be required. Failure to meet the standards of any one applicable permit program, however, will result in disapproval of a project. However, it is important to note that the most stringent standards for disapproval for projects which involve freshwater wetlands will be those of the Act and this chapter.

100. COMMENT: Requiring a freshwater wetlands permit prior to a 90-day law permit will cause too much delay for construction, repair and maintenance work on bridges. This should be covered in a general permit.

RESPONSE: The commenter's concerns are addressed by changes to N.J.A.C. 7:7A-2.1(e), which no longer requires a freshwater wetlands permit prior to 90-day construction law permit application. Also see N.J.A.C. 7:7A-9.2 which authorizes certain types of repair and maintenance work on bridges under a general permit.

101. COMMENT: Eight commenters stated that the requirement of N.J.A.C. 7:7A-2.1(e) to obtain a freshwater wetlands permit or letter of interpretation prior to application for a permit issued pursuant to the 90 day law will unduly delay the permit review process. Permits required for a project under the 90 day law should be conditioned upon approval of a freshwater wetlands permit.

RESPONSE: In response to several comments expressing such concerns, the rule has been modified to delete the requirement in question. The adopted rule now allows for the issuance of 90-day construction law permits prior to issuance of freshwater wetlands permits, and conditions on the 90 day law permits wetlands permit approval where the project involves wetlands concerns. The rule also encourages applicants to pursue freshwater wetland permit approvals prior to other regulatory approvals since the strict standards of the Act and this chapter will likely be the limiting factor for a project located in a freshwater wetland.

102. COMMENT: N.J.A.C. 7:7A-2.1(e) conflicts with the Department's current practice of considering project portions as severable, such that a non-freshwater wetlands phase of a large project could be reviewed and permitted, while a further phase involving freshwater wetlands could be reviewed at a later date, and goes against the Legislature's intent to consolidate permit processes.

RESPONSE: The rule has been modified to encourage, rather than require, a freshwater wetlands permit prior to application for a 90 Day Law permit. For projects which have severable portions, it should be noted that the applicant may not obtain a looser standard of review for a large project by presenting it to the Department as several smaller projects.

7:7A-2.3

103. COMMENT: Three commenters asserted that disturbance of the water table should be quantified using a threshold of drainage or addition of runoff since anything adjacent to a wetland will disturb the water table.

RESPONSE: The Department disagrees. Regulated activities as proposed at N.J.A.C. 7:7A-2.3 relates to impacts on the values or functions of the wetland. A quantity of drainage is not needed to evaluate impact.

104. COMMENT: A regulated activity should be defined by including the phrase "that would have a significant adverse effect on a wetland".

RESPONSE: The listed activities are specifically set out by Section 3 of the Act. To limit the definition as suggested would considerably diminish the class of activities set out by the Legislature for regulation. This would contravene the specific words of the Act, as well as the general statement of legislative intent in Section 2 of the Act.

105. COMMENT: It is not clear whether the proposed rule will allow (as it should) normal farm management practices without a freshwater wetlands permit.

RESPONSE: In N.J.A.C. 7:7A-2.7(a), the rule sets out the types of farm activities which do not require a permit. Further, in recognition of the commenter's concerns, this section has been clarified and examples added.

106. COMMENT: Is a bridge an obstruction in the definition of regulated activities? A definition of "obstruction" may be needed.

RESPONSE: The definition of "placing of obstructions", which is found in N.J.A.C. 7:7A-1.4, clearly indicates that any part of a bridge or its supporting structure, if placed in a freshwater wetlands, would be regulated. Therefore, a separate definition of the word "obstruction" is not necessary.

107. COMMENT: Tree cutting should not need a permit unless trees are large, unique, old, or endangered.

RESPONSE: The Act specifically regulates the destruction of plant life which would alter the character of a freshwater wetland including the cutting of trees except normal harvesting of forest products in accordance with a forest management plan approved by the State Forester.

108. COMMENT: The "destruction of plant life" is a regulated activity if it would alter the character of a wetland. The word "alter" is not defined here. Instead, the destruction of plant life should only be regulated if it would result in "significant adverse environmental consequences," a term which is defined in the rule.

RESPONSE: The words "which would alter" are taken directly from Section 3 of the Act. Definition of the term is unnecessary to its plain meaning is intended.

109. COMMENT: N.J.A.C. 7:7A-2.3(a)6 should be changed to read, "The physical removal of the existing wetlands vegetation or causing the loss of life of vegetation by the application of herbicides or by other means which cause mortality to the established vegetative community."

RESPONSE: The Department disagrees. Currently, the provision refers to "the destruction of plant life which would alter the character of a freshwater wetland . . . ." As written, this includes, but is not limited to, the removal of vegetation or its destruction by herbicides. Because of this more thorough scope, and the fact that the provision is taken verbatim from Section 3 of the Act, the provision as written more closely fulfills the Legislature's intent. Therefore, it will remain as proposed.

7:7A-2.4

110. COMMENT: If the up-to-date composite freshwater wetlands map and inventory to be developed over the next few years will not be

the basis for definitive wetland delineations, the Department should stipulate in the rule the circumstances under which field inspections and onsite verification are required.

RESPONSE: The Department disagrees. The circumstances under which a Department site visit may be warranted are many and varied. It would be inappropriate, if not impossible, to set them out in the rule adoption. The adopted rule must allow the Department the flexibility to respond on a case-by-case basis within the framework of the three parameter approach, and therefore remains as proposed.

111. COMMENT: How often will the Department's freshwater wetlands maps be updated?

RESPONSE: Maps will be updated as often as necessary, subject, however, to the constraints of time and resources.

112. COMMENT: The use of National Wetland Inventory (NWI) maps should be prohibited after DEP's maps are available.

RESPONSE: Both the NWI maps and the forthcoming NJDEP Freshwater Wetland maps are intended as a general guide to indicate the presence of wetlands and their approximate locations. Neither map series determines the exact jurisdiction of the freshwater wetlands program. These maps will be used as reference sources. A complete delineation will generally be required before permit applications are reviewed. The prohibition of either series of maps would hamper the public in attempting to find any freshwater wetlands in their area.

113. COMMENT: The DEP should not rely on the NWI maps at all since they were not field verified.

RESPONSE: The NWI maps will be used as one of the general indicators of the presence of freshwater wetlands. They will not determine the jurisdiction of the wetlands program. Field investigations and other informational sources will also be used to determine the location of freshwater wetlands.

114. COMMENT: The NWI maps should not be called "unreliable" in N.J.A.C. 7:7A-2.4(c). They were not designed for locating wetlands boundaries.

RESPONSE: The term "unreliable" is not meant to be derogatory. The proposed rule used the term to alert the general public to the fact that the NWI maps were prepared for an inventory purpose and should not be used to locate actual wetland boundaries.

115. COMMENT: County planning boards should have input on the maps. There should also be public review and comment on the maps, which should also be reviewed every five years.

RESPONSE: Since the maps do not solely determine the location of wetlands, and do not constitute an administrative rule under the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., they do not require public comment. The Department encourages county and local officials to alert the Division of Coastal Resources of any errors on the maps as they become available.

116. COMMENT: Instead of using "Wetland Plants: Northeast Region" as a list of hydrophytic plants indicative of freshwater wetlands, a better, more state-specific plant list is "Wetland Plants of the State of New Jersey 1986".

RESPONSE: The Department has adopted, at N.J.A.C. 7:7A-2.4(d), an updated plant list for New Jersey.

117. COMMENT: The USFWS regional plant list includes plants which sometimes occur on uplands and therefore should not be used.

RESPONSE: The USFWS regional plant list does not specify that all the species listed grow exclusively in freshwater wetlands, but rather that these plants occur predominantly in freshwater wetlands. Specific categories describing a plant's affinity for wetlands are assigned to each species on the list. The list was developed with the advice and guidance of an interagency panel of botanists. Moreover, USFWS wetland plant lists are referenced by the EPA Wetland Identification and Delineation Manual and are suitable for use with the EPA methodology.

118. COMMENT: The commenter supports the language of this section since it is taken from the Act and urges the Department to spend its resources widely in preparation of "functional" composite freshwater wetlands maps.

RESPONSE: Maps are currently being developed as efficiently and cost-effectively as possible.

119. COMMENT: Two commenters suggested that the rule should require that the maps sent to municipal clerks should also be sent to each county planning department.

RESPONSE: Since the maps have been sent to all municipal clerks, and also are available through the State Office of Map Sales (at telephone number 609-530-5790), the Department believes that the resources required to distribute extra maps could be better used in other parts of the freshwater wetlands program. Therefore, no such requirement has been added.

120. COMMENT: The Department should set a date for completion of DEP mapping and prepare maps at a scale of at least 1 inch to 400 feet.

RESPONSE: The Department intends to complete the statewide freshwater wetlands mapping by July 1, 1991 at a scale of 1:12,000. This equates to 1 inch to 1,000 feet. The reasons for the selection of this scale are economics and accuracy.

121. COMMENT: The proposed rule mentions maps based on aerial photographs. To be valid, these maps should be based on "orthophotos," aerial photographs corrected for topographic distortion.

RESPONSE: The DEP mapping project currently in progress will be corrected for topographic distortion.

7:7A-2.5

122. COMMENT: Two commenters stated that criteria should be developed to distinguish between intermediate and ordinary value isolated wetlands.

RESPONSE: The Department has modified the rule to more specifically define ordinary value isolated wetlands. Intermediate resource value wetlands continue to be defined, as they are in Section 7 of the Act, as freshwater wetlands not defined as exceptional or ordinary.

123. COMMENT: DEP should use the Habitat Evaluation Procedure (HEP) or the Adamus method to classify wetlands.

RESPONSE: The Department will use the classification criteria set forth in Section 7 of the Act.

124. COMMENT: The definition of freshwater wetlands of ordinary value should be clarified, especially the term "certain isolated wetlands". "Certain isolated wetlands" should mean only those wetlands more than 50 percent surrounded by development and less than 5,000 square feet in size.

RESPONSE: The Department has clarified this term at N.J.A.C. 7:7A-2.5(c).

125. COMMENT: Freshwater wetlands discharging into potable water sources should be "exceptional value".

RESPONSE: The Department will use the classification criteria set forth in Section 7 of the Act.

126. COMMENT: Freshwater wetlands with hydrologic connection to waters containing endangered species or their habitat should be classified as exceptional value.

RESPONSE: Section 7 of the Act sets out the criteria for classification of exceptional resource value freshwater wetlands. One of the criteria is that a freshwater wetland be a present or documented habitat for threatened or endangered species. This language clearly applies only to the freshwater wetlands themselves. The geograpic extent of the exceptional resource value designation would extend to all freshwater wetlands continuous with the documented habitat and exhibiting similar habitat features.

127. COMMENT: N.J.A.C. 7:7A-2.5(b)1 concerning criteria to define exceptional resource value wetlands should be expanded to include trout maintenance waters to conform with existing stream encroachment permit rules (N.J.A.C. 7:13). Both trout production and trout maintenance streams are classified as Projects of Special Concern in that chapter and are afforded the same level of protection.

RESPONSE: The criteria listed in the proposal for classifying a wetland as exceptional resource value are taken directly from Section 7 of the Act.

128. COMMENT: Counties and municipalities should have input on determination of freshwater wetlands resource value.

RESPONSE: Resource value classifications depend largely on water quality data and sightings of or information on endangered species. All persons are encouraged to inform the Division of Fish, Game and Wildlife, Nongame and Endangered Species Program, if they have information on endangered species in local wetlands. This information can be added to the Department's wildlife databank, the basis for the Department's resource value classifications. An opportunity for local officials to comment on request for letters of interpretation is also afforded in the rule. Therefore, sufficient opportunity for local input on resource value classification is already present in the rules as proposed.

129. COMMENT: In the context of N.J.A.C. 7:7A-2.5(b)2, the burden of proof that "historically documented habitats" remain suitable for habitation should be on the applicant. The rule should be amended to make this an explicit presumption.

RESPONSE: Section 7 of the Act says the Department must make a habitat finding based on available information "including, but not limited to" information submitted by the applicant.

130. COMMENT: The proposed rule indicates that classification of freshwater wetlands will be based in part on the presence of historically documented habitats. The Department should designate an agency such as U.S. Fish and Wildlife Service or the State Division of Parks and Forestry to arbitrate claims of historic documentation. Unless narrowed in this way, virtually all waters and lands can be said to be historically documented habitats, in that it is safe to assume that at one time all waters/lands of the state were habitat for these species.

RESPONSE: The Division of Coastal Resources has been delegated the responsibility to implement the program and it will resolve issues such as these. Further, the word "historic" has been deleted from this provision. As stated in the definition of "documented habitat", it is not sufficient to assume that a species could use the habitat to make this determination. There must be some record of past habitation. The Department will rely on its data base, which is coordinated with the Division of Fish, Game and Wildlife and the Office of Natural Lands Management, for these determinations.

131. COMMENT: There are problems with the language in N.J.A.C. 7:7A-2.5(c), which allows an applicant to request that a documented freshwater wetland not be classified as exceptional if the applicant demonstrates long term loss of one or more habitat requirements of the documented species. The problem is that there may be more than one endangered species present. Also, habitat requirements of some species vary greatly, and for other species are not well understood. Finally, the applicant could make a self-serving finding of lack of habitat, rather than a scientifically valid one.

RESPONSE: Section 7 of the Act allows an applicant to request that an exceptional wetland be reclassified. It does not require the Department to grant that request in every case. As mentioned above, the Act says that the Department must make a finding based on information "including but not limited to" information provided by the applicant. The Department will base its finding on scientifically valid data and records for endangered and threatened species provided by Department experts, not solely on information provided by the applicant. Clarifying language to this effect has been added to the subsection.

132. COMMENT: Some procedural steps should be added for detecting species required for a determination of exceptional resource classification. The accuracy of classification must be high so that the judgment of impact will be correct, and the buffer distance correctly determined. Suggested procedures follow:

1. A site visit by the Department should be mandatory.
2. The site visit must be made during the season(s) likely to show the species or other germane characteristics.
3. If the site visit cannot wait for the appropriate season, the site could be classified conditionally, pending a visit during the appropriate season. Alternatively the site could be visited during the less than optimum season, but classified based on comparison to the habitat characteristics of other documented exceptional sites.

RESPONSE: The Department is currently developing a protocol to determine exceptional resource value wetlands, which will include a scientific methodology flexible enough to take into consideration all forms of site specific information.

133. COMMENT: The definition of wetlands of exceptional resource value should be expanded to consider not only the natural resource value but also the social utility of a particular wetland system relative to the level of existing development and regional watershed protection objectives.

RESPONSE: Section 7 of the Act articulates the specific parameters to be considered in classifying freshwater wetland resource value. Consideration of the social utility of particular freshwater wetland in a particular watershed is not specifically included in those parameters. Such considerations are, however, used by the U.S. Environmental Protection Agency in identifying EPA Priority Wetlands in New Jersey. The EPA priority wetlands designation process probably will consider the historic level of disturbance to the wetland system and the value of that system to the watershed. Priority wetlands designation by the EPA will have direct implications for the types of projects permitted in those wetlands. (See N.J.A.C. 7:7A-9 General Permits).

134. COMMENT: The section on classification of wetlands should be reorganized for clarification.

RESPONSE: The Department has made minor modifications which, it is hoped, will clarify the section.

135. COMMENT: Concerning classification of freshwater wetlands by resource value, the Department should maintain a list of exceptional value freshwater wetlands. This list should be drawn not only from endangered species and heritage program sources, but also from a literature search of other sources, so that the data base is as wide as possible. This will save time and field visits and will protect more sites by reducing the number of sites for which the application is the sole source of resource information.

RESPONSE: The Department has compiled information to develop such a list based on surface water quality designations and is updating its information on threatened and endangered species. The latter effort is a dynamic and ongoing process. The Department is exploring options to publish and update these data to both inform the public at large and to make the data base as extensive and as accurate as possible.

136. COMMENT: The Department should prepare maps of FW-1 and FW-2 trout production waters and their tributaries and describe how they can be obtained.

RESPONSE: These maps have been prepared and can be obtained from the Department Division of Water Resources—Bureau of Water Resources Management Planning.

137. COMMENT: The term "present habitats" of endangered or threatened species should be defined and a procedure for placing a habitat in this category should be established.

RESPONSE: The term is self-evident and need not be defined in the rule. The Departmental procedure for determination of "present habitat" will be based on a variety of scientific and site specific information ranging from the Department's geographic information system (GIS) records, to applicant data, to information supplied by interested citizens.

138. COMMENT: Habitat should not be used to classify wetlands as exceptional unless the habitat has been found to be in use. The rule reference to "possible habitat" is not sufficient.

RESPONSE: There is no reference to "possible habitat" in the rule. The definition of "documented habitat" is set out in N.J.A.C. 7:7A-1.4, and includes a requirement of a past sighting of the species. For the purposes of N.J.A.C. 7:7A-2.5(b)2, "documented habitat" is defined in that section.

139. COMMENT: The rule should be corrected to clarify "long-term loss of one or more habitat requirements" so that loss of only one requirement is not sufficient to downgrade the freshwater wetlands from exceptional to intermediate.

RESPONSE: The specific language of the Act requires that an applicant may request a downgrading if the applicant shows loss of one or more requirements. Once the request is made, the Department will review all of the information available and make a final determination of classification, giving consideration to the loss of habitat requirement(s) but based on many factors.

140. COMMENT: The Department should require that "the applicant demonstrate that the long-term loss of one or more habitat requirements occurred prior to initiation of the proposed project and due to actions or conditions not caused or created by the applicant" and that the loss of the requirement has resulted in abandonment of the habitat by the documented threatened and endangered species.

RESPONSE: This change is not necessary. Any regulated activities pursued by the applicant without a permit which degrade the wtlands habitat value will be considered a violation of the Act and this chapter. Therefore, if an applicant purposely damaged a wetlands prior to applying for a permit, thereby causing loss of one or more habitat requirements, the applicant would be subject to enforcement action. In addition, the ultimate determination of wetlands value rests with the Department based upon the criteria enumerated in section 7 of the Act.

141. COMMENT: Declassification requests should require public notice similar to that for a permit application.

RESPONSE: Such a process is not required by the Act and would be extremely time consuming. The types of input required for the determination, that is, habitat characteristics and species sighting data, are not likely to be elicited from the general public through such a process. However, the Department encourages citizens with knowledge of the habitat, wildlife, or other relevant features of any wetland area to submit such information to the Division of Fish, Game and Wildlife to add to its data base on freshwater endangered and threatened species.

142. COMMENT: Ordinary resource value wetlands should include "man-made drainage ditches, swales or detention facilities" as defined by section 7(b) of the Act.

RESPONSE: N.J.A.C. 7:7A-2.5 has been clarified to indicate when swales and human-made drainage ditches and detention facilities are considered ordinary resource value wetlands.

7:7A-2.7

143. COMMENT: N.J.A.C. 7:7A-2.7(d) (adopted as N.J.A.C. 7:7A-2.7(g)), concerning submittal of Nationwide permit compliance information as the basis for exemption under the statute, should be amended to require that "the applicant be required to receive written approval from the Corps", not simply evidence of submittal of information. The applicant should be required to submit a site plan of the project showing the proposed area of wetlands disturbed, including a professionally prepared wetlands delineation based on the three parameter approach as well as any other information required by the Corps, and to stipulate that when the submitted information is determined to be insufficient for the Corps to make a compliance determination that a State permit will be required.

RESPONSE: The language of this section has been clarified to indicate that, should a person proceed under authority of a Corps general permit, and later be denied approval by the Corps, the exemption in N.J.A.C. 7:7A-2.7(d) (now (g)) should be void. Therefore, proceeding prior to receipt of a Corps approval letter would be "at peril" of ultimate Corps disapproval. In case of ultimate Corps disapproval, any regulated activities pursued in reliance upon the exemption in N.J.A.C. 7:7A-2.7(d) (now (g)), if not otherwise expressly permitted by the State, would be in violation of the FWPA. Further, any regulated activities in progress at the time of the Corps denial or incompleteness ruling would have to stop until a Department permit is obtained.

144. COMMENT: The exemption provision concerning U.S. Army Corps of Engineers Section 404 permit approvals should be amended to change the exemption threshold to the application date rather than the approval date.

RESPONSE: This provision was excerpted directly from section 4 of the Act.

145. COMMENT: N.J.A.C. 7:7A-2.7(d) (now N.J.A.C. 7:7A-2.7(g)) allowing the grandfathering of U.S. Army Corps of Engineers Nationwide Permits prior to July 1, 1988, is inadequate. The Department should specify some minimum requirement in terms of documentation and information which must be supplied to the Army Corps in order for the applicant to be considered for grandfathering under this provision of the law.

RESPONSE: Section 4 of the Act exempts activities authorized by permits issued by the Army Corps of Engineers prior to July 1, 1988. N.J.A.C. 7:7A-2.7(d) (now (g)) has been clarified to indicate that, prior to engaging in an activity exempted because of a Nationwide permit a person must submit to the Department a copy of a complete application for an approval letter to the Corps, and proof that the complete application was submitted to the Corps prior to June 10, 1988. Further, the Corps must eventually approve the activity or the exemption will be void and the person acting thereunder would be in violation of the Act and this chapter.

146. COMMENT: "Bridges, highways, storm drain pipelines, culverts, rights-of-way therefor and drainage ways for mosquito control, existing before July 1, 1988, shall be exempt from the requirements of N.J.A.C. 7:7A-3.1 through 3.5" should be added to the list of exemptions.

RESPONSE: The Department disagrees. Under the Act, activities associated with these facilities are regulated when they occur in wetlands. Maintenance and repair of them will, however, usually be authorized under general permits if no changes or repairs involving new wetland encroachments are made. See N.J.A.C. 7:7A-9.2.

147. COMMENT: N.J.A.C. 7:7A-2.7 should also exempt "construction, reconstruction or maintenance of ponds in existing State or commercial fish hatcheries."

RESPONSE: These activities are not exempted by the Act and are regulated activities. However, maintenance and reconstruction of existing facilities are permitted under a Statewide General Permit (see N.J.A.C. 7:7A-9.2).

148. COMMENT: The maintenance and installation of electric distribution and transmission lines should be exempt from regulation if they receive approval from the Board of Public Utilities.

RESPONSE: The Department disagrees. The Board of Public Utilities is not authorized to issue freshwater wetlands permits. Some of the activities mentioned, however, may be covered under Statewide general permits in N.J.A.C. 7:7A-9.2, and thus may require only minimal review.

149. COMMENT: Regional stormwater management facilities and flood control projects should be exempt from the permit requirement. Regional stormwater management facilities are more effective in protecting wetlands than are individual basins. No research exists to show that these facilities have adverse effects on the environment. Also, flood control projects which protect lives and property merit special consideration. If exemption is not possible then mitigation should not be required.

RESPONSE: These projects are not included in the list of statutory exemptions.

150. COMMENT: The rules should provide exemption from permit requirements for activities not subject to Corps jurisdiction, but which have been approved under Executive Order 53, prior to adoption of the FWPA.

RESPONSE: The Department disagrees. The Act does not exempt roadway projects approved under Executive Order 53 which are not subject to Army Corps of Engineers jurisdiction. Therefore, the Department has no authority to do so. However, some of these activities may be allowed under statewide general permits specified in N.J.A.C. 7:7A-9.

151. COMMENT: Would freshwater wetlands which have been farmed awhile be regulated if they were proposed for development uses? The definition of freshwater wetlands should include those areas of hydric soils without hydrophytic vegetation, in order to prevent the conversion of formerly wetlands farmland to development.

RESPONSE: The Department will make all freshwater wetland determinations on a site by site basis in accordance with the three parameter approach detailed in the EPA Wetland Identification and Delineation Manual. As long as an area can be classified as a wetland by this method it will be regulated. If the wetland has been drained or altered for a long enough time to no longer be classifiable as wetlands under the EPA method, it would no longer be regulated as wetlands by the Act of this chapter. If, however, it is classified as a freshwater wetland and the proposed use changes it from farming to some other development activity, the activity would be regulated.

152. COMMENT: Surveying activities should not be exempted if motorized vehicles or equipment is used.

RESPONSE: The exemption for surveying activities has been deleted to meet Federal 404 program assumption requirements.

153. COMMENT: The exemption for water level recording devices should exclude the construction of dams or flow control devices.

RESPONSE: This exemption has been deleted to meet Federal 404 program assumption requirements.

154. COMMENT: All conservation practices contained in an approved Soil Conservation Plan should be exempt from the permit requirement, instead of only "upland soil and water conservation practices".

RESPONSE: This exemption is taken directly from section 4 of the Act. The Act specifically refers to "upland soil and water conversation practices." This specificity implies that only upland portions of conservation plans were intended to be exempt from regulation by the Legislature. The suggested change would expand a narrow exemption beyond the strict protective intent of the Act and therefore the provision will remain as proposed.

155. COMMENT: Only farming which is "ongoing or continuing" as of July 1, 1988 should be exempt.

RESPONSE: The exemption for "normal farming" has been clarified at N.J.A.C. 7:7A-2.7(a) to indicate this.

156. COMMENT: The rule should make it clear that spoil from pond construction must be placed outside the wetland unless it is needed for the structural or environmental integrity of the pond.

RESPONSE: This has been clarified in the adoption.

157. COMMENT: Tree harvesting should be exempt only if it does not change the natural character of the wetland.

RESPONSE: The exemption language used in the rule was taken directly from Section 4 of the Act.

158. COMMENT: A delineation of freshwater wetlands performed by the Corps prior to July 1, 1988 should be considered a permit pursuant to N.J.A.C. 7:7A-2.7(a)4iii.

RESPONSE: The Department disagrees. A wetland delineation alone does not represent a permit approval decision by the Army Corps of Engineers. Section 4 of the Act exempts only projects which have obtained a permit from the Corps. A Corps delineation may be submitted to the Department for verification as part of a request for a letter of interpretation, or as part of a permit application.

159. COMMENT: The second sentence of N.J.A.C. 7:7A-2.7(a)4i (now 7:7A-2.7(d)1) should be deleted in order to exempt those projects that are being built on lots pursuant to a filed subdivision map that was filed prior to the passage of the Municipal Land Use Law.

RESPONSE: The Department disagrees. The Act exempts projects with local approval "pursuant to the Municipal Land Use Law" (MLUL). Therefore, projects approved prior to the MLUL's passage are not exempted. To exempt projects approved earlier would expand the class of exempted projects.

160. COMMENT: If preliminary subdivision approval is obtained prior to July 1, 1988, is a project exempt from the permit requirement even if it needs other land use approvals for a building permit? For instance, an office park where site plan approval is needed for improvements to previously subdivided lots. Such a project should be exempt under the Act.

RESPONSE: Under N.J.A.C. 7:7A-2.7(b) (now 7:7A-2.7(e)), the project shall retain its exemption if the subsequent site plan approval conforms to the original subdivision approval and does change the use, increase the amount of wetland or State open waters to be disturbed, or increase the intensity of the planned use.

161. COMMENT: The provision in N.J.A.C. 7:7A-2.7(a)4ii (now 7:7A-2.7(d)2) that a preliminary site plan application must remain under active consideration by the local body is ambiguous. This is not authorized by the Act and should be deleted.

RESPONSE: The provision has been deleted.

162. COMMENT: Seventeen commenters stated that the proposed rule unduly limits the exemption for projects with preliminary approvals from municipalities under the Municipal Land Use Law (MLUL) to those projects initiated within five years of July 1, 1987. This is inconsistent with the passage by the Legislature of an amendment to the MLUL to extend the life of preliminary approvals to up to 20 years in certain situations. Also, this five year limit on the exemption does not add to freshwater wetlands protection because the rule already includes another provision protecting against changes involving more freshwater wetlands in projects which are exempted.

RESPONSE: The limitation is intended to balance protection of investments and protection of wetlands. The Act's exemption was designed to protect persons who had invested substantial amounts of time and resources in project planning prior to the Act's passage. The proposed limitation does not reduce protection for those persons. The provision requires only that the project be started within five years to prevent the exemption from lapsing. If a project is not far enough along in the planning process to be ready to start work within five years, it probably has not had the substantial investment in planning that the Act was designed to protect.

There are also equitable reasons for the five year limit on the exemption. If unlimited, the exemption would produce an unjust advantage for some persons. A person could obtain preliminary local approvals for projects they had no intention of building for years to come. Then, 20 years from now when all other builders are subject to strict freshwater wetlands and transition area requirements, that person could build nonconforming, environmentally destructive projects on properties immediately adjacent to those subject to strict regulation. In addition, these projects might take many forms unknown at present, since their only restriction would be to follow a general, preliminary site plan or subdivision map. In summary, the Department believes a limit on the exemption is appropriate in the adoption at N.J.A.C. 7:7A-2.7(d).

163. COMMENT: In N.J.A.C. 7:7A-2.7, an exemption from the permit requirement is provided for projects with local approval pursuant to the Municipal Land Use Law. There are several situations in which electrical utilities do not need municipal approval but rather go to the Board of Public Utilities for an Order. These projects should also be exempt.

RESPONSE: The Department disagrees. The Legislature created a limited number of narrow exemptions for preliminary approvals in section 4(d) of the Act. In view of the strongly expressed legislative intent to protect wetlands, and in view of the possibility that such an expansion could threaten the Department's ability to obtain assumption of the Federal 404 program, the suggested exemption is rejected.

164. COMMENT: N.J.A.C. 7:7A-2.7(a)4ii (now 7:7A-2.7(d)1) should be limited to only exempt those subdivision and site plan applications deemed to be complete by local governments.

RESPONSE: This provision was taken directly from Section 4d of the Act. The Department understands it to exempt all applications submitted prior to June 8, 1987 (the date of Governor Kean's Freshwater Wetlands Moratorium, Executive Order 175, filed June 9, 1987) regardless of their completeness status.

165. COMMENT: Twelve commenters said DEP should not require a permit application for projects which have proposed a change in use or intensity that would otherwise be exempt from permitting requirements of the Act. Eleven commenters felt that if such a provision is used, significant change in the project should be defined as 25 percent of the site plan.

RESPONSE: The Department disagrees. The justification for the exemption in the Act was to insulate a person with plans in place from being required by the State to change those settled plans because of a new statute. The limit on the exemption is appropriate because the exemption applied to the plans as approved, not as changed and the exemption was created to spare a person from having to change their project because of the State's changing laws. Where a party with an exemption initiates a change, the equities supporting the exemption no longer exist, and the party should be subject to the permitting requirements of the Act and the rule. To better define the level of change which voids the exemption, the provision now references the MLUL standards for such determinations. See N.J.A.C. 7:7A-2.7(e).

166. COMMENT: Pursuant to N.J.A.C. 7:7A-2.7(b), changes in the proposed use of a project nullify its exemption from permit requirements. Four commenters felt that this assumes that any change will have an adverse impact, that such an assumption is unreasonable, and that only changes resulting in more disturbance to wetlands should nullify the exemption.

RESPONSE: The Department disagrees. This provision was not based on an assumption of more adverse impact, rather on an assumption that there might be more or different impacts on wetlands and therefore that the Department should review the change to determine if this is true, and what limits should be placed on the project.

167. COMMENT: N.J.A.C. 7:7A-2.7(b) (now 7:7A-2.7(e)) should be adopted as written.

RESPONSE: The Department acknowledges this comment in support of the proposal.

168. COMMENT: N.J.A.C. 7:7A-2.7(c) uses a cut off date of July 1, 1988 for receiving preliminary approvals after which time it implies that a project will have to design for transition areas. Two commenters said this is contrary to Section 34 of the Act which directs the Department not to require transition areas until July 1, 1989, and that this section of the rule should be revised to clarify that projects which have received preliminary approvals prior to July 1, 1989, will not be required to have transition areas.

RESPONSE: The rule has been so clarified at N.J.A.C. 7:7A-2.7(f).

169. COMMENT: Two commenters, advocating that N.J.A.C. 7:7A-2.7(d) (now 7:7A-2.7(g)) be changed to provide more clarity, suggested the following specific language:

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 request for certification that the proposed activity is authorized by a Nationwide Permit was submitted to the United States Army Corps of Engineers prior to July 1, 1988. To demonstrate that a Nationwide Permit authorized the proposed activity, a copy of the United States Corps of Engineers letter of confirmation, if issued, or a copy of the information submitted to the United State Corps of Engineers with the request for certification of Nationwide Permit applicability must be submitted to the Department. The information submitted to the Corps of Engineers must be certified as being submitted not later than June 30, 1988.

RESPONSE: In recognition of several comments suggesting changes to N.J.A.C. 7:7A-2.7(d) (now 7:7A-2.7(g)), the subsection has been clarified to indicate that submission of a complete application for Nationwide permit authorization to the Corps prior to June 10, 1988 qualifies a person for an acknowledgement by the Department of coverage by the statutory exemption. However, should the Corps later disapprove the application or rule the application incomplete, the exemption would not be effective. See N.J.A.C. 7:7A-2.7(d)

170. COMMENT: The deadline to submit information to the Corps to qualify for this exemption should be extended from "20 days prior to June 30, 1988 to June 30, 1988.

RESPONSE: The Department disagrees. Since the Corps requires a 20 day review period to determine whether an individual permit is required, it would not be appropriate to extend the submission date for this exemption and eliminate any review the Corps may require.

171. COMMENT: The Department should require an approval letter from the Corps, and proof of receipt by the Corps of information (including a wetlands delineation by a recognized professional) by May 10, 1988.

RESPONSE: The Department disagrees. A May 10, 1988 cutoff date would limit the exemption beyond that required to effectuate the intent of the Act. The June 10, 1988 date allows the 20 day completeness review by the Corps to be finished by July 1, 1988, the Act's deadline for Corps approval.

172. COMMENT: Two commenters stated that there should be a procedure for persons covered by exemptions to obtain a letter from the Department confirming this.

RESPONSE: The Department agrees. The criteria under which the Department will issue exemption letters is contained in N.J.A.C. 7:7A-2.9. Obtaining such letters is optional.

173. COMMENT: Two commenters felt that exemptions should not be allowed for Corps general permits unless the Corps has issued an approval letter prior to July 1, 1988. Application materials submitted to the Corps are often inaccurate, and should not alone form the basis for exemption from the FWPA.

RESPONSE: The rule has been clarified to indicate that, if the application is later ruled incomplete or disapproved by the Corps, the exemption will be void and any regulated activities undertaken thereunder will be deemed to have been taken in violation of the Act and the rule. See N.J.A.C. 7:7A-2.7(d) (now 7:7A-2.7(g)).

174. COMMENT: Maintenance activities in existing, approved rights-of-way such as the repair of power lines, towers, bridges, culverts and the cutting of vegetation should be exempt from the permitting requirements of the Act.

RESPONSE: Since these activities meet the definition of regulated activities, they will be regulated pursuant to the Act. The Department recognizes that routine maintenance of utilities often has minimal impacts on freshwater wetlands. Thus, many of these activities are covered by Statewide general permits, listed in N.J.A.C. 7:7A-9.

175. COMMENT: Under N.J.A.C. 7:7A-2.7(a), the following statement should be added: "Maintenance of existing mosquito control drainage ditches carried on in accordance with best mosquito management practices to assure that flow and circulation patterns and biological characteristics of the existing freshwater wetlands are not impaired." This would ensure that degradation of these ditches does not result in the creation of mosquito breeding habitat.

RESPONSE: The Department disagrees. The potential for adversely affecting freshwater wetlands is too great to merit exemption from the permitting requirements of the Act and this chapter. The Department plans, however, to propose this activity for adoption as a Statewide general permit.

7:7A-3

176. COMMENT: The chapter should be structured to make it difficult to prove no practicable alternatives.

RESPONSE: The chapter is structured to implement the strong legislative statement in section 2 of the Act that the policy of the State shall be "to preserve the purity and integrity of freshwater wetlands from random, unnecessary or undesirable alteration or disturbance . . ." The Department will be guided by this legislative intent when judgments are made regarding the practicability of alternatives.

177. COMMENT: The standards for non-water dependent activities should also be applied to linear development.

RESPONSE: The standards for permitting in sections 9, 10 and 11 of the Act classify projects based on, among other things, whether they are water dependent or not. Some linear development may be water-dependent. The Department does not have the discretion to categorically classify an activity as non-water dependent. In determining water-dependence, the Department must apply the same standards to linear development as to non-linear development.

178. COMMENT: The Department should clarify the meaning of activities determined to have a less adverse impact on the aquatic ecosystem. The Department should amend N.J.A.C. 7:7A-3.1 to require "no adverse impact" rather than "less adverse impact."

RESPONSE: The phrase "less adverse impact" is taken directly from section 9 of the Act.

179. COMMENT: N.J.A.C. 7:7A-3.1 and 3.2 both refer to practicable alternative which "would have a less adverse impact on the aquatic ecosystem" and "would not have other significant adverse environment consequences." This is redundant and does not allow for consideration of the varying degrees of environmental impact.

RESPONSE: The use of "less adverse impact on the aquatic ecosystem" is intended to be distinct from "other significant environmental consequences". The first applies to environmental impacts within the aquatic ecosystem. The phrase "other significant environmental consequences" applies to all environmental impacts whether upland or wetland, which may be considered in the search for alternatives. The rule has been clarified to better reflect the legislative intent that alternatives to activities in freshwater wetlands shall not be considered practicable if they merely substitute unacceptable damage to non-wetland areas for unacceptable damage to freshwater wetlands.

180. COMMENT: In N.J.A.C. 7:7A-3.2 and throughout the proposed rules, there is a suggestion that a permit application should be rejected if the Department believes the applicant could have purchased other land for the project. Under the currently proposed language, there is no time limit on when the other land could have been purchased. This could penalize persons for purchasing freshwater wetlands prior to any thought by the State of protecting them. This language should be clarified to apply only to purchases and development of land made subsequent to the passage of the Act which are made despite the existence of other lands available for purchase or development. It should be made clear that if one purchased freshwater wetlands prior to any rules or regulations protecting same, one should not be held to the same standard for those wetland areas purchased following passage of the Act.

RESPONSE: The Department disagrees. N.J.A.C. 7:7A-3.2 provides that, once a rebuttable presumption that a practicable alternative exists has arisen, a person may not rebut the presumption by claiming that a particular alternatives would require land not owned by the applicant. This provision is taken directly from section 10a of the Act. The reasonableness standard incorporated into the provision will guard against abuses of the provision, while preserving Department flexibility to pursue the alternatives analysis mandated by the Act.

181. COMMENT: The term "practicable alternative" in N.J.A.C. 7:7A-1.4 should be defined more fully.

RESPONSE: The Department disagrees. The term is adequately defined with sufficient precision to provide notice of the basis for a Department determination on the existence of a practicable alternative.

182. COMMENT: Four commenters felt that N.J.A.C. 7:7A-3.2(c)5 is outside the scope of the Act and related Federal regulations. The Act and Federal regulations refer to projects and not to the land, and therefore N.J.A.C. 7:7A-3.2(c)5 should be deleted.

RESPONSE: Several commenters noted that this provision examines the availability of alternative projects for the particular site. The more appropriate inquiry is of the availability of alternative sites for the particular project. The provision has been deleted from the adoption.

183. COMMENT: To be consistent with current judicial terms, the words "reasonable use" should replace "reasonable return".

RESPONSE: The provision at N.J.A.C. 7:7A-3.2(c)5 which contained this phrase has been deleted, and the provision at N.J.A.C. 7:7A-1.4 has been so corrected.

184. COMMENT: The language of N.J.A.C. 7:7A-3.3(a)2 which states that, to rebut the presumption against non-water dependent activities, an applicant must show that denial of a permit would impose an "extraordinary hardship brought about by circumstances peculiar to the subject property" should be expanded to read "peculiar to the subject property and its relationship to the basic project purpose".

RESPONSE: The language in the proposal was taken directly from Section 10b of the Act. It would not be appropriate for the Department to weaken the presumption of a practicable alternative.

185. COMMENT: The provision in N.J.A.C. 7:7A-3.3(a)2, allowing for overturning of a permit denial due to "extraordinary harship," should be deleted.

RESPONSE: This provision is quoted directly from section 10c of the Act.

186. COMMENT: The Department lacks authority under the Act to look at watershed impacts in permit reviews.

RESPONSE: The Department disagrees. Section 9 of the Act requires the Department to evaluate impacts on the aquatic ecosystem, of which the watershed is a part. Also, section 13 of the Act states the "the Department shall require as a condition of a freshwater wetland permit that all appropriate measures have been carried out to mitigate adverse environmental impacts . . ." Therefore, the Department is empowered to evaluate impacts on hydrology in the watershed as well as impacts to water quality.

187. COMMENT: Criteria must be established to determine whether under N.J.A.C. 7:7A-3.4(a)3, an activity will "result in the likelihood of the destruction or adverse modification of a habitat".

RESPONSE: The Department disagrees. Evaluation of impacts on habitats is a complex process. Department scientists must have flexibility to use their technical training and experience to determine impacts on a case-by-case basis within a scientific framework. Accordingly, the provision remains as proposed.

188. COMMENT: Language should be added to N.J.A.C. 7:7A-3.4(a)7, which should read: "will not cause or contribute to a significant degradation of ground or surface waters except for filling of wetlands for which the requisite permits have been secured."

RESPONSE: The Act, at section 9b(5), clearly prohibits the granting of "the requisite permit," that is, a freshwater wetlands permit, if the activity would significantly harm water quality.

189. COMMENT: Two commenters felt that, in determining whether an activity is in the public interest, ecological importance of the wetland should be given more weight than the economic benefits of the proposed activity and that public benefits should be more important than private economic benefits.

RESPONSE: Section 11 of the Act requires the Department to consider a broad range of factors in determining whether a proposed activity is in the public interest. These factors include, but are not limited to, the ecological importance of the wetlands, economic benefits (private and public) and positive and detrimental impacts associated with a regulated activity. None of the factors in Section 11 are given greater weight over another in the Act. The Department will balance all factors on a case-by-case basis in order to implement the legislative intent of Section 2, and of the Act in general.

190. COMMENT: The reference to "in the public interest" in N.J.A.C. 7:7A-3.5 should be clarified to prevent arbitrary regulation.

RESPONSE: This provision's analysis of whether an activity is in the public interest is taken directly from Section 11 of the Act. The language has been determined by the Department to be sufficiently clear to offer a systematic framework for these determinations, thus preventing arbitrary regulation.

191. COMMENT: N.J.A.C. 7:7A-3.5(a) should be expanded to include an item 8 to read "The activity is required to meet public health and safety concerns and/or deal with environmental pollution problems."

RESPONSE: The commenter's concerns are already addressed through the existing provision. (See N.J.A.C. 7:7A-3.5(a)1 through 7).

192. COMMENT: The requirement in N.J.A.C. 7:7A-3.5(a)1 to consider "the interest of the property owners in reasonable economic development" should be clarified. Adjacent property owners to proposed developments are not always the most reliable indicators of "reasonable economic development."

RESPONSE: The language was taken directly from section 9 of the Act. In this provision "the property owners" refers primarily to the owners of the property on which the proposed activity will take place. Thus, the Department will balance the economic interest those owners have in the proposed activity going forward, against the public's interest in preserving those natural resources which will be affected by the activity if approved.

193. COMMENT: The terms "quality of the wetland" and "ecological value" should be deleted and reference should be made to the classification system at N.J.A.C. 7:7A-3.5.

RESPONSE: While not deleting these terms, the Department has added a reference to the freshwater wetlands classification system at N.J.A.C. 7:7A-2.5.

194. COMMENT: The requirements for issuing emergency permits should be amended to provide similar notice and public hearing provisions to those for normal permits.

RESPONSE: The Department disagrees. Such prior notice and hearing procedures would negate the purpose of the emergency permit. Any situation where there is enough time for notice and public hearing would fail the Act's test for the issuance of an emergency permit, and an individual or general permit would be required. However, the rule does require public notice and comment after the issuance of an emergency permit. See N.J.A.C. 7:7A-5(d).

195. COMMENT: County and municipal agencies and all who request to be notified should be notified when an emergency permit is issued.

RESPONSE: Public notice and comment procedures will be followed within 10 days of the issuance of an emergency permit. See N.J.A.C. 7:7A-5.

196. COMMENT: The Department should stipulate the types of situations that would qualify for emergency permits.

RESPONSE: The Department believes the language in N.J.A.C. 7:7A-5 (proposed as N.J.A.C. 7:7A-3.6(a)) provides a sufficiently specific framework for determining whether an emergency permit is appropriate in a given situation, while allowing the Department to react in a responsive way to unforeseen circumstances.

197. COMMENT: Two commenters felt the Department should provide for 24 hour notification to the Department of requests for emergency permits.

RESPONSE: The Department agrees, and arrangements are being made to so provide through the DEP hotline. However, since final arrangements, such as appropriate phone numbers, have not been established, it is not yet possible to include the information in the rule.

198. COMMENT: The phrase "is not given" at N.J.A.C. 7:7A-3.7(c) (adopted as N.J.A.C. 7:7A-5.2(c)) should be replaced by "can not be obtained" to address those cases where no one at the Department was available during the emergency to grant an approval.

RESPONSE: See comment and response directly above. Provision for a 24 hour emergency telephone response line will obviate the need for the suggested change.

7:7A-4

199. COMMENT: The 404(b)(1) Guidelines should be included in the rule.

RESPONSE: The Department disagrees. The New Jersey Administrative Procedure Act rules, at N.J.A.C. 1:1-30, allow incorporation by reference. The 404(b)1 guidelines (40 CFR part 230) are available at public or private law libraries, and can be obtained from the U.S. Army Corp of Engineers. The Department will also have copies available upon request.

7:7A-5

(Note: The subject matter in subchapter 5 has been changed from transition areas to emergency permits being a recodification of proposed N.J.A.C. 7:7A-3.6 and 3.7.)

7:7A-6 (proposed at 7:7A-5)

200. COMMENT: The Department should establish transition area rules as soon as possible to avoid arguments for a new set of "grandfathering" provisions for these areas, based on applicant representations that until such rules are adopted, they will not know the substantive criteria on which their projects will be judged. These rules should put the development community on notice that all projects located in transition areas which have not received an exemption as provided in the Act and which are not completed prior to July 1, 1989 will be required to apply for and obtain a transition area waiver.

RESPONSE: The transition area rules will be promulgated as soon as possible. However, N.J.A.C. 7:7A-2.7(f) provides that projects which receive preliminary local approval prior to July 1, 1989 will be exempted from the transition area requirements of the Act.

201. COMMENT: For exceptional value freshwater wetlands, the transition area should be the maximum size allowed by the FWPA.

RESPONSE: The Department is currently evaluating information about appropriate transition area widths and will develop standards before implementation of transition area requirements on July 1, 1989.

202. COMMENT: Two commenters felt that farms and farming areas should be exempt from transition area requirements.

RESPONSE: Farming activities which are exempted by section 4 of the Act from transition area requirements will be exempted by the rule when promulgated. Any other activities may be subject to transition area requirements, unless specifically exempted in this adoption.

203. COMMENT: Two commenters felt the rules should make it clear that farmers may execute the terms of adopted soil conservation plans or Soil Conservation Service (SCS) BMPs near freshwater wetlands regardless of transition areas.

RESPONSE: The farming exemption in section 4 of the Act extends to existing "normal farming" practices. The rules have been clarified at N.J.A.C. 7:7A-2.7(a) to more specifically define "normal farming". Some soil conservation practices may fit the definition and therefore be exempt under the Act. Those that do not will require a permit or transition area waiver. To exempt all soil conservation activities would essentially delegate permitting authority to the SCS.

204. COMMENT: Greenhouses and farm structures should be exempted from the ban on new or expanded buildings in transition areas.

RESPONSE: The Department disagrees. The Act exempts "normal farming" and describes a variety of activities related to direct physical work with soil and plants. To expand the exemption to include farm buildings would significantly decrease protection of freshwater wetlands.

205. COMMENT: For intermediate value freshwater wetlands which have characteristics similar to those of exceptional value freshwater wetlands, the maximum transition area allowed for intermediate value freshwater wetlands should be required.

RESPONSE: In determining transition area sizes, the Department will consider the relative resource value characteristics within each classification of wetland.

206. COMMENT: The provision for transition areas is an enormous harm to many farmers. They constitute a taking of private property and are unnecessary if delineations are accurate and rules are enforced.

RESPONSE: The establishment of transition areas is required by section 16 of the Act. Many farming activities are exempted from the requirements of the Act. If the Act or the rule restricts the use of land to the extent that it rises to the level of a constitutional taking, the landowner may file an action in a court of competent jurisdiction pursuant to section 22 of the Act.

207. COMMENT: Transition area rules should involve considerable input from the public prior to formal proposal, including input from the counties.

RESPONSE: The Department will attempt to elicit input from all available sources. Any person is free at any time to submit written suggestions to the Division of Coastal Resources. Any written comments submitted during the official 60-day comment period after the transition area rules are proposed will be addressed in the rule adoption.

208. COMMENT: The buffer requirement should be loosened for low density, low impact activities.

RESPONSE: The scheme fashioned by the Legislature (see section 16b of the Act) for determining the size of a transition area hinges on the quality of the wetland being protected by that transition area, not on the types of activities being pursued. The only exception to this is where an activity will have no impact. In that case, the transition area may be the minimum required by the Act.

209. COMMENT: There should be a minimum 50 foot buffer around all wetlands.

RESPONSE: Section 16a of the Act states that transition areas shall only be required for intermediate and exceptional resource value wetlands.

210. COMMENT: The buffer requirements put an unfair burden for saving open space on the individual property owner.

RESPONSE: The transition area requirements are necessary to protect wetlands, and are required by the Act.

211. COMMENT: Landowners should be compensated for loss of transition areas.

RESPONSE: Many State actions affect the value of land. A landowner who feels that the transition area requirements of the Act rise to the level of a constitutional taking may file a court action pursuant to section 22 of the Act.

7:7A-8 (proposed at 7:7A-7)

212 COMMENT: The Army Corps of Engineers conducts delineations similar to the proposed letter of interpretation process set forth in N.J.A.C. 7:7A-7.1 (now 8.1). These delineations, if completed within the six months before July 1988, should be automatically confirmed. This would spare applicants and the Department duplicative delineation.

RESPONSE: The Department disagrees. Army Corps of Engineers wetland delineation methods are technically different from those of EPA's which are mandated by the Act for the Department's use. An applicant may submit the Corps delineation as part of a request for a letter of interpretation but the Department will review and verify it using the statutory standard before issuing a letter of interpretation.

213. COMMENT: The rule should provide that a request for a letter of interpretation be given a number to track it through the application process. Also, the same paperwork submitted for the letter of interpretation should be used for the permit application, since the requirements are the same.

RESPONSE: The Department is currently developing application tracking procedures, which will include a numbering system by lot, block, county and municipality. These procedures will provide cross referencing between letters of interpretation and permit applications. Because of the number of copies, and the different types of information required for each process, it would not be practical to use the same paperwork for both.

214. COMMENT: The Department should indicate how an individual can obtain a printed fee schedule.

RESPONSE: The Department proposed a fee rule in the March 21, 1988 New Jersey Register at 20 N.J.R. 576(a). Printed copies of fee schedules will be made available after it is adopted.

215. COMMENT: The language in N.J.A.C. 7:7A-7.1 (now 8.1) should be broadened to allow any property owner to request a letter of interpretation from the Department. Requests should not be limited to individuals who are proposing an activity in wetlands.

RESPONSE: The Act does not require the Department to issue letters of interpretation to any property owner. Therefore, the Department will not so commit its limited resources by including such a provision in the rule. However, as resources permit, the Department will make every effort to issue letters of interpretation to all property owners, whether or not they proposed a regulated activity.

216. COMMENT: Procedures for getting a letter of interpretation are confusing, especially regarding additional information.

RESPONSE: The requirements for a request for a letter of interpretation have been simplified at N.J.A.C. 7:7A-8.

217. COMMENT: N.J.A.C. 7:7A-7.7 (now 8.7) should be deleted since it serves no purpose.

RESPONSE: The Department disagrees. The section warns individuals who do not receive a letter of interpretation not to assume that the proposed regulated activity is not in a freshwater wetlands. Also, the section states that a person who does not receive a letter of interpretation may apply directly for a freshwater wetland permit. This information is important guidance to applicants.

218. COMMENT: A county should not have to pay a fee for a letter of interpretation.

RESPONSE: The Act provides that "an agency of the State" shall not have to pay a fee. Since counties are not agencies of the State, and since fees for letters of interpretation are necessary to cover the cost of the review and processing of all requests for letters of interpretation, the Department has not broadened the class of those exempted from the fee requirement to include counties.

219. COMMENT: The Department should allow information to be submitted on tax map sheets in addition to the outbound survey of the property.

RESPONSE: The Department cannot accept wetland delineations on tax maps because they are not based on field surveys, do not indicate topographic lines and may contain errors in scale and property lines.

220. COMMENT: A complete hydrological report should be part of a request for a letter of interpretation.

RESPONSE: The Department takes this comment to mean a complete assessment of all factors relevant to wetland hydrology, specifically hydric soils and seasonal high groundwater. This information is required by the EPA three-parameter wetland delineation methodology and is required in N.J.A.C. 7:7A-8.2 concerning letters of interpretation.

221. COMMENT: The requirements of N.J.A.C. 7:7A-7.2 (now 8.2) pertaining to letters of interpretation should be similar to the "less than one acre" requirements and should provide that the Department may request additional information as necessary. Specific language has been suggested for sub-sections (b) and (c) which reflect this.

RESPONSE: The Department disagrees. The information which is required to obtain a letter of interpretation is the minimum needed to accurately determine a wetland boundary. The Department could not issue letters of interpretation in a timely manner if more information had to be requested in many cases.

222. COMMENT: N.J.A.C. 7:7A-7.2 (now 8.2) (a) and (b) should be the same, and both should use sub-section (b) since it is more comprehensive.

RESPONSE: The Department disagrees. It would be unnecessarily burdensome for small property owners to submit topographic information and extensive soil borings. In many cases, the Department will do delineations for these property owners.

223. COMMENT: The Department should not require notice to the municipal planning board, environmental commission or landowners within 200 feet when a request for a letter of interpretation is made. This requirement is burdensome and unreasonable and unauthorized by the Act. Notice in the DEP Bulletin is adequate.

RESPONSE: Under section 8 of the Act, the Department may require the submittal of information necessary to issue a letter of interpretation. The information required by the rule is reasonable and necessary to provide an adequate basis for the issuance of a letter of interpretation. In addition, notice to municipalities and adjoining landowners may be an important means for the Department to obtain information germane to the letter of interpretation. N.J.A.C. 7:7A-8.2(b)5 has been modified to delete notice requirements to landowners within 200 feet of the site when the letter of interpretation request concerns a property less than one acre in size.

224. COMMENT: Provisions requiring that notice of application for a letter of interpretation and a copy of the application be forwarded to local and county planning boards and landowners within 200 feet are both useful and necessary in assuring that the Department has adequate local information on which to issue a letter of interpretation. An additional provision should be added to require that DEP transmit copies of letters of interpretation to all local interests at the time of issuance to applicants.

RESPONSE: A provision has been added to the rule at N.J.A.C. 7:7A-8.2(h), which addresses the commenter's concerns by providing that copies of letters of interpretation will be sent to local bodies who received copies of the original request.

225. COMMENT: The Department should be required to publish requests for letters of interpretation in the DEP Bulletin and to allow 30 days for comment.

RESPONSE: Section 8 of the Act requires in most cases that the Department issue letters of interpretation within 30 days of receipt of a request. Due to the practical logistics of publishing the DEP Bulletin, the Department could not wait for publication and comment, and still meet the statutory deadline. Accordingly, this provision will not be added.

226. COMMENT: N.J.A.C. 7:7A-7.4 (now 8.4) allows municipal comment on requests for letters of interpretation. Counties should be added.

RESPONSE: The provision has been changed to explicitly include counties.

227. COMMENT: Three comments stated that N.J.A.C. 7:7A-7.4 (now 8.4) should require the Department to consider equally the comments of all persons, including all local government officials.

RESPONSE: All comments will be considered. The Department will consider the merit of each comment, as well as the source of each comment. This is especially important in making a scientific determination such as a delineation, when a comment from a trained, experienced scientist may have more weight than that of an individual with no experience in wetland delineation. A requirement that equal weight to be given to all comments would prevent such flexibility.

228. COMMENT: Regarding letters of interpretation, county agencies should be given the chance to comment on the classification of wetlands, not just on the location of their boundaries.

RESPONSE: County agencies may submit information pertaining to the classification of wetlands at any time. The Department especially encourages the submittal of information on endangered and threatened wildlife and their habitats.

229. COMMENT: N.J.A.C. 7:7A-7.2 (now 8.2) should include provision for local and county input for determining whether a freshwater wetlands is less than one acre in size.

RESPONSE: At the time that the local entity is notified by the applicant of a request for a letter of interpretation, information regarding the size of the freshwater wetlands may be submitted to the Department.

230. COMMENT: The Department should require that registered notice include the location and times that the application is available to be reviewed by the public.

RESPONSE: It would be impossible for a notice published by the applicant to include such information because the applicant may not known when or where the local body will allow inspection. All applications can be viewed at the Department's offices in Trenton, however, during business hours.

231. COMMENT: Four commenters stated that the time allowed in N.J.A.C. 7:7A-7.4 (now 8.4) for local comments on applications for a letter of interpretation should be expanded from 15 days to at least 30, preferably 60 days. Otherwise, it will be difficult or impossible for local bodies to provide input.

RESPONSE: The Department recognizes the time constraints this deadline places on local commenters. However, the 15 day deadline is necessary so that the local comments can be considered by the Department before the end of the Act's 30 day deadline for Department decisions on letters of interpretation.

232. COMMENT: The Department should not have extra time after receiving Departmentally-requested additional information to declare applications for letters of interpretation complete. The Department should respond within 45 days of receipt of information submitted.

RESPONSE: In recognition of the commenter's concerns, this provision has been clarified to indicate that the Department will respond within 45 days of receipt of the additional information requested by the Department. See N.J.A.C. 7:7A-8.2(e).

233. COMMENT: The provision authorizing the Department to extend the time for review of requests for letters of interpretation if the Department requests more information should be deleted. The provision is unnecessary because the application requirements are stated in the rule.

RESPONSE: One extension of time after more information is submitted is specifically authorized by Section 8 of the Act. It is the experience of the Department that such a provision will allow for thorough, careful review of letter of interpretation requests.

234. COMMENT: The rule specifies use of USFWS categories and lists of vegetative species. The Army Corps of Engineers wetland delineation manual's classifications and lists should be used.

RESPONSE: The Department disagrees. The Corps wetland delineation manual's classifications and lists reflect the views of a single agency whereas the USFWS list for wetland plants is the product of a multi-agency review by botanists and other experts from the U.S. Fish and Wildlife Service, Environmental Protection Agency, Army Corps of Engineers, and the Soil Conservation Service.

235. COMMENT: Two commenters asserted that the requirements for soil logs and related vegetative species recordings should be better defined.

RESPONSE: These requirements are clarified somewhat in the adoption. Further technical information is presented in detail by the "EPA Wetland Identification and Delineation Manual."

236. COMMENT: Four commenters suggested that the requirement to perform soil borings to a depth of three to four feet is excessive and the depth should be limited to the root zone, 15-18 inches, or the B horizon of the soil profile.

RESPONSE: In recognition of these concerns, the soil boring depth requirements will be 20 inches in most situations. However, the Department retains the discretion to require deeper borings as appropriate, for example, in wetlands which display atypical characteristics or which have been disturbed by human activities such as filling, excavation, or drainage. See N.J.A.C. 7:7A-8.2(b)2.

237. COMMENT: Recording vegetation at each soil boring is redundant and not representative of the entire site. A plant community plan with a list of the vegetative species for each community identified would be more useful and could be done in conjunction with EPA and Corps field forms.

RESPONSE: Recording vegetation at each soil boring is necessary to determine whether the sampled location meets the three parameters for wetland identification (that is vegetation, soils, and hydrology). Anything less would be technically deficient and would not conform with the EPA wetland identification and delineation method nor with the intent of the Act.

238. COMMENT: If the Department rejects an application for a letter of interpretation because a good faith effort has not been made to provide the Department sufficient information, an applicant ought to be able to appeal this rejection.

RESPONSE: The Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. and Rule 2:2 of the Rules Governing the Courts of the State of New Jersey set forth appeal rights.

239. COMMENT: The rule should explain onsite inspection procedures.

RESPONSE: Inspection procedures are not included in the rule in order to allow flexibility to the Department to deal with varied situations.

240. COMMENT: Two commenters felt that the Department should specify when an onsite delineation of the freshwater wetlands is required and when it is not.

RESPONSE: The need for an inspection varies greatly with each situation. When in the Department's judgement, accuracy demands an onsite inspection, the Department may perform one. Therefore, a specific requirement will not be included in the rule.

241. COMMENT: For wetlands of ordinary value which are smaller than one acre, no site inspection should be needed.

RESPONSE: It is the Department's experience that the need for onsite inspection varies greatly depending on many factors, only one of which is the size of the proposed project. Accordingly, the Department will determine the need for an onsite inspection on a case-by-case basis.

242. COMMENT: Three commenters state that local government officials should be notified of site inspections and should be given access to sites.

RESPONSE: See comment and response directly below.

243. COMMENT: Two commenters suggested that the Department should be required to provide an applicant with notice prior to conducting an on-site inspection. One comment suggested three hours notice, and one suggested five days, to provide an applicant with an opportunity to be present and to meet constitutional requirements.

RESPONSE: It is not clear what constitutional requirements are alluded to in this comment. However, the Department disagrees with the suggestion that notice should be required. On-site inspections are solely for the purpose of delineating, or verifying delineations of wetlands. This is a technical task, involving scientific determinations only. The presence of the property owner, local officials, or any other individuals is not necessary for this scientific determination.

244. COMMENT: The review process for letters of interpretation and for permit applications does not require an on-site inspection to verify the presence of wetlands.

RESPONSE: Section 8 of the Act grants the Department the discretion to make site inspections. In addition, on-site inspections may be needed to supplement and monitor the quality of information submitted to the Department. Therefore, the adoption contains this option for the Department.

245. COMMENT: Two commenters stated that since transition area requirements do not go into effect until July 1, 1989, any reference to them should be deleted.

RESPONSE: The Department disagrees. The references to transition areas in the rule do not imply that transition area requirements will be effective sooner than July 1, 1989. In many cases, these references clarify the present and future regulatory scheme as a whole.

246. COMMENT: N.J.A.C. 7:7A-7.5 (now 8.5) should provide a finite time period within which the EPA may review, modify or revoke a letter of interpretation.

RESPONSE: The Department has no power to so limit the Federal agency.

247. COMMENT: The Department should be able to withdraw a letter of interpretation especially in cases of false information in the application.

RESPONSE: Section 8 of the Act specifically requires that a person be able to rely on a letter of interpretation. However, a provision has been added to N.J.A.C. 7:7A-8.6 to clarify that these letters shall be void in cases where the information on which they were based is incorrect.

248. COMMENT: Three commenters suggested that a State program to certify wetland consultants should be established so that the number of onsite inspections by the State can be reduced.

RESPONSE: The Department received many comments advocating the certification of professional wetland consultants and may consider it in the future.

249. COMMENT: N.J.A.C. 7:7A-7.2 (now 8.2) provides for the submittal of a wetland delineation report by a qualified professional. Who decides who is a qualified professional and what criteria is used?

RESPONSE: A qualified professional is an individual who is familiar with the soils, vegetation, hydrology and ecology of wetland areas and with the EPA Wetland Identification and Delineation Method and is trained in its implementation. There is at present no licensing or certification program for these professions. Accordingly the Department will verify all wetland delineations.

250. COMMENT: Letters of interpretation should be valid for more than three years.

RESPONSE: In recognition of the five year validity of State issued permits, this provision has been revised so that letters of interpretation are valid for five years.

251. COMMENT: N.J.A.C. 7:7A-7.7(a) (now 8.7(a)), as proposed states that if a letter of interpretation is not received from the Department within the required time, a freshwater wetlands permit may be directly applied for. If this occurs, the rules should state that the applicant's letter of interpretation fee will be refunded or credited to a freshwater wetlands permit fee.

RESPONSE: A provision has been added to allow the crediting of the fee for the letter of interpretation to a permit application fee.

252. COMMENT: DEP should be required to respond to a request for a letter of interpretation within 90 days of the receipt of such request.

RESPONSE: The Department will respond to requests for letters of interpretation within the time specified in the Act, that is, within 30 days (or as extended by N.J.A.C. 7:7A-8.2(e) or 8.3(f) if additional information is submitted) of their submittal.

7:7A-9 (proposed as 7:7A-8)

253. GENERAL COMMENT: The Department proposal to adopt in modified form five of the 26 Corps Nationwide permits generated significant public comment. In general the comments fell into two major categories: those advocating a larger list of activities authorized by general permits, with fewer conditions limiting each of the adopted permits; and those advocating limiting the scope and number of adopted Nationwide permits to the minimum practicable. Two opposing points of view also applied to stacking of general permits, that is, with many comments strongly opposing stacking, and many supporting it.

254. COMMENT: Several commenters noted that numerical references to Nationwide Permits in the proposed rules were in some cases incorrect or redundant.

RESPONSE: The Department clarified the proposed provisions concerning the Nationwide permits in its notice of correction which appeared in the January 4, 1988 issue of the New Jersey Register at 20 N.J.R. 22(a).

255. COMMENT: Cranberry and blueberry farming should be allowed in freshwater wetlands in accordance with best management practices.

RESPONSE: Among the activities exempt from permit requirements in N.J.A.C. 7:7A-2.7 is normal farming such as plowing, seeding, cultivating, minor drainage and harvesting for the production of food and fiber. These activities, when part of an ongoing operation conducted on properties which have received or are eligible for farmland assessment, and in accordance with best management practices (BMPs), are exempt from the permit requirements of the Act. See N.J.A.C. 7:7A-2.7(a).

256. COMMENT: General permits should not be allowed in the Passaic River Basin, and especially not in the Great Swamp Area. Instead, individual permits should be required to prevent damage such as that which has already resulted from development and stormwater in this area.

RESPONSE: The Department is working with the U.S. Environmental Protection Agency to develop a list of priority wetlands for the State. Should the Passaic River Basin wetland system or some subset thereof, such as the Great Swamp, be classified as an EPA Priority Wetland or as of exceptional resource value under State standards, some general permits will not apply and individual permits will be required.

257. COMMENT: The Department should rescind 401 Water Quality Certification for one acre of fill in headwater freshwater wetlands under Nationwide Permit 26. This should be done before July 1, 1988, to prevent the further loss of freshwater wetlands.

RESPONSE: The chapter effectively limits authorizations to fill wetlands under the Department's 401 Water Quality Certification Program to those which are acceptable under the Freshwater Wetlands Protection Act. This limitation could not be accomplished prior to July 1, 1988 due to administrative and legal constraints.

258. COMMENT: Three commenters felt that any project which needs any other State permit should not be allowed to use a general permit. Instead, the activities potentially covered by the general permit should be evaluated in the review process with the other activities.

RESPONSE: The Department disagrees. The adopted Statewide general permits are either mandated by the Act or cover activities which have been determined to meet the Act's criteria for a general permit. Individual review of activities determined to cause only minimal cumulative adverse impacts on the environment would be burdensome to the public and the Department, and would drain the Department's resources away from the review of other permits. Projects which require permits under other State programs will still be required to meet the standards of those programs.

259. COMMENT: Each generally permitted activity should be qualified as follows: "provided that adequate measures are taken to minimize impacts on freshwater wetlands".

RESPONSE: This requirement has been clarified in N.J.A.C. 7:7A-9.3, Standard Conditions for Statewide General Permits. Part of the environmental assessment of activities considered for a general permit is a determination that the activity will cause only minor impacts on freshwater wetlands. In addition, the rule proposed includes provisions allowing the Department to require an individual permit if in a specific case a determination is made that the activity will not result in minimal impact.

260. COMMENT: No general permit should allow any general (that is, not covered under a "specific activity" type general permit) filling of wetlands.

RESPONSE: The only Statewide general permits not limited to particular activities are those specifically required by section 23b of the Act.

261. COMMENT: Any general permit activities which disturb more than .25 acres of wetlands should require an individual permit.

RESPONSE: The Act mandates that the Department adopt two particular Statewide general permits allowing up to one acre of fill. For those general permits for which acreage limits were not specifically required by the Act, the Department has added criteria limiting the maximum area of disturbance, where this limit was judged necessary to insure minimal impact.

262. COMMENT: The general permit for State or federally funded roads should be amended. The general permit should be available for all roads built by any State agency, authority or political subdivision which are subject to review under The National Environmental Policy Act of 1969, 42 U.S.C. §4321 et seq. (NEPA), Executive Order 53 or Executive Order 172. This will prevent multiple reviews.

RESPONSE: This general permit is available to all road projects which are State or federally funded and which were planned and developed in accordance with NEPA and Executive Order 53, approved November 21, 1983, regardless of whether they are proposed by a State agency authority or other political subdivision of the State. If a project is not covered under these requirements, an individual wetlands permit application will be required.

AGENCY NOTE: The following 12 comments concern general permits for mosquito management and for Nationwide general permit numbers 4, 5, 6, 7 and 14. The agency has prepared one response for these comments which follows:

263. COMMENT: Nationwide Permit No. 14, allowing for minor road crossings, should be approved with modifications which 1) limit road crossing to less than one quarter acre of total freshwater wetlands disturbance, and 2) require mitigation.

264. COMMENT: If Nationwide Permit No. 14 is adopted, it should be modified to require donations to the Wetlands Mitigation Bank for each issued permit and to limit its application to only ordinary and intermediate quality wetlands.

265. COMMENT: Five commenters suggested amending Nationwide Permit No. 14 to define minor road crossings as creating a total of less than 0.25 acres of wetlands disturbance, and adopting this general permit as amended.

266. COMMENT: The Department should adopt Army Corps of Engineers Nationwide Permit No. 14 for minor road crossings. As currently administered by the Corps, a roadway with a seven foot change in elevation would permit up to .41 acres of wetland fill. This permit would allow minor road crossings which are necessary to access the upland of a site, and which are designed in accord with accepted traffic safety standards.

267. COMMENT: Two commenters felt that Nationwide Permit No. 7 for outfall and intake structures should be adopted by the Department since stormwater outfalls are a necessary part of any development and they must discharge to the lowest point of a site which is usually a wetland or stream corridor.

268. COMMENT: The purpose of general permits is to reduce administrative burdens to the Department and reduce costly delays to the public. Therefore the Department should adopt all of the Nationwide Permits.

269. COMMENT: Five commenters stated that the Department should adopt Army Corps of Engineers Nationwide Permits No. 7 (outfall and intake structures where effluent is permitted under NPDES), 12 (backfill for utility lines), 13 (bank stabilization activities), 14 (minor road crossing fills), 15 (discharges of fill for bridge construction), 18 (discharges of 10 cubic yards of fill or less in waters other than wetlands), 23 (Federally funded, categorically excluded projects), 25 (discharges of concrete into sealed forms) and 26 (discharges of up to 10 acres of fill in headwater wetlands or isolated wetlands), since they have a minor environmental impact, would be consistent with the existing Corps Nationwide permit system and to avoid unnecessary administrative burdens and costly delays to the regulated public.

270. COMMENT: A mosquito management general permit should be adopted because a decrease in the water management activities available for use by mosquito commissions will result in an increase in the application of pesticides.

271. COMMENT: Eight commenters asserted that the Department should adopt a Statewide General Permit for mosquito control activities which incorporates requirements to satisfy defined best management practices and compelling public need standards.

272. COMMENT: Eight commenters suggested that a general permit for mosquito control activities provide that the New Jersey Office of Mosquito Control Coordination be used as a clearinghouse to determine if best management practices have been met and if a mosquito problem exists.

273. COMMENT: The exclusion by the Department of most of the Army Corps of Engineers Nationwide Permits runs contrary to the Corps' program which has found these activities to have minimal adverse impacts on wetlands.

274. COMMENT: Six Nationwide Permits were not proposed for adoption which should have been. The Legislature intended the Department to adopt Nationwide Permits that do not conflict with the expanded definition of regulated activities which is found in the Act. The Department has exceeded the Legislature's intent by not adopting at least Nationwide Permits Nos. 7, 13, 14, 17, 18, and 23.

RESPONSE: The Department has not adopted general permits for mosquito management activities, nor for Nationwide general permits numbers 4, 5, 6, 7, or 14. However, due to numerous comments, the Department is considering issuing general permits for many of the activities. The Department is preparing for publication in the June 20, 1988 New Jersey Register a proposed amendment reflecting such a change.

275. COMMENT: The commenter objects to the proposal not to adopt Nationwide Permit No. 25, that is the discharge of concrete into tightly sealed forms or cells. This type of discharge is commonly used by utilities in setting poles or tower footings below grade. The impacts to freshwater wetlands from these activities are de minimus because of the small size of the poles and footings. Requiring an individual permit for such a minor encroachment is totally unnecessary. Nationwide Permit No. 25 should be adopted in its present form.

RESPONSE: A review of Nationwide Permit No. 25 and the Corps' supporting documentation for this permit indicates that it was intended to allow the placement of concrete pilings in water areas. This permit can also be used to allow the placement of footings for utility poles. The Department has decided not to issue a Statewide General Permit for the placement of concrete pilings or footings. These structures can be used in turn to construct other facilities which would ordinarily require an individual permit but if built upon footings or pilings approved by this general permit would not require an individual freshwater wetlands permit. This problem is currently experienced by the Corps in the 404 program. Further, since the cutting of vegetation is a regulated activity under the Act, and usually occurs in connection with the placement of utility poles, Nationwide Permit No. 25 would not eliminate the need to obtain a freshwater wetlands Permit for utility poles and their rights-of-way.

276. COMMENT: The temporary disturbance of wetlands for their use as temporary detention basins or basins intermittently flooded should not be considered disturbance under the Act and should be allowed under a general permit.

RESPONSE: The use of wetlands as detention facilities is currently a topic of much ongoing research and debate. Preliminary findings indicate that the deposition of sediment containing heavy metals in the wetlands from detained stormwater and the uptake of these heavy metals by wetlands plants are adverse effects upon freshwater wetlands. Until scientific evidence is produced which demonstrates that detention basins in wetlands have only minimal individual or cumulative adverse environmental effects, the Department cannot issue a general permit for these facilities under section 23 of the Act.

277. COMMENT: The commenter suggests the adoption of Nationwide Permits Nos. 3, 12, 16, 20, and 22.

RESPONSE: The Department agrees and included modified versions of these Nationwide Permits in the proposed rules. These Nationwide Permits, as modified, will be adopted as proposed.

278. COMMENT: Nationwide Permits Nos. 12, 25 and 26 should be adopted to regulate utility companies to a lesser degree.

RESPONSE: The Act required the adoption of a modified version of Nationwide Permit No. 26 and this version has been adopted. A modified version of Nationwide Permit No. 12 has also been adopted. However, Nationwide Permit No. 25 is not being adopted. This permit is intended to apply mostly to concrete pilings used for structural support. Since these pilings could be used as structural support for various types of facilities which would otherwise require a permit under the Act, it is not appropriate to issue a Statewide General Permit for the installation of these pilings. Rather, the Department will review the pilings as part of the individual permit for the entire structure.

279. COMMENT: Army Corps of Engineers Nationwide Permit No. 13 (bank stabilization) should be adopted as is, except that part (v) should be modified to read "no dredged material should be placed in any adjoining wetland area unless authorized by the Department". Bank stabilization activities are required to prevent erosion and should be permitted.

RESPONSE: The Department disagrees. It is the Department's experience that such activities usually occur on embankments outside of wetlands and that those which occur in wetlands would have more than minimal adverse environmental effects on wetlands and therefore are not eligible for a general permit. Such activities may be eligible for a permit through the individual permit process.

280. COMMENT: The Department should change the phrase "exceptional quality wetlands" in N.J.A.C. 8.2(c)2 (now 9.2(a)7ii) to wetlands of "exceptional resource value" to avoid confusion.

RESPONSE: The Department agrees, and has made the suggested change.

281. COMMENT: Stacking of general permits should be allowed provided the maximum disturbance allowed does not exceed one acre of wetlands.

RESPONSE: The Department has included a provision for stacking of certain general permits, and has included acreage limits in that provision. See N.J.A.C. 7:7A-9.4.

282. COMMENT: Two commenters felt that N.J.A.C. 7:7A-8.3 (now 9.3) should prohibit the use of general permits in exceptional resource value wetlands or EPA priority wetlands.

RESPONSE: Some general permits are limited in these areas, but since some general permits are very minor in impact, it is not appropriate to institute this broad prohibition.

283. COMMENT: Management practices contained in the Corps of Engineers regulations at 33 C.F.R. 330.6 should apply to all general permits.

RESPONSE: The Department agrees that the standard conditions for all Statewide General Permits should include a provision requiring, where applicable, the use of best management practices including those referenced at 33 C.F.R. 330.6. The rule has been modified at N.J.A.C. 7:7A-9.3(b)7 to include BMPs.

284. COMMENT: For a project which is covered under a general permit, it is necessary to notify municipal and county governments if a project is not subject to the Municipal Land Use Law.

RESPONSE: To avoid confusion, the reference to the Municipal Land Use Law in N.J.A.C. 7:7A-8.4(a) has been deleted (in the adoption at N.J.A.C. 7:7A-9.5(a)).

285. COMMENT: N.J.A.C. 7:7A-8.4(a) (now 9.5(a)) should clarify that notice of application for general permit authorization should go to all local officials noticed on permit applications.

RESPONSE: The Department disagrees. Because of the expedited nature of the authorization process for generally permitted activities, minimal notice requirements were proposed, and have been retained and clarified in the adopted rule. Authorizations, once issued, will be published in the DEP Bulletin so that local officials will be aware of the work proceeding in their localities.

286. COMMENT: Any modifications or rescissions of general permits should be sent to the municipalities for their files.

RESPONSE: Any modifications or rescissions of the general permits themselves will appear in the New Jersey Register. Any changes to individual authorizations to act under general permits will necessitate reapplication for authorization. In that case, municipal and county clerks will be notified as part of the application required by N.J.A.C. 7:7A-9.5(a).

287. COMMENT: Fishing and survey activity regulated by the U.S. Army Corps of Engineers under Nationwide Permits Nos. 4 and 6 are proposed to be exempt from regulation under this code. If adopted as proposed, do the conditions for the Nationwide Permits still apply?

RESPONSE: In order to comply with the EPA's requirements for the Department's assumption of the 404 program, these activities have been removed from this category of exempted activities.

288. COMMENT: The utility line general permit should be expanded to allow up to five acres of fill and should not require a water quality certification so as to avoid sewer extension review.

RESPONSE: Water quality certification is required to meet the assumption requirements of the Federal Act. Allowing up to five acres of fill would also contravene the State Legislature's intent to protect wetlands, and would fail to meet the environmental impact test for general permits set out in section 23 of the Act.

289. COMMENT: The commenter suggested that the criterion which limits disturbance for linear development under the general permit in N.J.A.C. 7:7A-8.1(a)2i to one acre be eliminated.

RESPONSE: The Department disagrees. Linear development, like other generally permitted activities, must be strictly limited to prevent unacceptably severe environmental impacts. Even a narrow linear development can effectively block water flow and circulation patterns so as to have a far reaching effect on freshwater wetlands or State open waters. Therefore, it is appropriate to limit the amount of wetland disturbance.

290. COMMENT: Parts of Nationwide Permit No. 26 have not been proposed for adoption. Can conditions exist when an activity is permitted by the State, but Army Corps approval is still required?

RESPONSE: Yes. Until State assumption of the 404 program, all currently required Federal permits are still necessary. Therefore, an activity could require approval under both a Statewide General Permit and a Nationwide General Permit.

291. COMMENT: N.J.A.C. 7:7A-8.2(e)5 should add "wastewater management facilities" after stormwater management facilities.

RESPONSE: Maintenance of existing wastewater management facilities is allowed under the Statewide permit at N.J.A.C. 7:7A-9.2 since these are considered public utilities.

292. COMMENT: Four commenters felt that regional stormwater management practices should be allowed if they are part of an approved regional stormwater management plan.

RESPONSE: The Department has conducted an environmental assessment for stormwater facilities and determined that a general permit for these facilities would not meet the standards in section 23 of the Act.

293. COMMENT: Road drainage should be allowed under a general permit.

RESPONSE: The discharge of stormwater from roadways into freshwater wetlands is allowed under the Statewide General Permit for stormwater outfalls provided it satisfies the specific conditions under that general permit. See N.J.A.C. 7:7A-9.2.

294. COMMENT: The Department should adopt a Statewide General Permit for stormwater management facilities provided no excavation of wetlands is proposed.

RESPONSE: After conducting the environmental analysis required by section 23(a) of the Act, the Department has determined that stormwater management facility construction on wetlands would have more than minimal adverse impacts upon wetlands. Therefore, a general permit for stormwater facility construction in wetlands has not been adopted.

295. COMMENT: The term "substantial modification", as used in N.J.A.C. 7:7A-8.2(b)1 (now 9.2(a)6i), should be defined, so that the exact limits of a general permit can be determined in advance.

RESPONSE: The term comes directly from section 23 of the Act and the Department believes this term is sufficiently clear.

296. COMMENT: Five commenters felt that the Department should eliminate any provision to adopt the Federal Nationwide Permit No. 26 which exempts one acre headwater fills.

RESPONSE: The Act, in section 23b, directs the Department to adopt specific elements of Nationwide Permit No. 26. The other elements of this general permit may only be adopted if the Department determines that the activities cause only minimal adverse impacts on the environment. The Department has determined that adoption of Nationwide Permit No. 26 in its entirety would result in cumulative adverse impacts on the environment and has therefore limited its scope to that specifically required by the Act.

297. COMMENT: The Department should adopt Nationwide Permit No. 26 (one acre of fill in wetlands) since current practice has shown that some wetland encroachment is necessary and unavoidable and that if some encroachment is allowed an applicant will minimize wetland disturbance within the scope of this permit.

RESPONSE: The Department has determined that the activities in Nationwide Permit No. 26 which the Department did not propose for adoption would result in a cumulative adverse impact on the wetlands. Therefore, in accordance with section 23 of the Act, these elements of Nationwide Permit No. 26 have not been added to the rules.

298. COMMENT: The class of waters covered by the Statewide General Permit in N.J.A.C. 7:7A-8.2(b) (now 9.2(a)6) should be further limited to take place only in wetlands of five acres or less.

RESPONSE: The language for this general permit was taken directly from section 23 of the Act. It would contravene the Legislature's intent if the Department were to further limit it.

299. COMMENT: The general permit proposed at N.J.A.C. 7:7A-8.2(c) should read "are not located in headwater areas."

RESPONSE: The proposal's language is specifically mandated by section 23 of the Act. The general permit is intended to be limited to activities in headwater areas.

300. COMMENT: Two commenters stated that the requirement of notice to the Department before acting under a general permit, and the requirement of awaiting a Department response before acting, as required in N.J.A.C. 7:7A-8.4 (now 9.5), is contrary to the entire concept of a general permit.

RESPONSE: The concept of a general permit under the Act is to provide an expedited approval process for routine, common activities with little adverse effects on wetlands. Such a notice requirement, besides being required by section 23 of the Act, does not deprive a person contemplating an activity covered by a general permit of an approved process which is shorter and simpler than that required for an individual permit. The response requirement is also necessary so that the Department can control cumulative impacts of activities covered under each general permit to ensure that they have only a minimal adverse impact, as required by the Act.

301. COMMENT: The commenter proposed that the language in N.J.A.C. 7:7A-8.2(b)2 (now 9.2(a)6ii) which limits the New Jersey Statewide General Permits under this section from permitting fill in "waters of the State" which are special aquatic sites, be eliminated.

RESPONSE: Waters defined as "special aquatic sites" are highly sensitive and environmentally valuable. These areas must be protected as strictly as freshwater wetlands. This language is also required for assumption of the Federal 404 program.

302. COMMENT: The Department should require that all approvals of Nationwide Permits by the U.S. Army Corps of Engineers be done in writing and that no local approvals be granted without written Federal authorization.

RESPONSE: Both recommendations are beyond the scope of authority of the Act and this chapter. The Department is, however working with Federal agencies and local governments to effect a coordinated decision making and approval process.

303. COMMENT: The commenter suggested that the Department interpreted the language in section 23(b) of the Act incorrectly and that paragraphs 2 and 3 of N.J.A.C. 7:7A-8.2(c) (now 9.2(a)6ii and iii) be rewritten as follows: "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) may be approved or applied to a project or to the pre-existing subdivision. 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 swales and manmade ditches provided the ditches or swales. . ."

RESPONSE: The Department disagrees. The suggested language does not change the effect of the rule, but does group unrelated provisions in a confusing way. Accordingly, this change has not been made.

304. COMMENT: The language in N.J.A.C. 7:7A-8.2(e) under Statewide General Permits 1, 3, 5 and 6 which does not allow "disturbance of additional freshwater wetlands or state regulated waters upon completion of the activity" should be eliminated since it is in conflict with the Statewide General Permits under N.J.A.C. 7:7A-8.1 which allow disturbance of wetlands.

RESPONSE: This provision of the proposed rule did in some cases conflict or confuse. The rule has been modified to consolidate the general permits for maintenance activities and to provide consistent conditions for these activities.

305. COMMENT: Maintenance of existing stormwater management facilities for mosquito problems should be permitted under a general permit.

RESPONSE: The maintenance of existing stormwater management facilities for mosquito problems or for any other purpose is covered by the Statewide General Permit in N.J.A.C. 7:7A-9.2(a)1, provided that additional areas of freshwater wetlands are not disturbed.

306. COMMENT: The Statewide General Permit which covers State and Federally funded roads should include bridges.

RESPONSE: Bridges are covered under this general permit to the extent that they are part of such roads.

307. COMMENT: The Statewide General Permit in N.J.A.C. 7:7A-8.2(e)1 for repair of existing roads and public utilities should include bridges, culverts, and stormdrain pipes.

RESPONSE: Maintenance of bridges is included in this general permit if they are part of the road. Maintenance of existing culverts and stormdrain pipes are covered under other general permits. See N.J.A.C. 7:7A-9.2.

308. COMMENT: The Act does not prohibit multiple use of general permits on a single property. The rule does not give a rationale for this prohibition in N.J.A.C. 7:7A-8.2.

RESPONSE: The rule has been modified to allow limited "stacking" of Statewide General Permits in certain instances. See N.J.A.C. 7:7A-9.4 for specific language.

309. COMMENT: Four commenters stated that the Department does not have the authority to limit the number of general permits for each site. It also conflicts with the exemptions in section 4d of the Act.

RESPONSE: In order to ensure that generally permitted activities meet the impact standards in section 23 of the Act, the Department must limit the number of general permits which can be used in close proximity, that is, on one site.

310. COMMENT: N.J.A.C. 7:7A-8.2(d) prohibits future additional general permits for the same property. Thus, even a de minimus activity such as a utility pole would require an individual freshwater wetlands permit if the property owner has previously received a general permit, or if the utility company had previously received a general permit on an easement on the same property. This will create administrative problems.

RESPONSE: The Department has modified the rule to allow the use of most general permits more than once on a single site over time. See N.J.A.C. 7:7A-9.4.

311. COMMENT: Two commenters said the condition in N.J.A.C. 7:7A-8.1(a)2 which limits generally permitted utility line right-of-ways to a maximum width of 20 feet is unreasonable. Utility right-of-ways average 50-100 feet and this condition should be modified to reflect this.

RESPONSE: Based upon the experience of the Department in other permitting programs, a 20 foot right-of-way is a sufficient width to install most utility lines. Other utility lines which require greater disturbance are not considered to have minor impacts and therefore will require individual permits.

312. COMMENT: Item v in N.J.A.C. 7:7A-8.1(a)2 (now 9.2(a)2v), which requires that backfill be the original soil material, should be changed to allow suitable backfill to be replaced since in many instances the original soil material is not suitable as backfill.

RESPONSE: The Department concurs that suitable backfill material may be required for certain pipelines or other utilities. Therefore this general permit has been modified to require that only the upper 18 inches of the excavation be backfilled with the original topsoil material.

313. COMMENT: Conditions i, ii, iii and iv in N.J.A.C. 7:7A-8.1(a)2 (now 9.2(a)2) should be eliminated for Statewide General Permit No. 2, backfill for utility lines, since the disturbance is only temporary and the site will revegetate.

RESPONSE: The Department disagrees. Section 23 of the Act requires the Department to issue general permits for only those activities with minimal impact on the environment. Without these four limitations, the activity could have substantial impact, and would therefore be ineligible for general permit coverage.

314. COMMENT: In N.J.A.C. 7:7A-8.3(b)1 (now 9.3 (b)1) "proximity" should be changed to "immediately upstream of or where it will affect" a public water supply intake.

RESPONSE: The Department disagrees with the suggested language. Any activity which is close to a public water supply must be carefully reviewed through the individual permit process on a case-by-case basis to ensure safe drinking water for the public.

315. COMMENT: N.J.A.C. 7:7A-8.3(b)4 (now 9.3(b)4) requires structures to be "properly maintained." Criteria for proper maintenance should be specified, and legal agreements and performance bonds should be provided for.

RESPONSE: Since proper maintenance techniques will vary depending upon the activity which is permitted, it is reasonable to require maintenance as a general, standard condition. Any activity requiring specific types of maintenance will be so limited by adding conditions to the general permit approval, or by requiring an individual permit. The authorization process for a permitted activity produces a legal obligation on the permittee which requires performance.

316. COMMENT: The standard condition on general permits in N.J.A.C. 7:7A-8.3 (now 9.3) that an activity shall not be covered by a general permit if it is in the proximity of a public water supply should not apply unless the wetland is hydrologically connected to the waterway.

RESPONSE: Due to the sensitivity of public water supplies to contamination, it is necessary to require a detailed review of any activities which occur around these facilities.

317. COMMENT: The Department should have 45 days, not 30, to notify an applicant of authority to act under a general permit.

RESPONSE: Section 23 of the Act requires the Department, within 30 days of receipt of written notice of a proposal to engage in an activity covered by a general permit, to notify the applicant if an individual permit is required for the activity. It would be inconsistent with this statutory provision to allow 45 days for notification of authorization to act.

318. COMMENT: Six commenters felt that the time allowed for the Department to review general permit notifications should be 30 calendar days, not 30 working days, and that passage of 30 days without response should equal DEP approval.

RESPONSE: In recognition of these concerns, the word "working" has been deleted from N.J.A.C. 7:7A-9.5. However, it would be inconsistent with the protective intent of the Act to create a default type permit approval process. Accordingly, no such provision has been added to the rule.

319. COMMENT: The standard condition in N.J.A.C. 7:7A-8.3(b)3 (now 9.3(b)3) should contain a presumption that indigenous fill is free from toxic material.

RESPONSE: Such a presumption would contravene the legislative intent of the Act, and would be less stringent than the Federal requirements for 404 assumption. Therefore, it is incumbent on the applicant to establish that the indigenous fill is free from toxic material.

320. COMMENT: Five commenters stated that notice to DEP should not be required on general permits. Also, the Department should not review general permits since the review diverts public and private resources away from individual permit review.

RESPONSE: Section 23 of the Act requires a person proposing to engage in an activity covered by a general permit to "provide written notice to the Department containing a description of the proposed activity at least 30 working days prior to commencement of work". The Act also requires the Department to review this information and notify the person proposing to engage in the activity covered by a general permit within 30 days as to whether an individual permit is required for the activity. In order to meet the protective goals of the Act, these requirements are retained as proposed.

321. COMMENT: The language in N.J.A.C. 7:7A-8.3(b) (now 9.3(b)2) should be revised to be consistent with that in N.J.A.C. 7:7A-1.4 and eliminate the word "or" from "historic or documented habitat."

RESPONSE: Because the word "historic" has been deleted from the definition of "documented habitat", this change is no longer necessary. N.J.A.C. 7:7A-9.3(b)2 has been changed to refer to all habitats for threatened or endangered species.

322. COMMENT: A new general permit should be added to allow for temporary disturbances to wetlands. The commenter proposed the following language: Wetlands areas temporarily disturbed by regulated activities shall be, in the case of excavation, backfilled with the original soil material to the preexisting elevation and, in all cases, shall be revegetated with native indigenous species. The temporary activity shall be designed so as to not interfere with the natural hydraulic characteristics of the wetland and subwatershed.

RESPONSE: Such a general permit would not meet the environmental standards set forth in section 23 of the Act, and therefore will not be adopted.

323. COMMENT: The commenter supports the seven conditions placed on Statewide General Permit No. 2 regulating pipelines, because linear disturbance of freshwater wetlands can be disruptive.

RESPONSE: The Department acknowledges receipt of this comment in support of the proposal.

324. COMMENT: The standard conditions for general permits should not apply to the two general permits which are specifically set forth in the Act, but only to those issued under section 23(c) of the Act.

RESPONSE: The standard conditions in N.J.A.C. 7:7A-9.3 are designed to carry out the Act's intent to protect wetlands, and to meet Federal requirements for assumption of the 404 program. These provisions must apply to all general permits in order to meet these goals. Accordingly, the rule remains as proposed.

325. COMMENT: Notice should not be required for normal maintenance or repair of roads and associated drainage facilities prior to the commencement of the work. The rule should state that the application requirements for general permits do not apply to these activities when the acts do not extend beyond the boundaries of existing facilities.

RESPONSE: Section 23 of the Act requires written notice to the Department for all general permit activities at least 30 days prior to commencement of work. Therefore, the provision remains as proposed.

326. COMMENT: When notifying the applicant as to whether an activity is covered by a general permit, the Department should be required to specify reasons for the determination.

RESPONSE: The Department will provide reasons for its determination when appropriate. Due to the administrative burdens of reviewing general permit notifications, this has not been adopted in the rule as a requirement. The Department intends, however, to make every effort to provide a basis for its determinations.

327. COMMENT: The requirement to notify municipalities and landowners of notice of intent to act under a general permit is excessive and contrary to the intent of the Act.

RESPONSE: There is no requirement to notify landowners of general permit activities. Notice is only required to municipal and county clerks. Without local awareness of which projects have been authorized by the Department, local officials and citizens would be less able to effectively monitor activities in their areas.

328. COMMENT: N.J.A.C. 7:7A-8.4(b)2 (now 9.5(b)2) should be modified to eliminate the Department's discretion to require both a site description and a site plan.

RESPONSE: Both of these may be needed to assess whether the general permit applies. Thus, the provision has been retained.

7:7A-10 (proposed as 7:7A-9)

329. COMMENT: Two commenters suggested that it is unnecessary to notify the local municipality of requests for pre-application conferences since these are informal sessions.

RESPONSE: In recognition of the burdens of notification to and participation of local authorities, the rule has been modified to delete this requirement.

330. COMMENT: Both the county and municipality should be informed of the date, time and place of the pre-application conference.

RESPONSE: In order to retain the informality and non-binding nature of these conferences, prior notice of pre-application conferences to local governments has been deleted.

331. COMMENT: The Department should use the same application and paperwork for the letter of interpretation request as was used for the pre-application conference request.

RESPONSE: The materials submitted prior to a pre-application conference are very different in level of detail and number of copies from those submitted for letters of interpretation and permit applications. Further, the passage of time between the pre-application conference and the actual issuance of a letter of interpretation or permit application may render materials out-of-date and inaccurate. Accordingly, the rule remains as proposed.

332. COMMENT: The memorandum of record should be binding on all parties.

RESPONSE: The Department disagrees. The pre-application conference is designed to be informal and preliminary so that applicants can change their projects in response to comments received from the Department before formal review proceedings begin. If the memorandum of record was legally binding, it would require greater Department review and would limit the utility of pre-application conferences as informal guidance to applicants.

333. COMMENT: Two commenters said a time limit should be imposed for the Department to complete the memorandum of record (MOR) after the pre-application conference. The MOR should be issued within 20 days of the conference in order for an applicant to use the information for project design.

RESPONSE: In recognition of the commenters' concerns, the rule has been modified to require the Department to mail the MOR to the applicant within 30 days of the pre-application conference.

334. COMMENT: The burden of notifying all interested persons of pre-application conferences should be on the Department through the DEP Bulletin, not on the applicant.

RESPONSE: The requirement for notice before the conference has been deleted. No notice will be required of applicants.

7:7A-11 (proposed as 7:7A-10)

335. COMMENT: A complete hydrologic report should be part of a permit application.

RESPONSE: The rule requires various information from applicants regarding the hydrology of the site, including hydric soils and surface and groundwater saturation. It is the Department's judgment that this information will be sufficient.

336. COMMENT: The Department should provide a checklist to help applicants submit a complete application.

RESPONSE: The Department intends to develop a checklist prior to the effective date of the Act.

337. COMMENT: One commenter asserted that it should be the responsibility of the Department to notify interested persons or organizations which specifically request to be notified of permit applications and the burden should not be upon the applicant. Publication in the DEP bulletin should be sufficient.

RESPONSE: The provision objected to, N.J.A.C. 7:7A-10.1(a)8, adopted as N.J.A.C. 7:7A-11.1(a)9 is specifically required by section 9a(2) of the Act and therefore cannot be changed.

338. COMMENT: The registered notice to the counties and designated parties should include a project description.

RESPONSE: Such a project description is already required by N.J.A.C. 7:7A-11:1(a)9.

339. COMMENT: Notice of permit applications should go to county water resources associations, county planning boards, and a complete application should go to both the county and local planning boards.

RESPONSE: The Department has balanced the need for local notice and input against the administrative burdens of ensuring such notice and input. The Department has added a requirement to the rule at N.J.A.C. 7:7A-11.1(a)9, that applicants send local authorities a vicinity map identifying the site of the proposed project. However, a requirement of notice to multiple local bodies, all affiliated with the same jurisdiction, was deemed too onerous, and so was not included in the adoption.

340. COMMENT: In N.J.A.C. 7:7A-10.1(a)8 (now 11.1(a)9), the term "mosquito commission of the county" should be changed to "county mosquito control agency."

RESPONSE: The rule has been clarified accordingly.

341. COMMENT: Counties should not have to pay an application fee for a wetlands permit.

RESPONSE: The Department disagrees. The Act exempts "agencies of the State" from the application fee requirement. Since counties are not agencies of the State and since application fees are a crucial source of program revenues, the rule will not exempt counties from the fee requirement.

342. COMMENT: For the purposes of N.J.A.C. 7:7A10.1(a)12 (now 11.1(a)13), freshwater wetlands should not be considered special aquatic sites.

RESPONSE: The Department agrees. The rule has been clarified to specifically refer to the definition of "special aquatic site" in N.J.A.C. 7:7A-1.4, which makes this clear.

343. COMMENT: Two commenters stated that, in N.J.A.C. 7:7A-10.1(a) (now 11.1(a)), it is unclear if "owners of property adjacent to the proposed project" and "all landowners within 200 feet of the site" are a common list. The commenters felt that either of these notice requirements imposes a severe hardship on linear development, and that alternative means of providing notice should be provided, that is, notification in a local newspaper. One commenter requested that these notification requirements be deleted for linear development.

RESPONSE: "Owners of property adjacent to the proposed project" and "all landowners within 200 feet of the site" may or may not be a common list depending on the particular site. As noted, section 9 of the Act specifically requires notice to landowners with 200 feet. This cannot be changed by rule. The Department has clarified the notice provision at N.J.A.C. 7:7A-11.1(a)9 to require notice to adjacent landowners and to landowners within 200 feet of the property or properties upon which the activity is occurring.

344. COMMENT: The provision requiring "a list of plants or wildlife which are dependent upon water quality or quantity" should be modified to indicate that the list is required only for those species "in the location of the regulated activity".

RESPONSE: The Department disagrees. The provision (See N.J.A.C. 7:7A-11.1(a)13) requires a list covering plants and wildlife "in the proposed activity or discharge site". This is sufficiently specific. Further, this is patterned on the Federal 404 rules, and thus will aid in the State's assumption of the Federal 404 program.

345. COMMENT: Two commenters said the provision in N.J.A.C. 7:7A-10.1(a)14, which requires a list of uses affecting human health and welfare, is vague and should be limited to "aspects of the regulated activity affecting human health and welfare.

RESPONSE: The Department disagrees that a change is needed. As written, the provision (now at N.J.A.C. 7:7A-11.1(a)15) requires submittal of information regarding "uses of the proposed activity or discharge site" which might affect human health and welfare. This requirement is sufficiently specific, and is the same as that used in the Federal 404 program regulations.

346. COMMENT: N.J.A.C. 7:7A-10.1(a)14 (now 11.1(a)15) should read "site which might adversely affect human health and welfare". The term adversely should be added.

RESPONSE: Information on all effects on human health and welfare, not just those which adversely affect human health and welfare, is required by the Federal Act. In order to assume the 404 program, the Department cannot limit the scope of its review to only adverse effects. Therefore, the adoption retains this provision as proposed.

347. COMMENT: The requirement to provide information regarding existing structures on the project site and adjacent sites is overburdening for a linear development such as a utility line. Electric distribution and transmission facilities should be exempt from regulation.

RESPONSE: The Act does not exempt electrical distribution and transmission facilities from regulation, and, therefore such facilities are subject to the rule.

348. COMMENT: In N.J.A.C. 7:7A-10.1(b)1 (now 11.1(b)1), the applicant must list the structures on the "immediately adjacent lots". "Adjacent" is not clear in this phrase.

RESPONSE: The Department believes that the phrase "immediately adjacent lots" clearly refers to all lots adjacent to the lot(s) upon which the activity is conducted. No language to further clarify this phrase was submitted by the commenter. Therefore, no change will be made in the rule.

349. COMMENT: In N.J.A.C. 7:7A-10.1(b)2, the applicant must list the "distances and dimensions of areas, structures and lots. . ." This does not indicate clearly what areas must be listed.

RESPONSE: This provision (now at 11.1(b)2) does not require a list. Rather, it requires a site plan showing areas, structures and lots. The word "areas" refers to spaces between the features specifically shown on the plan, such as buildings or water bodies.

350. COMMENT: Language should be added to the signatory provision in N.J.A.C. 7:7A-10.3(a)3 to allow signature by a duly authorized representative.

RESPONSE: The rule already includes such language in N.J.A.C. 7:7A-11.3(b).

7:7A-12 (proposed as 7:7A-11)

351. COMMENT: DEP should quantify the extent and accuracy of wetlands on a site in a decision document.

RESPONSE: The letter of interpretation is such a decision document. If no letter of interpretation is obtained, the permit itself will include a delineation or a verification of the applicant's delineation.

352. COMMENT: The Department should amend the section on Review of Applications to make more clear the time periods available for review procedures.

RESPONSE: The section has been clarified at N.J.A.C. 7:7A-12.1(b).

353. COMMENT: Two commenters felt that the wording of N.J.A.C. 7:7A-11.1(c) allows the Department to continue to request additional information about an application, needlessly delaying the review process. The section should clarify that the Department has only one opportunity to request information and after that one time can only request clarification of the original request.

RESPONSE: The provision has been clarified at N.J.A.C. 7:7A-12.1(b) to indicate this. However, it should also be noted that, in cases where the additional information submitted is incomplete, the application may be cancelled pursuant to N.J.A.C. 7:7A-12.7.

354. COMMENT: Two commenters stated that additional information submitted to the Department should be sent, upon request, to all persons who received notice of the application, not "at the discretion of the Department".

RESPONSE: The initial application was not required to be sent to anyone. Rather, a notice summarizing the proposed activity was sent. Much of the additional information would be useless without the original application. Therefore the rule remains as proposed. However, to facilitate public awareness and input, all permit applications, with any additional information submitted, will be available for public review at the offices of the Division of Coastal Resources within the Department of Environmental Protection.

355. COMMENT: N.J.A.C. 7:7A-11.1(d) should provide for resubmission of an incomplete application within one year without a new fee as in N.J.A.C. 7:7A-11.6(d).

RESPONSE: These two provisions have been combined and clarified, at N.J.A.C. 7:7A-12.7. In order to deter applicants from wasting the Department's time by failing to follow up on incomplete applications, the Department will retain the authority to require a new fee in cases of cancelled applications. To avoid forfeiting the fee, an applicant need only withdraw their application prior to its being declared complete.

356. COMMENT: The rule as proposed does not require submittal of information sufficient to determine if the activity will affect wetlands or State open waters other than the one in which the discharge originates.

RESPONSE: The Department disagrees. The application requirements at N.J.A.C. 7:7A-11.1(a) include vicinity maps and other information regarding nearby waters and wetlands.

357. COMMENT: The scope of EPA review should be limited to discharges in freshwater wetlands and State open waters, and should not extend to those which affect these areas.

RESPONSE: EPA review (see N.J.A.C. 7:7A-12.3(a)1) is limited to "discharges which may affect freshwater wetlands or State open waters other than the one in which the discharge originates." This does not extend EPA review to any areas which are not freshwater wetlands or State open waters. Further, this scope of review is required by the Federal Act and therefore cannot be modified by rule without jeopardizing the Department's ability to obtain assumption of the Federal 404 program. The Freshwater Wetlands Protection Act mandates the Department to work to obtain the assumption.

358. COMMENT: Two commenters felt that a definition of a "major discharge" is needed.

RESPONSE: The term has been defined in N.J.A.C. 7:7A-1.4 to include activities or projects with potentially significant adverse effects on the environment.

359. COMMENT: How do "major discharges" in the context of this section relate to discharges covered by the NJPDES program?

RESPONSE: The definition of "major discharges," included in the rule, applies to the wetlands and open water fill permit programs only.

360. COMMENT: N.J.A.C. 7:7A-11.2(e) allows the Department to extend their time for permit review past 180 days to allow for EPA review.

However, section 5(c) of the Act does not allow this until after the Department assumes the Federal 404 program.

RESPONSE: The provision has been revised to reflect the statutory language more accurately.

361. COMMENT: The commenter supports the 180 day time frame given in N.J.A.C. 7:7A-11.2 for decisions on permit applications, providing that proper classification procedures for undocumented freshwater wetlands can take place within that time frame.

RESPONSE: The Department will classify freshwater wetlands in accordance with the criteria enumerated in the Freshwater Wetlands Protection Act. Since the Department interprets "undocumented wetlands" to mean a wetland where the presence of endangered or threatened species habitat is uncertain, the classification will be based on the best available information, including records from the Department's Division of Fish, Game and Wildlife and Office of Natural Lands Management.

362. COMMENT: Some legal provision should be made to guarantee that local governments make applications available to the general public.

RESPONSE: Unfortunately, considerations of cost and administrative burdens dictate that local governments will not generally have complete permit applications sent to them and therefore will not be able to make them available to the public. However, municipalities will receive a site plan and brief description of the activity. Complete applications can be viewed in the Department's offices during business hours.

363. COMMENT: Three commenters stated that in N.J.A.C. 7:7A-12 (proposed as N.J.A.C. 7:7A-11), provisions should be added for public review and comment on permit applications. This should be done through fact finding meetings such as those presently used by the Bureau of Flood Plain Management. These are informal meetings with presentations by applicants and discussion among representatives of the public, the applicant and the Department. These meetings could in some cases replace public hearings.

RESPONSE: Unfortunately, the short time available for review of applications precludes such a provision. However, in recognition of the need for public input and to meet Federal 404 program requirements, provisions for the issuance of draft permits and public notice and comment are included in the rule.

364. COMMENT: Section 27c of the Act requires the Department to pursue joint permit processing with Federal agencies. This issue is not addressed in this chapter and should be.

RESPONSE: The joint processing of permits is a stated goal of the Act. However, very little specific guidance is provided by the Act as to how this should be accomplished. The Department is currently working with the Corps to develop these joint processing procedures.

365. COMMENT: The rule should require that a record of proceedings at all public hearings to be made available to the public.

RESPONSE: The rules so provide N.J.A.C. 7:7A-12.5(g) requires that a copy of a transcript of the hearing be maintained in Trenton at the DEP offices for public inspection.

366. COMMENT: Hearing notification requirements in N.J.A.C. 7:7A-12.4(f)2 (proposed at N.J.A.C. 7:7A-11.4(f)2) are too onerous for linear development. Newspaper notice is sufficient. Utility poles and towers should be exempted since they have a de minimus effect on wetlands.

RESPONSE: The Department disagrees. This level of notice is required to meet the protective goals of the Act, and to satisfy 404 program assumption requirements. Linear development for utility poles and towers can have a substantial adverse impact on freshwater wetlands, largely through clearing of vegetation for right-of-way corridors, construction of maintenance roads, creation of berms, and soil compaction due to the passage of heavy construction vehicles. Therefore, the provision remains as proposed.

367. COMMENT: The cost of any required public hearing should be included in the application fee as is currently the practice in CAFRA.

RESPONSE: The Department disagrees. Since it is impossible to predict at the time of application which applications will require hearings, a blanket hearing fee would have to be added to all permit application fees. This would unfairly charge a higher fee to those persons whose applications required no hearing. Note that the current practice of the Division of Coastal Resources under CAFRA is to require an applicant to carry the cost of a public hearing in addition to the original permit fee.

368. COMMENT: The Department currently does not charge an applicant for the cost of a public hearing. N.J.A.C. 7:7A-11.4(h) (now 12.5(h)) should be deleted.

RESPONSE: The Department disagrees. The current practice of the Division of Coastal Resources is to require a permit applicant to bear any costs associated with a public hearing held for that application. The Division does not assess any fee for its part in the hearing, but costs such as the court reporter and hearing room should be paid by the person who will benefit financially from a permit approval and not by the general public. Accordingly, the provision will remain as proposed.

369. COMMENT: Participants in a public hearing should be sworn to tell the truth as are applicants.

RESPONSE: The intent of the public hearing process is to provide the Department with public information and viewpoints regarding the permit application prior to a decision on that application. Since the hearing is not an adversarial proceeding before a judge, it is not necessary to swear in witnesses.

370. COMMENT: One hundred eighty days is too long a time frame for Department decision making after an application is declared complete. The time frame should be 90 days and if decisions are not timely, an approval should be automatic.

RESPONSE: The Department disagrees, Section 5 of the Act states "Until the State assumes the implementation of the Federal Act, the Department shall issue or deny a permit within 180 days of the submittal of a complete application . . ." This indicates a clear legislative intent to allow the Department this time for thorough review of permit applications. The creation of a permit by default is not authorized by the Act, and would contravene the protective intent of the Act. Therefore, the rule remains as proposed.

371. COMMENT: In addition to notifying the applicant of permit issuance, denial, or requests for modification, the Department should also notify local officials who received the initial application.

RESPONSE: As noted above, copies of permit applications will not be sent automatically to local officials. However, the status of all permit applications will be published in the DEP Bulletin.

372. COMMENT: In N.J.A.C. 7:7A-11, the proposed rules provide that fees submitted with an application which is subsequently canceled shall be non-refundable. But in that same subchapter, at N.J.A.C. 7:7A-11.6. the proposal provides that if an application is denied or withdrawn and then resubmitted within one year, no new fee is required. Since there seems to be no difference between a canceled application and a withdrawn application, different rules should not apply.

RESPONSE: A withdrawn application is a voluntary action by an applicant before the Department has spent a significant amount of time on review and evaluation. An application cancellation is a Departmental action to avoid wasting staff time on incomplete applications for which the applicant fails to submit necessary information. (See N.J.A.C. 7:7A-12.7). The rules are intended to advise an applicant of available options in the event an application is canceled or withdrawn. It should be noted that no fee is refundable, but sometimes may be credited towards a future application.

373. COMMENT: Three commenters were concerned with N.J.A.C. 7:7A-11.6(c), which states that any amendment to a pending application "may require reinitiation of the entire review process." The commenters felt this language is very broad and could produce delays in permit processing and that the word "amendment" is not clear. The Department should not be able to slow the review process by requesting an amendment. This language should be clarified so that only major amendments initiated by the applicant can cause a reinitiation of the review process. Different rules should apply if the request for an amendment is initiated by the Department.

RESPONSE: The rule has been clarified at N.J.A.C. 7:7A-12.1(b) to indicate that the Department has only one chance to request more information on an application. However, should an applicant voluntarily modify the permit application during the permit review process, the Department reserves the discretion to require reinitiation of the process as appropriate. See N.J.A.C. 7:7A-12.7(c).

374. COMMENT: Eight commenters felt that appeals of permit decisions should be permitted by any third party with an interest in the protection of wetlands.

RESPONSE: The Department disagrees. The Act requires only that the applicant have a right to a hearing. The rule adds "other affected parties" so as to include persons with a constitutionally protected interest which might require a hearing. Further, opportunity for public input on the letter of interpretation and permit application should protect public interests and concerns.

375. COMMENT: N.J.A.C. 7:7A-1.7 (now 12.8) should be clarified to only allow parties with particular property rights or other special interests which may be affected by a permit decision to request hearings on permit issuance, denial, or modification. Further, because of the extensive notice requirements at the time of permit applications, only

affected parties who filed relevant factual correspondence prior to issuance of the permit should be allowed to request a hearing.

RESPONSE: The Department disagrees. To limit the right to a hearing to persons who filed particular types of information prior to a permit's issuance might exclude persons with constitutionally protected rights which justify a hearing.

376. COMMENT: The term "affected party" should be changed to the word "person" as defined in the Act.

RESPONSE: The Department disagrees. See above two comments and responses.

377. COMMENT: After comments from EPA on a permit application, a public hearing should be held if there is a significant degree of public interest.

RESPONSE: The rule so provides at N.J.A.C. 7:7A-12.5(c).

378. COMMENT: "Other reviewing agencies" as used in N.J.A.C. 7:7A-11.1(a) (now 12.1(a)) should be identified so applicants can anticipate their concerns.

RESPONSE: The other reviewing agencies may vary depending upon the scope of the permit application. Generally, they will be the United States Fish and Wildlife Service and other Federal agencies which may be affected by proposed activities.

379. COMMENT: N.J.A.C. 7:7A-11.2 (now 12.3) should precisely define the types of permits requiring EPA review.

RESPONSE: The Department has defined "major discharges" to provide more specificity regarding permits reviewed by EPA. In addition, the Memorandum of Agreement, currently being negotiated as part of the State's application for assumption, will clarify this.

7:7A-13 (proposed as 7:7A-12)

380. COMMENT: N.J.A.C. 7:7A-12.1(a)12iii (now 13.1(a)12iii), concerning permit transfer requirements, should be modified to make revocation and reissuance a requirement in all cases as a means of ensuring new owner accountability for the terms and conditions of the permit.

RESPONSE: This requirement would add unnecessary procedural delay in cases where no change in a permit was made except the identity of the permittee. As written, the rule does allow the Department to revoke and reissue upon transfer if necessary.

381. COMMENT: The right to enter and inspect a site should be provided for other reviewing agencies besides the Department in order to facilitate review.

RESPONSE: The Department disagrees. This is not required by the Federal Act or regulations, and would cause unnecessary intrusion on applicant is property. Other reviewing agencies should notify DEP of special concerns prior to on-site inspection. If appropriate, these agencies may then perform inspections concurrently with EPA or the Department.

382. COMMENT: A prominently displayed sign should be required on all permitted work sites indicating Department authorization for the work, the permit number, a Department phone number for verification and a local agency address where the permit can be viewed.

RESPONSE: The Department agrees. This will facilitate public participation in enforcement as required by section 21j of the Act. The rule has been modified to include this provision in N.J.A.C. 7:7A-13.1(a)17.

383. COMMENT: Notice of all changes to a permitted project, including those due to water quality standards, etc. should also go to the municipality.

RESPONSE: All requests for (other than minor) permit modifications will be copied and submitted to the local jurisdiction, pursuant to N.J.A.C. 7:7A-13.6, referencing public notice requirements of 40 C.F.R. 124.10. The Department will publish notice of any approved permit modifications in the DEP Bulletin.

384. COMMENT: The types of monitoring required by N.J.A.C. 7:7A-12.1(a)10 must (now 11(a)10) be relevant to freshwater wetlands. This section should also provide a time frame to terminate any required monitoring.

RESPONSE: Monitoring requirements and their duration will be established as needed for each permit. Thus, the requirements at N.J.A.C. 7:7A-13.1 and 2 will be relevant not only to the freshwater wetland permit program but also to the open water fill program and to the specific site and project or activity.

385. COMMENT: Three commenters said it is unclear how N.J.A.C. 7:7A-13.1(a)2, 3, 4, 6, 7, 9, 10, 12 and 16 pertain to freshwater wetlands. These commenters asserted that this language deals with NJPDES rules and the requirements of that program which are also covered by other parts of these rules and thus should be eliminated from this section.

RESPONSE: The permit conditions in N.J.A.C. 7:7A-13.1(a) are taken in part from the standard permitting procedures for the Federal Clean Water Act (CWA), and must be included in this rule if the State is to assume the 404 program. Since both the NJPDES and 404 programs originate in the CWA, the standard conditions which must be included in permits under each program are very similar, and are appropriate for use in both programs.

386. COMMENT: N.J.A.C. 7:7A-12.1(a)14 should be rewritten as follows for clarity: "Regulated activities are not conducted under the authority of the permit if they are not specifically identified and authorized in the permit".

RESPONSE: This provision has been rewritten at N.J.A.C. 7:7A-13.1(a)14 as suggested.

387. COMMENT: Applications which are under review and have been declared complete should not be subject to any regulatory or statutory changes which occur after that time.

RESPONSE: In order to comply with the requirements for assumption of the Federal 404 program, the State must keep its program current with applicable Federal law. The language allowing a change in the event of a change in the law was taken directly from the 404 regulations at 40 C.F.R. 233.8. However, it should be noted that the only time a change in the law requires modification of a permit is when a water quality standard is changed.

388. COMMENT: Two comments stated that permits for large scale projects should be valid for more than five years.

RESPONSE: All State permits and Federal 404 permits are effective for no longer than five years. In the interests of consistency and of the State's assumption of the 404 program, the rule will remain as proposed.

389. COMMENT: Permits should not all be effective for five years, but should be effective for as long as the proposed project will take to complete. Also, extensions of time and renewal of permits should be provided for if necessary to complete a project.

RESPONSE: It is not a requirement that all permits be issued for a five year period. Rather the duration of any permit is limited to a maximum of five years. If a project is not completed within five years, renewal of the permit may be applied for pursuant to N.J.A.C. 7:7A-13.3(b).

390. COMMENT: Two commenters asserted that permit approvals should be easily transferred with the land and could be accomplished by a written agreement containing the date for transfer, coverage of the permit liability between the current and new permittee which would be submitted to the Department. In accordance with this change, N.J.A.C. 7:7A-12.8(a)(2) should be deleted.

RESPONSE: The provision referred to is required in order for the Department to obtain assumption of the Federal 404 program. In addition, the proposed transfer provisions of the rule are necessary to ensure permittee accountability. Accordingly, the provision has been retained and clarified.

391. COMMENT: The rules as proposed contemplate only those modifications which the Department seeks to impose on the permittee. There must be a mechanism by which permittees may seek approval of minor modifications. A model for this is contained in the Coastal Permit Program rules at N.J.A.C. 7:7E-4.10 and should be incorporated in this rule.

RESPONSE: N.J.A.C. 7:7A-12.6 as proposed (now N.J.A.C. 7:7A-13.6) allows modification of permits when the Department receives information "through a request for modification or revocation and reissuance". Since this provision allows for minor modification if appropriate upon a permittee's request, no change is required to meet the commenter's concerns.

392. COMMENT: The Department has no authority to revoke a permit without the opportunity for a hearing. See N.J.S.A. 52:14B-11.

RESPONSE: The rule so provides at N.J.A.C. 7:7A-13.6(e).

393. COMMENT: Eliminate the word "facility" in N.J.A.C. 7:7A-12.7(a)1 (now 13.7(a)1) to provide more clarity. Activities are regulated under the Act, not facilities.

RESPONSE: The rule has been modified to refer to "projects" instead of facilities.

394. COMMENT: Two commenters stated that the provisions at N.J.A.C. 7:7A-12.7(a)2 and 3 should be deleted because the Department does not have the authority to unilaterally modify permits unless there has been a false representation in the application process. The commenters felt that permits should not be revocable because of changed standards or rules, because this does not provide permittees with final assurance that their project is authorized.

RESPONSE: N.J.A.C. 7:7A-12.7(a)2 and 3 (now 13.7(a)2 and 3) only allow the Department to modify permits. Further, they only allow the Department to modify permits on the grounds of a change in the project, a change in water quality standards, or if the Department receives other information unavailable at the time of issuance which would have prevented issuance of the permit. These provisions are taken directly from the Federal 404 program regulations at 40 CFR part 233.14(a)(2).

395. COMMENT: The monitoring and recording requirements in N.J.A.C. 7:7A-12.1(a)10 should be more specific regarding the type and length of monitoring required.

RESPONSE: Specific monitoring requirements will be established under this subsection for each individual permit.

396. COMMENT: The 120-day limit on compliance date extensions in N.J.A.C. 7:7A-12.9(b)3 is not reasonable since things such as mitigation compliance delays may require up to one year to attain.

RESPONSE: This provision has been deleted because the freshwater wetlands and open water fill programs do not provide for compliance schedules.

7:7A-14 (proposed as 7:7A-13)

397. COMMENT: All losses of freshwater wetlands must be mitigated.

RESPONSE: Mitigation, in the sense of minimization of adverse impacts, is required for all activities in wetlands. Mitigation pursuant to N.J.A.C. 7:7A-14 is required for all wetland disturbances which have more than minimal adverse environmental effects on a freshwater wetland. Those activities which the Department believes will have minimal adverse environmental effects have been authorized under Statewide General Permits and will not require mitigation.

398. COMMENT: Three comments stated that the Department should adopt verbatim the USFWS mitigation policy.

RESPONSE: The Department has reviewed this methodology and found it to be based upon wildlife considerations only and not on all the freshwater wetland values and functions recognized by the Act. Therefore, the rule will remain as proposed.

399. COMMENT: Mitigation decision making should involve step-by-step consideration to ensure that mitigation is indeed a wetland management tool of last resort.

RESPONSE: The Department agrees and is developing procedures for permit review and for evaluation of mitigation plans which will carry out this statutory goal. No change is necessary in the rules to accomplish this goal.

400. COMMENT: The mitigation provisions stipulating that the Department shall not consider a mitigation proposal when determining compliance with permitting standards are excellent. The commenter expressed concern as to the long term benefits of mitigation in situations other than restoration of temporary disturbance, or as a penalty for violation.

RESPONSE: The Department will not allow the merit of a mitigation plan to influence the decision to approve or deny a permit. Once a wetlands encroachment is authorized by an individual permit in accordance with the standards of the Act, the permit will include provisions for mitigation pursuant to N.J.A.C. 7:7A-14 in all cases to ensure no net loss of the resource to the citizens of the State over time.

401. COMMENT: The various forms of mitigation are not equally valuable. Enhancement is not as good as creation of like wetland because it results in a net loss of freshwater wetlands surface area and of open space. Mitigation also frequently fragments previously contiguous freshwater wetlands. and it is doubtful that the discrete mitigated parcels can ever be as valuable as the original contiguous piece. Furthermore, enhancement must be evaluated as to its long term improvement of the whole freshwater wetlands not just as to its short term improvement of a few freshwater wetland functions.

RESPONSE: The Act requires mitigation to be of equal ecological value to the wetland lost or disturbed. The Act also gives the Department the option of permitting the creation of freshwater wetlands or the restoration of degraded freshwater wetlands. The rules provide a hierarchy of acceptability of mitigation alternatives as follows: creation or restoration onsite; creation offsite within the same watershed; creation of wetlands elsewhere in the State; enhancement of degraded wetlands; contribution to the Wetlands Mitigation Bank; and donation of land to Wetlands Mitigation Bank. Mitigation plans will be subject to scrutiny by both the Department and the EPA to ensure equal ecological value and to prevent fragmentation of the wetland system. Section 29 of the Act requires the Department to submit to the Legislature within two years of the Act's effective date a full report on the effectiveness of mitigation projects authorized by this program. The Department is developing a data management system specifically to monitor the success of mitigation projects.

402. COMMENT: The Department should remember that mitigation properties can be degraded by subsequent development.

RESPONSE: Protection against this result is provided at N.J.A.C. 7:7A-14.5(a)3, requiring that mitigated areas be subject to a conservation easement.

403. COMMENT: Four commenters stated that the formula for the creation of freshwater wetlands under mitigation plans, as currently proposed, will encourage violation of the Act. The same ratio of creation to destruction will be required for approved permits as the ratio required as a penalty for violations. The ratio of 2:1 is a fair ratio for mitigation under approved permits, but is too lenient for violators. Some commenters requested that the rule be modified to require creation of at least four acres of freshwater wetlands for each acre destroyed, or enhancement of at least 14 acres of freshwater wetlands for each acre destroyed. Others advocated that mitigation ratios associated with violations should be tripled to serve as a strong disincentive to potential violators.

RESPONSE: The Department will consider these suggestions for possible inclusion in the rules in the future.

404. COMMENT: All mitigation should be accomplished in the same watershed as the freshwater wetlands destruction. N.J.A.C. 7:7A-13.3(a) should be eliminated.

RESPONSE: The Department disagrees. The rule reflects section 13 of the Act in providing a hierarchy of acceptability of mitigation alternatives. The Department must retain this repertoire of possible methods of mitigating wetlands losses in order to be flexible in responding to varied situations. Accordingly, mitigation outside of the watershed of the permitted project may sometimes be considered acceptable.

405. COMMENT: All permits involving mitigation plans should become invalid if the mitigation is not carried out properly. To implement this, all approved mitigation plans should be listed by the Department to ensure public awareness and accountability for their proper execution. Further, all mitigation plans should be available for public review.

RESPONSE: Proper execution of mitigation plans will be a standard condition of all individual freshwater wetlands permits. The Department currently has a data management system for tracking all wetland mitigation projects authorized by coastal permits under CAFRA and the Wetlands Act of 1970. This will be expanded to encompass projects authorized under the Act and the data will be available for public review.

406. COMMENT: Two comments stated that mitigation should be used as a last resort because it is imperfect, unproven, and is often carried out poorly by persons who know little about freshwater wetlands. Guidelines adopted by the U.S. Fish and Wildlife Service (USFWS) in consultation with the Council on Environmental Quality, and the EPA, which outline steps to be taken before approving mitigation plans, should be adopted as part of the freshwater wetlands rules. These guidelines require avoidance of freshwater wetlands disturbance before considering the mitigation alternative.

RESPONSE: Under the Act and this chapter, mitigation is used only as a tool of last resort. Mitigation planning is preceded by a stringent set of permitting standards that are modeled after Federal procedures. However, it is the Department's experience that the USFWS mitigation guidelines are not well suited for use in the Department's wetlands regulatory scheme because they do not account for the full variety of wetlands attributes protected by the Act. For this reason, they will not be included in the subchapter.

407. COMMENT: The rule should be structured to provide explicit guidance or a mitigation timetable and in particular, to ensure that habitats are created as early as possible and disturbed as late as is practicable.

RESPONSE: N.J.A.C. 7:7A-14.2(a) does specify that mitigation shall be performed prior to or concurrent with activities that will permanently disturb wetlands and immediately after activities that will temporarily disturb wetlands.

408. COMMENT: Mitigation required for stormwater management facilities constructed in wetlands may prove prohibitively expensive, helping force municipalities to use onsite instead of regional stormwater detention.

RESPONSE: The Act and the rule both attempt to strike a balance between environmental and economic interests. The use of wetlands for regional stormwater detention has been determined by the Department to be inconsistent with the general permit standards of the Act. Therefore the rule includes no provision for a general permit for this activity. This activity must be individually permitted and mitigated as appropriate.

409. COMMENT: Three commenters felt the mitigation ratio for linear development should be equal to those for other types of development,

unless it can be demonstrated that a specific linear development project will have no permanent impact on wetland functions.

RESPONSE: The provisions of the proposed N.J.A.C. 7:7A-13 caused some confusion and have been reorganized for clarity. This provision provided for restoration at ratios of 1:1 and 2:1 for various types of activities. However, since restoration refers only to rehabilitation of an activity site after temporary disturbances, the provision for 2:1 "restoration" was contradictory. The Department has clarified the rule at N.J.A.C. 7:7A-14.2. Restoration of a site is allowed only if the disturbance lasts less than six months. Linear disturbances lasting longer than six months require mitigation equivalent to any other non-temporary disturbance.

410. COMMENT: Creation or restoration of freshwater wetlands of equal ecological value should not be required for every permit. Section 13a of the Act says the Department "shall require" mitigation of adverse impacts, but it "may require" creation or restoration for those which will be lost. Thus, only when onsite mitigation is ineffective should offsite mitigation, or contribution to the Bank be required.

RESPONSE: As noted, section 13 of the Act states that the Department "may require" creation or restoration. This clearly grants the Department authority to do so if, in the Department's judgment, it is necessary or appropriate. Mitigation can be in the form of restoration, enhancement, creation or donations to the Wetlands Mitigation Bank as stated in N.J.A.C. 7:7A-14.2. The rule is structured to allow offsite mitigation or contribution only after onsite mitigation is determined not feasible.

411. COMMENT: The rules should clarify when is the appropriate time to submit mitigation plans.

RESPONSE: The Department has provided language at N.J.A.C. 7:7A-11.1(a)17 to allow the submission of a mitigation plan as part of the application package. This is not a requirement of a complete application since these plans may be submitted later if the applicant prefers. These plans are often costly and time consuming to prepare and since they will not be considered in the decision to approve or deny an application, some applicants may wait until their project is approved before submittal. However, an approved mitigation plan will be required as a condition precedent to engaging in a regulated activity under an individual permit.

412. COMMENT: The rules should clarify that mitigation is not required when a general permit is used. The Act only requires mitigation as a condition of a freshwater wetlands permit.

RESPONSE: The Department has clarified this in the rule at N.J.A.C. 7:7A-14.1(a).

413. COMMENT: The option in N.J.A.C. 7:7A-13.1 (now 14.1) of donating land to the Mitigation Bank should be limited so that land already preserved cannot be used as a donation. This comports with current national policy.

RESPONSE: The existing status of the land with respect to its protection or preservation will be a consideration in evaluating its appropriateness as a donation to the Bank.

414. COMMENT: Creation or restoration of small wetlands is difficult, unpredictable and will be nearly impossible to monitor. Wetlands conditions are also unpredictable. Therefore a watershed approach to mitigation should be taken and maintained as a mitigation bank.

RESPONSE: The Department agrees that mitigation based upon watershed considerations makes sense. However, onsite restoration as defined at N.J.A.C. 7:7A-14.2 is preferred in the Act over offsite creation and is less burdensome to individual property owners. It is also a priority to maintain wetlands and their values and functions within specific subwatersheds and on individual sites. Therefore, the Department has set up a hierarchy of preferred mitigation solutions in N.J.A.C. 7:7A-14.2. The Act also provides for the establishment of the Wetlands Mitigation Council and a Wetland Mitigation Bank to implement these considerations. Use of the Mitigation Bank will only be available, however, when alternatives within the watershed are determined to be infeasible.

415. COMMENT: The Department should study whether small scale onsite mitigation is really better than large scale or aggregative approaches.

RESPONSE: The Department will do this as part of the preparation of the mitigation report required under section 29 of the Act.

416. COMMENT: A minimum disturbance of 0.1 acre per bridge should be allowed for bridge reconstruction or replacement without requiring mitigation.

RESPONSE: Bridge reconstruction or replacement that does not result in the disturbance of additional freshwater wetlands is covered by a general permit. (See N.J.A.C. 7:7A-9.2 which does not require mitigation.) However, the Department has determined that, in order to meet the goals of the Act, disturbance of additional wetlands should require an individual permit and should require mitigation pursuant to N.J.A.C. 7:7A-14.

417. COMMENT: The mitigation for a violation should be both a fine and restoration of the freshwater wetlands. The amount of the fine and the size of restoration should be large enough to act as a deterrent to violation.

RESPONSE: The Department will take this suggestion into consideration for possible inclusion in the rules at a subsequent date.

418. COMMENT: N.J.A.C. 7:7A-13 (adopted at N.J.A.C. 7:7A-14) should define "watershed" as narrowly as possible.

RESPONSE: The Department agrees that a definition of the term watershed is needed and has adopted the term at N.J.A.C. 7:7A-1.4.

419. COMMENT: Requiring the "creation or restoration of an area of freshwater wetlands of equal ecological value to those which will be lost as a result of the granting of a permit pursuant to the Act and this chapter" is at the present time impossible to do. The scientific community does not have sufficient knowledge of freshwater wetlands ecology to allow for this type of comparison.

RESPONSE: The Department recognizes that comparisons of ecological value will be difficult and in some cases limited by the present state of scientific knowledge. In addition, creating certain types of wetlands will be difficult and in most cases it will take time for a wetland of equal ecological value to develop. However, section 13 of the Act requires the Department to assess mitigation on the basis of equal ecological value. Accordingly, this assessment will be made as accurately as possible within these constraints. In recognition of the need for more scientific information on this subject, the Act requires the Department and the Wetlands Mitigation Council to prepare a report within two years on the success of mitigation projects under the freshwater wetlands program.

420. COMMENT: There should be standard requirements for monitoring mitigation projects which relate to equal ecological values. The monitoring plans should be cost effective and able to compare altered and natural systems. The Department should consult with experts on wetlands values and functions to determine better ways to evaluate success.

RESPONSE: The Department has extensive experience in managing tidal wetlands and mitigation projects pursuant to the Wetlands Act of 1970. Standards developed for ensuring mitigation success will be applied to freshwater wetlands and approved mitigation projects will be monitored over time. The Department will employ and contract with experts on these matters.

421. COMMENT: The Department has done an excellent job in writing N.J.A.C. 7:7A-13 (adopted as 14).

RESPONSE: The Department acknowledges this comment in support of the proposal.

422. COMMENT: Two commenters stated that mitigation should not be required for ordinary value wetlands or for approvals under general permits.

RESPONSE: The Department disagrees in part and finds that mitigation pursuant to N.J.A.C. 7:7A-14 for loss of ordinary resource value wetlands is necessary to fulfill the wetlands protection goals of the Act. Mitigation for general permits is not required. The rule has been clarified to so indicate at N.J.A.C. 7:7A-14.1(a).

423. COMMENT: Four commenters contended that, in order to follow section 13b of the Act, the extent of required mitigation should be based upon a determination of equal ecological value, not merely land area. Simple acreage ratios seem arbitrary.

RESPONSE: Past data from the coastal zone management program suggest that mitigation at a 2:1 ratio generally provides equal ecological value and compensates for ecological losses over time. In addition, it provides a predictable, efficient, and equitable standard for applicants to follow in planning. The rule does, however, allow for mitigation at less than a 2:1 ratio, provided that an applicant can demonstrate to the Department's satisfaction that a lesser area of mitigation will result in wetlands of equal ecological value. (See N.J.A.C. 7:7A-14.2(a). These demonstrations, however, are often costly and time consuming for both the applicant and the Department and are therefore optional.

424. COMMENT: What management level Department personnel will decide whether creation or enhancement will be required as a permit condition?

RESPONSE: Mitigation decisions will be made by the Director of the Division of Coastal Resources or in some cases by her or his designee.

425. COMMENT: Mitigation should be a general requirement for all permits, not a compensating factor.

RESPONSE: Mitigation is a tool to compensate for wetlands disturbance or loss. It is a requirement for all individual permits.

426. COMMENT: N.J.A.C. 7:7A-13.1(b) assumes more authority than the Act provides by requiring mitigation for all projects. The Act says the Department may require mitigation and the rule says the Department shall require mitigation.

RESPONSE: Section 13 of the Act allows the Department to exercise its discretion as to when mitigation will be required. The Department has determined that whenever an individual permit allows disturbance or loss of wetlands by filling or other means, mitigation will be required. This is clearly within the Department's authority under the Act.

427. COMMENT: The wetlands mitigation options should be flexible enough to allow a combination of approaches, particularly as they relate to large scale projects.

RESPONSE: The hierarchy of mitigation alternatives, including contribution to the Wetlands Mitigation Bank, provides a flexible framework for compensating for wetland losses while providing adequate protection of this resource.

428. COMMENT: One comment stated that the general requirement for mitigation as creation of 2:1 and as enhancement at 7:1 is arbitrary and without support in the Act and is likely to be confiscatory. Three commenters stated that the 7:1 enhancement requirement will discourage the use of enhancement.

RESPONSE: The Act allows the Department to require the creation of new freshwater wetlands or the enhancement of degraded freshwater wetlands. The latter option, since it involves improvement of already existing wetlands, results in a loss of wetlands values and functions in the State. Thus, more wetlands must be enhanced to compensate on the basis of equal ecological value for wetlands lost to the ecosystem. The Department therefore has determined that a higher enhancement ratio was warranted to replace the total ecological value lost.

429. COMMENT: Equal ecological value and functions should be measured by plant diversity, cover and productivity; evidence of use by desired species of animals; evidence that undesirable flora and fauna are not dominant; and evidence that the desired hydrologic regime is present.

RESPONSE: These types of considerations will enter into Department evaluation of mitigation proposals, and Department determinations of ecological value in cases under N.J.A.C. 7:7A-14.2(a), where an applicant chooses to demonstrate equal ecological value. The Department's experience, however, has shown that the ratio approach to mitigating wetlands losses is also environmentally sound and workable, and provides an acceptable baseline for determinations of equal ecological value.

430. COMMENT: Creation of wetlands must be carefully evaluated given the limited experience with this technology.

RESPONSE: The Department agrees and will be studying the effectiveness of this and other forms of mitigation. Pursuant to section 29 of the Act, the Department will prepare a comprehensive mitigation report within two years of the Act's effective date.

431. COMMENT: Clarify the information required from the applicant or permittee which will allow the Department to monitor mitigation projects.

RESPONSE: The monitoring will vary depending on the type of mitigation and the site. Therefore, the information required will be established as part of each approved mitigation plan.

432. COMMENT: The Department should require mitigation within the subwatershed of the project.

RESPONSE: The Department has fashioned the rules with this as its goal but recognizes that it may not be feasible in every case. Accordingly, the rule retains other options as appropriate.

433. COMMENT: Restoration should be permitted for activities which are temporary in nature, not limited to six months and should also be allowed for violations pursuant to N.J.A.C. 7:7A-14.

RESPONSE: This provision is intended to allow restoration for activities which are temporary in nature. However, an activity cannot be considered temporary if the duration of the wetland disturbance is more than six months because of the detrimental impact of long term activities on wetlands.

434. COMMENT: Wetlands creation (as opposed to restoration) should not be allowed on wetland sites that have been filled unless the fill has been in place for more than one year.

RESPONSE: Creation will only be allowed on sites which do not have wetlands characteristics. Thus, even if disturbance to a wetlands has only existed for a short time, it can be used for creation if wetlands characteristics were obliterated. Restoration refers only to sites which are mitigated by the person(s) who disturbed them.

435. COMMENT: A greater area should be required for restoration of a wetland than for creation of a wetland.

RESPONSE: Restoration means physically recreating former wetland values and functions on temporarily disturbed sites. There is no basis for imposing a greater mitigation requirement on a permitted activity that only involves temporary disturbance to the wetland system. However, enhancement, meaning restoration type improvement of existing degraded wetlands, is required at a ratio of seven to one. See N.J.A.C. 7:7A-14.2.

436. COMMENT: Section 13 of the Act allows donation of money or land to the Mitigation Bank. The rules should specify that the donations must assure equal ecological values, not just additions to the wetland ecosystem. The Department should create an accounting system to document loss and replacement of equal value freshwater wetlands. Also, a basis for determining that alternatives to donation are not practicable or feasible should be included in the rules.

RESPONSE: "Practicable alternative" is defined at N.J.A.C. 7:7A-1.4, and applies to mitigation projects. The commenters concern is also met in that the rule at N.J.A.C. 7:7A-14.2(b)4, which calculates contribution based on the cost of purchasing lands and "creating a wetland of equal ecological value".

437. COMMENT: Two commenters felt that contributions to the Wetlands Mitigation Bank should place a substantial burden on violators by requiring an 8:1 mitigation contribution.

RESPONSE: Those who violate the Act will not be able to avail themselves of the Wetlands Mitigation Bank option since the penalty provision of the Act (section 21) stipulates restoration of the site and payment of a fine. Only in the case of an after the fact permit (See N.J.A.C. 7:7A-15.9) would this be an option, and even then only if there was no practicable or feasible alternative to creation or restoration.

438. COMMENT: The provision for the donation of land as a mitigation alternative is an excellent idea. However, more information must be supplied by the applicant in order to determine if the value of the donation is acceptable as mitigation.

RESPONSE: The Department agrees. Criteria for that determination will be developed within the guidelines set by the Act.

439. COMMENT: Two commenters asserted that contributions to the Wetlands Mitigation Bank should be unrestricted in place of creating wetlands. Other options such as land transfers and deed restrictions should also be allowed.

RESPONSE: The Department disagrees. Section 13 of the Act stipulates a hierarchy of acceptable mitigation alternatives, and requires that creation be determined not to be feasible before contribution to the Bank is considered. Land transfers to the Bank are only acceptable under these conditions.

440. COMMENT: The special allowance in N.J.A.C. 7:7A-13.2(d) for linear development should be eliminated. The requirement of 1:1 restoration for linear development disturbances should be deleted.

RESPONSE: The rule has been modified to clarify that restoration as a form of mitigation shall be at a ratio of 1:1 regardless of the nature of the activity, and that restoration can only be used to mitigate temporary disturbance. Linear development that results in a long term wetland disturbance would be subject to other forms of mitigation.

441. COMMENT: N.J.A.C. 7:7A-13.2(d) should be adopted as proposed.

RESPONSE: The Department acknowledges this support for the proposed. The provision has been reorganized for clarification.

442. COMMENT: Linear development by a public agency for public health, safety and welfare reasons should, if it constitutes a "compelling public need," require lesser or no mitigation.

RESPONSE: The Department disagrees. The public need for an activity is met by the granting of the permit. The resultant loss to the public of the benefits of freshwater wetlands is compensated for by mitigation. The public need for an activity and the fact it is pursued by a public agency, do not lessen the activity's impact on freshwater wetlands. Accordingly, the requirement of mitigation, which is designed to compensate for impact, should not vary because of these factors.

443. COMMENT: In N.J.A.C. 7:7A-13.2(d), restoration is required in the event of linear development. If, as is implied by the proposed rule, linear development has only a minor impact, why is it not treated as a de minimus activity throughout the regulations?

RESPONSE: Linear development was singled out in the proposed rule because it was assumed that such development would cause only temporary disturbances to wetlands. The rule has been clarified to indicate that restoration as a form of mitigation shall be at a ratio of 1:1 regardless of the nature of the activity. There is no special provision for linear development which causes long term wetlands disturbance. Linear development that would result in a long term freshwater wetland loss or disturbance will be subject to other forms of mitigation requirements.

444. COMMENT: One commenter objected to the requirement of any mitigation requirements when only temporary filling (approximately three months) is done, contending that reseeding with native vegetation where soil disturbance has occurred should be sufficient, and has been deemed acceptable by the Corps, EPA, USFWS, and the Department's Stream Encroachment Bureau, water quality management and Federal consistency determination review personnel in recent licensing of projects.

RESPONSE: The Department is required by section 13 of the Act to "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. . ." The Act also allows the Department to require restoration, creation, or contribution to the Mitigation Bank as a condition of a permit. The Department will consider mitigation plans on a case-by-case basis. Thus, if the only action required to comply with the Act's mandate is reseeding with native vegetation, the Department has discretion to approve a mitigation plan involving only that action by a permittee. However, the rule also allows the Department to require more extensive restoration efforts when necessary. Because requirements of effective mitigation vary considerably from project to project, it is necessary that the Department retain this authority.

445. COMMENT: By requiring a higher ratio of mitigation in N.J.A.C. 7:7A-13.2(d)ii and iii, the Department is administering punitive action for restoration projects.

RESPONSE: These provisions have been deleted because, by definition, it would not be possible for an applicant to "restore" more wetland than had been disturbed by the project. However, the ratios required for the various types of mitigation are not designed to be punitive but to compensate for the loss of wetland habitat, values and functions, in compliance with Section 13 of the Act.

446. COMMENT: The proposed rules take an unnecessarily restrictive view of mitigation. The Department should allow creative mitigation solutions such as demonstration projects which use wetlands as natural flood control or water pollution control features. The Department does not have the flexibility to allow such projects under the proposed rules.

RESPONSE: Section 13 of the Act requires "creation or restoration of an area of freshwater wetlands of equal ecological value to those which will be lost". Directing stormwater into existing wetlands for flood control and pollution filtration will likely cause the same types of damage to wetlands that mitigation is designed to compensate for. Accordingly, such use of wetlands is not acceptable as mitigation, and the rule will remain as proposed.

447. COMMENT: If mitigation cannot be onsite, can the project proceed while offsite mitigation land is being obtained?

RESPONSE: No. Mitigation must be performed prior to or concurrent with activities that disturb freshwater wetlands and immediately after activities that temporarily disturb wetlands. Concurrent mitigation requires that the offsite parcel be secured and that a site specific mitigation plan be approved by the Department prior to permitted disturbance at the planned project site.

448. COMMENT: The Department should allow contributions to the Wetland Mitigation Bank for activities which are relatively insignificant and would only produce isolated pockets of additional wetlands. N.J.A.C. 7:7A-13.6(b) should be revised to read "or under circumstances where the goals and ideals of the Act are better served through such contribution or donation to the Wetlands Mitigation Bank."

RESPONSE: Determinations as to the acceptability of donation to the Bank will be made on a case-by-case basis within the framework established by the Act.

449. COMMENT: The Wetlands Mitigation Council should have input into the type of mitigation required, donation versus creation, to be able to determine if the goals of the Act are better served.

RESPONSE: The Wetlands Mitigation Council's functions are set by sections 14 and 15 of the Act. These sections indicate that the Council is not intended to be involved in the evaluation of mitigation options for individual projects. Once donation to the Wetlands Mitigation Bank is required by the Department, the Council then has input on the amount of land or money which should be donated and on whether the land involved is an acceptable parcel for donation.

450. COMMENT: Two commenters asserted that notice of mitigation proposals should go to local government.

RESPONSE: The Department disagrees. Copies of complete mitigation proposals are likely to be quite technical and lengthy, and do not lend themselves to wide distribution. They will, however, be available for public scrutiny at the Department's freshwater wetlands permit program office, as part of the permit application for each project. In addition, a list of approved mitigation projects will be available to the public.

451. COMMENT: Two commenters felt that, since transition area requirements do not go into effect until July 1, 1989, the reference to them should be deleted from N.J.A.C. 7:7A-13.4(a)1.

RESPONSE: The Act and the rule clearly state that the transition area requirements of the Act do not go into effect until July 1, 1989. However, it is necessary at times to discuss transition areas in order to provide guidance to the regulated public. The number of these references has been reduced in the adoption.

452. COMMENT: Three commenters suggested that a performance bond be required for mitigation projects.

RESPONSE: The Department will take this suggestion into consideration.

453. COMMENT: Five commenters noted that the requirement to maintain a wetland mitigation site in perpetuity as a wetland is unreasonable due to natural ecological changes, and therefore the language of N.J.A.C. 7:7A-13.4(a)3 should be modified to require only preservation of the mitigation site in a natural state.

RESPONSE: The restriction of any future development of offsite mitigation projects is specifically required in section 13c of the Act. However, the Department does agree that, in cases where a mitigated freshwater wetland naturally evolves into a non-wetland area, it should not be required that it be changed back to a wetland. Accordingly, N.J.A.C. 7:7A-13.4(a)3 (now 14.4(a)3) has been clarified. If, however, the reason for the change from wetland to non-wetland is the improper or inadequate execution of the mitigation plan, the Department will consider this a violation of the plan, the Act, and this chapter and restoration of the mitigation site and penalties may be required.

454. COMMENT: Six commenters asserted that mitigation plantings should have a survival rate measured over five years or more, not three years.

RESPONSE: The Department has balanced the need for conclusively demonstrating mitigation success against administrative concerns and permittees' needs for finality. It is the Department's judgment that monitoring success rates over three years provides an adequate balance.

455. COMMENT: The requirement for an "85 percent survival rate" for a mitigation site should be replaced by requiring an "85 percent success rate." This relates to Army Corps practices. The Corps requires 85 percent success after two years and success is defined as 85 percent survival and 85 percent area coverage.

RESPONSE: The Department agrees and the rule has been clarified at N.J.A.C. 7:7A-14.4(a)4 to respond to the commenter's concerns.

456. COMMENT: The indicator status of existing and proposed wetland species (established by the U.S. Fish and Wildlife Services indicating a plant species affinity to a wetland environment) would be useful for determining replacement of equal ecological value of a wetland.

RESPONSE: The Department mitigation standard for replacing wetland losses is creation of wetlands at a 2:1 ratio in the same watershed. This would be done on a case-by-case basis and involve explicit consideration of the vegetative species and its affinity to occur in wetland. Mitigation will be in-kind whenever possible.

457. COMMENT: The requirement to provide mitigation plans with cross sections and one foot contour intervals is expensive and unnecessary. The two foot interval is sufficient for the review process.

RESPONSE: The Department disagrees. To recreate a wetland hydrologic regime that will create a saturated soil condition sufficient to support hydrophytic vegetation is a complex process. The information at a one foot contour interval is necessary to ensure proper grading and drainage.

458. COMMENT: The evaluation standards in N.J.A.C. 7:7A-13.5(a) (now 14.5(a)) do not relate to the Act's requirement to evaluate mitigation based upon equal ecological value and therefore should be deleted.

RESPONSE: The Department disagrees. This provision provides factors to consider in a determination of equal ecological value. Should an applicant desire, N.J.A.C. 7:7A-14.1 provides an alternative.

459. COMMENT: N.J.A.C. 7:7A-13.5 (now 14.5) is redundant to N.J.A.C. 7:7A-13.5(a)8 and should be deleted.

RESPONSE: N.J.A.C. 7:7A-14.5(a) has been clarified to address the commenter's concerns.

460. COMMENT: Fish and wildlife resources should be considered in evaluating the success of a mitigation site.

RESPONSE: The rule has been modified at N.J.A.C. 7:7A-14.5(a)8 to indicate that the Department will consider fish and wildlife resources as well as other wetland values and functions.

461. COMMENT: Why is there no restoration on public lands? Mitigation should not be limited to private lands, with the exception of lands acquired by the Council.

RESPONSE: Section 13c of the Act specifies that creation or restoration (enhancement) of degraded wetlands offsite shall take place on private property. The intent was to direct mitigation efforts towards unprotected freshwater wetlands, rather than to wetlands already protected by the State. The exception to this for lands held by the Bank is solely to allow the Council to pursue mitigation projects.

462. COMMENT: The rule should clarify that the Mitigation Bank will not finance the mitigation efforts of persons that have destroyed freshwater wetlands.

RESPONSE: The proposed rules have been clarified to indicate at N.J.A.C. 7:7A-14.6(d) that the Bank's money and land will only be used on State initiated mitigation projects, and that permittees and violators will be required to finance their own mitigation projects themselves.

463. COMMENT: In N.J.A.C. 7:7A-13.6(c), a further limit should be put on the Mitigation Council regarding restoration of public lands. It should be prohibited for the Mitigation Bank to acquire any lands which are already preserved.

RESPONSE: N.J.A.C. 7:7A-14.6 states the "Council shall not engage in the restoration of degraded wetlands on public lands, except those lands acquired by the Bank." Lands acquired by the Council would become public land upon acquisition. The preserved status of land will be considered in determining which land may be donated to the bank.

464. COMMENT: In N.J.A.C. 7:7A-13.6 (now 14.6), the Mitigation Council should not transfer funds for research on mitigation. This should be funded by the private sector, so that all public moneys go directly to preserving natural resources.

RESPONSE: Section 15 of the Act allows the Mitigation Council to transfer funds to provide for research to enhance the practice of mitigation. This research will be used to prepare the mitigation report required by section 29 of the Act, and as a basis for future wetland management decisions.

465. COMMENT: The Council should be able to transfer funds or land to county conservation agencies as well as State or Federal ones.

RESPONSE: Section 15 of the Act states that Mitigation Council may transfer land to a State or Federal conservation agency.

466. COMMENT: Two areas of research should be addressed by the Wetland Mitigation Council. These include the control of Phragmites australis and the success and failure of certain mitigation types. A data base to manage this information is also needed.

RESPONSE: The Department agrees with this comment. At present, the Department had developed a computer data base for wetland mitigation projects and will expand this effort as the freshwater wetlands program progresses. "Nuisance" (exotic) wetland vegetation, for example, Phragmites australis, will be considered as a subject for further study.

467. COMMENT: Funds for research releated to mitigation should be limited to 10 percent of those acquired. Funds should be directed toward mitigation itself.

RESPONSE: Pursuant to sections 14 and 15 of the Act, the Department will not be responsible for the disbursement of funds from the Mitigation Bank. The Mitigation Council will have the discretion as to how the funds will be used.

7:7A-15 (proposed as 7:7A-14)

468. COMMENT: The commenter suggests that violations in exceptional freshwater wetlands should trigger the maximum allowable penalties possible, as a disincentive to violation.

RESPONSE: The resource value of a wetland will be considered in assessing penalties. Detailed penalty provisions for wetlands violations were proposed in the March 21, 1988 New Jersey Register at 20 N.J.R. 576(a).

469. COMMENT: Three commenters said that the strong civil and criminal penalties in the proposed rules are excellent, that fines collected should go to the Mitigation Bank, and that violations in exceptional quality wetlands should receive the highest fines possible.

RESPONSE: Section 21 of the Act requires that fines go to the State Treasury. The amount of each penalty will be set at least partly according to the degree of environmental harm, which will vary with the quality of the wetland. Penalty provisions were proposed in the March 21, 1988 New Jersey Register at 20 N.J.R. 576(a), and are expected to be adopted by July 1, 1988.

470. COMMENT: N.J.A.C. 7:7A-14.3(a) should tell how compliance inspections will be done, and who will go into the field on inspections.

RESPONSE: Compliance inspection, procedures and personnel are aspects of internal Department procedures and are not appropriate to include in a rule.

471. COMMENT: Two commenters asserted that "after the fact" permits should only be issued after the violator has performed the freshwater wetlands creation or restoration at another site, not after merely having been required to do the work, to create a strong disincentive to violation.

RESPONSE: The rule states in N.J.A.C. 7:7A-15.9(b)2 that an "after the fact" permit shall only be issued when creation or restoration "has been required" of the violator. The rule will remain as proposed to allow the Department discretion to require mitigation either before the "after the fact" permit is issued or as a condition of that permit.

472. COMMENT: Three commenters stated that the enforcement practices of the Department should be consistent with those of the Federal government in the administration of the 404 program. The commenters suggested the entirety of N.J.A.C. 7:7A-14.9(a) as proposed be deleted and other language provided by the commenter be adopted. The suggested language was closely patterned after the Army Corps' regulations for after the fact permits, found at 33 CFR 326.3(e).

RESPONSE: The language of N.J.A.C. 7:7A-15.9(a) quotes almost exactly from section 21 of the Act. Since the Legislature so specifically laid out the conditions of an "after the fact" permit, the Department is not substituting the very different system for issuing after the fact permits used by the Army Corps.

473. COMMENT: N.J.A.C. 7:7A-14.10(b) (now 15.10(b)) should be clarified to indicate that violations must be remedied within 90 days of approval by the Department of a restoration or other acceptable plan.

RESPONSE: The Department agrees and the rule has been clarified to so indicate.

474. COMMENT: The proposed 10 day period in N.J.A.C. 7:7A-14.10(b) (now 15.10(b)) for remedying violations or proposing a plan for same is unrealistic. Thirty days to accomplish this would be appropriate.

RESPONSE: The Department disagrees. Damage to wetlands from filling or disturbance generally increases over time. The purpose of this requirement is to ensure that violations will be speedily reversed, thus preventing further damage to freshwater wetlands.

475. COMMENT: It is unclear where N.J.A.C. 7:7A-14.10(c) (now 15.10(c)) is referring the reader and therefore it should be clarified.

RESPONSE: The rule has been clarified to refer to the preceding subsection, N.J.A.C. 7:7A-15.10(b).

476. COMMENT: Two commenters stated that when a permittee violates a condition of a permit, under N.J.A.C. 7:7A-14.10 the violator faces the loss of the permit, cessation of the regulated activity, and punitive measures from the Department and should not be required in addition to restore areas filled under a previously valid permit.

RESPONSE: The Department disagrees. The permit will be terminated because of violation or nondisclosure by the permittee. After such a termination, the person who altered the site would be responsbile for restoring the site. Because actions under control of the permittee led to the termination of the permit, the permittee can avoid the requirement of restoring the site by complying with the permit. The suggested change would result in the taxpayers paying for damage done by a violator.

477. COMMENT: Two commenters stated that N.J.A.C. 7:7A-14.8, concerning recording a notice of violation on a deed, involves a Notice of Lis Pendens and case law indicates that this notice cannot be filed without first allowing for a hearing. Therefore the provision should be deleted.

RESPONSE: The provision, a direct quote from section 21 of the Act, specifies that the record of violation shall be recorded on the deed on order of the Commissioner. The Act expressly grants hearing for other decisions of the Department. The absence of such a grant in this case is indicative of the legislative intent not to require a hearing. Therefore, the provision is adopted without change.

478. COMMENT: A provision for suspension of permits should be incorporated in N.J.A.C. 7:7A-14.10.

RESPONSE: The Department shall take the suggestion into consideration.

479. COMMENT: Two commenters asserted that the language of N.J.A.C. 7:7A-14.1, burden of proof and degrees of knowledge, is already

a matter of State law and is unnecessary within these rules and should be deleted.

RESPONSE: The Department disagrees. The provision helps alert persons to the terms of the Act.

AGENCY INITIATED CHANGES

Some further changes and clarifications have been made to the chapter. These changes either clarify the rule or make it consistent with parts of the rule which were changed in response to comments. Some changes were technical; that is, renumbering and correcting typographical erros. A summary of the changes is set forth below.

1. The term "State regulated waters", defined in N.J.A.C. 7:7A-1.4, has been changed to "State open waters." This term more clearly indicates the scope of these waters, and avoids the confusion caused by the fact that the Federal 404 program uses the term "State regulated waters" for a slightly different set of waters than that contained in the rule.

2. The definition of "mitigation", in N.J.A.C. 7:7A-1.4, was changed so as to make it consistent with subchapter 13.

3. N.J.A.C. 7:7A-3.6 and 3.7, regarding emergency permits, were moved to a separate subchapter at N.J.A.C. 7:7A-5. These sections apply to both the wetlands and open water fill programs, but appeared in the proposal in a subchapter applying only to the wetlands program.

4. A definition of "resting" in N.J.A.C. 7:7A-2.5 was deleted as unnecessary.

5. N.J.A.C. 7:7A-13.3(d) was deleted to conform more accurately to Section 13 of the Act.

6. Provisions for Department issuance of Draft Permits were added at N.J.A.C. 7:7A-12.2 in accordance with Federal requirements.

7. The Mitigation section has been clarified to remove redundancies.

8. The definition "discharge of dredged material" has been expanded to include both State open waters and wetlands, in order to meet Federal standards.

9. The term "detention basin" has been defined at N.J.A.C. 7:7A-1.4.

10. The term "established ongoing farming ranching or silviculture operation" was defined to comport with the Federal requirements.

11. To alleviate confusion among the terms ditch and swale, these two words have now been separately defined in N.J.A.C. 7:7A-1.4, and a definition of "intermittent stream" has also been added to the definitions section.

12. The Department has incorporated the Federal requirements for Statewide General Permit conditions into N.J.A.C. 7:7A-9.1. N.J.A.C. 7:7A-8.5 was recodified as N.J.A.C. 7:7A-9.1(d) through (h).

13. The Department has incorporated as N.J.A.C. 7:7A-11.1(d) and (e) the Federal requirements for permit applications for projects involving the discharge of dredged or fill material (see 40 C.F.R. part 233.5).

14. N.J.A.C. 7:7A-12.1(a)4 (now 13.1(a)4) has been clarified upon adoption to include the statutory requirement that adverse impacts be prevented, minimized or corrected in undertaking permitted activities (see section 13a of the Act).

Full text of adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*:

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 ***State*** 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]* ***open*** 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]* ***open*** 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). ***Examples include practices found at 33 C.F.R. 330.6, 40 C.F.R. 233.35(a)6, and the Department's Technical Manual for Stream Encroachment.***

"Clean Water Act" (CWA ***or Federal Act***) means the *[Federal Clean Water Act (33 U.S.C. §125 et seq.)]* ***Federal Water Pollution Control Act Amendments of 1972 as amended by the Clean Water Act of 1977 (33 U.S.C. §§1251 et seq.) and any amendments and supplements thereto, and the regulations adopted pursuant thereto.***

"Climax habitat" means a mature, well developed natural ecological community.

"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]* ***other means*** available to meet the established public need. ***See N.J.A.C. 7:7A-3.3(a)1.***

"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 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]* ***has*** an ecological value *[equal to]* ***substantially less than*** 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.

"Detention basin" means an impoundment area made by constructing an embankment, or excavating a pit, or both, for the purpose of temporarily storing stormwater.

"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]* ***open*** waters ***or freshwater wetlands***. The term includes the addition of dredged material into State *[regulated]* ***open*** waters ***or freshwater wetlands*** and the runoff or overflow from a contained land or water dredge material disposal area. Discharges of pollutants into State *[regulated]* ***open*** 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]* ***open*** waters ***or freshwater wetlands***. The term includes the following activities *[in State regulated waters]*:

1. *[p]****P***lacement of fill that is necessary for the construction of any structure;

2. *[t]****T***he building of any structure or impoundment requiring rock, sand, dirt, or other materials for its construction;

3. *[s]****S***ite-development fill for recreational, industrial, commercial, residential, and other uses;

4. *[c]****C***auseways or road fills;

5. *[d]****D***ams and dikes;

6. *[a]****A***rtificial islands;

7. *[p]****P***roperty protection or reclamation devices, or both, such as riprap, groins, seawalls, breakwaters, and revetments;

8. *[b]****B***each nourishment;

9. *[l]****L***evees;

10. *[f]****F***ill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and

11. *[a]****A***rtificial reefs.

"Disturbance of the water level or water table"***, a term used to define regulated activity in N.J.A.C. 7:7A-2.3(a)2,*** 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.

"Documented habitats for endangered or threatened species" means freshwater wetland habitats with recorded data on past inhabitation by endangered and threatened species.

"Drainage" means active or passive methods for changing *[wetlands]* ***the*** hydrologic conditions ***of wetlands or State open water***, such as lowering groundwater ***or surface water*** levels through pumping*,* ditching*,* or otherwise altering water flow patterns.

"Dredging" means *[the active]* removal of wetlands ***or State open water*** 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.]* ***designated as priority wetlands by EPA.***

"Equal ecological value" means functional equivalency, ***including similar wildlife habitat,*** similar vegetative species coverage and density, *[and]* equivalent flood water storage capacity***, and equivalency of any other values or functions specific to a particular wetland***.

Established, ongoing farming, ranching or silviculture operation" means activities on areas subject to a farming, ranching silviculture use as of June 30, 1988. Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation. Activities which bring an area into farming, silviculture, or ranching use are not part of an establishing operation. An operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operartions.

"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]* ***material of any kind***, etc.) into an area*,* which changes the resultant elevation in relation to surface ***water*** or groundwater level. ***"Fill" also means the material deposited.***

"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" ***or 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]* ***USEPA***, and any subsequent amendments thereto.

"Freshwater wetlands permit" means a permit to engage in a regulated activity ***in a freshwater wetland*** 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 ***land***.

"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 ***of*** 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 ***Identification and*** 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,]* ***the "National List of Plant Species that Occur in Wetlands: 1988—New Jersey" and amendments thereto,*** compiled by the *[United States Fish and Wildlife Service]* ***USFWS***, United States Army Corps of Engineers ***(Corps)***, *[United States Environmental Protection Agency]* ***USEPA*** and the United States Soil Conservation Service.

"Intermittent stream" means surface water drainge channels with definite bed and banks in which there is not a permanent flow of water. Most intermittent streams are shown on Soil Conservation Service county soil surveys.

"Isolated wetlands" means a ***freshwater*** 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]* ***for*** the purpose of indicating the presence or absence of wetlands (see N.J.A.C. 7:7A-6)***, or for the purpose of verifying or delineating the boundaries of freshwater wetlands, or both***.

"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.

***"Major discharge" means:**

1. Discharges of dredged or fill material into areas identified by the Department, in consultation with USEPA, the Corps and the USFWS, which could have the following impacts:

i. Significant adverse effects on freshwater wetlands or State open waters which are unique for a particular geographic region;

ii. Significantly reduce the ecological, commercial, or recreational values of more than 10 acres of a freshwater wetland or State open water; or

iii. Affect a Federally listed or proposed endangered or threatened species;

2. Wetland fills involving more than 10,000 cubic yards of material.*

"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]* ***or State open water***.

*["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 ***activities carried out pursuant to N.J.A.C. 7:7A-14 in order to compensate for freshwater wetlands loss or disturbance caused by regulated activities.*** *[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.]* ***the area not onsite.***

"Onsite" means ***the area*** 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.]* ***the legal boundary of the property or properties on which the regulated activity or activities are proposed, are occurring, or have occurred, as set forth in the deed for that area, plus any contiguous land owned by the same individual as set forth in the deed or deeds for that contiguous land, as these boundaries existed at the commencement of the regulated activity or activities.***

"Open water fill permit" means the type of New Jersey Pollution Discharge Elimination System*[s]* permit issued pursuant to this chapter which governs the discharge of dredged or fill material into State *[regulated]* ***open*** 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 ***freshwater*** 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]* ***spoil***, 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] "*[s]**S*ignificant adverse impact" shall be deemed to exist where it is determined that *[one or more of the following]* ***a*** modification*[s]* of a wetland will negatively affect the ecological integrity of the wetland and its biotic components***. Such modifications may include, but are not limited to***:

*[1. An increase in surface water runoff discharging into a wetland;

2. A change in the normal seasonal flow patterns in the wetland;]*

*[3]****1.***. An alteration of the water table or hydrologic patterns in the wetland or its subwatershed;

*[4.]****2.*** An increase in erosion resulting in increased sedimentation in the wetland ***or State open water***;

*[5.]****3.*** A change in the natural chemistry of the ground or surface water in the wetland;

*[6.]****4.*** A loss of wetland habitat;

*[7.]****5.*** A reduction in wetland habitat diversity;

*[8.]****6.*** A change in wetlands species composition; or

*[9.]****7.*** 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]* ***any site described in subpart E of*** the 404(b)(1) guidelines (40 C.F.R. *[§§]*230 et seq.), *[except that]* ***with the exception of freshwater wetlands which,*** for the purposes of this chapter *[any freshwater wetland covered by this chapter]****,*** shall not be considered *[a]* special aquatic *[site]* ***sites***.

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

"State *[regulated]* ***open*** 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]* ***open*** 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 paragraph*[s (1) and (2)]* ***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]* ***susceptible to a reasonble use as is*** or developed as authorized by the provisions of the Act, ***and*** 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.

"Swale" means a linear topographic depression, either naturally occurring or of human construction, which drains less than 50 acres and is not an intermittent stream.

"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.]* ***in the lists of Endangered and Threatened Wildlife and Plants found at 50 C.F.R. 17.11(h) or 17.12(h) and subsequent amendments thereto.***

"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.

"Watershed" means the smallest drainage area of a specific creek, stream, river, pond, lake or other surface water body within which a particular site is located.

"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 ***or migratory birds*** 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)]**(b)* The Act, on and subsequent to July 1, 1988, shall supersede any law or ordinance **enacted prior to July 1, 1988 by any municipality, county, or political subdivision thereof,*** regulating freshwater wetlands *[enacted prior to July 1, 1988,]* except to the extent that *[a]* ***such*** law or ordinance regulates or requires a transition area. *[State and local]* ***Local*** laws ***and ordinances*** 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 ***and ordinances***. ***With the exception of political subdivisions under the jurisdiction of the Pinelands Commission, no municipality, county, or political subdivision thereof shall enact, after July 1, 1987, any law, ordinance, or rule or regulation requiring a transition area adjacent to a freshwater wetland.***

*[(d)]**(c)* 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]****8.4***.

*[(e)]**(d)* This *[section]* ***chapter*** 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., ***the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq.,*** and State approved municipal water quality management plans. ***These programs will continue to regulate based on the concerns covered by their respective enabling statutes and rules, and may, through such regulation, have some impact on projects in freshwater wetlands. However, except pursuant to (e) below, those programs will not use freshwater wetlands concerns as a basis for regulation, and any such regulation by these programs of projects in freshwater wetlands will be limited to that based on other (for example, flood danger) concerns.***

*[(f)]**(e)* If *[a determination is made that]* a proposed project does not involve a freshwater wetland or State *[regulated]* ***open*** 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. ***For projects exempted under the Act and this chapter's wetlands requirements under N.J.A.C. 7:7A-2.7(d) or (g), the final decision on the application will be based on the requirements of other applicable permit programs as they existed on June 30, 1988.***

7:7A-1.7 Effective and operative dates

This chapter shall be effective June 6, 1988, and shall become operative on July 1, 1988.*

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]* ***open*** 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]* ***open*** 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]* ***open*** 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 ***including all fee requirements***. 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]* ***applicants are strongly encouraged to acquire a permit under the Act and this chapter first. If a project requires*** 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]* ***13:1D-29*** 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]* ***any*** permit ***issued*** under the 90-day construction law ***will be conditioned upon the granting of a permit under the Act and this chapter***.

[(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 (Emergency permits),*** *[5]****6*** (Transition areas), *[6]****7*** (Transition area waivers), *[7]* ***8*** (Letters of interpretation), *[8]****9*** (General permits), *[9]****10*** (Pre-application conferences), *[10]****11*** (Application procedure), *[11]****12*** (Review of applications), *[12]****13*** (Permit contents), *[13]****14*** (Mitigation), and *[14]****15*** (Enforcement) of this chapter.

(b) Any person proposing to discharge dredged or fill materials into State *[regulated]* ***open*** waters shall comply with the provisions of subchapters 1 (General information), 2 (Applicability), *[4]****3*** (General standards for granting open water fill permits), ***5 (Emergency permits),*** *[8]****9*** (General permits), *[9]****10*** (Pre-application conferences), *[10]****11*** (Application procedure), *[11]* ***12*** (Review of applications), *[12]****13*** (Permit contents), and *[14]****15*** (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 ***are regulated pursuant to the Act and are subject to the requirements of this chapter as set forth in N.J.A.C. 7:7A-2.2***:

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]* ***open*** 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 Geologic*[al]* 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)]* ***National List of Plant Species that Occur in Wetlands: 1988—New Jersey",*** 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]* ***a factor in, among other things,*** 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]* ***or*** 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. ***For the purposes of this section, notwithstanding the general definition of "documented habitat" in N.J.A.C. 7:7A-1.4,*** *[A]* ***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]* ***or*** 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)]****i.*** 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 ***resource*** 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. ***Upon such a request, the Department shall review all available information, and shall make a final classification of the wetland.***

*[(d)]****(c)*** 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.]****:*

1. Isolated wetlands that are not surface water tributary systems discharging into an inland lake or pond, or a river or stream, and which are more than 50 percent surrounded by development and less than 5,000 square feet in size;

2. Drainage ditches;

3. Swales; or

4. Detention facilities.*

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

*[(f)]****(e)*** The classification system established under this section shall not restrict the Department's authority to require the creation or restoration of freshwater wetlands pursuant to the provisions of N.J.A.C. 7:7A-*[13]****14***.

7:7A-2.6 Designation of State *[regulated]* ***open*** waters

(a) State *[regulated]* ***open*** 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 ***and N.J.A.C. 7:7A-1.4***).

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

7:7A-2.7 Activities exempted from permit requirement

(a) ***Subject to the limitations of this section,*** *[The]* ***the*** following ***activities, when part of an established, ongoing farming, ranching or silviculture operation on properties which have received or are eligible for a farmland assessment,*** 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 these 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,]

1. *[n]****N***ormal 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;

i. For the purposes of this paragraph "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 properly 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 this paragraph.

(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.

2. *[c]**C*onstruction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches***, provided that such facilities are for farming maching or silviculture purposes. Any spoil from pond construction or maintenance must be placed outside the freshwater wetlands unless it is needed for the structural or environmental integrity of the pond;***

3. *[c]**C*onstruction or maintenance of farm roads or forest roads constructed and maintained in accordance with best management practices ***(BMPs)*** to assure that flow and circulation patterns and chemical and biological characteristics of freshwater wetlands ***and State open waters*** are not impaired and that any adverse effect on the aquatic environment will be minimized. ***Where the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration.***

*[2.]****(b)*** Normal harvesting of forest products in accordance with a forest management plan approved by the State Forester*[;]* ***is exempt from the requirement of a freshwater wetlands permit or open water fill permit, subject to the limitations of this section.***

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

(d) Subject to the limitations of this section, the following are exempt from the requirement of a freshwater wetlands permit or open water fill permit until the State assumes the Federal 404 program. These activities may need Federal 404 permits:

[4. Projects for which:]

*[i.]****1. Projects for which*** *[P]****p***reliminary 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 ***provided those approvals remain valid under the Municipal Land Use Law***. This excludes approvals which were given prior to the effective date of the Municipal Land Use Law. Projects ***governed by this paragraph which are*** not initiated within five years of enactment of the Act shall *[apply for]* ***no longer be exempt from the requirement of*** a freshwater wetlands permit or open water fill permit*[.]**;*

*[ii.]****2. Projects for which*** *[P]****p***reliminary site plan or subdivision applications ***as defined in N.J.S.A. 40:55D-1 et seq.*** *[which]* have been submitted to *[and remain under active consideration by]* the local authorities prior to June 8, 1987***. Persons with projects governed by this paragraph which are not initiated within five years of July 1, 1987 shall no longer be exempt from the requirements of a freshwater wetlands permit or open water fill permit***; or

*[iii.]****3. Projects for which*** *[P]****p***ermit applications *[which]* have been approved ***and permits have been issued*** 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)]****(e)*** The activities listed in *[(a)4i, ii, and iii]* ***(d)1.-3.*** 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*]. ***A significant change will be deemed to have been made if, under the Municipal Land Use Law, the change would void the preliminary approval, and would require submittal or approval of a new or amended application.***

*[(c)]****(f)*** Projects not subject to the jurisdiction of the United States Army Corps of Engineers and for which preliminary site ***plan*** or subdivision applications have been approved prior to July 1, *[1988]* ***1989*** shall not require transition areas.

*[(d)]****(g)*** 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]* ***provided authorization*** for a particular site and use prior to July 1, 1988.

1. To demonstrate that a Nationwide Permit was approved for a particular site and activity, ***a person must submit to the Department either*** a copy of the approval letter ***issued prior to July 1, 1988 by the Corps,*** *[must be submitted]* or a copy of all the information submitted to the United States ***Army*** Corps of Engineers which requested approval under an effective Nationwide Permit *[must be submitted to the Department*], ***and proof that the information was received by the Corps prior to June 10, 1988***. *[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.]*

2. These submittals must be made to the Department according to the procedures at N.J.A.C. 7:7A-2.9 at least 30 working days prior to commencement of work and must be accompanied by a general permit fee pursuant to N.J.A.C. 7:7A-16.

(h) If any discharge of dredged or fill material resulting from the activities exempted by this section contains any toxic pollutant listed under section 307 of the CWA, such discharge shall be subject to any applicable toxic effluent standard or prohibition, and shall require a fresh wetlands or open water fill.

(i) If the USEPA's regulations providing for the delegation to the State of the Federal wetlands program conducted pursuant to section 404 of the Federal Act require a permit for any of the activities exempted by this section, the Department shall require a permit for those activities so identified by the USEPA. The exemptions in (d) and (g) above shall be void as of the date of assumption by the Department of the Federal 404 program.*

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*[.]* ***and/or a Federal 404 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]**. **However,*** the discharge of dredged or fill material ***into State open waters*** shall require a***n open water fill*** 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]**. **However,*** the discharge of dredged or fill material ***into State open waters*** shall require *[a]* ***an open water fill*** 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]*. ***In addition,*** the Pinelands Commission may provide for more stringent regulation of activities in and around freshwater wetland areas within its jurisdiction.

***7:7A-2.9 Exemption letters**

(a) A person may obtain a letter from the Department certifying that an activity is exempt from the Act and this chapter. Such a letter will be effective for five years from the date of issuance except for those exemptions which expire sooner as indicated at N.J.A.C. 7:7A-2.7. The letter will be based on the information required by this section, and will be void if the information submitted is not complete and accurate, or if the activity is not carried out as represented in the submittal(s) to the Department upon which the letter is based.

(b) To obtain an exemption letter, the following shall be submitted:

1. For a farming, silviculture or ranching exemption pursuant to N.J.A.C. 7:7A-2.7(a):

i. Certification of farmland assessment eligibility;

ii. A brief description of the activities, including the total area covered, the types of farming, silviculture, or ranching, best management practies to be employed and the length of time the operation has been ongoing; and

iii. The fee specified in N.J.A.C. 7:7A-16.

2. For a forest products harvesting exemption pursuant to N.J.A.C. 7:7A-2.7(b):

i. A copy of a forest management plan approved by the State Forester which includes the size of the site, the length of time required to complete the project, and a brief description of the activities involved including the best management practies to be employed; and

ii. The fee specified in N.J.A.C. 7:7A-16.

3. For a preliminary local approval exemption pursuant to N.J.A.C. 7:7A-2.7(d):

i. A copy of the preliminary local approval of the site plan or subdivision, including a copy of the site plan or subdivision itself; and

ii. The fee specified in N.J.A.C. 7:7A-16.

4. For a site plan or subdivision application exemption pursuant to N.J.A.C. 7:7A-2.7(d)2:

i. A copy of all of the application materials submitted to the municipality, proof that the municipality received them, and proof from the municipality that the application is under active consideration; and

ii. The fee specified in N.J.A.C. 7:7A-15.

5. For a Corps approved individual permit exemption pursuant to N.J.A.C. 7:7A-2.7(d)3:

i. A copy of the valid Corps permit; and

ii. The fee specified in N.J.A.C. 7:7A-15.

6. For an exemption letter under a Corps Nationwide general permit exemption pursuant to N.J.A.C. 7:7A-2.7(g), the applicant must submit the materials required by N.J.A.C. 7:7A-2.7(g)1.

i. Within 30 working days of submittal of the material required by N.J.A.C. 7:7A-2.7(g), the Department shall notify the applicant either:

(1) That the application package is not complete and, therefore, that the exemption will not apply. In this case, the activity would only be permitted if it were approved under an individual or general permit pursuant to this chapter; or

(2) That the application is complete and that the applicant may therefore proceed on the assumption that the Corps will approve the activity as represented in the application. This notification will allow a person to proceed with the activity. However, should their application ultimately be disapproved or ruled incomplete by the Corps, the exemption would be null and void, and any activities undertaken by its authority would be considered violations of the Act and this chapter, and would be subject to penalties for violation from the date that the activity commenced, as set out by the Act and this chapter.*

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]* ***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.]***1.*** Not involve a freshwater wetland ***and which would meet the requirements of (b) below***; or

*[ii.]***2.*** Involve a freshwater wetland, but would have a less adverse impact on the aquatic ecosystem*[;]* and ***would meet the requirements of (b) below.***

*[iii.]***(b) To be acceptable, an alternative shall*** *[Not]* ***not*** have other significant adverse environmental consequences, that is, *[would]* ***it shall*** 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.]***1.*** Not involve a freshwater wetland ***and which would meet the requirements of (b) below***; or

*[ii.]***2.*** Involve a freshwater wetland but would have a less adverse impact on the aquatic ecosystem*[;]* and ***would meet the requirements of (b) below.***

*[iii.]***(b) To be acceptable, an alternative shall*** *[Not]* ***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)]***(c)*** 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)]***(d)*** In order to rebut the presumption established in *[(b)]***(c)*** 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; ***and***

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*(c)*) 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 ***Standard*** *[R]* *r*equirements 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]* ***present*** or documented habitat or the continued existence of a local population of ***a threatened or endangered*** 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 ***as defined in N.J.A.C. 7:7A-1.4***;

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 ***as defined at 40 C.F.R. 230.10(c),*** of ground or surface waters;

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

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 ***and resource value classification pursuant to N.J.A.C. 7:7A-2.5*** 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. EMERGENCY PERMITS**

7:7A-5.1 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 open waters within this 90 day period, except that if more than 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 40 C.F.R. §124.10 and 124.11, and 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-5.2 Obtaining an emergency permit

(a) A person in need of an emergency permit shall inform the Director of the Division 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 State open waters resulting from the emergency permit or the activity.*

SUBCHAPTER *[5.]****6.*** 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.]****7.*** 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.]****8.*** LETTERS OF INTERPRETATION

7:7A-*[7.1]****8.1*** 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]****8.2*** 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 ***or the verification or delineation of a wetland boundary line.*** *[for a]*

(b) For a parcel of land or a property *[less than]* one acre ***or less*** in size, *[by submitting]* the following information ***shall be submitted***:

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]* ***identification of all*** 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.]****5.*** Verification that a registered ***mail*** notice and a complete copy of the application has been forwarded to the clerk of the municipality and that a registered ***mail*** notice has been forwarded to the environmental commission***,*** if any, and planning board, if any, of the muncipality in which the determination is to be made, ***and*** the planning board of the county in which the determination is to be made*[, and landowners within 200 feet of the site]*.

6. A fee pursuant to N.J.A.C. 7:7A-16, and as indicated on the printed fee schedule which is available from the Department.

*[(b)]****(c)*** 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, ***and*** 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 should be presented with an indication of the depth to the seasonal high water table. Soil borings must be to a ***minimum*** depth of *[three to four feet]* ***20 inches***, on transects perpendicular to the wetlands boundary, starting in the definite wetlands area and moving towards the uplands***. In wetlands with atypical characteristics such as sandy soils, or in wetlands which have been disturbed by human activities or as otherwise deemed appropriate, the Department may require deeper borings as needed***;

3. Verification that registered ***mail*** 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]* ***legal boundary line of the property or properties on which*** the proposed regulated activity ***will occur***, 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. ***If a delineation of the wetlands has been**

memorialized by the Corps as part of a jurisdictional determination, that delineation may be submitted to the Department, and will be subject to verification as are other delineations submitted as part of a request for a letter of interpretation.* 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 ***pursuant to N.J.A.C. 7:7A-16,*** as indicated on the printed fee schedule which is available from the Department.

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

*[(e)]***(f)*** 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)]***(g)*** 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)]***(h)*** 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.

(i) When a letter of interpretation is issued, the Department will send copies to all municipal and county bodies which received copies of the request for a letter of interpretation.

7:7A-*[7.3]***8.3*** 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. ***This performance and submittal will be required whenever the parcel which is the subject of the letter of interpretation is greater than one acre in size.*** 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 ***its*** proximity to documented hydrologic indicators, and other ***available information and*** 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]***8.4*** 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 ***or county*** 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]***8.5*** USEPA review

(a) The Department shall transmit to the USEPA a copy of *[any]* ***all*** letter***s*** of interpretation *[determining that the site of a proposed regulated activity is not in a freshwater wetland]* ***upon issuance***.

(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]***8.6*** 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]***8.5*** (USEPA Review), for a period of *[three]* ***five*** years ***unless the letter of interpretation is determined to have been based on inaccurate information, in which case it shall be void***.

7:7A-*[7.7]***8.7*** 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. ***In the event that a letter of interpretation is not issued within the deadlines imposed in this subchapter, the letter of interpretation fee will be applied to a permit application fee at the applicant's request.***

SUBCHAPTER *[8.]***9.*** GENERAL PERMITS

*[7:7A-8.1]***7:7A-9.1*** *[Nationwide Permits adopted as Statewide General Permits]* ***General provisions***

(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]***9.2***. Nationwide Permit numbers three, 12, 16, 21 and 22 have been *[proposed for adoption in N.J.A.C. 7:7A-8.2]* ***adopted at N.J.A.C. 7:7A-9.2***, 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;]*

***(b) The Department will issue a general permit for similar activities as specified in (c)1 below within a defined geographic area as specified in (c)2 below, after conducting an environmental analysis and providing public notice and opportunity for a public hearing, if it is determined that the regulated activities will cause only minimal adverse environmental impacts when performed separately and will have only minimal cumulative adverse impacts on the environment, will cause only minor**

impacts on freshwater wetlands and State open waters, will be in conformance with the purposes of the Act, and will not violate the Federal Act.

(c) In addition to the conditions in N.J.A.C. 7:7A-13.1, N.J.A.C. 7:7A-9.3, and the applicable requirements of N.J.A.C. 7:7A-13.2, each general permit shall contain conditions as follows:

1. A specific description of the type(s) of activities which are authorized, including limitations for any single operation, to ensure that the requirements of (a) above are satisfied. At a minimum, these limitations shall include:

i. The maximum quantity of material that may be discharged;

ii. The type(s) of material that may be discharged;

iii. The depth of fill permitted;

iv. The maximum extent to which an area may be modified; and

v. The size and type of structure that may be constructed.

2. A precise description of the geographic area to which the general permit applies, including, when appropriate, limitations on the type(s) of water(s) or wetlands where operations may be conducted, to ensure that the requirements of (a) above are satisfied.

(d) The Department may modify a general permit issued pursuant to this subchapter by adding special conditions applicable to a particular project or activity which must be met in order to qualify for authorization under the general permit.

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

(f) The Department may rescind a general permit and thereafter require individual permits for activities previously covered by the general permit, if it finds that the general permit no longer meets the standards of the Act and this chapter.

(g) The Department shall review each general permit 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 all general permits.

(h) If a general permit is not modified or reissued within five years of publication in the New Jersey Register, it shall automatically expire.

7:7A-9.2 Statewide General Permits

(a) The following activities in freshwater wetlands and State open waters are hereby allowed under Statewide General Permits provided the activity is in compliance with specific conditions contained in the Statewide General Permit and with the standard conditions for all Statewide General Permits in N.J.A.C. 7:7A-9.3 and provided the activities are in compliance with the Act, this chapter, and the Federal Act:

1. The repair, rehabilitation, replacement, maintenance or reconstruction of any previously authorized, currently serviceable structure, fill, roadway, public utility, active irrigation or drainage ditch, or stormwater management facility lawfully existing prior to July 1, 1988 or permitted under the Act, provided such activities do not deviate from plans of the original activity and further provided that the previously authorized structure, fill, roadway, utility, ditch or facility has not been put to uses differing from those specified in any permit authorizing its original construction. Minor deviations due to changes in materials or construction techniques and which are necessary to make repairs, rehabilitation or replacements are allowed provided such changes do not result in disturbance of additional freshwater wetlands or State open waters upon completion of the activity;*

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]* ***resource value***;

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 ***if feasible and otherwise with suitable material to within 18 inches of the surface. The upper 18 inches must be backfilled with the original topsoil material*** to the preexisting elevation;

vi. The area above the excavation is *[revegetated]* ***replanted in accordance with applicable BMPs*** with native, indigenous species; and

vii. The activity is designed so as not to interfere with the natural hydraulic characteristics of the wetland and *[sub]*watershed;

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;]* ***undertaken by the State or Federal government, provided the activity:***

i. Does not occur in exceptional resource value wetlands;

ii. Does not occur in EPA Priority Wetlands.*

5. Minor work or temporary structures *[repaired]* ***required*** 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)]***6.*** Regulated activities *[are permitted]* in a freshwater wetland or in State *[regulated]* ***open*** waters which are not a surface water tributary system discharging into an inland lake, pond, river or stream, provided:

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

*[2.]***ii.*** 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]* ***open*** waters defined as a special aquatic site in 40 C.F.R. §230.1;

*[3.]***iii.*** 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)]***7.*** 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.]***i.*** Are located in headwater areas;

*[2.]***ii.*** Are not located in exceptional *[quality]* ***resource value*** wetlands;

*[3.]***iii.*** 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.]

iv. The activity would not result in the loss or substantial modification of more than one acre of wetlands or State open waters.

*[(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 prop-

erty, 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.]***8.* 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***s*** *[or State regulated waters]* outside of the fill area;

*[4.]***9.* 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]* ***November 21***, 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]***9.3* 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]* ***7:7A-9.2*** are subject to the specific conditions listed under each permit. *[Permittees wishing]* ***In order to be authorized*** to conduct activities under these general permits***, persons*** must comply with ***the standard conditions set forth at (b) below, as well as the conditions at N.J.A.C. 7:7A-13.1 and 13.2 and*** *[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]* ***7:7A-9.4*** 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]* ***N.J.A.C. 7:7A-9***:

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*[.]****; and**

7. Best management practices shall be followed whenever applicable.

7:7A-9.4 **Use of multiple Statewide General Permits**

(a) The Department may approve activities under the authority of more than one Statewide General Permit on a single property, subject to the limitations below, and subject to the standard conditions for Statewide General Permits at N.J.A.C. 7:7A-9.3. For the purposes of this section, a single property is defined as all property contiguous with the property line of the property or properties on which the regulated activity or activities are proposed and which is in common ownership at the time of the proposal. No activity is authorized by a Statewide General Permit without an approval letter from the Department indicating that a Statewide General Permit authorizes the particular activity at the particular location.

(b) The Department may issue an approval letter, authorizing activities covered under a single Statewide General Permit, for more than one location on a single property, provided that the total area of wetlands or State open waters disturbed on that property by activities covered by the Statewide General Permit does not exceed the maximum allowed under that general permit.

(c) For Statewide General Permits at N.J.A.C. 7:7A-9.2(a)2, 6, and 7, the Department may approve activities covered under more than one general permit on a single property, provided that the total area of wetlands or State open waters disturbed on that property by activities under general permits does not exceed one acre.

(d) Only one approval letter for activities covered by the Statewide General Permit at N.J.A.C. 7:7A-9.2(a)8 (Statewide General Permit 8) will be issued for a single property. Statewide General Permit 8 may not be used more than once on a single property. Later additions to a residence will require an individual permit.

(e) For Statewide General Permits at N.J.A.C. 7:7A-9.2(a)1, 3, 4, 5, and 9 the Department may issue approvals for any number of activities on a single property covered by any number of these general permits. Later activities on the same property will also be eligible for approval under these Statewide permits.

(f) No property will be the subject of Department approvals under Statewide General Permits 2, 6, or 7 more often than once every five years.*

7:7A-*[8.4]***9.5* 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 ***mail*** notice to the Department and to *[municipal]* ***the clerk of the municipality*** and ***to the*** county *[governments (pursuant to the Municipal Land Use Law)]* ***clerk*** 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) In addition to the above information, the notice to the Department shall contain:**

1. Any information necessary to determine whether the conditions of the general permit will be satisfied; and

2. A fee pursuant to N.J.A.C. 7:7A-16. If activities authorized under more than one Statewide General Permit are proposed a separate fee must be submitted for each of the Statewide General Permits.*

*[(c)]***(d)*** 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 ***pursuant to (e) below***. Activities began or carried out without this written notification shall be a violation of the Statewide General Permit, the Act and this chapter. ***Issuance of authorizations shall be published in the DEP Bulletin.**

(e) Upon receiving notice under (a) above, the Department may require that the owner apply for an individual permit. Cases where an individual permit may be required include but are not limited to:

1. The activity has more than a minimal adverse environmental effect;

2. The cumulative effects on the environment of the authorized activities are more than minimal; or

3. The applicant or project is not in compliance with the conditions of the general permit.*

*[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.]***10.*** PRE-APPLICATION CONFERENCES

7:7A-*[9.1]***10.1*** 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]***10.2*** 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]***10.3*** 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]***10.4*** 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]* ***the*** 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 ***or her*** agent, if designated in writing, ***and to the municipality, within 30 days*** 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.]***11.*** APPLICATION PROCEDURE

7:7A-*[10.1]***11.1*** 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 ***property which the site of 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 ***used, filled or*** modified, the total area of the freshwater wetland or State *[regulated]* ***open*** 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]* ***open*** waters complex, for example, one-half acre to be filled of a 15 acre freshwater wetland.

4. A description of the source of any ***dredged or*** 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. A description of alternatives to the proposed activity or discharge, including alternative sites, construction methods, methods of discharge, and reasons for rejecting the alternatives;

*[5.]***6.*** 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.]***7.*** A list of the approvals required by other Federal, interstate, State and local agencies for the activity, including all approvals or denials received;

*[7.]***8.*** A vicinity map identifying the proposed activity site ***and the local jurisdiction closest to the site***;

*[8.]***9.*** Verification that a registered ***mail*** notice ***and a copy of the vicinity map in (a)7 above have*** *[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 ***county*** mosquito *[commission]* ***control agency*** of the county in which the proposed regulated activity will occur, landowners within 200 feet of the *[site of]* ***property or properties on which*** the proposed regulated activity ***will occur***, 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.]***10.*** 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.]**11.* A statement detailing any potential adverse environmental effects of the regulated activity and any measures necessary to *[mitigate]* **prevent and/or minimize** 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.]**12.* A fee *[not to exceed the cost of reviewing and processing the application,]* as set forth in the fee schedule published by the Department **at N.J.A.C. 7:7A-16**;

*[12.]**13.* A **list and brief** description of *[any]* **all freshwater wetlands,** special aquatic sites **as defined at N.J.A.C. 7:7A-1.4,** public use areas, wildlife refuges, and public water supply intakes in the affected or adjacent areas that may require special protection or preservation;

*[13.]**14.* A list of plants **fish, shellfish** and/or wildlife in the proposed *[development]* **activity** or discharge site which may be dependent on water quality and quantity;

*[14.]**15.* Uses of the proposed *[development]* **activity** or discharge site which might affect human health and welfare; and

*[15.]**16.* A description of technologies or management practices by which the applicant proposes to minimize adverse environmental effects of the *[project]* **activity** or discharge. ***Some guidance regarding minimizing adverse effects can be found at 40 C.F.R. 230.***

(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]* **subsection**. 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 appropriate** (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]* **open** waters and mean high water line (if appropriate), upland property, roads and utility lines;

3. A complete delineation of the wetlands boundary in accordance with the requirements of N.J.A.C. 7:7A-8.2(c)2,5,6,7 and 9. A letter of interpretation issued by the Department or a jurisdictional letter from the Army Corps of Engineers, may be submitted to satisfy this requirement.

*[3.]**4.* The proposed *[work]* area **which will be used for the activity or discharge**;

*[4.]**5.* The general site location in relation to development in the region;

*[5.]**6.* The scale of the plan and a north arrow;

*[6.]**7.* The name of the person who prepared the plan and the date of preparation; and

*[7.]**8.* 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.]**1.* Location of known freshwater wetlands and State *[regulated]* **open** waters; and

*[ii.]**2.* Proposed location of the regulated activity.

***(d) If the proposed project involves the discharge of dredged or fill material, the application shall include a cross-sectional view of the proposed project showing the following:**

1. Water elevations;

2. Water depths at waterward face of proposed work, or if dredging is proposed, showing dredging grade;

3. Cross-section of fill;

4. Elevation of spoil areas;

5. Location of wetlands;

6. Delineation of disposal site; and

7. A title block for each sheet submitted identifying the proposed activity and containing the name of the body of water, river mile, if applicable; name of county, State and nearest incorporated municipality; name of applicant; number of the sheet and the total number of sheets in set; and date the drawing was prepared.

(e) A mitigation plan meeting the requirments of may be submitted N.J.A.C. 7:7A-14.4 with the permit application. The Department requires an approved mitigation plan as a condition precedent to engaging in a regulated activity.*

7:7A-*[10.2]**11.2* 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]* **11.1** for a period of at least three years from the date the application is submitted to *[DEP]* **the Department**.

7:7A-*[10.3]**11.3* 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.]**12.* REVIEW OF APPLICATIONS

7:7A-*[11.1]**12.1* 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 **more** information, or declare the application complete. However, this deadline **for requesting additional information** 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-12.2 Draft permits**

(a) A draft permit will be prepared by the Department for all those activities listed at N.J.A.C. 7:7A-12.3(a).

(b) If the Department prepares a draft permit, the draft permit shall contain the following information:

1. All conditions under N.J.A.C. 7:7A-13.1 and 13.2; and

2. All monitoring requirements under N.J.A.C. 7:7A-13.1 and 13.2.

(c) All draft permits prepared by the Department under this section shall be accompanied by a statement of basis which meets the requirements of 40 C.F.R. §124.7 or a fact sheet which meets the requirements of 40 C.F.R. §124.8, and shall be publicly noticed in accordance with 40 C.F.R. §124.10 and made available for public comment in accordance with 40 C.F.R. §124.11.*

7:7A-*[11.2]***12.3** 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". ***The Department will provide copies of all appropriate applications to USEPA for review and comment.*** Permits for the following categories of activities will require USEPA review:

1. Discharges which may affect freshwater wetlands or State *[regulated]* ***open*** 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]* ***present or documented*** 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)]***(b)** The Department shall consider and give great weight to comments provided by USEPA.

7:7A-*[11.3]***12.4** 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]***11**.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 ***(see N.J.A.C. 7:7A-1.3 for address)*** 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]***12.5** 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 ***or on a draft permit if one is issued***.

(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]* ***open*** 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),]* ***at least 30 days before the hearing and*** 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. ***See N.J.A.C. 7:7A-1.3 for address.***

(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 ***or draft permit*** at or within 15 days after the hearing.

7:7A-*[11.5]****12.6*** 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]* ***Until*** 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)]****(b)*** If the Department issues, denies or requests modification of a permit, the Department shall send notice thereof to the applicant.

*[(d)]****(c)*** 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)]****(d)*** Decisions by the Department shall be published in the DEP Bulletin.

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

7:7A-*[11.6]****12.7*** *[W]****Cancellation, w***ithdrawal, resubmission and amendment of applications

***(a) Applications may be cancelled by the Department; or withdrawn, amended, or resubmitted by an applicant.**

(b) 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.*

*[(a)]****(c)*** 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]*. ***In some cases however (see (d) below) the fee may be credited toward future applications.***

*[(b)]****(d)*** 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, however, if the application was withdrawn prior to being declared complete, the original permit fee from the previously withdrawn application may be credited to the new fee,*** provided the application is resubmitted within one year of the date of *[denial or]* withdrawal.

*[(c)]****(e)*** Permit applications may be amended ***at the applicant's discretion*** 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 ***at the Department's discretion*** require reinitiation of the entire review process.

7:7A-*[11.7]****12.8*** 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.]****13*** PERMIT CONTENTS

7:7A-*[12.1]****13.1*** 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 ***prevent,*** minimize or correct any adverse impact on the environment resulting from ***activities conducted pursuant to the permit, or from*** noncompliance with the permit. *[Compliance may require mitigation as set forth in N.J.A.C. 7:7A-13.]* ***Mitigation consistent with N.J.A.C. 7:7A-14 will also be required.***

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. ***This provision requires the proper execution of any approved mitigation plan designed to mitigate losses caused by the permitted activity.***

6. Permit actions: The permit may be modified, revoked and reissued, ***suspended,*** 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 determine 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]***11.3***.

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]* ***project or activity***.

ii. Anticipated noncompliance: The permittee shall give advance notice to the Department of any planned changes in the permitted *[facility]* ***project*** 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] ***13.5***). 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.]***v.*** 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.]***vi.*** Other noncompliance: The permittee shall report all instances of noncompliance not reported pursuant to (a)12 i, iv, *[v,]* and *[vi]***v.*** above, at the time monitoring reports are submitted. The reports shall contain the information listed in (a)12 *[vi]***v*** above.

*[viii.]***vii.*** 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]***Regulated 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]***13.6***, to conform to the standard, limitation or prohibition.

***17. All projects authorized by an individual or general permit issued pursuant to this chapter shall be posted with a sign, prominently displayed at the main entrance to the property or worksite, at all times from commencement to completion of the permitted activity. The sign shall contain at least the following information:**

i. The work which is authorized by the Department;

ii. The type of permit applied for or authorizing the work, and the permit or application number;

iii. A Department phone number for verification; and

iv. The location nearest the site at which the permit may be inspected.*

7:7A-*[12.2]***13.2*** Establishing permit conditions

(a) In addition to conditions required in all permits (N.J.A.C. 7:7A-1*[2]***3***.1), the Department shall establish conditions in permits, as required on a case-by-case basis, under N.J.A.C. 7:7A-1*[2]* ***3***.3 (duration of permits) and N.J.A.C. 7:7A-1*[2]***3***.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]***13***.

2. New or reissued permits, and to the extent allowed under N.J.A.C. 7:7A-*[12]***13.6***, modified or revoked and reissued permits, shall incorporate each of the applicable requirements referenced in N.J.A.C. 7:7A-*[12.1]***13.1***.

(c) In addition to the requirements in N.J.A.C. 7:7A-*[12.1]* ***13.6***, 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]* ***open*** 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]****13.6***;

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]****13.6***;

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]****9.3***;

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:

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

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

iii. 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]****13.3*** 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. ***However, if necessary, a permit may be renewed through the application process set forth in this chapter.***

7:7A-*[12.4]****13.4*** 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, ***suspended,*** or terminated during its term for cause as set forth in this *[sub]*chapter.

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

7:7A-*[12.5]****13.5*** 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]* ***N.J.A.C. 7:7A-13.6***, or a minor modification made under N.J.A.C. 7:7A-*[12.9]****13.9*** 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]****13.6*** 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]****13.7 and 13.8*** exist. If cause exists, the Department may modify or revoke and reissue the permit accordingly, subject to the limitations of *[(d)]****(e)*** below, and may request an updated application, if necessary.

(b) Any permit modification not processed as a minor modification must be made for cause and with the draft permit (if applicable) and public notice and hearings procedures required for permit applications under N.J.A.C. 7:7A-12.3 and 12.4.

*[(b)]****(c)*** If cause does not exist under this *[sub]*chapter, the Department shall not modify or revoke and reissue the permit.

*[(c)]****(d)*** If a permit modification satisfies the criteria in N.J.A.C. 7:7A-*[12.9]****13.9*** for "minor modifications", the permit may be modified ***without public review***.

*[(d)]****(e)*** 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.

(f) Any modification will be published in the DEP Bulletin.

7:7A-*[12.7]****13.7*** 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]* ***project*** 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]****9.5***.) 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]****13.8*** 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]* ***15.10*** (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]****13.5*** of a proposed transfer of the

permit ***and the transfer does not meet the criteria at N.J.A.C. 7:7A-13.9(b)3***.

7:7A-*[12.9]***13.9*** 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]***13.6***. 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]***13.6***.

(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.]***3.*** Allow for a change in ownership or operational control of a *[facility]* ***a project activity*** 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.]***4.*** Extend the term of a permit, so long as the modification does not extend the term of the permit beond five years from its original effective date.

SUBCHAPTER *[13.]***14.*** MITIGATION

7:7A-*[13.1]***14.1*** Mitigation goals

(a) The Department shall require as a condition of *[a]* ***an individual*** 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. ***In addition, mitigation pursuant to this subchapter may also be required and may include restoration, creation, enhancement, or donation of money or land or both to the Mitigation Bank.***

[(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.]

(b) When an individual permit allows the disturbance or loss of wetlands this disturbance or loss shall be compensated for as specified below at N.J.A.C. 7:7A-14.2, 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.

(c) Mitigation must be performed prior to or concurrently with activities that will permanently disturb wetlands, and immediately after activities that will temporarily disturb wetlands.

(d) 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)]***(e)*** 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.]*

(f) Any mitigation carried out offsite shall be on private property, and no future development will be permitted on the mitigation site.

(g) When loss or disturbance of freshwater wetlands results from a violation of the Act, this chapter, or any permit, order or approved mitigation plan issued pursuant thereto, the mitigation portion of the penalty shall be that specified in N.J.A.C. 7:7A-16.

7:7A-*[13.2]***14.2*** 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)]***(a)*** The Department distinguishes between four *[categories]* ***types*** of mitigation *[as follows]* ***restoration, creation, enhancement, and contribution. Depending on the circumstances under which wetlands are lost or disturbed, different types of mitigation may be required by the Department. The types of mitigation are explained below, in decreasing order of their desirability***:

*[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 similarity to a natural and undisturbed wetland.

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

***1. Restoration refers to actions performed on the site of a regulated activity, within six months of the regulated activity, in order to reverse or remedy the effects of the activity on the wetland, and to restore the site to pre-activity condition.**

i. Restoration will be required at a ratio of one acre restored to one acre lost or disturbed. If restoration type actions are performed more than six months after the regulated activity which disturbed the wetland, these actions will no longer be considered restoration, but will be

considered creation, and will be governed by the provisions of (a)2 below.

ii. If restoration type actions are performed on degraded freshwater wetlands offsite, these actions will be considered enhancement, and will be governed by the provisions of (a)3 below.

2. Creation refers to actions performed to establish freshwater wetland characteristics, habitat and functions on:

i. A nonwetlands site; or

ii. A formerly freshwater wetlands site which has been filled or otherwise disturbed such that it no longer retains wetland characteristics. If the site retains wetlands characteristics such that it meets the definition of a degraded wetland pursuant to N.J.A.C. 7:7A-1.4, it is not eligible for use in creation. Rather it is only eligible for enhancement activities pursuant to (a)3 below. If the disturbance to a formerly wetlands site is the result of a violation of the Act or this chapter, the Department may, at its discretion, condition approval of a mitigation plan, or a permit, or both, on the resolution of the violation.

3. Enhancement refers to actions performed to improve the characteristics, habitat and functions of an existing, degraded wetland such that the enhanced wetland will function have resource values and functions similar to an undisturbed wetland. Enhancement will be required at a ratio of seven acres enhanced to one acre lost or disturbed.

4. Contribution refers to the donation of money or land to the Mitigation Bank. The Department will permit the donation of land only after determining, in consultation with the USEPA, that all alternatives to the donation are not practicable or feasible. If money is donated, the Department will require 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; ***or***

ii. The cost of purchasing an area which was historically an upland, and creating freshwater wetlands or 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.]

5. If the Department determines that land may be donated as part or all of a contribution, the Wetlands Mitigation Council must first determine that the donated land has the potential to be a valuable component of the freshwater wetlands ecosystem.

*[(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]****14.3*** 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]****14.4*** 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, ***a description of the freshwater wetlands which are being lost or disturbed*** 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]* ***natural area*** in perpetuity;

4. A ***monitoring and*** maintenance plan to ensure *[an]* 85 percent survival *[rate]* ***and 85 percent area coverage*** 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 seasonal*[ly]* 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]****14.5*** 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]****14.3*** and in relation to adjacent development;

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

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

4. Suitability of the monitoring program ***and maintenance*** to ensure *[an]* 85 percent survival *[rate]* ***and 85 percent area coverage*** 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.]*

8. Ability of the site to support wildlife; and

9. Any other relevant consideration.

7:7A-*[13.6]**14.6* 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]* **'s duties and functions shall include***:

1. Accepting donations of money or land when the Department has determined donation to be an acceptable form of mitigation for a permit or a violation.

*[1.]**2.* Determin*[e]**ing* if land to be donated has the potential to be a valuable component of the freshwater wetlands ecosystem;

*[2.]**3.* *[Be responsible for the disbursements]* ***Disbursement*** of funds from the Wetlands Mitigation Bank to finance mitigation projects; and

*[3.]**4.* Purchas*[e]**ing* 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)]**(b)* The Wetlands Mitigation Council shall not engage in restoration of degraded wetlands on public lands, except those *[acquired]* ***lands which became public lands solely by virtue of being held*** by the Bank.

*[(d)]**(c)* 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.

(d) Under no circumstances will the resources of the Mitigation Bank be used to aid permittees or violators in pursing mitigation required of them because of their permit or violation.

SUBCHAPTER *[14.]**15.* ENFORCEMENT

7:7A-*[14.1]**15.1* 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]**15.2* 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]**15.3* 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 ***or rehabilitation*** of the freshwater wetland*s*, State *[regulated]* ***open*** 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]**15.4* 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*s* or State *[regulated]* ***open*** 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 ***or rehabilitate*** 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]**15.5* 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. ***Specific penalty amounts, and procedures for their assessment and for adjudicatory hearings on penalties assessed, can be found at N.J.A.C. 7:7A-17.***

1. Any amount assessed under this section shall fall within ***the*** *[a]* range*s* established by ***N.J.A.C. 7:7A-17*** *[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 ***pursuant to N.J.A.C. 7:7A-17.8***. *[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 ***in accordance with N.J.A.C. 7:7A-17.9***. 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.]**4.* 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.]**5.* 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]**15.6* Civil penalty

(a) A person who violates the Act ***or this chapter*** 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]**15.5*, 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]***15.7*** 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]***15.8*** 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]***15.9*** "After the fact" permit

(a) If the violation is one in which the Department has determined that the restoration ***or rehabilitation*** of the site to its previolation condition would increase the harm to the freshwater wetland or State *[regulated]* ***open*** 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]***15.4 has been*** made;

2. The creation or *[restoration]* ***enhancement*** 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]***15.10*** 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]* ***a*** 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, ***request a hearing*** or offer a ***mitigation*** plan as to how ***the violation will be corrected.*** *[, within]* ***Within*** 90 days ***of Department approval of a plan***, the violations *[will]* ***shall*** be remedied.

(c) If the *[above]* requirements ***in (b) above*** 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.]***(d)*** Should a permit be terminated, the permittee shall restore the site to its pre-activity condition to the maximum extent practicable and feasible *[and]* ***or*** otherwise compensate for any loss in resource value through mitigation ***pursuant to N.J.A.C. 7:7A-14***. This restoration shall be accomplished within 90 days unless the Department authorizes in writing a longer period of time.

*[(d)]***(e)*** 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]***15.11*** Remedies not exclusive

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

NEW JERSEY WATER SUPPLY AUTHORITY

(a)

New Jersey Water Supply Authority Policies and Procedures

Readoption with Amendments: N.J.A.C. 7:11

Proposed: March 7, 1988 at 20 N.J.R. 448(a).

Adopted: May 13, 1988 by Richard T. Dewling, Chairman, New Jersey Water Supply Authority and Commissioner, Department of Environmental Protection.

Filed: May 13, 1988 as R.1988 d.264, **without change.**

Authority: N.J.S.A. 58:1B-7.

DEP Docket Number: 007-88-02.

Effective Date: May 13, 1988, for Readoption, June 6, 1988 for Amendments.

Expiration Date: May 13, 1993.

Summary of Public Comments and Agency Responses:

One comment was received from the City of New Brunswick Water Utility expressing no objection to readoption of the rule.

Full text of the readoption appears in the New Jersey Administrative Code at N.J.A.C. 7:11.

Full text of adopted amendments to N.J.A.C. 7:11-2 may be found in this issue of the New Jersey Register at 20 N.J.R. 1286(a).

Full text of the adopted amendments to N.J.A.C. 7:11-1 follows:

7:11-1.6 Definitions

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

...

"Round Valley Recreation Area" means those areas of the Round Valley Reservoir which are under the administrative jurisdiction of the State Park Service and/or the Division of Fish, Game and Wildlife for the purpose of providing public recreational activities, including but not limited to swimming beaches, camping and picnic sites, horse trails, boat launching areas, and office, research and maintenance areas.

...

"Spruce Run Recreation Area" means those areas of the Spruce Run Reservoir which are under the administrative jurisdiction of the State Park Service and/or the Division of Fish, Game and Wildlife for the purpose of providing public recreational activities, including but not limited to swimming beaches, camping and picnic sites, boat launching or storage areas, and office, research and maintenance areas.

. . .

7:11-1.19 Picnicking

No person shall picnic, with or without cooking grills, on property under the jurisdiction of the Authority except for those areas which are designated for such use. This provision shall not apply to informal picnicking by a small number of persons along the D & R Canal.

7:11-1.27 Recreational activities

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

(c) No person shall engage in the following activities on Authority lands and waters without a written permit issued by the Executive Director or his or her designee:

1.-6. (No change.)

7. Model boating operation;

Renumber existing 7.-10. as 8.-11. (No change in text.)

7:11-1.32 Operation of motor vehicles

(a) (No change.)

(b) No person shall operate a motor vehicle at any time on or over any road designated by "closed" signs or barriers. No person shall operate a motor vehicle on or over any cultivated or planted area, recreational trails, transmission line, survey line or in the woods or fields unless a permit is issued by the Executive Director or his or her designee.

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

7:11-1.37 Additional boating restrictions

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

(d) All boats are prohibited from entering areas marked with buoys, "Keep Out" signs, or "Restricted Area" signs.

(e) (No change.)

(a)

Schedule of Rates, Charges and Debt Service Assessments for the Sale of Water from the Delaware and Raritan Canal and the Spruce Run/Round Valley Reservoirs Systems

Adopted Amendments: N.J.A.C. 7:11-2.2, 2.3, 2.9, and 2.13

Proposed: January 19, 1988 at 20 N.J.R. 144(a).

Adopted: May 13, 1988 by Richard T. Dewling, Chairman, New Jersey Water Supply Authority and Commissioner, Department of Environmental Protection.

Filed: May 13, 1988 as R.1988 d.265, **without change.**

Authority: N.J.S.A. 58:1B-7.

DEP Docket Number: 065-87-12.

Effective Date: June 6, 1988.

Expiration Date: May 13, 1993.

Summary of Public Comments and Agency Responses:

No comments received.

Full text of the adoption follows.

CHAPTER 11
NEW JERSEY WATER SUPPLY AUTHORITY

7:11-2.2 General Rate Schedule

(a) The General Rate Schedule for Operations and Maintenance per million gallons listed below is based on estimated annual primary costs, renewal and replacement reserve, pumping reserve, major rehabilitation reserve and general reserve. The current sales base of 157.312 million gallons per day has been used in setting the rate listed below.

1. (No change.)

7:11-2.3 Debt Service Assessments

(a) The Debt Service Assessment rate per million gallons shall be based on the amounts and schedule of payments required by the Treasurer of the State of New Jersey to pay for the bonds issued pursuant to the "Water Conservation Bond Act of 1969", P.L. 1969, c.127 ("1969 Bonds") for the construction of outlet pipeline and dam rehabilitation; bonds sold pursuant to the "Water Supply Bond Act of 1981", P.L. 1981, c.261 ("1981 Bonds") for the rehabilitation of the Delaware and Raritan Canal; and the amount needed to implement the FY89 Debt Rate Stabilization Fund.

(b) The debt service assessment rate for the 1969 Bonds shall be based on a sales base of 152.587 million gallons per day, excluding water users of the Delaware and Raritan Canal within the Delaware River Basin. This debt service assessment rate does not apply to Delaware and Raritan Canal customers in the Delaware River Basin.

1. 1969 Bond Funds:

Period	Allocation	Rate/Million Gallons
7/1/88 to 6/30/2002	Million gallons per day (mgd)	$13.83

(c) 1981 Water Supply Bond Funds were borrowed from the State Treasurer to retire the tax exempt commercial paper used for temporary financing of the Delaware and Raritan Canal sediment removal program. The following debt service assessment rate, based on a sales base of 153.745 million gallons per day, in addition to that included in (b) above, will be applied to all customers:

Period	Allocation	Rate/Million Gallons
7/1/88 to 10/30/2006	Million gallons per day (mgd)	$33.15

(d) The following Debt Stabilization Fund component to cover unforeseen capital expenses for repairs to the system facilities is based on a sales base of 153.745 million gallons per day. The Debt Rate Stabilization Fund component set forth below, in addition to the component described in (a) and (b) above, will be applied to all customers:

Period	Allocation	Rate/Million Gallons
7/11/88 to 6/30/89	Million Gallons per day (mgd)	$10.50

7:11-2.9 Standby Charge

(a) A user classified under standby service, as provided in N.J.A.C. 7:11-2.8 above, shall pay a monthly minimum charge based on the capacity of his withdrawal system as specified below. Said purchaser shall also pay for all water withdrawn during the month in excess of such monthly Standby Charge, based on charges as set forth under N.J.A.C. 7:11-2.2 and 2.3.

NOTE: Mgd = million gallons daily; Gpm = gallons per minute.

1. For Delaware and Raritan Canal Standby Contracts within the Delaware River Basin:

Maximum withdrawal capacity	Charge per month
Each 1 mgd (700 gpm) or fraction thereof.	$94.64 plus annual debt service assessment rate for 1981 Bonds and FY89 Debt Rate Stabilization Fund.

2. For Standby Contracts within the Raritan River Basin:

Maximum withdrawal capacity	Charge per month
Each 1 mgd (gpm) or fraction thereof.	$94.64 plus annual debt service assessment rates for 1969 Bonds, 1981 Bonds and FY89 Debt Rate Stabilization Fund.

7:11-2.13 Short term user rate

Until such time as the total water supply capacity of the Delaware and Raritan Canal-Spruce Run/Round Valley Reservoir System is contracted for, interim short-term use of uncommitted capacity may be available on a nonguaranteed interruptible basis for a period of up to one year to support such uses as the growing of agricultural and horticultural products. Such purchaser shall only pay at the rate specified under the General Rate Schedule as set forth at N.J.A.C. 7:11-2.2, as applied to the total water actually diverted during any month.

(a)

DIVISION OF WATER RESOURCES

Construction Grants and Loans for Wastewater Treatment Facilities

Awarding Contracts for State Assisted Projects to Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals

Adopted New Rules: N.J.A.C. 7:22-9

Proposed: September 8, 1987 at 19 N.J.R. 1604(a).

Adopted: May 13, 1988 by Richard T. Dewling, Commissioner, Department of Environmental Protection; May 12, 1988, New Jersey Wastewater Treatment Trust, Ellis S. Vieser, Chairman.

Filed: May 13, 1988 as R.1988 d.263, **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. 58:11B-1 et seq., 40:11A-41 et seq., and 52:32-17 et seq.

DEP Docket Number: 039-87-08.

Effective Date: June 6, 1988.

Expiration Date: January 5, 1992.

Summary of Public Comments and Agency Responses:

The New Jersey Department of Environmental Protection ("the Department") is adopting N.J.A.C. 7:22-9 ("Subchapter 9") to ensure that a fair share of the contracts for wastewater treatment facilities jointly funded by State loans and the New Jersey Wastewater Treatment Trust are awarded to small business concerns owned or controlled by socially and economically disadvantaged individuals.

A public hearing was held on October 16, 1987 to provide interested parties the opportunity to present testimony on the proposed new rules. The comment period closed October 19, 1987. Three people testified at the hearing and written comments were received from four people.

COMMENT: What is the reason for the new acronym "SED"?

RESPONSE: The statute establishing the New Jersey Wastewater Treatment Trust ("the Trust"), N.J.S.A. 58:11B-1 et seq., requires that 10 percent of the contracts for a project funded by the Trust be awarded to small business concerns owned and controlled by socially and economically disadvantaged individuals as defined in sections 8(a) and 8(d) of the Small Business Act, 15 U.S.C. 637(a) and (b). (See N.J.S.A. 58:11B-26.) The new acronym "SED" was chosen because it is a more accurate acronym for socially and economically disadvantaged individuals and it is simpler and less confusing to use three letters than it is to use nine letters and two slashes such as is required by other older programs using the acronyms "MBA/WBA/SBA". As defined in the Small Business Act, "socially and economically disadvantaged individuals" includes women and minorities.

7:22-9.1 Scope and purpose

COMMENT: In the scope and purpose sections of the proposed SED rules it is stated: "Where a local government unit has a SED participation goal which exceeds ten percent of the total amount of all contracts, the local government unit's goal shall take precedence." Does this mean that the State will mandate that the local government unit must adhere to the goal that is above and beyond what the State is imposing?

RESPONSE: The New Jersey Wastewater Treatment Trust statute requires only 10 percent SED utilization but there is no reason for any local government unit not to try to comply with its own higher goals. What is intended by that phrase is that a local government unit should not lower its goal to the State's 10 percent SED utilization requirement if, pursuant to its own local ordinance, it has a higher goal. The State will not attempt to enforce the goals of a local ordinance that are higher than the percentage of SED utilization required by the Trust statute but when there is such an ordinance the contractor must comply with both these rules and the local ordinance. The wording of the rule has been changed to state this rather than stating that the local goal shall take precedence.

COMMENT: Local government units should be informed that in the 1986 Wygant decision, the United States Supreme Court established that race-conscious programs are unconstitutional unless they are based on a showing of actual prior discrimination by the government entity involved.

RESPONSE: The Department has reviewed *Wygant v. Jackson Board of Education,* 476 U.S. 267, 90 L.Ed. 2d 260, 106 S. Ct. 1842 (1986), and has determined that the decision is not applicable to this rule.

7:22-9.2 Definitions

COMMENT: Is there any difference between the "contracting agency" and the "local government unit"?

RESPONSE: The local government unit is the entity that is authorized to construct a wastewater treatment facility. The contracting agency is the body within the local government unit that has the authority to award and make contracts.

COMMENT: In the proposed rules, Native Americans are considered to be those individuals who have origins in any of the original peoples of North America. In the past it was necessary for a Cherokee to have tribal affiliations in order to be classified as a Native American. Is this still required?

RESPONSE: Tribal affiliations are not necessary in order to be considered a Native American for the purposes of the SED rules and for approval and registration as a minority by the Department of Commerce pursuant to the New Jersey Uniform Certification Act, N.J.S.A. 52:27H-21.17. If an individual is a descendant of a Native American then that individual is considered to be a Native American for the purpose of these rules. It is not necessary for a Cherokee to have tribal affiliations in order to be registered as a minority and to be classified as an SED.

7:22-9.5 Bidding for contracts or subcontracts through set-asides

COMMENT: In regard to set aside contracts, it is stated that a fair and reasonable price (for the work) will be determined by a comparison to other estimates received for the same work. It is unclear how there can be any comparative estimates on a set aside contract.

RESPONSE: There is an engineering evaluation for every project which includes price estimates for every component of each project. The price estimates are based upon bids which have been received for similar components of other projects. This is an appropriate estimate to use for purposes of determining a fair and reasonable price by comparison to other projects.

7:22-9.6 Notice of SED utilization opportunities

COMMENT: N.J.A.C. 7:22-9.6(a) requires that local government units give 30 days notice of opportunities for SED utilization. This should be amended to require at least 30 days notice.

RESPONSE: Since the intent of this section was to require that the notice be available at least 30 days earlier, the suggested clarification has been made.

7:22-9.10 Lowest bid resulting in payment of unreasonable price

COMMENT: The requirement that the contracting agency conduct an informal hearing when it cancels a set-aside designation is redundant and unnecessary in view of existing procedural safeguards already in the rules.

RESPONSE: The Department disagrees. Since all bidders will be notified of the rejection of all bids as well as the reason for that rejection, and since this will have to occur twice to constitute the cancellation of a set-aside contract, the Department has determined that an informal hearing for that cancellation is unnecessary, and has deleted N.J.A.C. 7:22-9.10(f).

7:22-9.11 Public agency compliance officer

COMMENT: SED utilization requirements are to be an agenda item at all meetings ". . . regardless of whether a loan agreement has been executed or not . . .". Does this attempt to apply these rules retroactively?

RESPONSE: These regulations apply only to those projects which are actively seeking loans or have already received loans. In the event that a loan has not yet been executed (such as for projects that have received preaward approval by the Department), such local government units must address SED utilization requirements because this will be a condition to the subsequent receipt of State and Trust loan moneys. Since all local government units have been clearly advised of this requirement and given notice well in advance, this provision of the rules is not a retroactive requirement.

7:22-9.12 Reports

COMMENT: Must the monthly progress report be filled out regardless of whether a contractor meets the SED utilization requirements or not?

RESPONSE: The progress reports are the Office of Equal Opportunity and Public Contract Assistance's (the "Office") barometer of how and when local government units plan to meet the SED 10 percent utilization requirements and, in particular, whether the total project is in danger of noncompliance with the SED participation requirements. Any change from monthly reporting (such as when no change in SED participation activity is expected over a period of time), however, would have to be specifically approved by the Office. Once all SED contractors have been obtained, however, submittal of the report is no longer required.

COMMENT: A SED utilization report for planning and design is required at the time of filing of an application for a construction grant or Fund/Trust loan. This clearly attempts to make these rules retroactive.

RESPONSE: Pursuant to these rules, the requirements are prospective only.

In the case of a Federal grant with an allowance for planning and design (pursuant to the Clean Water Act), the applicant must fulfill the applicable Federal requirements for minority participation. The SED rules do not apply to these Federal projects.

7:22-9.13 Noncompliance

COMMENT: There does not appear to be any set standard for noncompliance.

RESPONSE: The process for assessing noncompliance is contained in N.J.A.C. 7:22-9.13. The Office will evaluate all submitted documentation, including the items specified in this section, to assess the local government unit's efforts to solicit SED firms in order to meet the 10 percent requirement. If it is found through the Office's evaluation that any of the provisions of the rules were ignored, documentation was not submitted or the SED Utilization Plan that was developed by the local government unit and the Office was not fulfilled, then these findings will be submitted to the Department and/or the Trust for their action regarding any sanctions to be taken. As a result of further review, the Department has determined that this section is more appropriately called "Assessment of compliance" rather than "Noncompliance" and this change has been included in the revisions.

COMMENT: The rules appear to mandate quotas and do not speak of goals or "good faith effort". In the only section where good faith effort is even implied (N.J.A.C. 7:22-9.13), the rules are silent about the possible actions for failing to meet the 10 percent SED requirement.

RESPONSE: As indicated by the new title of this section (that is, "Assessment of compliance"), the Office will review the ("good faith") efforts taken by the local government unit to meet the 10 percent SED utilization requirement. The rules are not silent on penalties for noncompliance. As indicated in N.J.A.C. 7:22-9.14, penalties to be imposed by the Department or Trust will be as per N.J.A.C. 7:22-3.40 through 3.44, 7:22-4.40 through 4.44 and 7:22-6.40 through 6.44. These sections of the rules for the applicable funding programs address noncompliance with loan conditions, notice of noncompliance, withholding of funds, stop work orders and termination of loan agreements. The decision as to which of the sanctions are to be applied will be made by the Department and/or the Trust on a case-by-case basis, and will take into consideration project-specific issues. The Trust Act, however, mandates a 10 percent requirement and does not speak of goals or good faith efforts.

COMMENT: It is not clear whether 10 percent SED participation is an overall yearly agency total or a requirement of every contract.

RESPONSE: The requirement is that 10 percent of the contracts for a project be awarded to SEDs; not 10 percent of each contract but 10 percent of the cost of the entire project. The 10 percent requirement can be filled three ways: (1) Set aside 10 percent of all contracts for construction right at the start of the project; (2) invite all interested contractors to bid with the understanding that contractors are responsible for subcontracting 10 percent of the cost of the project to SEDs; or (3) through a combination of (1) and (2) above.

COMMENT: If a $5 million contract includes a piece of heavy equipment which is supplied by only one or two large manufacturers and costs $2 million, will the SED goal be applied only to the $3 million base?

RESPONSE: The SED utilization requirement is based upon the total project, so $5 million would be the base. The SED utilization requirement would be $500,000 worth of contracts.

7:22-9.14 Penalties

COMMENT: An action to withhold loan money previously committed to the contracting agency by the Department or the Trust is too severe a penalty.

RESPONSE: N.J.S.A. 58:11B-26 requires that not less than 10 percent of the amount of all contracts for construction, materials or services for a project be awarded to SEDs. A loan is made to the local government unit with its full knowledge that this requirement must be met. In accepting this loan, the local government unit is agreeing to comply with the SED requirement. Failure to make an effort to do so, therefore, will result in withholding of these funds, as is clearly indicated in the rules.

7:22-9.15 Adjudicatory hearings.

COMMENT: The local government unit must submit a written appeal. However, the Department will produce a written decision only when the local government unit so requests. Further, without a written decision, how would the local government unit know when 20 days had elapsed?

RESPONSE: After review of this section, the Department and the Trust agree with this comment. Therefore, the clause "when a local government unit so requests," has been deleted. These decisions will be provided in writing to the local government unit in all cases. Further, the term "appeal" has been replaced with "dispute" as this is a more appropriate term in the context of this section. In addition, the first sentence of N.J.A.C. 7:22-9.15(b) has been clarified to allow 20 days after receipt of the decision to request a hearing, and now reads "A local government unit may request an adjudicatory hearing within 20 days of receipt of a decision by the Department and/or the Trust."

While specific comments were not received on the following, several other changes are included in order to clarify the original intent of the rules:

7:22-9.4 Requirement to develop SED utilization plan

The term "project plan" was added to replace "plan" in N.J.A.C. 7:22-9.4(a) and (b) to clarify which plan was required (since a "contractor's plan" is required under N.J.A.C. 7:22-9.4(c)).

N.J.A.C. 7:22-9 requires the local government unit to ensure the contractor's compliance with the SED participation requirements. In the event that contractors do not do so, sanctions may be imposed on the local government units. In order to be more clear, N.J.A.C. 7:22-9.4(d) has been revised to indicate that if the contractor does not comply with the requirements of the contractor's plan and the local government unit does not take steps to otherwise comply with the rules, that the referenced sanctions may be taken by the Department and/or the Trust.

7:22-9.6 Notice of SED utilization opportunities

The citation to N.J.A.C. 7:22-9.13(b)8 in N.J.A.C. 7:22-9.6(a) is incorrect and has been changed to read N.J.A.C. 7:22-9.13(a)8.

7:22-9.7 Advertisements for SED utilization

In 7:22-9.7(a), the requirement that the successful bidder must comply with "all provisions" has been changed to "provisions" of N.J.A.C. 7:22-9.

In order to more clearly explain the requirements regarding advertisements for SED utilization, N.J.A.C. 7:22-9.7(b)2 has been expanded as follows: "The agencies specified in N.J.A.C. 7:22-9.13(a)8 will have a list of eligible SED firms and shall, upon request, provide them to local government units. Local government units shall, during the advertisement phase, provide copies of the list to all contractors bidding on unrestricted contracts."

The wording of the proposed N.J.A.C. 7:22-9.7(f) has been slightly changed and added to 7:22-9.7(b)2. As a result of this change, the proposed N.J.A.C. 7:22-9.7(f) has been deleted and the proposed N.J.A.C. 7:22-9.7(g) has become N.J.A.C. 7:22-9.7(f).

7:22-9-10 Lowest bid resulting in payment of unreasonable price

The Office as well as SED bidders must be notified of the rejection of all bids. Therefore, "and the Office" has been added to N.J.A.C. 7:22-9.10(b).

Before a contracting agency may withdraw the designated set-aside contract, the Office must be notified for approval. Therefore, "notify the Office and, after receipt of the Office's approval, shall" has been inserted after " . . . the contracting agency shall" in N.J.A.C. 7:22-9.10(c).

7:22-9.12 Reports

The order of N.J.A.C. 7:22-9.12(b) and (c) has been reversed to make a more logical progression. In addition, since the monthly progress report is not required after bidding is completed, the following sentence has been added to 9.12(b): "Once all SED contractors have been obtained, submittal of this report will no longer be required."

There may be occasions when variations in reporting requirements will be appropriate. Therefore, the sentence "Where appropriate, the Office may approve a variation in the frequency of reporting requirements specified in (b) through (d) of this section", has been added to N.J.A.C. 7:22-9.12(e).

7:22-9.13 Assessment of compliance

The title of N.J.A.C. 7:22-9.13 has been changed to "Assessment of compliance" from "Noncompliance", since this is more descriptive of this section's provisions.

Full text of the adoption follows (additions indicated in boldface with asterisks ***thus***; deletions indicated in brackets with asterisks *[thus]*).

SUBCHAPTER 9. AWARDING CONTRACTS FOR STATE ASSISTED PROJECTS TO SMALL BUSINESS CONCERNS OWNED AND CONTROLLED BY SOCIALLY AND ECONOMICALLY DISADVANTAGED INDIVIDUALS

7:22-9.1 Scope and purpose

(a) This subchapter establishes procedures for providing opportunities for socially and economically disadvantaged ("SED") contractors and vendors to supply materials and services under State financed construction contracts for wastewater treatment facilities. To implement the policies established in N.J.S.A. 58:11B-26, N.J.S.A. 40:11A-41 et seq., and N.J.S.A. 52:32-17 et seq., this subchapter applies to wastewater treatment projects receiving financial assistance from the New Jersey Department of Environmental Protection and the New Jersey Wastewater Treatment Trust pursuant to N.J.A.C. 7:22-3*[.1 et seq.]*, 7:22-4*[.1 et seq.]* and 7:22-6*[.1 et seq]*. Under the provisions of N.J.A.C. 7:22-3*[.1 et seq.]*, 7:22-4*[.1 et seq.]* and 7:22-6*[.1 et seq.]*, the Department and the Trust require recipients of Trust and Fund loans to establish such programs for socially and economically disadvantaged small business concerns, to designate a public agency compliance officer, and to submit to the Department and Trust procurement plans for implementing the SED program. In addition, N.J.A.C. 7:22-3.17(a)24, 7:22-4.17(a)24 and 7:22-6.17(a)24 provide that not less than 10 percent of the total amount of all contracts for building, materials and equipment, or services for a construction project shall be awarded to small business concerns owned and controlled by socially and economically disadvantaged individuals. Where a local government unit has a SED participation goal which exceeds 10 percent of the total amount of all contracts, the local government unit*['s goal shall take precedence]* ***must comply with both the Department's rules and the local set-aside ordinance***.

(b) This subchapter also establishes the standards and procedures that will apply to the contracting agencies of grant or loan recipients in the awarding and making of contracts under their SED programs.

7:22-9.2 Definitions

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

"Building" means the erection, alteration, remodeling, improvement or extension of a wastewater treatment facility.

"Construction" includes, but is not limited to:

1. The preliminary planning to determine the economic and engineering feasibility of wastewater treatment facilities, the engineering, architectural, legal, fiscal, and economic investigations and studies, surveys, design, plans, working drawings, specifications, procedures, and other action necessary for the construction of wastewater treatment facilities;

2. The purchase of land that shall be an integral part of the treatment process or used for the ultimate disposal of residues resulting from such treatment; the erection, building, alteration, remodeling, improvement, or extension of wastewater treatment facilities; and

3. The inspection and supervision of the building of wastewater treatment facilities.

"Contract" means any written agreement with a professional service or construction contractor related to the construction of a wastewater treatment project.

"Contracting agency" means the governing body of a local government unit or any department, branch, board, commission, committee, authority, agency or officer of such local government unit possessing the authority to award and make contracts.

"Contractor" means any party entering into a contract to provide or offering to provide building, materials and equipment, or services to a local government unit for the construction of wastewater treatment facilities. This includes but is not limited to planning and design, as well as building related services such as engineering, inspection and accounting.

"Contractor's plan" means the SED utilization plan submitted by the contractor to the local government unit and to the Department establishing subcontracting opportunities that will fulfill the requirements of this subchapter.

"Department" means the New Jersey Department of Environmental Protection.

"Financial agreement" means the legal instrument, including a grant agreement or loan agreement, executed between either the State of New Jersey or the New Jersey Wastewater Treatment Trust and the local government unit for the construction of wastewater treatment facilities.

"Local government unit" means a county, municipality, municipal or county sewerage or utility authority, municipal sewerage district, joint meeting or other political subdivision of the State authorized to construct and/or operate wastewater treatment facilities.

"New Jersey wastewater treatment financing program" means the New Jersey Wastewater Treatment Trust, the New Jersey Wastewater Treatment Fund and/or the Pinelands Infrastructure Trust Fund providing loans or grants for the construction of a wastewater treatment facility pursuant to the Wastewater Treatment Bond Act of 1985, P.L. 1985, c.329, the New Jersey Wastewater Trust Act, N.J.S.A. 58:11B-1 et seq., the Pinelands Infrastructure Trust Act, P.L. 1985, c.302, and the rules promulgated pursuant thereto, N.J.A.C. 7:22-3.1 et seq., 7:22-4.1 et seq., and 7:22-6.1 et seq.

"Office" means the Office of Equal Opportunity and Public Contract Assistance of the Department of Environmental Protection.

"Project" means the defined services for the construction of specified operable wastewater treatment facilities as approved by the Department in the local government unit's financial agreement.

"Project plan" means the proposal submitted at the time of application by the local government unit to the Department establishing the SED utilization plan and its requirements.

"Public agency compliance officer" means an officer or employee of the local government unit, who may be an existing officer or employee, who is designated by the local government unit to monitor and enforce compliance with the affirmative action and SED requirements of N.J.A.C. 7:22-3.1 et seq., 7:22-4.1 et seq. and 7:22-6.1 et seq. and this subchapter.

"SED utilization plan" means a written document outlining the entire project work, the estimated length of time it will take to complete the project, each significant segment of the project on which SEDs will or may participate, and a description of how SEDs will be contacted.

"Set-aside contract" means:

1. A contract for building, materials and equipment, or services, which is designated as a contract for which bids are solicited on a restricted basis such that responses will be accepted only from qualified small business enterprises owned and controlled by socially and economically disadvantaged individuals; or

2. A portion of a contract when that portion has been so designated; or

3. Any other purchase or procurement so designated.

"Socially and economically disadvantaged small business concern" or "SED" means any small business concern:

1. Which is at least 51 percent owned by one or more socially and economically disadvantaged individuals; or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more socially and economically disadvantaged

individuals; or, in the case of a joint venture, at least 51 percent of the beneficial ownership interests are legitimately held by SEDs; and

2. Whose management and daily business operations are controlled by one or more socially and economically disadvantaged individuals; and

3. Which, prior to July 1, 1988, has been approved by and registered with the New Jersey Department of Commerce and Economic Development pursuant to the Set-Aside Act for Small Businesses, Female Businesses and Minority Businesses (N.J.S.A. 52:32-17 et seq.) and, on or after July 1, 1988, has been certified by the New Jersey Department of Commerce and Economic Development pursuant to the New Jersey Uniform Certification Act (P.L. 1986 c.195), as an eligible minority business or female business.

i. "Socially disadvantaged individuals" means those individuals who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.

ii. "Economically disadvantaged individuals" means those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.

iii. "Socially and economically disadvantaged individuals" shall include women, Black Americans, Hispanic Americans, Native Americans, Asian Americans, and members of other groups, or other individuals, found to be socially and economically disadvantaged by the Small Business Administration under Section 8(a) of the Small Business Act, as amended (15 USC 637(a)). Black Americans, Hispanic Americans, Native Americans and Asian Americans shall be defined as follows:

(1) "Black American" means a person having origins in any of the black racial groups in Africa;

(2) "Hispanic American" means 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" means a person having origins in any of the original peoples of the Far East, Southeast Asia, Indian Subcontinent, Hawaii, or the Pacific Islands;

(4) "Native American" means a person having origins in any of the original peoples of North America.

"Small business concern" means a business which is independently owned and operated and which is not dominant in its field of operation. A business *[if]* ***is*** independently owned and operated if the management which controls the business is responsible for both its daily and long term operations.

"Subcontract" means an agreement to perform a portion of a contract.

"Subcontractor" means a third party that is engaged by the contractor to perform part of the work under a subcontract.

"Trust" means the New Jersey Wastewater Treatment Trust established pursuant to the New Jersey Wastewater Treatment Trust Act, N.J.S.A. 58:11B-1 et seq.

"Wastewater treatment facilities" means, but is not limited to any equipment, plants, structures, machinery, apparatus, land that shall be an integral part of the treatment process or used for the ultimate disposal of residues resulting from such treatment, or any combination thereof, acquired, used, constructed or operated by or on behalf of a local government unit for the storage, collection, reduction, recycling, reclamation, disposal, separation or other treatment of wastewater, wastewater sludges, septage or industrial wastes, including but not limited to, pumping and ventilating stations, treatment systems, plants and works, connections, extensions, outfall sewers, combined sewer overflows, intercepting sewers, trunk lines, sewage collection systems, storm water run-offs collection systems and other equipment, personal property and appurtenances necessary thereto.

7:22-9.3 SED utilization requirements for projects

(a) Not less than 10 percent of the total amount of all contracts for building, materials and equipment, or services for a project funded by a New Jersey wastewater treatment financing program shall be awarded to SEDs.

(b) The 10 percent SED utilization requirement shall be accomplished by the following:

1. Bids may be solicited on a restricted basis by setting aside a contract or subcontract for building, materials and equipment, or services. Once so designated, bids on a set aside contract shall be invited and accepted only from SEDs; or

2. Bids may be solicited on an unrestricted basis and not designated a set-aside contract. The bid documents, however, shall include a statement to the effect that the successful bidder must fulfill the SED utilization requirements by subcontracting portions or the work to SEDs; or

3. Contractors also have the option of establishing set-aside or unrestricted bidding procedures, or both, to fulfill the 10 percent SED utilization requirement for the project.

7:22-9.4 Requirement to develop SED Utilization Plan

(a) Each local government unit shall develop, in consultation with the Office, a plan for achieving its SED utilization requirements ***(the "project plan")***. Development of a plan shall be completed before the Department and, when relevant, the Trust may approve an application pursuant to N.J.A.C. 7:22-3.13, 7:22-4.13 and 7:22-6.13.

(b) The project plan shall identify those contracts proposed to be bid on a restricted (that is, a set aside contract) or on an unrestricted basis, or both. For each unrestricted contract the ***project*** plan shall also identify the SED utilization requirements that the successful bidder shall meet.

(c) All contractors, including SED contractors, shall submit their own SED utilization plan ("contractor's plan"), for the aspects of the project covered by the contract, to the local government unit and to the Office within 30 days of the awarding of a contract. The Contractor's Plan shall contain provisions to meet the specific SED utilization requirements imposed upon the contractor by the local government unit as well as to met the general SED utilization requirements for the project pursuant to N.J.A.C. 7:22-9.1 et seq.

(d) If the contractor does not comply with ***the requirements of the contractor's plan and the local government unit does not take steps to otherwise comply with*** N.J.A.C. 7:22-9.3(a), above, the Department and, in the case of a Trust loan, the Trust, may take any of the actions or combinations thereof specified in N.J.A.C. 7:22-3.40 through 3.44, 7:22-4.40 through 4.44 and 7:22-6.40 through 6.44.

(e) Local government units, contractors, and the Office shall consider factors similar to those set forth in N.J.A.C. 17:12-6.11 implementing the State Set-Aside Act when developing SED utilization plans.

7:22-9.5 Bidding for contracts or subcontracts through set-asides

(a) The 10 percent SED utilization requirement established by N.J.A.C. 7:22-9.3(a) may be attained by requiring that a contract or a subcontract shall be set aside for bidding only by qualified small businesses owned or controlled by socially or economically disadvantaged individuals ("SEDs") whenever there is a reasonable expectation that at least two bids will be obtained from such enterprises at a fair and reasonable price. A fair and reasonable price will be determined by comparison to other estimates received for the same work.

(b) Designation of set aside contracts shall be made prior to any notice and advertisement for bids. Once designated, the notices and advertisements for bids shall indicate that the contract or subcontract to be awarded is a set aside for qualified small businesses owned or controlled by socially and economically disadvantaged individuals ("SEDs").

(c) The provisions of (a) above and 7:22-9.8(a) requiring at least two bids to be obtained from qualified SEDs shall not apply to set-aside contracts for professional services and extraordinary unspecifiable services pursuant to N.J.S.A. 40A:11-5(1)(a)(i) and (ii), in which case a contract may be awarded to a qualified SED pursuant to N.J.S.A. 40A:11-5(1)(a)(i) or (ii).

7:22-9.6 Notice of SED utilization opportunities

(a) All local government units, ***at least*** 30 days prior to public advertisement for bids, shall notify the agencies specified in N.J.A.C. 7:22-9.13*[(b)(8)]* ***(a)8***, of the availability of opportunities for SEDs to provide services, to bid on set aside construction contracts or subcontracts, to bid on unrestricted contracts or subcontracts, or to provide any other necessary purchase or procurement. The notice shall include a description of the type and scope of the services involved.

(b) All notices shall include a statement to the effect that the project or contract is funded in part by New Jersey wastewater treatment financing programs and the successful bidder must comply with all the provisions of N.J.A.C. 7:22-9.1 et seq. for the participation of small business enterprises owned and controlled by socially and economically disadvantaged individuals.

7:22-9.7 Advertisements for SED utilization

(a) All advertisements for bids shall include a statement to the effect that the project or contract is funded in part by New Jersey wastewater treatment financing programs and the successful bidder must comply with *[all]* the provisions of N.J.A.C. 7:22-9*[.1 et seq.]* for the participation of small business enterprises owned and controlled by socially and economically disadvantaged individuals.

(b) The advertisement for bids shall indicate that the invitation to bid is on:

1. A set-aside contract or subcontract and that awards will be made, prior to July 1, 1988, only to small business concerns that are approved by and registered with the New Jersey Department of Commerce and Economic Development pursuant to the Set-Aside Act for Small Businesses, Female Businesses and Minority Businesses, N.J.S.A. 52:32-17 et seq. and, on or after July 1, 1988, only to small business concerns that are certified by the New Jersey Department of Commerce and Economic Development pursuant to the New Jersey Uniform Certification Act, P.L. 1986, c.195, as eligible minority businesses or female businesses; or

2. An unrestricted basis whereby the successful bidder must fulfill the SED utilization requirements. ***The agencies specified in N.J.A.C. 7:22-9.13(a)8 will have a list of eligible SED firms and shall, upon request, provide them to local government units. Local government units shall, during the advertisement phase, provide copies of the list to all contractors bidding on unrestricted contracts.***

(c) The advertisement for bids shall be in such newspaper or newspapers and other periodicals identified by the agencies specified in N.J.A.C. 7:22-9.13 as will best give notice thereof to appropriate bidders and shall be sufficiently in advance of the purchase or contract to promote competitive bidding. In no case shall the advertisement for bids be published less than 30 days prior to the date fixed for receiving bids on the purchase or contract.

(d) In the case of a set aside contract, the newspaper or newspapers in which the advertisement for bids appears shall be selected by the contracting agency in consultation with the Office.

(e) The advertisement for bids shall also state that a business which is not already registered or certified by the Department of Commerce***, Energy*** and Economic Development as a minority or female business, may submit a bid but then must apply to the Department of Commerce and Economic Development in accordance with N.J.A.C. 12A:11-1 for registration or certification as a minority or female business as appropriate, no later than the bid opening date, and in order to be eligible for an award must be registered or certified no later than five working days after the bid opening date. The advertisement for bids shall state that if, for whatever reason, the contracting agency does not receive approval of that bidder from the Department of Commerce within five working days after the bid opening date, the contracting *[Agency]* ***agency*** shall reject that bid without any obligation or recourse to the bidder.

NOTE: Pursuant to N.J.A.C. 12A:11-1, firms are required to apply to the Department of Commerce***, Energy*** and Economic Development 30 working days prior to receipt of certification.

[(f) All local government units shall, during the advertisement phase, provide copies of SED responses received by those agencies specified in N.J.A.C. 7:22-9.13(b)8. and as outlined in N.J.A.C. 7:22-9.5 to all contractors bidding on unrestricted contracts.]

*[(g)]****(f)*** If there are no responses to the bid solicitation from SEDs or if the successful bidder's proposal does not meet the SED utilization requirements, the successful bidder shall advertise and continue the search for SED participants for a minimum of 30 days after the contract is awarded. The contract shall include a provision to this effect.

7:22-9.8 Cancellation of set-aside designation

If, in consultation with the Office, the contracting agency determines that two bids from the appropriate qualified business enterprises cannot be obtained, the contracting agency may withdraw the designation of the set-aside contracts and resolicit bids on an unrestricted basis. The cancelled designation shall not be considered in determining the percentage of the total amount of contracts for a project awarded to SEDs. The project plan shall be modified accordingly.

7:22-9.9 Acceptance of set-aside bids

When a contract or portion thereof has been designated as a set-aside, or when the contractor is required to subcontract a portion of a contract to qualifed SEDs, acceptance of set-aside bids shall be confined, prior to July 1, 1988, to small businesses that are approved and registered as minority or female businesses pursuant to the Set-Aside Act for Small Businesses, Female Businesses and Minority Businesses, N.J.S.A. 52:32-17 et seq. by the New Jersey Department of Commerce and Economic Development and on or after July 1, 1988 to small business concerns that are certified as minority or female businesses by the New Jersey Department of Commerce and Economic Development pursuant to the New Jersey Uniform Certification Act, N.J.S.A. 52:27H-21.17.

7:22-9.10 Lowest bid resulting in payment of unreasonable price

(a) If the contracting agency determines that the acceptance of the lowest responsible bid on a set-aside contract will result either in the payment of an unreasonable price or in a contract otherwise unacceptable pursuant to the statutes and rules governing public contracts, the contracting agency shall reject all bids.

(b) Bidders ***and the office*** shall be notified of the rejection of all bids, the reasons for the rejection, and the contracting agency's intent to solicit bids for a second time on a set-aside contract.

(c) If the contracting agency determines a second time that the acceptance of the lowest responsible bid on a set-aside contract will result either in the payment of an unreasonable price or in a contract otherwise unacceptable pursuant to the statutes and rules governing public contracts, the contracting agency shall reject all bids and withdraw the designation of the set-aside contract, ***notify the Office and, after receipt of the Office's approval, shall*** amend the project plan accordingly.

(d) Bidders shall be notified of the set-aside cancellation, the reasons for the cancellation and the contracting agency's intent to resolicit bids on an unrestricted basis. SEDs may participate in the bidding on an unrestricted basis.

(e) The cancelled solicitation shall not be counted as a set aside for the purpose of obtaining the required 10 percent participation by small businesses owned or controlled by socially or economically disadvantaged individuals ("SEDs").

[(f) Except in cases of emergency, prior to the final award of the contract the local government unit shall provide an opportunity for an informal hearing on the reasons for the cancellation of the set-aside designation.]

7:22-9.11 Public agency compliance officer

(a) Each local government unit shall designate an officer or employee to serve as its public agency compliance officer.

(b) The public agency compliance officer shall be responsible for coordinating SED utilization efforts on the project and for monitoring and enforcing compliance with the affirmative action and SED requirements of N.J.A.C. 7:22-3.1 et seq., 7:22-4.1 et seq. and 7:22-6.1 et seq.

(c) SED utilization requirements shall be an agenda item at all contract award meetings and, wherever applicable, at preconstruction conference meetings regardless of whether a loan agreement has been executed or not. Each local government unit shall be responsible for notifying the Office of the time and place of such meetings.

(d) The public agency compliance officer shall attend all monthly construction progress meetings.

7:22-9.12 Reports

(a) The contracting agency shall submit its planning and design SED utilization report to the Office at the time of filing of its grant/loan application.

*[(b) Each public agency compliance officer shall submit a periodic report on behalf of the local government unit to the Office according to a schedule announced by the Office. At a minimum, this construction report shall be submitted quarterly; that is, January, April, July and October. This report shall include the following information:

1. The value of each contract and subcontract awarded to SEDs and the total dollar value and number of contracts and subcontracts awarded to SEDs;

2. The percentage of SED utilization in comparison to the cost of each contract, as well as the total percentage of SED utilization (including set aside contracts) in comparison to overall project costs;

3. The types and sizes of the participating SEDs and the nature of the goods and services being provided; and

4. The efforts made to publicize and promote the local government unit's SED utilization plan.]*

*[(c)]**(b)* Each public agency compliance officer shall submit the contracting agency's monthly progress reports to the Office. ***Once all SED contractors have been obtained, submittal of this report will no longer be required.***

***(c) Each public agency compliance officer shall submit a periodic report on behalf of the local government unit to the Office according to a schedule announced by the Office. At a minimum, this construction report shall be submitted quarterly; that is, January, April, July and October. Where appropriate, the Office may approve a variation in the frequency of reporting requirements specified in (b) through (d) of this section. This report shall include the following information:**

1. The value of each contract and subcontract awarded to SEDs and the total dollar value and number of contracts and subcontracts awarded to SEDs;

2. The percentage of SED utilization in comparison to the cost of each contract, as well as the total percentage of SED utilization (including set aside contracts) in comparison to overall project costs;

3. The types and sizes of the participating SEDs and the nature of goods and services being provided; and

4. The efforts made to publicize and promote the local government unit's SED utilization plan.*

(d) Contractors shall submit a quarterly construction report to the local government unit and to the Office. The public agency compliance officer may be contacted for assistance if needed.

(e) The report forms required by (a) through (d) above shall be obtained from the Office.

(f) The public agency compliance officer shall submit reports or information in addition to what is required by (a) through (c) above when requested to do so by the Office.

(g) Failure to comply with the reporting requirements of (a) through (d) and (f) above may subject the local government unit to the remedies for noncompliance with State and Trust loan conditions specified in N.J.A.C. 7:22-3.40 through 3.44, 7:22-4.40 through 4.44, and 7:22-6.40 through 6.44.

7:22-9.13 *[Noncompliance]* ***Assessment of compliance***

(a) Where the Office determines that a local government unit has failed or is failing to meet the 10 percent SED utilization requirement, the local government unit shall, upon the written request of the Office, submit the following:

1. Advertisements;
2. Signed contracts and subcontracts;
3. Documentation of solicitations of bids from SEDs;
4. Copies of Requests for Proposals;
5. Records of telephone quotations;
6. Established set-aside contracts;
7. Adequate and timely notice for encouraging SED participation; and
8. Proof that the assistance of State Agencies was solicited, including:

Office of Equal Opportunity and
Public Contract Assistance
New Jersey Department of Environmental Protection
440 East State Street
Trenton, New Jersey 08625

Division for the Development of Small Businesses and
Women Businesses and Minority Businesses
New Jersey Department of Commerce and Economic
Development
CN-835
1 West State Street
Trenton, New Jersey 08625

(b) Where the local government unit determines that a contractor has failed or is failing to meet the 10 percent SED utilization requirement, the contractor shall, upon the written request of the local government unit*,* submit the documents specified in (a) above.

(c) The Office shall summarize in writing its evaluation of the reasons given for noncompliance and the efforts made by the local government unit or contractor to comply with its plan for achieving the 10 percent SED utilization requirement. These findings shall be submitted to the Department and, in the case of a recipient of a Trust loan, to the Trust, who, in conjunction with the Office, shall determine the nature and extent of the local government unit's or contractor's noncompliance.

7:22-9.14 Penalties

Whenever a local government unit or a contractor has failed to comply with the requirements of this chapter, including the 10 percent requirement for SED utilization, the Department, or the Department and the Trust, in the case of a Trust loan recipient, may withhold all of the loan money, or a portion thereof, and may take any of the other actions or combinations thereof specified in N.J.A.C. 7:22-3.40 through 3.44, 7:22-4.40 through 4.44 and 7:22-6.40 through 6.44 which are remedies for noncompliance with any of the conditions of a loan.

7:22-9.15 *[Administrative]* ***Adjudicatory*** hearings

(a) The Department and, in the case of a Trust loan, the Trust, shall make a determination regarding all disputes arising under this subchapter. The local government unit shall specifically detail in writing the basis for its *[appeal]* ***dispute***. *[When a local government unit so requests, the]* ***The*** Department and/or the Trust shall produce a decision in writing and mail or otherwise furnish a copy thereof to the local government unit.

(b) A local government unit may request an administrative hearing within *[15]* ***20*** days of ***receipt of*** a decision by the Department and/or the Trust. The request for an administrative hearing shall specify in detail the basis for the appeal. Administrative hearings shall be conducted in accordance with the requirements of 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]*.

(c) Following receipt of a request for a hearing pursuant to (b) above, the Department and/or the Trust may attempt to settle the dispute by conducting such proceedings, meetings and conferences as deemed appropriate.

7:22-9.16 Severability

If any of the provisions of this subchapter are found to be invalid, the remainder of the provisions of this subchapter shall not be affected thereby.

(a)

DIVISION OF FISH, GAME AND WILDLIFE
Higbee Beach Wildlife Management Area
Adopted Amendment: N.J.A.C. 7:25-2.20

Proposed: March 7, 1988 at 20 N.J.R. 460(a).
Adopted: May 13, 1988 by Richard T. Dewling, Commissioner, Department of Environmental Protection.
Filed: May 13, 1988 as R.1988 d.266, **without change.**
Authority: N.J.S.A. 23:2A-5, 23:2A-7 and 23:7-9.

DEP Docket Number: 005-88-02.
Effective Date: June 6, 1988.
Expiration Date: February 18, 1991.

Summary of Public Comments and Agency Responses:

The notice of proposal was published in the March 7, 1988 New Jersey Register. The public comment period closed on April 6, 1988. Six comments were received.

COMMENT: The management problems presented by Higbee Beach Wildlife Management Act (HBWMA) are similar to those found at Tolz Beach located in Lower Township, Cape May County. As such, the current management program established at Tolz Beach by the New Jersey Conservation Foundation for migratory shore birds should be implemented at HBWMA for the protection of piping plovers.

RESPONSE: The birds associated with Tolz Beach (primarily semi-palmated sand pipers, ruddy turnstones, red knots and sanderlings) migrate through New Jersey in May and early June. They winter in South America and breed in the Arctic. The New Jersey Conservation Foundation implemented a management plan designed to decrease disturbances to these migratory birds as they stop, feed and "refuel" for their flight to the Arctic. To a limited extent, these migrating birds also use HBWMA and closure of the south-end beach area will provide them with a beach free of disturbances. However, the birds of major concern on the beach at the HBWMA are piping plovers which are classified as endangered by the New Jersey Division of Fish, Game and Wildlife (DFGW), and threatened by the United States Fish and Wildlife Service (FWS), due to the fact that approximately 550 nesting pairs remain on the Eastern coast of the United States. Piping plovers breed from April 15 to August 15. Their life cycles and their reliance on HBWMA are quite different from those migratory birds passing through at Tolz Beach. The dry sand beach and adjacent tidal areas at HBWMA are equally critical to and inextricably tied together in the life cycle of the piping plover, which has become endangered due to habitat loss, as more and more coastal areas are converted to recreational use. Therefore, management techniques for piping plovers at the HBWMA cannot be compared to the methods utilized at Tolz Beach for migratory birds.

In addition to the differences presented by the use of the area by nesting piping plovers, the beach at HBWMA is adjacent to a rare combination of natural dune, freshwater wetland and wooded areas. These areas provide a diverse habitat critical to at least 16 endangered species, and the dune system protects this habitat from the bay waters. Dune preservation is, therefore, a critical aspect of the management of HBWMA. The five-month closure of the south-end area will aid in the preservation and regeneration of this dune system during a period in which this natural buffer historically suffered from a large amount of destruction.

COMMENT: The proposed closure is inconsistent with the Department's policy prior to 1987 whereby Lower Township was allowed access to patrol with all-terrain vehicles in the very same south-end beach area now subject to closure due, in part, to the presence of piping plovers.

RESPONSE: Although piping plovers were observed at HBWMA prior to 1987, they were not observed nesting there until 1987. Therefore, the pre-1987 policy of allowing this kind of patrol is not inconsistent with current policy of increased protection, including the prohibition of this kind of patrol.

COMMENT: During the period of July 1, 1987 to August 16, 1987 there were no piping plovers nesting on the beach area.

RESPONSE: The Department verified the existence of two piping plovers nests in 1987. These birds may not have been seen by users of the beach area due to their cryptic coloring, a biological means by which plovers camouflage themselves for protection. It is also difficult to identify piping plover nests since they are merely scrapes in the sand, lined by pieces of shell and almost indistinguishable to human observers from the scattered shells and other small depressions found on a beach. Since the nests are no longer used when the young hatch, they disappear quickly. In addition, the bird nests may be located in or immediately adjacent to the dunes or on the beach up to the high water line. The critical territory includes all land from a nest site to the water's edge. Therefore, a large area must be searched in order to locate these small birds.

COMMENT: The time period covered by any new rule for the management of piping plovers should be limited to the 1988 nesting season in order to conduct an inventory and observe if a closure is warranted or if other methods of protection can be used.

RESPONSE: The closure of the south-end beach area was proposed not only to provide protection of critical wildlife habitat and endangered species such as piping plovers, but also to protect the sensitive dune ecosystem which is critical to the stability of the entire wildlife management area. The Department has determined that a closure of the south-end beach area is the most effective means of achieving protection of the dunes and the piping plovers at the HBWMA. Specifically, with regard to the piping plovers, any untested methods of protection implemented at this time may jeopardize the nesting success of the birds currently at the HBWMA. The rule may be amended in the future should new information reveal an alternative effective means of protection.

COMMENT: Use of the south-end beach area by people will not disturb piping plovers in the same manner as dogs or cats. When chased by dogs or cats, the birds will not return to the area, while people only temporarily interrupt nesting and feeding activities.

RESPONSE: Disturbances caused by animals will have a similar effect as disturbances caused by people. The primary adverse impact of any disturbance is the abandonment of unhatched eggs or chicks by the adult bird. This opens up the opportunity for predation. When the adult birds accompany chicks to feed in the wet sand areas, adults will react to intruders by trying to draw them away from the chicks. At this point, chicks are easy targets for predators such as seagulls. When adults leave the nest to draw away intruders, abandoned unhatched eggs may succumb to exposure from severe heat or cold depending on the weather conditions. Secondary impacts of disturbances include the expenditure of large amounts of energy by adults to draw away intruders. In addition, these activities reduce the amount of critical feeding time for both chicks and adults which may result in weakened condition, poor health, or eventual death.

COMMENT: Piping plovers do not nest in the tidal areas. Therefore, a closure of this area is unnecessary.

RESPONSE: It is true that piping plovers do not nest in the wet sand areas of the beach. However, the zone from the nesting area to the water is critical to nesting success since it is the critical feeding area. In addition, since nests can be located very close to the high water line, intruders in the tidal areas can disturb both nesting and feeding activities.

COMMENT: The Department should establish a panel to inventory endangered species nesting on the beach at HBWMA. The panel should include both citizens and wildlife management personnel who would walk the beach to inventory nesting birds or survey the beach from a distance with binoculars.

RESPONSE: The disturbance caused by a "panel"-conducted inventory could be extensive and the Department is unwilling to risk the loss of a tenuous nesting area. The Department will, therefore, make photographs and information collected by biologists available to interested persons.

Any citizens that would like to become more involved in the day-to-day management of the wildlife management area may join the DFGW's Conservation Corps. This is a volunteer program in which participants could either assist wildlife biologists in their day-to-day activities at the HBWMA or receive instruction in order to aid the DFGW's Conservation Officers by observing and reporting infractions of the wildlife management area rules. Information concerning the volunteer program can be obtained at the DFGW's Trenton Office (501 E. State Street, Station Plaza 5, Third Floor, CN 400, Trenton, N.J. 08625).

COMMENT: The Department should establish a panel to study the programs other beach areas use to aid endangered species in order to make recommendations for HBWMA. The panel should be staffed by an equal number of citizens and Departmental personnel.

RESPONSE: At the present time, the Department does not have the funds necessary to oversee the activities of this kind of panel nor provide the personnel necessary to participate on this panel. The establishment of such a panel may be possible in the future and nothing in the proposed amendments will discourage these kinds of efforts. However, all citizens that are interested in the management policies established for HBWMA and other areas managed by the DFGW's Endangered and Nongame Species Program may attend the meetings of the Endangered and Nongame Species Advisory Committee in order to express their views. These are open public meetings held monthly at locations throughout the State. The schedule and locations for such meetings are available at the DFGW's Trenton Office (501 E. State Street, Station Plaza 5, Third Floor, CN 400, Trenton, N.J. 08625).

COMMENT: New Jersey will be unique and set a precedent in the United States if this proposed amendment is implemented, since there is no other area in the country proposing beach closure as a solution to piping plover preservation.

RESPONSE: New Jersey is not unique in its determination that beach closure is necessary to protect the piping plover and other beach nesting species. The United States Fish and Wildlife Service has closed beaches at the following refuges for the very same reasons: Chincoteague National Wildlife Refuge, Virginia; Monomy National Wildlife Refuge and Parker River National Wildlife Refuge, Massachusetts; Morton National Wildlife Refuge, New York; Milford Point of McKinney National Wildlife Refuge, Connecticut: and Trustom Pond National Wildlife Refuge, Rhode Island.

COMMENT: As part of an alternative to the proposed closure amendment, the Department's strategy should identify bird nesting areas and then clearly mark them as "no trespassing" areas.

RESPONSE: The south-end beach area is the nesting area identified by the Department and the proposed closure of this area is analogous to cordoning off the nesting area with "no trespassing" signs.

COMMENT: The north-end beach area at the HBWMA is owned by the United States. The proposed economic impact states that "increased costs to the Department will occur due to law enforcement and beach maintenance required on the north-end beach area" which will remain open during the closure period for the south-end area. The establishment of rules by a New Jersey agency on this Federal property is objectionable. Regulation and maintenance of this area by multiple governmental agencies is an unnecessary waste of State resources and increased expenditures for the north-end beach area are an inefficient use of taxpayer monies.

RESPONSE: In June of 1979, the Department of the Army granted a license to the Department entitled "License for Conservation, Maintenance and Management purposes within the Right-of-Way of the Cape May Canal." This license granted the Department the authority to occupy 196 acres of land and water areas within the Army's Right-of-Way of the Cape May Canal for a period extending to April, 2004. The majority of the area designated as the north-end beach area falls within the area subject to this license. A condition of the license provides that the Department manage all forms of fish and wildlife and that the Department enforce the State fish and game laws and such orders and rules as may be issued by the DFGW. The license agreement, therefore, provides that the Department of the Army maintain those portions within its expertise and authority: bridges, wharves, bulkheads and jetties. Meanwhile, the Department will manage the property for those purposes within its expertise: fish and wildlife. Therefore, there is no overlap or inefficient control of this north-end beach area. The increased costs which will be incurred by the Department will result from the Department's decision to keep the north-end beach area open to the public rather than close all of the HBWMA Beach as in 1987. Increased costs will mainly result from increased enforcement activities which will be required to enforce wildlife management rules and to keep intruders out of the south-end beach area.

COMMENT: Instead of a closure, the south-end beach area should be patrolled in the same manner as the north-end beach area. This will ensure that beach users remain in the "public trust areas", thereby avoiding interference with wildlife.

RESPONSE: The "public trust areas" which are the tidal flowed areas of the beach are a critical component of the piping plover's habitat. Allowing the public to remain in this wet-sand area would result in interference with the bird's feeding and rearing activities.

COMMENT: There is no evidence that the Department utilized or considered the use of signs combined with other regulatory approaches such as those proposed at Tolz Beach.

RESPONSE: Informative signs have been used at many of the parks and refuges throughout the State. These signs describe the piping plover and its nest in order that beach users have the ability to recognize the birds and avoid disturbing them. Other signs have been used for dune protection. The Department's experience with signs has shown that they may not be sufficient to adequately protect the HBWMA. In the case of the piping plovers, it is either the inherent difficulty in actually identifying nests or just a lack of public compliance with the signs which necessitates the south-end beach closure.

COMMENT: The Department should open the beach during specified hours instead of closing it for five months.

RESPONSE: The establishment of "open hours" for public use of the beach area is not a feasible alternative to closure due to the fact that once piping plovers begin nesting, the nesting, feeding and rearing activities do not conform to a discernable schedule.

COMMENT: The Department should ban some activities while allowing others that are less intrusive, such as casual strolling beneath the high water park.

RESPONSE: Past experience indicates that allowing some uses and not others would result in the habitat destruction which the amendment seeks to prevent. Moreover, the presence of people anywhere on the beach, above or below the high water mark, whether they are driving off-road vehicles, strolling or even sunbathing, would be intrusive to the piping plovers.

COMMENT: Although efforts should be made to protect the HBWMA, surf fishermen have no detrimental effect on the area and should be permitted to fish anywhere on the beach.

RESPONSE: Surf fishermen must make use of the tidal and upland beach areas and would interfere with the piping plovers. The area must be closed to all activities from a dune management prospective and for the protection of piping plovers.

COMMENT: Is the Department aware of the illegal use of the beach and dune areas by off-road vehicles? If so, has any action been taken to stop this activity?

RESPONSE: The Department is aware of the problem and it is one of the reasons for the closure. The Department is expending as much time and resources as is possible at this time in order to prevent this activity and prosecute those involved. Barriers were installed and have been replaced or improved when necessary. When law enforcement officers encounter illegal users, they are confronted and all appropriate actions are taken.

COMMENT: Is the Department aware that frequently during the summer period boaters beach their boats offshore and enter the beach and dunes to conduct parties, after which garbage is left behind?

RESPONSE: The Department is aware of these activities and they highlight the need for strong measures such as a closure. The dunes are a critically important component in the ecology of the HBWMA since they provide a buffer against the bay waters. Trampling the dunes threatens the unique upland habitat behind the dunes as well as the other endangered species which this area supports. Garbage on the beach and in the dunes attracts predators which threaten the success of the piping plovers. Closure is intended to prevent these activities and the Department will take appropriate action against participants when apprehended.

COMMENT: The noise from the training of hunting dogs on the upland area beyond the dunes adversely affects wildlife at the HBWMA.

RESPONSE: The training of dogs on all State wildlife management areas is legal only during certain seasons, which do not correspond to the nesting season of piping plovers. There is no evidence that noise from dogs or shooting adversely affects fall migrants, but all users of the HBWMA are restricted to designated trails during most of the migratory season. In addition, the hunting season at HBWMA has been curtailed to begin after the fall migration. (See N.J.A.C. 7:25-20(a)4).

COMMENT: The small number of people participating in hunting, dog training, use of off-road vehicles and beach and dune parties are causing more damage to the area and piping plovers than the entire number of other visitors using the beach during the summer.

RESPONSE: As stated before, the seasons during which hunting and dog training are permitted do not correspond with the nesting season of piping plovers. The other activities identified by the commenter, when encountered, will be dealt with appropriately. However, whether the activity is legal or illegal, any use of the south-end beach area during the nesting season would be detrimental to the piping plovers and any damage to the dune system threatens the entire wildlife management area.

COMMENT: The Department cannot bar public access to property over which it has no ownership interest and which is subject to the Public Trust Doctrine.

RESPONSE: The Public Trust Doctrine stands for the principle that lands which are tidal flowed are to be held by the State in trust for the public. The doctrine requires that the State administer public trust lands for the benefit of the public. The State therefore cannot act in a manner which would be in derogation of the public's interest in such property.

HBWMA was obtained by the Department with funds provided by the Green Acres Bond Act and the Federal Aid to Endangered Species Program. These programs exist as a result of the public's insistence that both State and Federal legislatures act to protect endangered and threatened species of wildlife and their habitat. In order to carry out this mandate, the Department has been empowered to purchase lands such as the HBWMA for purposes of preservation and promotion of such wildlife and its habitat. The public's interest at HBWMA, therefore, includes habitat and wildlife preservation and the Department is required to administer this area with this primary goal. A limited closure of the south-end beach of HBWMA and adjacent tidal areas furthers this public interest, because this closure is effected for the benefit of the public.

COMMENT: Closure of the south-end beach area frustrates the paramount State policy under the Public Trust Doctrine of encouraging maximum access to the ocean beach.

RESPONSE: The policy of encouraging maximum access to tidal flowed public trust properties has been well developed by the courts of this State in cases involving beaches dedicated to recreational uses such as bathing, swimming, surf fishing and other shore activities. In a number of these cases, municipalities or property owner associations have attempted to limit use and enjoyment of recreational beaches to their citizens or members by employing methods designed to exclude non-members (for example, excessive beach entry fees and restricted public parking). In the majority of cases, New Jersey courts have ruled that these actions are in violation of the Public Trust Doctrine, in that lands which were inherently available for the general public's recreational use were being appropriated for the benefit of a select group of individuals.

The Department's action concerning HBWMA does not frustrate the Public Trust Doctrine because it does not involve a beach dedicated to recreational use nor does it effectuate an appropriation of public trust property in favor of a limited segment of the population.

The property at HBWMA was purchased as a wildlife management area, and not as a park, because it lies in a portion of the Cape May Peninsula that is widely recognized as one of the most important "migrant traps" in the continental United States. It is a critical staging area for a large number of avian species which stop to rest and "refuel" before or after their journey over the Delaware Bay and beyond. As stated previously, the unique mixture of habitat found at HBWMA supports at least 16 endangered species, including the piping plover.

The five-month closure of the beaches adjacent to the south-end area of HBWMA is consistent with the Public Trust Doctrine because it is consistent with the public purpose for which the area was obtained. Most important, closure does not favor one segment of the public over another. However, it does favor those type of wildlife species and their habitat that the general public, through its elected representatives, desires to have promoted and preserved. If some citizens were able to appropriate this critical area for their own recreational use to the detriment of endangered species and habitat, it would, in effect, constitute the very same kind of discrimination against the general public which New Jersey courts have held to be in violation of the Public Trust Doctrine.

COMMENT: The Department has a special obligation to narrowly craft this rule, rather than close public trust lands to public access. Only in this way can the Department ensure that the public's rights will not be unnecessarily endangered by overly restrictive governmental action.

RESPONSE: The closure at the HBWMA does not endanger public rights nor is it overly restrictive. The closure of the beach area is limited to five months and the closure area encompasses approximately 0.8 miles (the south-end beach area). Approximately 0.3 miles of beach area (the north-end beach area) will remain open for uses permissible pursuant to rules for wildlife management areas as specified at N.J.A.C. 7:25-2. In addition, special permission may be obtained in order to access the south-end beach area, upon written approval from the Department. As for public rights, it is the public that has declared, through the Legislature, that the need to promote and protect wildlife and habitat is both necessary and important. Thus, the Department's obligation to public rights at the HBWMA is to administer the area in a manner consistent with this public mandate. The ocean waters along the coastline belong to all citizens of the State. It would be contrary to the Public Trust Doctrine to forestall the general public's mandate for these areas.

COMMENT: According to the June 1978 deed which conveyed the Dresser Industries tract to the State of New Jersey, Department of Environmental Protection, and which is now part of the HBWMA, the Department does not own the area seaward of the high water line.

RESPONSE: As stated previously, HBWMA was acquired with Green Acres Bond Act Funds and land acquisition funds provided by the Federal Aid to Endangered Species program in order to establish an area to be managed with the primary goal of protection and preservation of endangered species and wildlife habitat. This upland area is administered by the DFGW in a manner which promotes this public purpose. The riparian areas adjacent to the upland area are held by the State in trust for the public, to be administered for the benefit of the public.

Endangered species do not distinguish between riparian and upland ownership and both are critical areas for their survival. Dry sand beach nesting species require undisturbed access to wet sand areas, and endangered species inhabiting the upland areas depend on the stability of the dune system to protect their habitat. It is, therefore, essential to administer both riparian and upland areas as a whole in order to effectively carry out the public mandate for this area. This action is consistent with Public Trust Doctrine requirements for this area.

Full text of the adoption follows.

7:25-2.20 Higbee Beach

(a) In addition to all regulations prescribed in this subchapter affecting the designated Wildlife Management Areas listed at N.J.A.C. 7:25-1.8, the following additional regulations shall apply to the public use of the Higbee Beach Wildlife Management Area (HBWMA):

1.-5. (No change.)

6. From 12:01 A.M. on April 15 until 12:01 A.M. on September 15 of each year, that part of the HBWMA designated as the south-end beach area, as described on the maps posted at the HBWMA parking lot, available at the Division's Endangered and Nongame Species office located at the HBWMA and at the Division's Trenton office (501 E. State Street, Station Plaza 5, Third Floor, CN 400, Trenton, N.J. 08625), and on file with the Office of Administrative Law, shall be closed to all public access and use, except upon prior written approval from the Department, which may be obtained from the Division's Trenton office.

7. That part of the HBWMA designated as the north-end beach area, as described on the maps posted and available in accordance with (a)6 above, shall be open year-round to public access and use for those activities permissible under N.J.A.C. 7:25-2.

8. At all times, the dune areas of HBWMA are closed to all public access and use, except upon prior written approval from the Department, which may be obtained from the Division's Trenton office at the address listed in (a)6 above. Dune areas may be observed from established trails as designated and described on the maps posted and available in accordance with (a)6 above. Entry onto the dunes from established trails is prohibited at all times.

MISCELLANEOUS NOTICES

COMMUNITY AFFAIRS

(a)

DIVISION OF HOUSING AND DEVELOPMENT

Uniform Construction Code State-Sponsored Model Code Changes Notice of Public Hearing

Take notice that a public hearing to receive proposals for State-sponsored changes to any of the model codes adopted by the State will be held at 10:00 A.M. on Friday, June 24, 1988 at the offices of the Construction Code Enforcement Element, 3131 Princeton Pike, Lawrenceville, New Jersey. The Department requests that any specific code language changes or recommendations be made available in writing at the hearing or be mailed to the Construction Code Enforcement Element at CN 805, Trenton, New Jersey 08625 (Attention: Chrystene Wyluda, Esq.) prior to the hearing date.

EDUCATION

(b)

STATE BOARD OF EDUCATION

Local Area Vocational School Districts and Private Vocational Schools

Notice of Correction: N.J.A.C. 6:46-2.3 and 4.13

Take notice that the text of N.J.A.C. 6:46-2.3(a)7 and 9 and 4.13(i) as published in the New Jersey Administrative Code through Transmittal No. 1987-10 (Supplement 11-16-87) is not correct due to printing errors.

Full text of these provisions as adopted by the Department of Education, State Board of Education, and as filed with the Office of Administrative Law as R.1987 d.434 (see 19 N.J.R. 1989(a)) is as follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

6:46-2.3 Criteria for eligibility for designation as a local area vocational school district

(a) To qualify for designation as a local area school district, at least one school within the district or more than one school facility, if recommended by the commissioner and approved by the State Board of Education, on the basis of demonstrated need, program cost and effectiveness, shall comply with all of the following requirements:

1.-6. (No change.)

[7. Provide for the establishment of a vocational student organization for every broad occupational area offered in (l)1, 2 and 3 above.]

7. Provide a full-time job placement coordinator or the equivalent.

8. (No change.)

[9. Establish a local advisory council for each of the proposed broad occupational areas.]

9. Provide appropriate opportunities for the enrollment of handicapped, disadvantaged and limited-English proficient pupils in addition to regularly enrolled students.

10. (No change.)

(b) (No change.)

6:46-4.13 Publicity, advertising and solicitation of students

(a)-(h) (No change.)

(i) A school that is accredited by an accrediting agency recognized by the United States Secretary of Education and/or the [National Commission on Accrediting] **Council on Postsecondary Accreditation** shall limit any published statement to "Accredited by ________". No school may advertise accreditation by an agency not recognized by the United States Secretary of Education or the Council on Postsecondary Accreditation.

(j)-(k) (No change.)

ENVIRONMENTAL PROTECTION

(c)

DIVISION OF WATER RESOURCES

Announcement: Application Period for Water Supply Bond Rehabilitation and Interconnection Loan Program

Public Notice

Take notice that Richard T. Dewling, Commissioner of the Department of Environmental Protection (Department), pursuant to the Water Supply Bond Act of 1981, P.L. 1981, c.261, and the Consolidated Water Supply Bond Loan Rules, N.J.A.C. 7:1A, announces that the Department will be accepting loan applications until June 30, 1988 for local projects for the rehabilitation or repair of antiquated, obsolete, damaged or inadequately operating publicly owned water supply transmission facilities and for the interconnection of unconnected or inadequately connected water supply systems. Any political subdivision of the State or agency thereof shall be eligible to apply for a water supply bond rehabilitation or interconnection loan. Note that N.J.A.C. 7:1A-2.3(a) requires every applicant to schedule an informal pre-application conference with the Division of Water Resources prior to making a formal application for a water supply bond rehabilitation or interconnection loan.

Applications may be obtained and pre-application conferences may be scheduled by contacting the Division of Water Resources as listed below. Any questions concerning the water supply bond rehabilitation or interconnection loan program should be addressed to:

Robert Oberthaler, Section Chief
Division of Water Resources
Water Supply Element
401 East State Street
CN-029
Trenton, New Jersey 08625
(609) 633-7486

Note that all applications for the water supply bond rehabilitation or interconnection loan program must be received on or before **June 30, 1988.**

(d)

Amendment to the Northeast Water Quality Management Plan

Public Notice

Take notice that on December 22, 1987 pursuant to the provisions of the Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq., and the "Water Quality Management Planning and Implementation Process" Regulations (N.J.A.C. 7:15-3.4), an amendment to the Northeast Water Quality Management Plan was adopted by the Department. This amendment will include the Wastewater Management Plan (WMP) for Hanover Township, Morris County. The WMP delineates the sewer service area for the Hanover Sewerage Authority. The Plan sets the maximum design capacity for the sewage treatment plant from 3.1 to 4.61 million gallons per day.

(e)

Amendment to the Northeast Water Quality Management Plan

Public Notice

Take notice that an amendment to the Northeast Water Quality Management (WQM) Plan has been submitted for approval. This amendment is to adopt a Wastewater Management Plan for the Town of Morristown. That document allows for the upgrade and expansion to design flow of 6.3 million gallons per day of the Town of Morristown's Wastewater Treatment Plant and establishes a sewer service area for that facility. The

Town of Morristown will be designated as the Wastewater Management Agency.

This notice is being given to inform the public that a plan amendment has been developed for the Northeast WQM Plan. All information dealing with the aforesaid WQM Plans and the proposed amendment is located at the office of NJDEP, Division of Water Resources, Bureau of Water Resources Management Planning, 401 East State Street, 3rd Floor, CN-029, Trenton, New Jersey 08625. It is available for inspection between 8:30 A.M. and 4:00 P.M., Monday through Friday.

Interested persons may submit written comments on the amendment to George Horzepa, Bureau of Water Resources Management Planning, at the NJDEP address cited above. All comments must be submitted within 30 days of the date of this public notice. All comments submitted by interested persons in response to this notice, within the time limit, shall be considered by NJDEP with respect to the amendment request.

Any interested person may request in writing that NJDEP hold a nonadversarial public hearing on the amendment. This request must state the nature of the issues to be raised at the proposed hearing and must be submitted within 30 days of the date of this public notice to Mr. Horzepa at the NJDEP address cited above. If a public hearing is held, the public comment period in this notice shall automatically be extended to the close of the public hearing.

(a)

Amendment to the Northeast Water Quality Management Plan

Public Notice

Take notice that an amendment to the Northeast Water Quality Management (WQM) Plan has been submitted for approval. This amendment would adopt a Wastewater Management Plan for the Township of Cedar Grove. That document allows for the upgrade and expansion of the Cedar Grove Wastewater Treatment Plant from 1.5 million gallons per day to 2.0 million gallons per day and establishes a sewer service area for that facility. The Township of Cedar Grove will be designated as the Wastewater Management Agency.

This notice is being given to inform the public that a plan amendment has been developed for the Northeast WQM Plan. All information dealing with the aforesaid WQM Plans and the proposed amendment is located at the office of NJDEP, Division of Water Resources, Bureau of Water Resources Management Planning, 401 East State Street, 3rd Floor, CN-029, Trenton, New Jersey 08625. It is available for inspection between 8:30 A.M. and 4:00 P.M., Monday through Friday.

Interested persons may submit written comments on the amendment to George Horzepa, Bureau of Water Resources Management Planning, at the NJDEP address cited above. All comments must be submitted within 30 days of the date of this public notice. All comments submitted by interested persons in response to this notice, within the time limit, shall be considered by NJDEP with respect to the amendment request.

Any interested person may request in writing that NJDEP hold a nonadversarial public hearing on the amendment. This request must state the nature of the issues to be raised at the proposed hearing and must be submitted within 30 days of the date of this public notice to Mr. Horzepa at the NJDEP address cited above. If a public hearing is held, the public comment period in this notice shall automatically be extended to the close of the public hearing.

(b)

Amendment to the Upper Raritan Water Quality Management Plan

Public Notice

Take notice that an amendment to the Upper Raritan Water Quality Management (WQM) Plan has been submitted for approval. A Wastewater Management Plan has been prepared for Hillsborough Township. This Plan would allow the expansion of the Valley Road Sewerage Companies, Incorporated, sewer service area to include the proposed Wyckoff Estates development. The River Road Sewerage Treatment Plant (STP) would be converted to a pump station with flows being connected to the Somerset-Raritan Valley Sewerage Authority's STP. The Fieldhedge Drive STP will be dismantled and its flow connected to the Somerset-Raritan Valley Sewerage Authority's STP. The Hillsborough Township Municipal Utilities Authority will be designated as the Wastewater Management Agency for the Township.

This notice is being given to inform the public that a plan amendment has been developed for the Upper Raritan WQM Plan. All information dealing with the aforesaid WQM Plan and the proposed amendment is located at the office of NJDEP, Division of Water Resources, Bureau of Water Resources Management Planning, 401 East State Street, 3rd Floor, CN-029, Trenton, New Jersey 08625. It is available for inspection between 8:30 A.M. and 4:00 P.M., Monday through Friday.

Interested persons may submit written comments on the amendment to George Horzepa, Bureau of Water Resources Management Planning, at the NJDEP address cited above. All comments must be submitted within 30 days of the date of this public notice. All comments submitted by interested persons in response to this notice, within the time limit, shall be considered by NJDEP with respect to the amendment request.

Any interested person may request in writing that NJDEP hold a nonadversarial public hearing on the amendment. This request must state the nature of the issues to be raised at the proposed hearing and must be submitted within 30 days of the date of this public notice to Mr. Horzepa at the NJDEP address cited above. If a public hearing is held, the public comment period in this notice shall automatically be extended to the close of the public hearing.

(c)

Amendment to the Lower Raritan/Middlesex County Water Quality Management Plan

Public Notice

Take notice that on February 17, 1988 pursuant to the provisions of the Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq., and the "Water Quality Management Planning and Implementation Process" Regulations (N.J.A.C. 7:15-3.4), an amendment to the Lower Raritan/Middlesex County Water Quality Management Plan was adopted by the Department. This amendment is to expand the sewer service area of the Middlesex County Utilities Authority to include the service area of the Monroe Township Municipal Utilities Authority's Forsgate Sewage Treatment Plant (STP). The Forsgate STP will be converted to a pumping station.

(d)

Amendment to the Tri-County Water Quality Management Plan

Public Notice

Take notice that on February 23, 1988 pursuant to the provisions of the Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq., and the "Water Quality Management Planning and Implementation Process" Regulations (N.J.A.C. 7:15-3.4), an amendment to the Tri-County Water Quality Management Plan was adopted by the Department. This amendment is to expand the sewer service area of Cinnaminson Township to include the Smethwycke Subdivision (Blocks 3402 and 3403, Lots 1, 2.02, and 5). Construction and development of the project will not encroach in wetlands except for the widening of the north bank of the stream from Lenola Road to Church Road, and the construction of a gabion wall for bank stabilization, and the placement of rip-rap west of the Lenola Road culvert.

HEALTH

(e)

EMERGENCY MEDICAL SERVICES

New Jersey Poison Information and Education System

Revision to Grant Program

Take notice that, in compliance with P.L. 1987, ch. 7, the Department of Health published notice of the availability of grants in the Directory of Department of Health Grant Programs (see 19 N.J.R. 2499(b)).

Take further notice that the following revised information concerning Grant Program 89-4-EMS, as listed in the above-noted Directory on page 33, by revising the purpose for which grant funds are available, to include provision of toll-free telephone access to the Statewide poison information and education system.

NAME OF GRANT PROGRAM: New Jersey Poison Information and Education System (NJPIES), Grant Program No. 89-4-EMS, Revised 4/11/88.

PURPOSE FOR WHICH THE GRANT PROGRAM FUNDS WILL BE USED: Operate and maintain a Statewide poison information and education system according to guidelines of P.L. 1982, c.177. Provide service 24 hours a day, 7 days a week with qualified poison specialists **including toll-free telephone access. Serve as an answering point for other toll-free telephone numbers sponsored by the New Jersey State Department of Health.** Provide associated educational/informational programs for the public and health care providers.

AMOUNT OF MONEY IN THE GRANT PROGRAM: The availability of funds for this program is contingent on appropriation of funds to the department. Contact the office identified below to determine whether the funds have been awarded and to receive further information.

GROUP OR ENTITIES WHICH MAY APPLY FOR THE GRANT PROGRAM: New Jersey hospitals operating a 24-hour, 7-day-a-week poison information and education service which is accredited by the American Association of Poison Control Centers (AAPCC) as a regional poison center.

QUALIFICATIONS NEEDED BY AN APPLICANT TO BE CONSIDERED FOR THE GRANT: Hospital must have AAPCC regional poison center accreditation; toxicologist as the poison center medical director; qualified poison specialists to answer the telephone lines around the clock and to handle over 65,000 calls annually.

PROCEDURES FOR ELIGIBLE ENTITIES TO APPLY FOR GRANT FUNDS: Contact office identified below for information and health services contract application form.

FOR INFORMATION CONTACT:

Director
Office of Emergency Medical Services
CN 364
Trenton, NJ 08625-0364
(609) 292-6789

DEADLINE BY WHICH APPLICATIONS MUST BE SUBMITTED: April 15 annually (one award).

DATE BY WHICH APPLICANT SHALL BE NOTIFIED WHETHER THEY WILL RECEIVE FUNDS: June 15 annually (for the grant period July 1—June 30).

HUMAN SERVICES

(a)

DIVISION OF PUBLIC WELFARE

Petition for Rulemaking
Standards of Performance

Petitioner: Robert Fasanello, Director, Hunterdon County Board of Social Services.

Authority: N.J.S.A. 52:14B-4(f) and N.J.A.C. 1:30-3.6(a).

Take notice that on April 15, 1988, a petition was filed with the Department of Human Services requesting that a rule be proposed concerning "a standard of measure for investigative performance of county welfare agencies" maintained as an "internal policy" by its Division of Public Welfare. The petitioner states that "standards of performance upon which the Division of Public Welfare acts to grant or withhold approval of budget and staffing for county welfare agencies should not be disseminated by internal memo . . . but are properly promulgated in the form of rules under the Administrative Procedures Act."

Pursuant to N.J.S.A. 52:14B-4(f), the Department filed a notice of action with the Office of Administrative Law, on May 13, 1988, which appears below.

AGENCY RESPONSE: The Division of Public Welfare is in agreement that certain criteria may exist which would more accurately portray the effectiveness of a county welfare agency's (CWA's) performance in specific areas.

Prior to preparation of the CWA Budget Instructions for Calendar Year 1988, a committee was formed, consisting primarily of CWA Directors, to review staffing standards in critical sections of operation. During the meetings which ensued, the members adopted recommendations designed to resolve a number of problem areas in staffing requirements. Upon presentation to the CWA Directors' Association, those recommendations were found to be acceptable.

Since further study and review of the matter will be required, including the reconvening of the above mentioned committee, the Department is not prepared to initiate rulemaking on the issue at this time. A final response will therefore be made no later than within the next six months.

(b)

THE COMMISSIONER

Developmental Disabilities Council
Availability of Grants

Take notice that, in compliance with N.J.S.A. 52:14-34.4, the Department of Human Services hereby announces the availability of the following grant program:

A. **Name of program:** The Office of Grants Management in Division of Developmental Disabilities (Department of Human Services) is the administering agency for the New Jersey Developmental Disabilities Council. These grants are utilized by the Division, pursuant to its responsibilities in implementing the "Developmental Disabilities Assistance and Bill of Rights Amendment of 1987—P.L. 100-146."

Grant Title: OPMRDD Public Information Initiation 1988, Part I.

B. **Purpose:** New Jersey Office for Prevention of Mental Retardation and Developmental Disabilities (OPMRDD) has been allocated State funding specific to the goal of public information relative to prevention of mental retardation and other developmental disabilities, with the intent (1) to increase public and professional awareness of the preventability of many forms of disability, and (2) to modify conditions of life, professional practices, or personal behaviors in such a way as to reduce the risks, and hence the incidence, of various kinds of mental and physical disabilities originated early in life.

C. **Amount of money in this program:** Fifteen grants will be awarded in amounts between $5,000 and $25,000. The grants will be planned for initiation and completion between October 1, 1988 and September 3, 1989.

D. **Organizations which may apply for funding under this program:** Agencies must be New Jersey based organizations, or corporate bodies; non-profit, profit making or public entities, who have demonstrated capacity to carry out the proposed project.

E. **Procedure for eligible organizations to apply.** Proposal packages may be requested from:

Gwen Ehlers, Supervisor
Office of Grants Management
Division of Developmental Disabilities
222 South Warren Street
CN 700
Trenton, NJ 08625

F. **Address for applications to be submitted:** Same as above.

G. **Deadline by which application proposals must be submitted:** Proposals must be submitted by June 20, 1988.

H. **Date by which applicants shall be notified of approval or disapproval:** Applicants shall receive notice of approval or disapproval of an RFP Proposal by July 20, 1988.

PERSONNEL

(c)

MERIT SYSTEM BOARD

Petition for Rulemaking
Non-interference in Collective Bargaining
N.J.A.C. 4A:1-1.5

Petitioners: Employees of the Division of Motor Vehicles, New Jersey Department of Law and Public Safety.

Authority: N.J.S.A. 11A:1-2(e).

Take notice that on April 19, 1988, employees of the Division of Motor Vehicles filed a rulemaking petition with the Department of Personnel requesting the promulgation of a new rule, N.J.A.C. 4A:1-1.5.

The petitioners' proposal would prohibit the Commissioner of the Department of Personnel and the Merit System Board from promulgating any rule, or undertaking any action which would abrogate, change or weaken any article under a union contract. The petitioners contend that this proposed rule is consistent with N.J.S.A. 11A:1-2(e) which protects career public employees from political coercion and recognizes bargaining and other rights secured under statute and collective negotiation law. In addition, if the proposed rule is adopted, the petitioners request that N.J.A.C. 4A:6-5.3(c) and (d); 4A:6-1.3 and 4A:4-2.6 be deleted so as to make all rules under Title 4A consistent with the new rule.

Notice of further action with respect to this petition will appear in the New Jersey Register pursuant to N.J.A.C. 1:30-3.6 and 4A:1-1.4.

EXECUTIVE ORDER NO. 66(1978) EXPIRATION DATES

Pursuant to N.J.A.C. 1:30-4.4, all expiration dates are now affixed at the chapter level. The following table is a complete listing of all current New Jersey Administrative Code expiration dates by **Title** and **Chapter.** If a chapter is not cited, then it does not have an expiration date. In some instances, however, exceptions occur to the chapter-level assignment. These variations do appear in the listing along with the appropriate chapter citation, and are noted either as an exemption from Executive Order No. 66(1978) or as a subchapter-level date differing from the chapter date.

Current expiration dates may also be found in the loose-leaf volumes of the Administrative Code under the **Title** Table of Contents for each executive department or agency and on the **Subtitle** page for each group of chapters in a Title. Please disregard all expiration dates appearing elsewhere in a Title volume.

This listing is revised monthly and appears in the first issue of each month.

OFFICE OF ADMINISTRATIVE LAW—TITLE 1

N.J.A.C.	Expiration Date
1:1	5/4/92
1:5	10/20/91
1:6	5/4/92
1:6A	5/4/92
1:7	5/4/92
1:10	5/4/92
1:10A	5/4/92
1:10B	10/6/91
1:11	5/4/92
1:13	5/4/92
1:20	5/4/92
1:21	5/4/92
1:30	2/14/91
1:31	6/17/92

AGRICULTURE—TITLE 2

N.J.A.C.	Expiration Date
2:1	9/3/90
2:2	10/3/88
2:3	6/18/89
2:5	6/18/89
2:6	9/3/90
2:7	9/29/88
2:9	7/7/91
2:16	5/7/90
2:22	7/6/92
2:23	6/6/88
2:24	2/11/90
2:32	6/1/92
2:48	11/27/90
2:50	5/1/92
2:52	6/7/90
2:53	3/3/91
2:54	Exempt (7 U.S.C. 601 et seq. 7 C.F.R. 1004)
2:68	8/1/88
2:69	10/3/88
2:70	5/7/90
2:71	9/1/88
2:72	9/1/88
2:73	7/18/88
2:74	9/1/88
2:76	8/29/89
2:90	6/24/90

BANKING—TITLE 3

N.J.A.C.	Expiration Date
3:1	1/6/91
3:2	4/15/90
3:6	3/3/91
3:7	9/16/90
3:11	3/19/89
3:13	11/17/91
3:17	6/18/91
3:18	1/19/93
3:19	3/17/91
3:21	2/2/92
3:22	5/21/89
3:23	7/6/92
3:24	8/20/89
3:25	8/17/92
3:26	12/31/90
3:27	9/16/90
3:28	12/17/89
3:30	10/17/88
3:38	10/5/92
3:41	10/16/90
3:42	4/4/93

PERSONNEL (CIVIL SERVICE)—TITLE 4/4A

N.J.A.C.	Expiration Date
4:1	1/28/90
4:2	1/28/90
4:3	6/4/89
4:4	12/5/91
4:6	5/5/91
4A:1	10/5/92
4A:2	10/5/92
4A:4	6/6/93
4A:5	10/5/92
4A:7	10/5/92
4A:9	10/5/92
4A:6	1/4/93
4A:10	11/2/92

COMMUNITY AFFAIRS—TITLE 5

N.J.A.C.	Expiration Date
5:3	9/1/88
5:4	10/5/92
5:10	12/1/88
5:11	3/1/89
5:12	1/1/90
5:13	12/24/92
5:14	12/1/90
5:17	6/1/89
5:18	2/1/90
5:18A	2/1/90
5:18B	2/1/90
5:19	2/1/93
5:22	12/1/90
5:23	3/1/93
5:24	9/1/90
5:25	3/1/91
5:26	3/1/91
5:27	6/1/90
5:28	12/20/90
5:29	6/18/91
5:30	6/1/88
5:31	12/1/89
5:37	11/18/90
5:38	11/7/88
5:51	9/1/88
5:70	7/9/92
5:71	3/1/90
5:80	5/20/90
5:91	6/16/91

N.J.A.C.	Expiration Date
5:92	6/16/91
5:100	5/7/89

DEPARTMENT OF DEFENSE—TITLE 5A

N.J.A.C.	Expiration Date
5A:2	5/20/90

EDUCATION—TITLE 6

N.J.A.C.	Expiration Date
6:2	3/1/89
6:3	8/18/88
6:8	1/5/92
6:11	12/12/90
6:12	4/2/91
6:20	8/9/90
6:21	8/9/90
6:22	9/3/90
6:24	4/2/91
6:26	1/24/90
6:27	1/24/90
6:28	6/1/89
6:29	3/25/90
6:30	8/31/88
6:31	1/24/90
6:39	10/18/89
6:43	4/7/91
6:46	10/5/92
6:53	7/7/92
6:64	5/1/88
6:68	4/12/90
6:69	6/4/91
6:70	1/25/90
6:79	11/25/92

ENVIRONMENTAL PROTECTION—TITLE 7

N.J.A.C.	Expiration Date
7:1	9/16/90
7:1A	6/5/92
7:1C	6/17/90
7:1D	12/1/88
7:1E	7/15/90
7:1F	4/20/92
7:1G	10/1/89
7:1H	7/24/90
7:1I	11/18/88
7:2	7/19/88
7:3	3/21/93
7:6	12/19/88
7:7	5/7/89
7:7A	6/6/93
7:7E	7/24/90
7:7F	1/19/93
7:8	2/5/93
7:9	1/21/91
7:10	9/4/89
7:11	5/13/93
7:12	4/11/93
7:13	5/4/89
7:14	4/27/89
7:14A	6/4/89
7:14B	12/21/92
7:15	4/2/89
7:17	4/7/91
7:18	8/6/91
7:19	4/15/90
7:19A	2/19/90
7:19B	2/19/90
7:20	5/6/90
7:20A	12/19/88
7:22	1/5/92
7:23	6/18/89
7:24	5/19/91

N.J.A.C.	Expiration Date
7:25	2/18/91
(Except for 7:25-1 which expired 9/17/85)	
7:25A	5/6/90
7:26	11/4/90
7:27	Exempt
7:27B-3	Exempt
7:28	10/7/90
7:29	3/18/90
7:29B	2/1/93
7:30	12/4/92
7:36-1	8/5/90
7:36-2	Expired 1/9/86
7:36-3	Expired 1/9/86
7:36-4	8/5/90
7:36-5	Expired 1/9/86
7:36-6	Expired 1/9/86
7:36-7	8/5/90
7:37	Exempt
7:38	9/18/90
7:45	Expired 1/11/85

HEALTH—TITLE 8

N.J.A.C.	Expiration Date
8:7	9/16/90
8:8	5/21/89
8:9	2/18/91
8:13	9/8/92
8:19	6/28/90
8:20	3/4/90
8:21	11/18/90
8:21A	4/1/90
8:22	8/4/91
8:23	12/17/89
8:24	5/2/93
8:25	5/20/88
8:26	8/4/91
8:31	11/5/89
8:31A	3/18/90
8:31B	10/15/90
8:33	10/7/90
8:33A	4/15/90
8:33B	10/7/90
8:33C	8/20/89
8:33D	2/1/87
8:33E	6/23/92
8:33F	1/14/90
8:33G	7/20/89
8:33H	7/19/90
8:33I	9/15/91
8:33J	5/17/89
8:33K	4/16/89
8:34	11/18/88
8:39	6/20/88
8:40	4/15/90
8:41	2/17/92
8:42	8/17/92
8:42A	6/12/91
8:42B	8/1/88
8:43	1/21/91
8:43A	9/3/90
8:43B	1/21/91
8:43E	12/11/92
8:43F	3/18/90
8:43G	9/8/91
8:43I	3/21/93
8:44	11/7/88
8:45	5/20/90
8:48	8/20/89
8:51	9/16/90
8:52	12/15/91
8:53	8/4/91
8:57	6/18/90
8:59	10/1/89
8:60	5/3/90

N.J.A.C.	Expiration Date
8:61	10/6/91
8:65	12/2/90
8:70	9/17/88
8:71	4/2/89

HIGHER EDUCATION—TITLE 9

N.J.A.C.	Expiration Date
9:1	1/17/89
9:2	6/17/90
9:3	10/17/88
9:4	10/30/91
9:5	1/21/91
9:6	5/20/90
9:6A	1/4/93
9:7	2/28/93
9:8	11/4/90
9:9	10/3/88
9:11	1/17/89
9:12	1/17/89
9:14	5/20/90
9:15	10/25/88

HUMAN SERVICES—TITLE 10

N.J.A.C.	Expiration Date
10:1	5/6/88
10:2	1/5/92
10:3	9/19/88
10:4	1/3/88
10:5	12/19/88
10:6	2/21/89
10:12	1/5/92
10:14	5/16/93
10:36	8/18/91
10:37	11/4/90
10:38	5/28/91
10:40	3/15/89
10:42	8/18/91
10:43	9/1/88
10:44	10/3/88
10:44A	2/7/88
10:44B	4/15/90
10:45	9/19/88
10:47	11/4/90
10:48	1/21/91
10:49	8/12/90
10:50	3/3/91
10:51	10/28/90
10:52	2/19/90
10:53	4/29/90
10:54	3/3/91
10:55	3/11/90
10:56	8/26/91
10:57	3/3/91
10:58	3/3/91
10:59	3/3/91
10:60	8/27/90
10:61	3/3/91
10:62	3/3/91
10:63	11/29/89
10:64	3/3/91
10:65	11/5/89
10:66	12/15/88
10:67	3/3/91
10:68	7/7/91
10:69	6/6/93
10:69A	4/20/93
10:69B	11/21/88
10:70	6/16/91
10:71	1/6/91
10:72	8/27/92
10:80	8/23/89
10:81	10/15/89
10:82	10/29/89

N.J.A.C.	Expiration Date
10:85	1/30/90
10:87	3/1/89
10:89	9/11/90
10:90	10/14/92
10:94	1/6/91
10:95	8/23/89
10:97	4/16/89
10:99	2/19/90
10:100	2/6/89
10:109	3/17/91
10:112	2/17/89
10:120	9/26/88
10:121	3/13/89
10:121A	12/7/92
10:122	8/6/89
10:122A	Exempt
10:122B	9/10/89
10:123	7/20/90
10:124	12/7/92
10:125	7/16/89
10:127	9/19/88
10:129	10/11/89
10:130	9/19/88
10:131	12/7/92
10:132	1/5/92
10:141	2/21/89

CORRECTIONS—TITLE 10A

N.J.A.C.	Expiration Date
10A:1	7/6/92
10A:3	10/6/91
10A:4	7/21/91
10A:5	10/6/91
10A:6	11/2/92
10A;8	11/16/92
10A:9	1/20/92
10A:10-6	8/17/92
10A:16	4/6/92
10A:17	12/15/91
10A:18	7/6/92
10A:31	2/4/90
10A:32	3/4/90
10A:33	7/16/89
10A:34	4/6/92
10A:70	Exempt
10A:71	4/15/90

INSURANCE—TITLE 11

N.J.A.C.	Expiration Date
11:1	2/3/91
11:1-20	7/7/88
11:1-22	7/7/88
11:2	12/2/90
11:3	1/6/91
11:4	12/2/90
11:5	11/7/88
11:7	10/19/92
11:10	7/15/90
11:12	10/27/91
11:13	11/12/92
11:14	7/2/89
11:15	12/3/89
11:16	2/3/91
11:17	4/18/93

LABOR—TITLE 12

N.J.A.C.	Expiration Date
12:15	8/19/90
12:16	4/1/90
12:17	1/6/91
12:18	3/7/93

N.J.A.C.	Expiration Date
12:20	11/5/89
12:35	8/5/90
12:45	5/2/93
12:46	5/2/93
12:47	5/2/93
12:48	5/2/93
12:49	5/2/93
12:51	6/30/91
12:56	9/26/90
12:57	9/26/90
12:58	9/26/90
12:60	3/21/93
12:90	12/17/89
12:100	11/5/89
12:105	1/21/91
12:110	1/19/93
12:120	5/3/90
12:175	12/9/88
12:190	1/4/93
12:195	9/6/88
12:200	8/5/90
12:235	5/5/91

COMMERCE AND ECONOMIC DEVELOPMENT—TITLE 12A

N.J.A.C.	Expiration Date
12A:9	3/7/93
12A:10-1	8/15/89
12A:11	9/21/92
12A:12	9/21/92
12A:100-1	9/8/91

LAW AND PUBLIC SAFETY—TITLE 13

N.J.A.C.	Expiration Date
13:1	7/19/88
13:1C	Expired 12/1/83
13:2	8/5/90
13:3	4/25/93
13:4	1/21/91
13:10	5/27/89
13:13	6/17/90
13:18	4/1/90
13:19	8/23/89
13:20	12/18/90
13:21	12/16/90
13:22	1/7/90
13:23	6/4/89
13:24	11/5/89
13:25	3/18/90
13:26	10/17/88
13:27	4/1/90
13:28	5/16/93
13:29	6/3/90
13:30	4/15/90
13:31	12/12/91
13:32	10/23/92
13:33	3/18/90
13:34	11/21/88
13:35	11/19/89
13:36	11/19/89
13:37	2/11/90
13:38	10/7/90
13:39	1/6/91
13:39A	7/7/91
13:40	9/3/90
13:41	9/3/90
13:42	11/3/88
13:43	9/8/88
13:44	8/20/89
13:44B	11/2/92
13:44C	6/2/91
13:45A	12/16/90
13:46	6/3/90

N.J.A.C.	Expiration Date
13:47	2/2/92
13:47A	10/5/92
13:47B	1/4/89
13:47C	8/20/89
13:48	1/21/91
13:49	12/19/88
13:51	4/27/92
13:54	10/5/91
13:58	9/7/89
13:59	9/16/90
13:60	1/20/92
13:70	2/25/90
13:71	2/25/90
13:75	8/20/89
13:76	9/6/88
13:77	2/1/93

PUBLIC UTILITIES—TITLE 14

N.J.A.C.	Expiration Date
14:1	12/16/90
14:3	5/6/90
14:5	12/16/90
14:6	3/3/91
14:9	4/15/90
14:11	1/27/92
14:10	9/8/91
14:17	5/7/89
14:18	7/29/90

ENERGY—TITLE 14A

N.J.A.C.	Expiration Date
14A:2	4/17/89
14A:3	10/7/90
14A:5	10/19/88
14A:6	8/6/89
14A:7	9/16/90
14A:8	9/20/89
14A:11	9/20/89
14A:12	2/7/88
14A:13	2/2/92
14A:14	2/6/89
14A:20	2/3/91
14A:21	11/21/90
14A:22	6/4/89

STATE—TITLE 15

N.J.A.C.	Expiration Date
15:2	5/2/93
15:3	7/7/91
15:5	2/17/92
15:10	2/18/91

TRANSPORTATION—TITLE 16

N.J.A.C.	Expiration Date
16:1	8/5/90
16:2	10/3/88
16:6	9/3/90
16:13	5/7/89
16:16	11/7/88
16:17	11/7/88
16:20A	12/17/89
16:20B	12/17/89
16:21	9/3/90
16:21A	8/20/89
16:22	2/3/91
16:26	8/6/89
16:27	9/8/91
16:28	11/7/88

N.J.A.C.	Expiration Date
16:28A	11/7/88
16:29	11/7/88
16:30	11/7/88
16:31	11/7/88
16:31A	10/20/88
16:32	4/15/90
16:33	9/3/90
16:41	7/28/92
16:41A	2/19/90
16:41B	3/4/90
16:43	9/3/90
16:44	10/3/88
16:49	3/18/90
16:51	4/6/92
16:53	3/19/89
16:53A	4/15/90
16:53C	9/19/88
16:53D	5/7/89
16:54	4/7/91
16:55	11/7/88
16:56	6/4/89
16:60	11/7/88
16:61	11/7/88
16:62	4/15/90
16:72	3/31/91
16:73	1/30/92
16:75	5/13/93
16:76	12/19/88
16:77	1/21/90
16:78	10/7/90
16:79	10/20/91

TREASURY-GENERAL—TITLE 17

N.J.A.C.	Expiration Date
17:1	5/6/93
17:2	12/17/89
17:3	6/6/88
17:4	7/1/90
17:5	12/2/90
17:6	2/19/89
17:7	6/6/88
17:8	6/27/90
17:9	6/6/88
17:10	5/6/93
17:12	8/15/89
17:16	12/2/90
17:19	3/18/90
17:20	11/7/88
17:25	6/18/89
17:27	11/7/88
17:28	9/13/90
17:29	10/18/90
17:30	5/4/92
17:32	3/21/93

TREASURY-TAXATION—TITLE 18

N.J.A.C.	Expiration Date
18:3	4/23/89
18:5	4/16/89
18:6	4/2/89
18:7	4/2/89
18:8	4/2/89
18:9	8/12/88
18:12	8/12/88
18:12A	8/12/88
18:14	8/12/88
18:15	8/12/88
18:16	8/12/88
18:17	8/12/88
18:18	4/2/89
18:19	4/6/89
18:22	4/2/89
18:23	4/2/89
18:23A	8/5/90
18:24	8/12/88
18:25	1/6/91
18:26	8/12/88
18:30	4/2/89
18:35	8/12/88
18:36	2/4/90
18:37	8/5/90
18:38	2/16/93
18:39	9/8/92

OTHER AGENCIES—TITLE 19

N.J.A.C.	Expiration Date
19:3	6/19/88
19:3B	Exempt (N.J.S.A. 13:17-1)
19:4	11/7/88
19:4A	5/2/88
19:8	6/1/88
19:9	7/13/88
19:12	8/7/91
19:16	8/7/91
19:17	7/15/88
19:25	1/9/91
19:30	10/7/90
19:40	9/26/89
19:41	5/12/93
19:42	5/12/93
19:43	4/27/89
19:44	10/13/88
19:45	4/7/88
19:46	4/28/93
19:47	4/28/93
19:48	10/13/88
19:49	3/29/88
19:50	5/12/93
19:51	8/14/91
19:52	9/25/91
19:53	4/28/93
19:54	4/15/88
19:61	7/7/91
19:65	7/7/91
19:75	1/17/89

REGISTER INDEX OF RULE PROPOSALS AND ADOPTIONS

The research supplement to the New Jersey Administrative Code

A CUMULATIVE LISTING OF CURRENT PROPOSALS AND ADOPTIONS

The **Register Index of Rule Proposals and Adoptions** is a complete listing of all active rule proposals (with the exception of rule changes proposed in this Register) and all new rules and amendments promulgated since the most recent update to the Administrative Code. Rule proposals in this issue will be entered in the Index of the next issue of the Register. **Adoptions promulgated in this Register have already been noted in the Index by the addition of the Document Number and Adoption Notice N.J.R. Citation next to the appropriate proposal listing.**

Generally, the key to locating a particular rule change is to find, under the appropriate Administrative Code Title, the N.J.A.C. citation of the rule you are researching. If you do not know the exact citation, scan the column of rule descriptions for the subject of your research. To be sure that you have found all of the changes, either proposed or adopted, to a given rule, scan the citations above and below that rule to find any related entries.

At the bottom of the index listing for each Administrative Code Title is the Transmittal number and date of the latest looseleaf update to that Title. Updates are issued monthly and include the previous month's adoptions, which are subsequently deleted from the Index. To be certain that you have a copy of all recent promulgations not yet issued in a Code update, retain each Register beginning with the April 4, 1988 issue.

If you need to retain a copy of all currently proposed rules, you must save the last 12 months of Registers. A proposal may be adopted up to one year after its initial publication in the Register. Failure to adopt a proposed rule on a timely basis requires the proposing agency to resubmit the proposal and to comply with the notice and opportunity-to-be-heard requirements of the Administrative Procedure Act (N.J.S.A. 52:14B-1 et seq.), as implemented by the Rules for Agency Rulemaking (N.J.A.C. 1:30) of the Office of Administrative Law. If an agency allows a proposed rule to lapse, "Expired" will be inserted to the right of the Proposal Notice N.J.R. Citation in the next Register following expiration. Subsequently, the entire proposal entry will be deleted from the Index. See: N.J.A.C. 1:30-4.2(c).

Terms and abbreviations used in this Index:

N.J.A.C. Citation. The New Jersey Administrative Code numerical designation for each proposed or adopted rule entry.

Proposal Notice (N.J.R. Citation). The New Jersey Register page number and item identification for the publication notice and text of a proposed amendment or new rule.

Document Number. The Registry number for each adopted amendment or new rule on file at the Office of Administrative Law, designating the year of adoption of the rule and its chronological ranking in the Registry. As an example, R.1988 d.1 means the first rule adopted in 1988.

Adoption Notice (N.J.R. Citation). The New Jersey Register page number and item identification for the publication notice and text of an adopted amendment or new rule.

Transmittal. A series number and supplement date certifying the currency of rules found in each Title of the New Jersey Administrative Code: Rule adoptions published in the Register after the Transmittal date indicated do not yet appear in the loose-leaf volumes of the Code.

N.J.R. Citation Locator. An issue-by-issue listing of first and last pages of the previous 12 months of Registers. Use the locator to find the issue of publication of a rule proposal or adoption.

MOST RECENT UPDATE TO THE ADMINISTRATIVE CODE: SUPPLEMENT MARCH 21, 1988

NEXT UPDATE: SUPPLEMENT APRIL 18, 1988

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
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	20 N.J.R. 1 and 124	January 4, 1988
19 N.J.R. 1121 and 1258	July 6, 1987	20 N.J.R. 125 and 220	January 19, 1988
19 N.J.R. 1259 and 1352	July 20, 1987	20 N.J.R. 221 and 320	February 1, 1988
19 N.J.R. 1353 and 1474	August 3, 1987	20 N.J.R. 321 and 434	February 16, 1988
19 N.J.R. 1475 and 1588	August 17, 1987	20 N.J.R. 435 and 570	March 7, 1988
19 N.J.R. 1589 and 1676	September 8, 1987	20 N.J.R. 571 and 692	March 21, 1988
19 N.J.R. 1677 and 1758	September 21, 1987	20 N.J.R. 693 and 842	April 4, 1988
19 N.J.R. 1759 and 1858	October 5, 1987	20 N.J.R. 843 and 950	April 18, 1988
19 N.J.R. 1859 and 1926	October 19, 1987	20 N.J.R. 951 and 1018	May 2, 1988
19 N.J.R. 1927 and 2086	November 2, 1987	20 N.J.R. 1019 and 1126	May 16, 1988
19 N.J.R. 2087 and 2224	November 16, 1987	20 N.J.R. 1127 and 1316	June 6, 1988
19 N.J.R. 2225 and 2324	December 7, 1987		

N.J.A.C. CITATION		PROPOSAL NOTICE (N.J.R. CITATION)	DOCUMENT NUMBER	ADOPTION NOTICE (N.J.R. CITATION)
ADMINISTRATIVE LAW—TITLE 1				
1:30-1.2, 2.8	Agency rulemaking: use of appendices	20 N.J.R. 1021(a)		
1:30-3.1	Regulatory flexibility analysis and proposed rulemaking	20 N.J.R. 573(a)		
	Most recent update to Title 1: TRANSMITTAL 1988-2 (supplement March 21, 1988)			
AGRICULTURE—TITLE 2				
2:5-2	Equine infectious anemia control	20 N.J.R. 695(a)		
2:23	Gypsy moth control: voluntary suppression program	20 N.J.R. 845(a)		
2:32-2.1, 2.3, 2.5, 2.8, 2.10, 2.12, 2.13, 2.14, 2.19, 2.20, 2.22, 2.25, 2.27, 2.33	Sire Stakes Program	20 N.J.R. 323(a)	R.1988 d.189	20 N.J.R. 975(a)
2:69-1.11	Commercial values of primary plant nutrients	20 N.J.R. 696(a)		
2:71	Grades and standards	20 N.J.R. 953(a)		
2:72	Licensing and bonding of buyers of perishable commodities	20 N.J.R. 955(a)		
2:73-2	Eggs: Seal of Quality program	20 N.J.R. 956(a)		
2:74-1	Controlled atmosphere storage for apples	20 N.J.R. 956(b)		
2:76-6.2, 6.5, 6.6, 6.9, 6.15, 6.16	Farmland development easements: residual dwelling sites	20 N.J.R. 324(a)		
	Most recent update to Title 2: TRANSMITTAL 1988-1 (supplement March 21, 1988)			
BANKING—TITLE 3				
3:1-1.1	Maximum interest rate on first mortgages on residences with one to six units	19 N.J.R. 2089(a)		
3:1-2.17	Repeal (see 3:32-1)	20 N.J.R. 697(a)		
3:1-14	Revolving credit equity loans	19 N.J.R. 1594(a)		
3:1-16	Mortgage loan practices	20 N.J.R. 1021(b)		
3:2-1.1, 1.2, 1.3, 1.4	Advertising by financial institutions	20 N.J.R. 1025(a)		
3:6-9	Capital stock savings bank: change in control	19 N.J.R. 1762(a)		
3:11-12	Commercial loans by savings banks	19 N.J.R. 1679(b)	R.1988 d.230	20 N.J.R. 1075(a)
3:13-2.2, 4.3, 4.4	Bank holding companies: financial filings	20 N.J.R. 127(b)	R.1988 d.149	20 N.J.R. 777(a)
3:32-1.1, 1.2, 1.4, 1.6, 1.7, 1.10, 1.11	Conversion of savings and loan associations from mutual to capital stock	20 N.J.R. 697(a)		
3:38-5	Repeal (see 3:1-16)	20 N.J.R. 1021(b)		
3:42	Pinelands Development Credit Bank: procedural rules	20 N.J.R. 128(a)	R.1988 d.157	20 N.J.R. 777(b)
	Most recent update to Title 3: TRANSMITTAL 1988-1 (supplement January 19, 1988)			
CIVIL SERVICE—TITLE 4				
4:1-6, 7, 10.1, 27	Repeal (see 4A:3)	20 N.J.R. 846(a)		
4:1-8, 9, 10.2–10.5, 11, 12, 13, 14, 15, 16.13	Repeal (see 4A:4)	20 N.J.R. 327(a)	R.1988 d.259	20 N.J.R. 1183(b)
4:1-16.1–16.6, 24.2	Repeal (see 4A:8)	19 N.J.R. 1363(a)		
4:2-6.3, 11, 13, 14.1, 15.1	Repeal (see 4A:4)	20 N.J.R. 327(a)	R.1988 d.259	20 N.J.R. 1183(b)
4:2-6.4–6.10, 7, 27	Repeal (see 4A:3)	20 N.J.R. 846(a)		
4:2-16.1, 16.2	Repeal (see 4A:8)	19 N.J.R. 1363(a)		
4:3-2	Repeal (see 4A:3)	20 N.J.R. 846(a)		

N.J.A.C. CITATION		PROPOSAL NOTICE (N.J.R. CITATION)	DOCUMENT NUMBER	ADOPTION NOTICE (N.J.R. CITATION)
4:3-6.4, 11.1, 13.2, 14	Repeal (see 4A:4)	20 N.J.R. 327(a)	R.1988 d.259	20 N.J.R. 1183(b)
4:3-16.1, 16.2	Repeal (see 4A:8)	19 N.J.R. 1363(a)		

Most recent update to Title 4: TRANSMITTAL 1988-1 (supplement January 19, 1988)

PERSONNEL—TITLE 4A

4A:1-1.3	Definitions	20 N.J.R. 326(a)	R.1988 d.258	20 N.J.R. 1183(a)
4A:1-1.3	State and local departments defined	20 N.J.R. 845(b)		
4A:3	Classification, services, and compensation	20 N.J.R. 846(a)		
4A:4	Selection and appointment	20 N.J.R. 327(a)	R.1988 d.259	20 N.J.R. 1183(b)
4A:6-1.3, 1.10	Sick leave; leave without pay	20 N.J.R. 133(a)		
4A:6-1.3, 1.10	Sick leave, leave without pay: extension of comment period	20 N.J.R. 341(a)		
4A:8	Layoffs	19 N.J.R. 1363(a)		

Most recent update to Title 4A: TRANSMITTAL 1988-1 (supplement January 19, 1988)

COMMUNITY AFFAIRS—TITLE 5

5:12-1.1, 2.1, 2.4	Homelessness Prevention Program: eligibility for temporary assistance	19 N.J.R. 1777(a)		
5:15	Emergency shelters for the homeless	20 N.J.R. 341(b)		
5:19-6.3, 8	Continuing care retirement communities: application fees; nonbinding reservation agreements	20 N.J.R. 347(a)	R.1988 d.190	20 N.J.R. 976(a)
5:23	Uniform Construction Code	20 N.J.R. 223(a)	R.1988 d.168	20 N.J.R. 893(a)
5:23-2.5	Uniform Construction Code: increase in structure size	20 N.J.R. 1026(a)		
5:23-2.23	UCC: use and occupancy of buildings undergoing alteration	20 N.J.R. 223(b)	R.1988 d.167	20 N.J.R. 893(b)
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)	R.1988 d.144	20 N.J.R. 783(a)
5:23-3.2	Commercial farm building subcode: public hearings	19 N.J.R. 1862(a)		
5:23-3.6	Uniform Construction Code: manufacturer's recommendations	20 N.J.R. 699(a)		
5:23-3.11A	Incorporation of education enhancements at N.J.A.C. 6:22-2.3	———	———	20 N.J.R. 824(d)
5:23-3.14, 3.20	Uniform Construction Code: 1988 building and mechanical subcodes	20 N.J.R. 575(a)		
5:23-8.17	Asbestos safety control monitor: correction	———	———	20 N.J.R. 1115(a)
5:23-3.18	Energy Subcode	20 N.J.R. 699(b)		
5:23-9.1, 9.2	UCC interpretations: Plumbing Subcode and manufactured housing	20 N.J.R. 224(a)	R.1988 d.195	20 N.J.R. 977(a)
5:24-2.3	Senior citizens and disabled protected tenancy: taxable income	20 N.J.R. 349(a)	R.1988 d.191	20 N.J.R. 978(a)
5:24-2.5	Senior citizen and disabled protected tenancy: review of determination documents	20 N.J.R. 1026(b)		
5:24-2.7	Senior citizen and disabled protected tenancy: appeal procedure	20 N.J.R. 437(a)		
5:30	Local Finance Board rules	20 N.J.R. 1027(a)		
5:80-26	Housing resale and rental affordability control	19 N.J.R. 802(a)	R.1988 d.166	20 N.J.R. 893(c)
5:80-26.1, 26.2, 26.3, 26.11, 26.16, 26.21	Housing affordability controls	20 N.J.R. 862(a)		
5:91-13.4	Council on Affordable Housing: motion procedure	20 N.J.R. 864(a)		
5:92-1.3, 17	Council on Affordable Housing: rehabilitation of indigenous need	20 N.J.R. 864(b)		
5:92-6.1	Council on Affordable Housing: rehabilitation credits	19 N.J.R. 1863(a)	R.1988 d.165	20 N.J.R. 897(a)
5:92-8.4	Council on Affordable Housing: developer agreements	20 N.J.R. 865(a)		
5:92-12.11	Council on Affordable Housing: rental surcharge	19 N.J.R. 1597(a)		

Most recent update to Title 5: TRANSMITTAL 1988-3 (supplement March 21, 1988)

DEFENSE—TITLE 5A

Most recent update to Title 5A: TRANSMITTAL 1 (supplement May 20, 1985)

EDUCATION—TITLE 6

6:3	School districts	20 N.J.R. 1027(b)		
6:3-1.23	Principal certification	20 N.J.R. 437(b)		
6:3-2	Transfer of pupil records	20 N.J.R. 133(b)	R.1988 d.199	20 N.J.R. 978(b)
6:11-3.3	Certification fees	20 N.J.R. 865(b)		
6:11-3.25, 4.2, 5.7, 10	Principal certification	20 N.J.R. 437(b)		
6:20-3.1	Reproposed: Determining tuition rates for sending and receiving districts	19 N.J.R. 2329(a)	R.1988 d.147	20 N.J.R. 787(a)
6:22-1.1, 1.3–1.7, 2.1–2.5, 3.1, 4.1	School facility planning services	20 N.J.R. 3(a)	R.1988 d.155	20 N.J.R. 788(a)
6:22-1.2	School site approval	20 N.J.R. 1032(a)		
6:27-1.14	Repeal (see 6:30)	20 N.J.R. 700(a)		
6:28-11	Special education pilot project	20 N.J.R. 14(a)	R.1988 d.148	20 N.J.R. 796(a)
6:30	Adult education programs	20 N.J.R. 700(a)		

N.J.A.C. CITATION		PROPOSAL NOTICE (N.J.R. CITATION)	DOCUMENT NUMBER	ADOPTION NOTICE (N.J.R. CITATION)
6:31-1.10	Bilingual education and English as a second language programs: exit testing and reentry process	20 N.J.R. 1034(a)		
6:44-2, 3, 4	Repeal (see 6:30)	20 N.J.R. 700(a)		

Most recent update to Title 6: TRANSMITTAL 1988-1 (supplement February 16, 1988)

ENVIRONMENTAL PROTECTION—TITLE 7

7:1C-1.2, 1.5	90-day construction permits: fee structure for treatment works approvals	20 N.J.R. 135(a)		
7:1I	Sanitary Landfill Facility Contingency Fund	20 N.J.R. 443(a)		
7:2	State Park Service	20 N.J.R. 714(a)		
7:2	State Park Service: extenstion of comment period	20 N.J.R. 1035(a)		
7:6-3.10	Water-skiing on Lake Hopatcong	20 N.J.R. 138(a)	R.1988 d.185	20 N.J.R. 898(a)
7:7-2.2	Coastal wetlands maps for Gloucester County	19 N.J.R. 2090(b)		
7:7-2.2	Coastal wetlands boundaries in Salem County	20 N.J.R. 349(b)		
7:7A	Freshwater Wetlands Protection Act rules	19 N.J.R. 2330(a)	R.1988 d.267	20 N.J.R. 1235(a)
7:7A-8.1	Freshwater Wetlands Protection Act rules: correction	20 N.J.R. 22(a)		
7:7A-15, 16	Freshwater Wetlands Protection Act rules: fees, penalties and hearings	20 N.J.R. 576(a)		
7:7E-3.41, 3.46, 7.14, 8.11	Hudson River waterfront development	20 N.J.R. 139(a)		
7:7E-3.41, 3.46, 7.41, 8.11	Hudson River waterfront development: extension of comment period	20 N.J.R. 552(a)		
7:9-1	Sewer systems and wastewater treatment plants	19 N.J.R. 2227(b)	R.1988 d.205	20 N.J.R. 980(a)
7:10-10.2, 11.2, 15	Safe Drinking Water Program fees	20 N.J.R. 142(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	New Jersey Water Supply Authority: policies and procedures	20 N.J.R. 448(a)	R.1988 d.264	20 N.J.R. 1285(a)
7:11-2.2, 2.3, 2.9, 2.13	New Jersey Water Supply Authority rates and charges	20 N.J.R. 144(a)	R.1988 d.265	20 N.J.R. 1286(a)
7:12	Shellfish growing waters	20 N.J.R. 450(a)	R.1988 d.206	20 N.J.R. 980(b)
7:14-8	Penalties and hearings concerning violations of Water Pollution Control Act	20 N.J.R. 455(a)		
7:14A-5.12	Hazardous waste management: closure and post-closure financial assurance	19 N.J.R. 2349(a)		
7:14A-6.4	Groundwater monitoring parameters for hazardous waste facilities	19 N.J.R. 1863(b)		
7:19-6.14	Penalties and hearings concerning violations of Water Pollution Control Act	20 N.J.R. 455(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)	R.1988 d.210	20 N.J.R. 1076(a)
7:22-9	Wastewater treatment: contract awards to small, female, and minority-owned businesses	19 N.J.R. 1604(a)	R.1988 d.263	20 N.J.R. 1287(a)
7:25-1	Shellfishing license program	19 N.J.R. 2358(a)		
7:25-2.20	Higbee Beach Wildlife Management Area	20 N.J.R. 460(a)	R.1988 d.266	20 N.J.R. 1292(a)
7:25-5	1988-89 Game Code	20 N.J.R. 1035(b)		
7:25-18.5	Drifting and anchored gill net seasons; netting mesh in staked gill net fishery	19 N.J.R. 1609(a)		
7:25-18.5	Gill net seasons; staked gill net fishery: extension of comment period	20 N.J.R. 715(a)		
7:25-18.5	Marine fisheries: bait net license and conditions	20 N.J.R. 866(a)		
7:26-1.4, 7.4, 9.1, 12.1	Hazardous waste research and testing facilities: pre-proposal	20 N.J.R. 460(b)		
7:26-1.4, 8.2, 8.3, 8.5, 8.12, 8.14, 9.4, App. A, 12.1, 12.5, 12.12	Hazardous waste management	19 N.J.R. 1936(a)		
7:26-1.4, 9.8–9.11, 9.13, App. A, 12.3	Hazardous waste management: closure and post-closure financial assurance	19 N.J.R. 2349(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)		
7:26-6.5	Interdistrict and intradistrict solid waste flow: Essex County	20 N.J.R. 1048(a)		
7:26-7.3, 7.4, 7.5, 7.6	Hazardous waste management	20 N.J.R. 867(a)		
7:26-12.9	Hazardous waste management: research, development and demonstration permits	20 N.J.R. 462(a)		
7:26-12.12	Hazardous waste facilities and public participation in permit process	20 N.J.R. 715(b)		

N.J.A.C. CITATION		PROPOSAL NOTICE (N.J.R. CITATION)	DOCUMENT NUMBER	ADOPTION NOTICE (N.J.R. CITATION)
7:26-14.1, 14A	Resource Recovery and Solid Waste Disposal Facility Loans	19 N.J.R. 828(a)		
7:26B-1.13	Certification and signatories: correction	———	———	20 N.J.R. 816(a)
7:30	Pesticide Control Code	20 N.J.R. 579(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 Catastropic Prevention Act program: extension of comment period	19 N.J.R. 2092(b)		
7:31-2.12, 2.15, 5	Toxic Catastrophe Prevention Act program: confidentiality and trade secrets	20 N.J.R. 350(a)		
7:31-2.12, 2.15, 5	Confidentiality and trade secrets: correction and extension of comment period	20 N.J.R. 554(a)		
7:36	Green Acres Program	19 N.J.R. 2358(b)		
7:36	Green Acres Program: extension of comment period	20 N.J.R. 552(b)		
7:36	Green Acres Program: extension of comment period	20 N.J.R. 869(a)		
7:45	Delaware and Raritan Canal: State Park review zone	20 N.J.R. 23(a)		
7:45	Delaware and Raritan Canal review zone: extension of comment period	20 N.J.R. 552(c)		
7:50-2.11, 3.32, 4.1, 4.40, 4.66, 5.22–5.26, 5.30, 5.43, 5.47, 6.7, 6.84, 6.107, 6.123, 6.131, 6.132, 6.133	Pinelands Comprehensive Management Plan	20 N.J.R. 716(a)		

Most recent update to Title 7: TRANSMITTAL 1988-3 (supplement March 21, 1988)

HEALTH—TITLE 8

8:7-1.2	Public Health Licensing and Examination Board	20 N.J.R. 364(a)	R.1988 d.236	20 N.J.R. 1204(a)
8:24	Chapter XII, State Sanitary Code: retail food establishments	20 N.J.R. 365(a)	R.1988 d.204	20 N.J.R. 982(a)
8:25	Youth Camp Safety Act standards	20 N.J.R. 463(a)		
8:26-1.2, 1.3, 2.10, 3.15, 3.17, 4.3, 4.4, 5.1, 5.2, 5.3, 5.7, 5.10, 5.11, 6.4, 7.9, 8.9, 8.10	Public recreational bathing	20 N.J.R. 464(a)	R.1988 d.229	20 N.J.R. 1079(a)
8:31B-3.22, 3.31, 3.51	Hospital reimbursement: graduate medical residents	20 N.J.R. 594(a)		
8:31B-3.38	Apportionment of full financial elements	19 N.J.R. 1279(a)		
8:31B-4.37, 4.39	Uncompensated Care Trust Fund: charity care eligibility	20 N.J.R. 595(a)		
8:31B-4.38	Hospital reimbursement: uncompensated care coverage for outpatient dialysis	19 N.J.R. 2092(c)		
8:31B-4.62	Hospital reimbursement: outpatient HealthStart maternal and pediatric care	19 N.J.R. 2365(a)	R.1988 d.213	20 N.J.R. 1082(a)
8:33B-1.3	Demonstration of extracorporeal shock wave lithotripsey services	20 N.J.R. 869(b)		
8:33E-1.1, 1.2	Cardiac diagnostic facilities: complex electrophysiology studies	20 N.J.R. 467a)		
8:33E-2.2, 2.3, 2.4	Cardiac surgery centers: complex electrophysiology studies	20 N.J.R. 468(a)		
8:42B	Drug treatment facilities: standards for licensure	20 N.J.R. 598(a)		
8:39	Long-term care licensing standards	20 N.J.R. 469(a)		
8:43E-2.4, 2.5, 2.19, 2.20	Adult open acute psychiatric beds: need review	20 N.J.R. 617(a)		
8:43E-3.19, 3.20	Inpatient screening psychiatric beds: need review	20 N.J.R. 618(a)		
8:43E-5.20	Intermediate adult and special psychiatric beds: need review	20 N.J.R. 619(a)		
8:60-2.1 (12:120-2.1)	Asbestos removal defined	20 N.J.R. 1049(a)		
8:60-5 (12:120-5)	Asbestos worker and supervisor permits	20 N.J.R. 728(a)	R.1988 d.261	20 N.J.R. 1232(b)
8:65-1.3, 6.6, 8.13	Handling of sodium pentobarbital in animal humane facilities	20 N.J.R. 366(a)		
8:65-10.1	Scheduling of controlled dangerous substances	———	———	20 N.J.R. 1000(a), 1000(b), 1001(a)
8:70-1.4	Drug Utilization Review Council: notice of action on a drug product	20 N.J.R. 870(a)		
8:71	Interchangeable drug products (see 19 N.J.R. 1312(b), 1644(a), 2278(b), 2400(a); 20 N.J.R. 191(a), 654(a))	19 N.J.R. 615(a)	R.1988 d.161	20 N.J.R. 898(c)
8:71	Interchangeable drug products (see 19 N.J.R. 2279(b), 2401(a); 20 N.J.R. 190(a), 655(a))	19 N.J.R. 1488(a)	R.1988 d.163	20 N.J.R. 899(b)
8:71	Interchangeable drug products (20 N.J.R. 191(b), 654(b))	19 N.J.R. 1878(a)	R.1988 d.162	20 N.J.R. 899(a)
8:71	Interchangeable drug products	20 N.J.R. 146(a)	R.1988 d.164	20 N.J.R. 900(a)
8:71	Interchangeable drug products	20 N.J.R. 871(a)		

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N.J.A.C. CITATION		PROPOSAL NOTICE (N.J.R. CITATION)	DOCUMENT NUMBER	ADOPTION NOTICE (N.J.R. CITATION)
HIGHER EDUCATION—TITLE 9				
9:5-1.1	Independent student status	19 N.J.R. 2372(a)	R.1988 d.176	20 N.J.R. 901(a)
9:7-4	Garden State Scholarship Program	20 N.J.R. 720(a)		
9:9-11	Guaranteed Student Loan Program: compliance evaluation of participating institutions	20 N.J.R. 872(a)		
9:11-1.1, 1.7, 1.8, 1.22, 1.23	EOF grant awards for approved part-time enrollment	19 N.J.R. 2373(a)	R.1988 d.151	20 N.J.R. 805(a)
9:11-1.3, 1.4	Educational Opportunity Fund: eligible non-citizens; independent student status	19 N.J.R. 2234(c)	R.1988 d.150	20 N.J.R. 806(a)
9:11-1.5	Educational Opportunity Fund: maximum income levels for undergraduate eligibility	20 N.J.R. 722(a)		
9:11-1.7	Equal Opportunity Fund grants: graduate awards	19 N.J.R. 1879(a)	R.1988 d.152	20 N.J.R. 807(a)
9:11-2	Martin Luther King Physician-Dentist Scholarship Program	19 N.J.R. 2374(a)	R.1988 d.153	20 N.J.R. 807(b)

Most recent update to Title 9: TRANSMITTAL 1988-2 (supplement March 21, 1988)

N.J.A.C. CITATION		PROPOSAL NOTICE (N.J.R. CITATION)	DOCUMENT NUMBER	ADOPTION NOTICE (N.J.R. CITATION)
HUMAN SERVICES—TITLE 10				
10:1-2	Public comment procedure and petitions for rulemaking	20 N.J.R. 1050(a)		
10:4	Communication with communities regarding development of group homes	19 N.J.R. 1976(a)		
10:4	Communication with communities regarding development of group homes: extension of comment period	20 N.J.R. 149(a)		
10:13	Legal Assistance for Medicare Patients (LAMP)	20 N.J.R. 873(a)		
10:14	Statewide Respite Care Program	19 N.J.R. 1712(a)	R.1988 d.226	20 N.J.R. 1107(a)
10:14-1.4, 4.1, 6.3	Statewide Respite Care Program	20 N.J.R. 1051(a)		
10:44A	Licensed community residences for developmentally disabled	20 N.J.R. 149(b)		
10:49-1.1	Presumptive Medicaid eligibility for pregnant women	20 N.J.R. 367(a)	R.1988 d.192	20 N.J.R. 983(a)
10:49-1.1, 1.2	Medical assistance for aged, blind and disabled	20 N.J.R. 548(a)	R.1988 d.212	20 N.J.R. 1103(a)
10:49-1.4	Outpatient hospital services for Medically Needy	19 N.J.R. 1388(a)		
10:49-6.9	Medicaid providers and administrative charges and service fees	20 N.J.R. 518(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)	R.1988 d.262	20 N.J.R. 1214(a)
10:51-1, App. B, C, D, E	Pharmaceutical Services Manual: covered products	20 N.J.R. 875(a)		
10:51-5.6	Pharmaceutical Assistance to Aged and Disabled: income limits	19 N.J.R. 2375(a)	R.1988 d.174	20 N.J.R. 902(a)
10:52-1.6, 1.8	Outpatient hospital services for Medically Needy	19 N.J.R. 1388(a)		
10:53-1.5, 1.7	Outpatient hospital services for Medically Needy	19 N.J.R. 1388(a)		
10:54-4	Medicaid coverage for postpartum services	20 N.J.R. 1052(a)		
10:58-1.2, 3	Medicaid coverage for postpartum services	20 N.J.R. 1052(a)		
10:61-2.4, 2.5	Independent laboratories: standardized claim form	19 N.J.R. 1779(a)	R.1988 d.145	20 N.J.R. 807(c)
10:62-1, 2, 3	Vision Care Manual	20 N.J.R. 956(c)		
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)	R.1988 d.145	20 N.J.R. 807(c)
10:66-1.3, 3	Mental health services: partial care	20 N.J.R. 1054(a)		
10:66-1.6, 3	Medicaid coverage for postpartum services	20 N.J.R. 1052(a)		
10:66-3	Family planning services provided by independent clinics	19 N.J.R. 2376(a)	R.1988 d.156	20 N.J.R. 809(a)
10:69	Hearing Aid Assistance for Aged and Disabled (HAAAD)	20 N.J.R. 519(a)	R.1988 d.250	20 N.J.R. 1220(a)
10:69A	Pharmaceutical Assistance to the Aged and Disabled	20 N.J.R. 369(a)	R.1988 d.211	20 N.J.R. 1106(a)
10:69A-1.2, 6.2, 6.6, 6.10	PAAD income limits	19 N.J.R. 2375(a)	R.1988 d.174	20 N.J.R. 902(a)
10:69C	(see 10:14)	19 N.J.R. 1712(a)	R.1988 d.226	20 N.J.R. 1107(a)
10:71-5.4, 5.5, 5.6, 5.7	Medicaid Only computation amounts and income eligibility standards	20 N.J.R. 207(a)	R.1988 d.193	20 N.J.R. 985(a)
10:72-1.1, 1.2, 2.1, 2.3, 2.7, 3.4, 3.5, 4.3, 4.4, 4.5	Medical assistance for aged, blind and disabled	20 N.J.R. 548(a)	R.1988 d.212	20 N.J.R. 1103(a)
10:72-6	Presumptive Medicaid eligibility for pregnant women	20 N.J.R. 367(a)	R.1988 d.193	20 N.J.R. 983(a)
10:81-3.38–3.42, 3.46	PAM: client resources in AFDC program	20 N.J.R. 1056(a)		
10:81-4.5	AFDC program: transportation costs incident to education or training	20 N.J.R. 620(a)	R.1988 d.253	20 N.J.R. 1221(a)
10:81-7.40	AFDC program: fraudulent receipt of assistance	20 N.J.R. 722(a)		
10:81-11.7	Child support enforcement program	19 N.J.R. 1879(b)		
10:81-11.18	Child support guidelines: spousal support obligation	20 N.J.R. 1058(a)		
10:82-3.2, 3.6, 3.7	ASH: client resources in AFDC program	20 N.J.R. 1059(a)		
10:85-1.5	General Assistance Program audits	19 N.J.R. 2376(b)	R.1988 d.146	20 N.J.R. 809(b)
10:85-3.2, 3.3	GAM: travel costs for job seeking or training	20 N.J.R. 879(a)		
10:85-5.2	General Assistance: payment of inpatient hospital bills	20 N.J.R. 521(a)	R.1988 d.251	20 N.J.R. 1222(a)
10:85-5.3	General Assistance Manual: deadline for medical bills	20 N.J.R. 162(a)	R.1988 d.169	20 N.J.R. 902(b)
10:85-6.3	General Assistance Program statement of refunds: preparation of Form GA-12	19 N.J.R. 2377(a)	R.1988 d.172	20 N.J.R. 903(a)

N.J.A.C. CITATION		PROPOSAL NOTICE (N.J.R. CITATION)	DOCUMENT NUMBER	ADOPTION NOTICE (N.J.R. CITATION)
10:85-8.4	GAM: Pharmaceutical Assistance (PAAD) program information	20 N.J.R. 522(a)	R.1988 d.252	20 N.J.R. 1222(b)
10:86	AFDC Work Incentive Program	20 N.J.R. 162(b)	R.1988 d.170	20 N.J.R. 903(b)
10:87-5.9	Food Stamps eligibility: income exclusion and utility allowance payments	19 N.J.R. 1986(a)		
10:87-11.21, 11.28	Liability for overissuance of food stamp benefits	20 N.J.R. 162(c)	R.1988 d.173	20 N.J.R. 903(c)
10:89-3.5, 3.6, 5.3	Home Energy Assistance program	20 N.J.R. 1060(a)		
10:100-3.7	Chargeable CWA for funerals and burials	20 N.J.R. 163(a)	R.1988 d.171	20 N.J.R. 904(a)
10:100, App. A	Supplemental Security Income payment levels	20 N.J.R. 208(a)	R.1988 d.143	20 N.J.R. 809(c)
10:123-3.2	Residential health care facilities and boarding homes: personal needs allowance of residents	20 N.J.R. 225(b)	R.1988 d.201	20 N.J.R. 985(b)

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CORRECTIONS—TITLE 10A

10A:1-2	Rulemaking and rule exemption authority of Commissioner	20 N.J.R. 493(a)	R.1988 d.240	20 N.J.R. 1222(c)
10A:1-11	Personal property of inmates	20 N.J.R. 494(a)		
10A:4-1.2, 13	Inmate discipline: Boy's Unit at Skillman	20 N.J.R. 496(a)	R.1988 d.239	20 N.J.R. 1224(a)
10A:4-11.9, 12	Inmate discipline: appeal to Office of Administrative Law	20 N.J.R. 496(b)		
10A:4-11.9, 12	Inmate appeals to Office of Administrative Law: public hearing	20 N.J.R. 880(b)		
10A:9-1.3, 5.6	Work credits for I.S.P. violators housed in county facilities	20 N.J.R. 879(b)		
10A:9-4.6	Open charges and reduced custody status	20 N.J.R. 880(a)		
10A:16-11	Special medical unit	20 N.J.R. 163(b)	R.1988 d.142	20 N.J.R. 810(a)
10A:17-2, 5, 6	Social services: Volunteer Service Program; religion; institutional chaplaincy	20 N.J.R. 167(a)	R.1988 d.241	20 N.J.R. 1224(b)
10A:18-8.7	Use of telephone by inmates	20 N.J.R. 496(c)	R.1988 d.238	20 N.J.R. 1229(a)
10A:22-2	Inmate and parolee records	20 N.J.R. 723(a)		
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)		

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INSURANCE—TITLE 11

11:1-8.1, 9, 12.1, 12.3, 12.4, 12.6, 14, 18, 19	Repeal (see 11:17-1, 2, 5)	20 N.J.R. 225(c)	R.1988 d.186	20 N.J.R. 904(b)
11:1-20, 22	Cancellation and nonrenewal requirements and practices	20 N.J.R. 1061(a)		
11:2-1.1–1.6, 19.1–19.5	Repeal (see 11:17-3.1–3.5, 5.7)	20 N.J.R. 237(a)		
11:4-2	Replacement of life insurance policy	19 N.J.R. 1286(a)		
11:4-16.6	Basic hospital expense coverage	20 N.J.R. 172(a)		
11:4-18.3, 18.5, 18.10	Individual health policies: loss ratio standards	19 N.J.R. 1620(b)		
11:4-19	Optional coverage for pregnancy and childbirth benefits	20 N.J.R. 43(a)		
11:4-28	Group coordination of health care benefits	19 N.J.R. 845(a)	Expired	
11:4-30	Hospital preadmission certification programs (HPCPs)	20 N.J.R. 880(c)		
11:5-1.13	Control of real estate brokerage files	20 N.J.R. 883(a)		
11:5-1.15	Real estate advertising practices	20 N.J.R. 497(a)	R.1988 d.237	20 N.J.R. 1205(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)		
11:5-1.23	Real estate services to handicapped	20 N.J.R. 725(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)	R.1988 d.254	20 N.J.R. 1205(b)
11:5-1.27	Educational requirements for real estate licensure	20 N.J.R. 725(b)		
11:5-1.28	Certification as real estate instructor; classroom procedure	20 N.J.R. 498(a)		
11:12-1.3	Repeal (see 11:17-1, 2, 5)	20 N.J.R. 225(c)	R.1988 d.186	20 N.J.R. 904(b)
11:16-1	Fraud prevention: verification and claim form statements	20 N.J.R. 1062(a)		
11:17-1, 2, 5	Insurance producer licensing	20 N.J.R. 225(c)	R.1988 d.186	20 N.J.R. 904(b)
11:17-3.1–3.5, 5.7	Insurance producer licensing: professional qualifications	20 N.J.R. 237(a)		
11:17-3.2	Insurance producer prelicensing education: correction to proposal at 20 N.J.R. 237(a)	20 N.J.R. 370(a)		
11:18	New Jersey Medical Malpractice Reinsurance Recovery Fund Surcharge: pre-proposed new rules	20 N.J.R. 242(a)		

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N.J.A.C. CITATION		PROPOSAL NOTICE (N.J.R. CITATION)	DOCUMENT NUMBER	ADOPTION NOTICE (N.J.R. CITATION)
LABOR—TITLE 12				
12:16A-11	Unemployment and Disability Insurance group accounts	20 N.J.R. 1071(b)		
12:17-2.6	Noncompliance with quality control reviews of unemployment insurance claims	20 N.J.R. 884(a)		
12:45–49	Vocational rehabilitation	20 N.J.R. 620(a)	R.1988 d.235	20 N.J.R. 1230(a)
12:100-4.2, 5.2, 6.2	Public employee safety and health	20 N.J.R. 726(a)	R.1988 d.260	20 N.J.R. 1232(a)
12:120-2.1 (8:60-2.1)	Asbestos removal defined	20 N.J.R. 1049(a)		
12:120-5 (8:60-5)	Asbestos worker and supervisor permits	20 N.J.R. 728(a)	R.1988 d.261	20 N.J.R. 1232(b)
12:195	Carnival-amusement rides	20 N.J.R. 1072(a)		
	Most recent update to Title 12: TRANSMITTAL 1988-3 (supplement March 21, 1988)			
COMMERCE, ENERGY, AND ECONOMIC DEVELOPMENT—TITLE 12A				
12A:12-2	Local Development Financing Fund	19 N.J.R. 2381(a)	R.1988 d.180	20 N.J.R. 930(d)
12A:12-3	Tourism Matching Grant Program	20 N.J.R. 172(b)	R.1988 d.215	20 N.J.R. 1082(a)
12A:50-1	Cogeneration: reporting by non-utility generators	19 N.J.R. 2383(a)		
12A:54	Cogeneration equipment and use tax exemption: technical sufficiency standards	20 N.J.R. 1073(a)		
	Most recent update to Title 12A: TRANSMITTAL 1988-1 (supplement March 21, 1988)			
LAW AND PUBLIC SAFETY—TITLE 13				
13:1	Police Training Commission rules	20 N.J.R. 622(a)		
13:3-1, 2, 3, 4, 7	Amusement games control	20 N.J.R. 627(a)	R.1988 d.227	20 N.J.R. 1085(a)
13:3-3.4, 3.5, 3.6	Amusement games: preproposal concerning player fees and value of prizes	20 N.J.R. 44(a)		
13:4-3.4, 3.5, 8.2	Discrimination complaints: confidentiality of parties' identities	20 N.J.R. 499(a)		
13:21-11.13	Temporary registration of motor vehicles	20 N.J.R. 176(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)		
13:27-5.4	Licensure of out-of-state architects	20 N.J.R. 884(b)		
13:27-5.8, 8.7, 8.8, 8.15	Certification of landscape architects	20 N.J.R. 885(a)		
13:27A	Repeal (see 13:28)	20 N.J.R. 370(b)	R.1988 d.214	20 N.J.R. 1088(a)
13:28	Board of Cosmetology and Hairstyling	20 N.J.R. 370(b)	R.1988 d.214	20 N.J.R. 1088(a)
13:28-5.1	Board of Cosmetology and Hairstyling: fee schedule	20 N.J.R. 886(a)		
13:29-5	Board of Accountancy: Quality Enhancement Program	19 N.J.R. 2240(a)		
13:34-3.6	Marriage counseling: temporary permit holders	20 N.J.R. 501(a)	R.1988 d.228	20 N.J.R. 1095(a)
13:35-1.5	Participation in medical residency programs	19 N.J.R. 2243(a)	R.1988 d.203	20 N.J.R. 986(a)
13:35-6.7	Medical examiners board: prescribing of amphetamines and sympathomimetic amine drugs	19 N.J.R. 1786(a)		
13:36-1.6	Board of Mortuary Science fees	20 N.J.R. 177(a)	R.1988 d.158	20 N.J.R. 912(a)
13:39	Board of Pharmacy rules	19 N.J.R. 1952(a)		
13:39	Board of Pharmacy rules: extension of comment period	20 N.J.R. 244(a)		
13:40-3.1	Professional engineers and land surveyors: conflict of interest; approval of work	20 N.J.R. 736(a)		
13:44C	Practice of audiology and speech-language pathology	20 N.J.R. 244(b)		
13:45A-12.1, 12.2, 12.3	Sale of animals	20 N.J.R. 501(b)		
13:46-1A.3	Athletic Control Board: weighing of boxers	20 N.J.R. 380(a)		
13:47-6.20, 7.17	Legalized games of chance: unaffiliated organizations; unlicensed games	20 N.J.R. 249(a)	R.1988 d.184	20 N.J.R. 912(b)
13:70-6.55	Thoroughbred racing: respiratory bleeders	20 N.J.R. 506(a)	R.1988 d.245	20 N.J.R. 1207(a)
13:70-14A.9	Thoroughbred racing: competition by bleeders	20 N.J.R. 506(b)	R.1988 d.244	20 N.J.R. 1207(b)
13:71-11.9	Harness racing: respiratory bleeders	20 N.J.R. 507(a)	R.1988 d.246	20 N.J.R. 1207(c)
13:71-23.8	Harness racing: competition by respiratory bleeders	20 N.J.R. 250(a)	R.1988 d.183	20 N.J.R. 912(c)
13:75-1.7	Violent crimes compensation: prosecution of offender	20 N.J.R. 736(b)		
13:76	Training requirements for arson investigators	20 N.J.R. 963(a)		
13:76-1.3, 3.1, 3.2, 5.1	Arson investigation training	19 N.J.R. 1788(b)	R.1988 d.159	20 N.J.R. 913(a)
13:80-1	Hazard Waste Management Information Awards	20 N.J.R. 507(b)		
	Most recent update to Title 13: TRANSMITTAL 1988-3 (supplement March 21, 1988)			
PUBLIC UTILITIES—TITLE 14				
14:3-7.5	Interest on customer deposits	20 N.J.R. 737(a)		
14:3-7.13	Collection activity on disputed charges; interest on overpayments	20 N.J.R. 963(b)		
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)		
14:18-15.1	Preproposal: Statewide cable TV access channel for educational and public affairs programming	20 N.J.R. 1063(a)		
	Most recent update to Title 14: TRANSMITTAL 1988-1 (supplement January 19, 1988)			

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ENERGY—TITLE 14A				
14A:3-7	Individual electric metering in residential buildings: repeal	19 N.J.R. 2247(a)	R.1988 d.188	20 N.J.R. 991(a)
14A:6-2	Business Energy Improvement Program	20 N.J.R. 250(b)	R.1988 d.197	20 N.J.R. 991(b)
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)	R.1988 d.187	20 N.J.R. 995(a)

Most recent update to Title 14A: TRANSMITTAL 1988-1 (supplement February 16, 1988)

STATE—TITLE 15				
15:2-1	Commercial recording: expedited services	20 N.J.R. 522(b)	R.1988 d.202	20 N.J.R. 997(a)
15:10-6	Voting accessibility for elderly and handicapped	19 N.J.R. 2249(a)		

Most recent update to Title 15: TRANSMITTAL 1987-1 (supplement February 17, 1987)

PUBLIC ADVOCATE—TITLE 15A

Most recent update to Title 15A: TRANSMITTAL 1987-1 (supplement 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	Speed limits on State highway system	20 N.J.R. 887(a)		
16:28-1.13, 1.15, 1.30, 1.93	Speed limit zones along Routes 13, 20, 44, and 70	20 N.J.R. 630(a)	R.1988 d.217	20 N.J.R. 1095(b)
16:28-1.26, 1.41	Speed limit zones along U.S. 9 and Route 185	20 N.J.R. 632(a)	R.1988 d.219	20 N.J.R. 1096(a)
16:28-1.31	Speed limits along Route 56 in Cumberland and Salem counties	20 N.J.R. 964(a)		
16:28-1.41	Speed limits along U.S. 9 in Cape May County	Emergency (expires 6-24-88)	R.1988 d.225	20 N.J.R. 1113(a)
16:28-1.49	Speed limits along Route 35 in Bay Head	20 N.J.R. 965(a)		
16:28-1.112	Speed limit zones along Route 156 in Hamilton	20 N.J.R. 632(b)	R.1988 d.220	20 N.J.R. 1097(a)
16:28A	Restricted parking and stopping	20 N.J.R. 887(a)		
16:28A-1.2, 1.7, 1.15	Bus stop zones along U.S. 1 and 9 in North Bergen, U.S. 9 in Howell, and Route 23 in Wayne	20 N.J.R. 965(b)		
16:28A-1.7, 1.18, 1.57	Restricted parking along U.S. 9, Route 27, and U.S. 206	20 N.J.R. 633(a)	R.1988 d.218	20 N.J.R. 1097(b)
16:28A-1.7, 1.46	Stopping restrictions along U.S. 9 in Cape May and U.S. 130 in Mercer County	20 N.J.R. 887(b)		
16:28A-1.28, 1.41	Restricted parking along U.S. 40 and Route 77 in Upper Pittsgrove Township	20 N.J.R. 508(a)	R.1988 d.208	20 N.J.R. 1098(a)
16:28A-1.33	Route 47 in Franklin: correction	———	———	20 N.J.R. 1001(c)
16:28A-1.34	Bus stops along Route 49 in Salem and Fairfield	20 N.J.R. 888(a)		
16:28A-1.46	No parking bus stop along U.S. 130 in Edgewater Park	20 N.J.R. 634(a)	R.1988 d.222	20 N.J.R. 1098(b)
16:28A-1.46, 1.98	Parking restrictions along U.S. 130 in Salem and Burlington counties, and Route 56 in Vineland	20 N.J.R. 1064(a)		
16:28A-1.51	Parking restrictions along Route 168 in Gloucester Township	20 N.J.R. 1065(a)		
16:28A-1.61	No parking bus stop along U.S. 9W in Alpine	20 N.J.R. 634(b)	R.1988 d.223	20 N.J.R. 1098(c)
16:28A-1.70	No parking bus stop along Route 439 in Elizabeth	20 N.J.R. 635(a)	R.1988 d.221	20 N.J.R. 1099(a)
16:29	No passing zones	20 N.J.R. 887(a)		
16:30	Miscellaneous traffic rules	20 N.J.R. 887(a)		
16:30-3	Pre-proposal: Exclusive bus lane on Routes 3 and 495	19 N.J.R. 1421(b)		
16:30-3.6	Exclusive bus and HOV lanes along Routes 3 and 495 into Manhattan	20 N.J.R. 737(b)		
16:30-4.2	Bicycle restrictions along Route 88 in Point Pleasant	19 N.J.R. 2254(a)		
16:30-10.6, 10.7	Midblock crosswalks along Routes 35 and 37 in Seaside Heights	20 N.J.R. 509(a)	R.1988 d.207	20 N.J.R. 1099(b)
16:31	No left turns	20 N.J.R. 887(a)		
16:31A	Prohibited right turns on red	20 N.J.R. 888(b)		
16:44	Contract administration	20 N.J.R. 889(a)		
16:44-1.2	Contract administration: classification of prospective bidders	20 N.J.R. 380(b)	R.1988 d.175	20 N.J.R. 913(b)
16:53C	Rail Freight Program	20 N.J.R. 966(a)		
16:55	Licensing of aeronautical activities	20 N.J.R. 967(a)		
16:60	Aircraft safety: issuance of summons and designation of peace officer	20 N.J.R. 968(a)		
16:61	Aircraft accidents	20 N.J.R. 968(b)		
16:75	NJ TRANSIT: bus allocation guidelines	20 N.J.R. 635(b)	R.1988 d.249	20 N.J.R. 1207(d)

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TREASURY-GENERAL—TITLE 17				
17:1	Division of Pensions: general administration	20 N.J.R. 636(a)	R.1988 d.243	20 N.J.R. 1208(a)
17:1-2.36	Alternate Benefit Program: transfers and interest	20 N.J.R. 969(a)		
17:1-4.37	Applications for disability retirement	20 N.J.R. 510(a)	R.1988 d.231	20 N.J.R. 1208(b)
17:2-2.2	Public Employees' Retirement System: multiple enrollments	20 N.J.R. 969(b)		

N.J.A.C. CITATION		PROPOSAL NOTICE (N.J.R. CITATION)	DOCUMENT NUMBER	ADOPTION NOTICE (N.J.R. CITATION)
17:2-7.1	Public Employees' Retirement System: transfer of service credit	19 N.J.R. 2386(a)	R.1988 d.141	20 N.J.R. 812(a)
17:5-6.1	State Police Retirement System: transfer of service credit	20 N.J.R. 47(b)		
17:9-4.2	State Health Benefits Program: full-time employee defined	20 N.J.R. 741(a)		
17:10	Judicial Retirement System administrative rules	20 N.J.R. 510(b)	R.1988 d.242	20 N.J.R. 1208(c)
17:10-6.1	Judicial Retirement System: transfer of service credit	20 N.J.R. 179(b)	R.1988 d.182	20 N.J.R. 998(a)
17:16-32.12	Common Pension Fund A: permitted investment	20 N.J.R. 741(b)	R.1988 d.248	20 N.J.R. 1208(d)
17:16-36.12	Common Pension Fund B: permitted investment	20 N.J.R. 742(a)	R.1988 d.247	20 N.J.R. 1208(e)
17:19-10.4, 10.5, 10.7, 10.9	Architect/engineer selection procedures	20 N.J.R. 180(a)		
17:20-6.3	State Lottery: confidentiality of individual agent's operation	20 N.J.R. 48(a)	R.1988 d.198	20 N.J.R. 998(b)

Most recent update to Title 17: TRANSMITTAL 1988-2 (supplement March 21, 1988)

TREASURY-TAXATION—TITLE 18

18:2-2	Post tax amnesty	19 N.J.R. 2255(b)		
18:5-1.1, 6.2, 12.5	Sale of tobacco to minors	20 N.J.R. 970(a)		
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)		
18:7-3.18	Corporation business tax: recycling equipment credit	20 N.J.R. 48(b)		
18:8-4.5, -8	Post tax amnesty	19 N.J.R. 2255(b)		
18:9	Business Personal Property Tax	20 N.J.R. 511(a)		
18:9-8.5–8.7	Post tax amnestv	19 N.J.R. 2255(b)		
18:12–17	Local property taxation	20 N.J.R. 1066(a)		
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	Sales and Use Tax	20 N.J.R. 512(a)		
18:26	Transfer inheritance tax and estate tax	20 N.J.R. 637(a)		
18:26-8.4, 9.8	Post tax amnesty	19 N.J.R. 2255(b)		
18:35	Gross Income Tax; Setoff of Individual Liability	20 N.J.R. 514(a)		
18:35-1.24	Gross income tax: investment fund distributions	20 N.J.R. 742(b)		
18:35-1.9, 1.18, 1.19, 1.20	Post tax amnesty	19 N.J.R. 2255(b)		
18:35-1.21, 1.22, 1.23	Gross Income Tax: employee defined; employer withholding; business expenses	20 N.J.R. 515(a)		
18:37-2.1, 2.2, -3, -4	Post tax amnesty	19 N.J.R. 2255(b)		

Most recent update to Title 18: TRANSMITTAL 1988-2 (supplement March 21, 1988)

TITLE 19—OTHER AGENCIES

19:3, 4, 4A	Hackensack Meadowlands Development Commission rules	20 N.J.R. 743(a)		
19:4-4.35, 4.39, 4.41	Residential development in waterfront recreation zones	19 N.J.R. 2386(b)	R.1988 d.154	20 N.J.R. 813(a)
19:4-6.28	Rezoning in East Rutherford	19 N.J.R. 1975(a)		
19:8	Use and administration of Garden State Parkway	20 N.J.R. 890(a)		
19:8-1.1, 3.1	Tolls on Garden State Parkway	20 N.J.R. 49(a)	R.1988 d.160	20 N.J.R. 913(c)
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	Appeal Board rules concerning majority representation fee in lieu of dues	20 N.J.R. 891(a)		
19:25-19.3	Personal financial disclosure: reporting of earned income	19 N.J.R. 1541(a)		
19:25-19.3	Reporting of earned income: withdrawal of proposal	20 N.J.R. 762(a)		

Most recent update to Title 19: TRANSMITTAL 1987-6 (supplement October 19, 1987)

TITLE 19 SUBTITLE K—CASINO CONTROL COMMISSION/CASINO REINVESTMENT DEVELOPMENT AUTHORITY

19:40-2	Access to information maintained by casino licensees	20 N.J.R. 1068(a)		
19:41	Applications	20 N.J.R. 763(a)	R.1988 d.255	20 N.J.R. 1209(a)
19:41-9.9A, 9.11A	Junket enterprise and representative license fees	20 N.J.R. 381(a)	R.1988 d.200	20 N.J.R. 998(c)
19:42	Hearings	20 N.J.R. 764(a)	R.1988 d.256	20 N.J.R. 1209(b)
19:45	Accounting and internal controls	20 N.J.R. 382(a)	R.1988 d.178	20 N.J.R. 930(a)
19:45-1.1, 1.10, 1.11, 1.12, 1.16, 1.17, 1.32, 1.33, 1.36, 1.37, 1.38, 1.42, 1.44	Slot machine bill changer system	20 N.J.R. 765(a)		
19:45-1.1, 1.10, 1.11, 1.12, 1.16, 1.17, 1.32, 1.33, 1.36, 1.37, 1.38, 1.42, 1.44	Slot machine bill changer system: 90-day implementation	———	———	20 N.J.R. 769(a)

N.J.A.C. CITATION		PROPOSAL NOTICE (N.J.R. CITATION)	DOCUMENT NUMBER	ADOPTION NOTICE (N.J.R. CITATION)
19:45-1.2, 1.46	Reporting of complimentary items and services	19 N.J.R. 1975(b)	R.1988 d.209	20 N.J.R. 1102(a)
19:45-1.14, 1.36, 1.39, 1.40B, 1.45	Internal casino controls	20 N.J.R. 1069(a)		
19:45-1.25	Verification of travelers checks	20 N.J.R. 51(a)		
19:45-1.25	Verification of travelers checks: public hearing	20 N.J.R. 1071(a)		
19:45-1.33, 1.42, 1.43	Count times for cash and coin	19 N.J.R. 2265(a)		
19:45-1.34, 1.36, 1.37, 1.44	Use of slot tokens not redeemable for cash	20 N.J.R.516(a)	R.1988 d.224	20 N.J.R. 1099(c)
19:46	Gaming equipment	20 N.J.R. 638(a)	R.1988 d.232	20 N.J.R. 1209(c)
19:46-1.5, 1.25, 1.26, 1.33	Use of slot tokens not redeemable for cash	20 N.J.R. 516(a)	R.1988 d.224	20 N.J.R. 1099(c)
19:46-1.19	Dealing shoes	20 N.J.R. 1069(a)		
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19:46-1.25, 1.26	Slot machine bill changer system: 90-day implementation	Expires 7-10-88	————	20 N.J.R. 769(a)
19:46-1.29	Approval of slot machine modifications	20 N.J.R. 52(a)		
19:47	Rules of the games	20 N.J.R. 639(a)	R.1988 d.233	20 N.J.R. 1209(d)
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)		
19:49	Junkets	20 N.J.R. 181(a)	R.1988 d.177	20 N.J.R. 930(b)
19:50	Casino hotel alcoholic beverage control	20 N.J.R. 770(a)	R.1988 d.257	20 N.J.R. 1210(a)
19:53	Equal employment opportunity and affirmative action	20 N.J.R. 640(a)	R.1988 d.234	20 N.J.R. 1214(a)
19:53-1.3, 1.13	Casino licensee's EEO/AA office: reproposal	20 N.J.R. 970(b)		
19:53-1.5	Pre-proposal: Affirmative action employment goals for handicapped or disabled persons	19 N.J.R. 1182(a)		
19:54	Gross revenue tax; investment obligation alternative tax; investment tax credits	20 N.J.R. 383(a)	R.1988 d.179	20 N.J.R. 930(c)

Most recent update to Title 19K: TRANSMITTAL 1988-1 (supplement January 19, 1988)

RULEMAKING IN THIS ISSUE—Continued

Filing Deadlines

July 5 issue:
Proposals .... June 6
Adoptions .... June 13
July 18 issue:
Proposals .... June 20
Adoptions .... June 24
August 1 issue:
Proposals .... July 1
Adoptions .... July 11
August 15 issue:
Proposals .... July 18
Adoptions .... July 25

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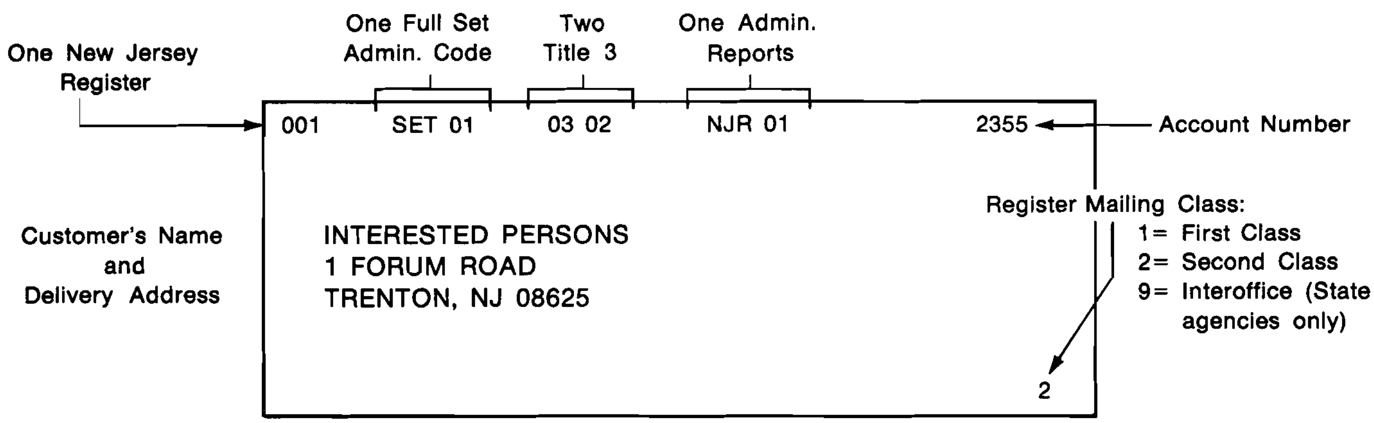

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